

MINUTES
WV RACING COMMISSION
Wednesday, August 17, 2016
WV Lottery Conference Room

The WV Racing Commission met on August 17, 2016 to conduct business and consider administrative matters. Roll call was taken and present were Chairman Jack Rossi and Commissioner Bill Phillips. Commissioner Greg McDermott was present via conference call. Counsel was represented by Kelli Talbott.

Approval of the July 19 minutes

The Commissioners and legal counsel received the minutes from the July 19th meeting prior to this meeting. Motion was made by Mr. McDermott for approval, seconded by Mr. Phillips. Motion passed.

Executive Director's Report
Joe Moore

Joe Moore stated the Racing Commission conducted its first out-of-competition testing for the WV Derby on August 6th and were able to test 12 of the nominations. Out of those 12 tests, 25% of the starting field was effectively tested. We are currently working with Charles Town on getting their nominations and locating them in an effort to have sufficient testing done to hopefully test 50% of the starting field, as was discussed in the prior meeting. After speaking with the Jockey Club, it was agreed that Charles Town and Mountaineer will both incur the expense of 5 tests and the Jockey Club would expand upon those 5 tests, up to an additional 15, therefore, having the ability to test 20 horses. Hopefully with 20 of the nominations we will be able to get to that percentage of the starting field. Mr. Phillips stated he would like to add his appreciation to Mountaineer and to Charles Town for their willingness to engage in this initial step towards out-of-competition testing and to Dr. Dionne Benson for her assistance and the Jockey Club for helping with the cost.

Auditor's Report
Becky Carnefix

Becky Carnefix stated the capital improvements submitted during the month for reimbursement and paid were the following: Charles Town submitted 4 projects for reimbursement and was paid \$331,336. The details of the projects paid are included in the information provided to the Commissioners. Mountaineer submitted 8 projects for reimbursement and was paid \$159,803.85. The details of those projects paid are also included in the Commissioners information.

For the Thoroughbred Development Fund, a mailing will be sent out the last week of August to all participants at Mountaineer and Charles Town for verification of race information for race results January-July 2016.

She has provided the Commissioners with a copy of her FY'17 audit schedule for their review.

Accountant's Report Joe Moore

Joe Moore stated with the beginning of the fiscal year, total in-state handle is up nearly 4.5% compared to the beginning of the previous fiscal year. Both live and simulcast are also up compared to FY'16.

On July 29th, the Commission sent out the year-end WV Greyhound Breeding Development Fund distribution. The total was \$1,068,860.93 and was distributed among 55 participants.

Legal Update

Kelli Talbott stated she is on a sub-committee that RCI has formed to look at a model out-of-competition testing rule for all racing jurisdictions in the United States. She has been participating with other members of that sub-committee on that rule that will eventually go to the RCI Board. The national constituents have been participating in the input on that rule and hopefully when that rule is done, WV can have the benefit of the sub-committee's work when that time is appropriate.

Thoroughbred Racing Rule

Pari-Mutuel Wagering Rule

Kelli Talbott stated the Commission should recall amendments to these two Rules were put out for public comment. The public comment period ended August 12th and no public comments were received on either one of the Rules. She has advised Secretary Kiss' office that no public comments were received and would be reporting to the Commission today. The next step is to file the Rule for consideration during the Legislative Session and during Interims. Motion was made by Mr. Phillips to move forward on these two Rules, seconded by Mr. McDermott. Motion passed.

Assessment of Hearing Costs

Joe Moore stated in June the Commission had a brief discussion on the hearing costs and the burden it places on the Racing Commission's Administrative Funds. At that point the Commissioners asked Ms. Talbott and himself to dig into the issue a little bit deeper, look at the costs, and make recommendations to the Commission as to certain changes that could be made going forward. Ms. Talbott has provided the Commission with a detailed document of her findings in that research and he will let her speak about those findings specifically.

Kelli Talbott stated the Racing Commission has a Statute that allows it to require a permit holder who appeals a Stewards or Judges ruling to post a reasonable security for the hearing in front of the Commission and also allows the Commission to assess the cost of the hearing against the permit holder if they do not substantially prevail in that hearing. In recent times the Commission has been putting in every single notice of hearing that has been issued on an appeal, notice to the permit holders that they could be assessed those costs if they don't substantially prevail. To date, costs have been assessed in 2 recent cases. When the permit holder didn't pay the costs that they were asked to pay, there is a Rule that says if they don't pay a fine, fee or cost, their permit is suspended, and 2 permit holders have actually been

suspended for non-payment of costs after they did not substantially prevail in the hearing. She provided the Commissioners an outline of the issues of what is involved in the assessment of costs and what is permitted to be assessed. Things that we are permitted to assess are the hearing examiners cost, the court reporter costs, travel costs for Counsel and witnesses. Also, there are time we have to pay to rent a room to hold a hearing and we assess the cost of that room. Costs do not include attorney's fees. If the Commission wanted to seek at some point to allow the assessment of attorney's fees, the Statute would have to get amended specifically to include that.

As far as requiring the reasonable security piece of it in advance of a hearing, right now the Rule sets that security at \$100. That is almost never enough to cover the full cost of the hearing. There's a balance to be struck here about what is required for a permit holder to put up front for a hearing. Balancing the Commission's needs with the permit holder's right to have a hearing if they so desire to proceed, and requiring them to basically post the entire projected cost of a hearing up front may prove difficult to navigate because there has to be some contingency for the fact that someone might be indigent and can't afford to post that and she's not confident someone can be denied a hearing because they can't post that up front. She thinks it's fair that the Commission might want to consider raising that \$100 fee to something higher. An example to look at, although not an exact comparison, is when you file an action in the courts in WV there is a \$200 filing fee. That is something the Commission could look at and say that is what we will require up front and if the permit holder doesn't prevail, then costs can still be assessed on the back end of the hearing. If they don't pay, the Commission has the remedy under its Rule of suspending their permit, and there is also the remedy, if the Commission wanted to pursue it, that if someone doesn't pay the cost of the hearing the Commission is allowed to collect that in the Court of Law. The Commission has recently imposed costs onto permit holders and she has been putting it in every Notice of Hearing that has been issued as an attempt to allow permit holders to know that is something they need to consider.

Mr. Phillips stated the work that was done by Mr. Moore and Ms. Talbott on this was outstanding. Personally, he thinks raising the fee to \$200 does send another message. Finally, he thinks we need to be thinking about ways to communicate to our constituents that we are serious about matters like this.

Mr. McDermott stated he concurs with Mr. Phillips' comments and he commends Mr. Moore and Ms. Talbott for the thoroughness in quality of the information provided regarding a very complicated issue. One further comment he'd like to make is that at some point he thinks the Commission is going to have to consider pushing for some amendment to the Statute that would allow them to seek recovery of attorney's fees in these cases since that is the bulk of the expenses incurred. In the interim, efforts to seek some of the other expenses Ms. Talbott identified we need to be serious about. Finally, the idea of raising the security bond necessary to \$200 is a great idea also.

Ms. Talbott added what started the Commission discussing this issue was there were a couple of appeals of relatively small fines, and having appeals over those small fines that cost the Commission substantial sums causes the Commission heartburn over that. On the other hand, she thinks it's only fair to the horsemen and the dog men that not every appeal to the Racing Commission is about a small fine. Some are substantial issues and potentially career ending. Mr. McDermott stated the Commission concurs with her 100% on that regard. There's a balance of interest and obligation involved and the Commission is just concerned about the expenses they have been hit with on these things.

Chairman Rossi stated he concurs with everything that has been said and would like to thank Mr. Moore and Ms. Talbott for their efforts in this. He would like to see the bond higher but understands where we are coming from. He's a believer that we send a message and also agrees with Mr. McDermott that we should have changes made in the Legislature to pursue

recovery of attorney's fees. Ms. Talbott added the \$100 filing fee is in a Procedural Rule so if they are going to amend that amount to increase it, they would have to amend the Rule and put it out for public comment and then go to Secretary Kiss. Since it's a Procedural Rule, it doesn't go through the Legislature, however, the Statute would have to be amended to recover attorney's fees. She and Mr. Moore have had many discussions about what would be the amount they would raise the security fee to and she gave the Commission the \$200 because it's something she knows the courts do. Mr. Moore added the \$200 is really the only comparable that they have in considering increasing the fee to a certain dollar amount. At some point you have to figure out what is a reasonable number. Chairman Rossi stated he concurs with Mr. Moore on that matter. He doesn't want the fee to be exorbitant, but on the other hand he thinks it needs to be realistic and reasonable.

Mr. Phillips made the motion to proceed forward to change the Rule to \$500, seconded by Mr. McDermott. Motion passed.

Motion was made by Mr. McDermott to direct Ms. Talbott to pursue legislative action to permit the Commission to recover attorney's fees, seconded by Mr. Phillips. Motion passed.

Hearing Examiner Recommendation – Edwin Tobin

Kelli Talbott stated the hearing examiner recommended a 6 month ejection. She and Mr. Moore have been discussing when that 6 months is going to run. Mr. Moore stated the discussion they have been having was is that 6 months to run from the time he was ejected from the track because the hearing examiner did not put an end date in his recommended decision. He recommended that Mr. Tobin remain ejected from the track for a period of 6 months and be allowed back on the premises at the conclusion of that ejection period. Does that start at the time he was ejected or does that remain ejected for 6 months start at the time the Commission approves the hearing examiners recommendation? Mr. McDermott asked Mr. Moore to briefly advise everyone about the conduct that is at issue here.

Mr. Moore stated Mr. Tobin was ejected from Charles Town after a horse that he had sold was found in a kill pen known to have sent horses to slaughter. During the findings and the hearing that was conducted by Mr. Blaydes, it was determined that the intent of Mr. Tobin to sell the horse and it end up in a kill pen on its way to slaughter was not necessarily what he had in mind. He was briefed the horse was going to go to a farm that was conducting a program for mentally disabled children and believed that was truly the case in the sale of this horse. While there was no intent on him selling the horse to end up in a kill pen and sent to slaughter, it is in the Code that there is some due diligence that a trainer must do when he sells a horse to know ultimately where that horse will end up. The hearing examiner found that Mr. Tobin was negligent in performing that due diligence. Ms. Talbott added typically when the hearing examiner makes a recommendation it would be 6 months from the time the person was ejected, however, since he didn't clearly state that, she thinks it's in the Commission's discretion to decide how they want to treat that.

Mr. Phillips stated on page 7 of the document they received it states that Mr. Tobin is to remain ejected for a period of 6 months from April 5, 2016. He took that to be the date the ejection started. Mr. McDermott stated that's how he interpreted it also. Mr. Phillips added so basically they are saying if they go along with the hearing examiners recommended decision, the ejection will have begun on April 5th, is that correct? Ms. Talbott replied that would be correct.

Motion was made by Mr. Phillips to accept the recommended decision, seconded by Mr. McDermott. Motion passed.

Wheeling Island Capital Improvement Request - \$256,056.46

Becky Carnefix stated back in the January 2013 Commission meeting the Commission approved the reimbursement of the Phase II expansion project for Wheeling Island, with the condition that an allocation plan be submitted identifying how much of the expenditures were racing related, and to re-submit the allocation plan going forward. The portion of the Phase II plan that was submitted at that time for reimbursement was greater than the amount available, and therefore, they have carried over a balance and each year a request of the amount available to them for the current year is made. The amount available for FY'16 is \$256,056.46. The documents have been reviewed and she recommends payment of the FY'16 available funds.

Motion was made by Mr. Phillips for approval, seconded by Mr. McDermott. Motion passed.

Wheeling Island Mystery Voucher Requests

Joe Moore stated this request is for approval of multiple mystery voucher promotions at Wheeling Island. The first one is set for September 25th, the second one is October 30th, the third one is November 27th, and the fourth one is December 18th. The reason this request comes in this format is due to their request coming in after a Commission meeting and missed a couple mystery voucher promotions that they wanted to conduct prior to the next Commission meeting, so they submitted this request for the next 4 mystery voucher promotion they wish to do. Their promotion is not unlike many of the others that have been approved in the past. He would recommend the Commission approve this request.

Motion was made by Mr. Phillips for approval, seconded by Mr. McDermott. Motion passed.

Mountaineer Park Export Request – Breakers Sports Bar OTB

Joe Moore stated the request from Mountaineer Park, as well as the approval letter from Jami Poole, President of the Mountaineer Park HBPA, have been provided to the Commissioners for Breakers Sports Bar to be included as one of the export sites Mountaineer sends its races to.

Motion was made by Mr. McDermott for approval, seconded by Mr. Phillips. Motion passed.

Mountaineer Park Capital Improvement Request – Parking Lot Repair, \$91,460.14

Becky Carnefix stated this request is for racing parking lot crack and filling, rejuvenator and striping, totaling \$91,460.14. She has reviewed the supporting documentation and bids for this request. This request encompasses the sealing, crack fill and striping of the following lots: Horseman's Parking Lot, North Track Road and North Grandstand Parking. All of these areas are primarily utilized by racing patrons and/or horsemen. She recommends this request for approval.

Motion was made by Mr. McDermott for approval, seconded by Mr. Phillips. Motion passed.

NTRA Safety & Integrity Presentation

Chairman Rossi stated in 2008 the Thoroughbred Racing Industry in North America united to form the National Thoroughbred Racing Association Safety & Integrity Alliance. Through an industry-wide scientifically based and consensus driven process, the Alliance set about identifying and implementing national uniform standards in 6 critical areas: injury reporting and prevention, safety equipment, and a safe racing environment, medication and testing, jockey health and welfare, aftercare of retired racehorses, and wagering security. Through a racetrack accreditation process and adherence to a code of standards, positive and meaningful change is occurring in many racing jurisdictions. Currently there are 23 racetracks in 11 states and Ontario, Canada accredited by the Alliance.

The presenter today is Steve Koch. He joined the NTRA in 2015 as the Executive Director of the Safety & Integrity Alliance, the Thoroughbred Industry's accreditation program. Steve previously served 12 years at Canada's Woodbine racetrack where he was Vice-President of Racing from 2008-2015. From 2003-2008, his Woodbine career included Director of Racing and Director of Backstretch Operations. Prior to that Steve worked for Keeneland.

(See attachment for presentation.)

Chairman Rossi inquired on the 23 tracks that are basically accredited, and whether you are working for management or working for regulators, have the majority of the tracks hired you or have the regulators hired you? Mr. Koch replied in all cases so far they have been hired by the racetrack. Chairman Rossi then asked as far as the ongoing certification, how extensive is that? What do you do in an ongoing review, the first one at the end of the 2 year period? Mr. Koch replied it's actually not a different process than the very first one. The very first time you accredit a racetrack it's a lot more complicated because the application is starting from scratch and it's not an easy application. It takes quite a bit of time and effort to put together, then it takes quite a bit of time for them being at that racetrack for the first time and figuring out where are all of the different points they are looking for. When they come back in 2 years to accredit that track for a second time, it's still exactly the same process, but they know at that time where to look and what they are looking for. Chairman Rossi asked if he would be safe in assuming the recurring cost would be similar? Mr. Koch replied that is correct.

Mr. McDermott asked if he was correct in understanding that the Safety & Integrity Alliance was hired, with respect to the tracks that are currently accredited, in the initiative of the tracks and not the Racing Commissions of the states where the tracks are located? Mr. Koch replied yes, in all cases so far they have been hired by the racetrack. It is not unheard of for a Racing Commission to require the racetrack, as a concept of licensure, to achieve accreditation. Mr. McDermott stated so it's a collaboration, in other words. Mr. Koch replied in the overwhelming majority, it is the racetrack engaging with them directly, but there have been incidences where the regulator has required the racetrack to engage with them.

Mr. Phillips inquired if we are in the position as a Racing Commission to require our 2 Thoroughbred tracks to engage the services of the Alliance for the initial survey team to come in and look at those 2 tracks in terms of the 7 points of their Code of Standards? Ms. Talbott replied she would have to research that. Mr. Phillips then inquired of Mr. Koch if either of the 2 WV tracks had any initial discussions in the last couple of years regarding participating in this endeavor? Mr. Koch replied he has been on this task now for a bit less than a year and a half and he knows prior to that there has been conversation in engagement but not the engagement to the extent where they have actually proceeded any process.

Chairman Rossi inquired of Ms. Talbott if the fee could be paid out of capital improvement money? Ms. Talbott replied that's another question she will have to look at and do research on. As she understands it, there would be an upfront fee for the Alliance to come and

do the review, is that correct? Mr. Koch replied to accredit your racetrack there is a fee and then every two years they would require that fee again. Ms. Talbott then asked if the fee is the same regardless of the racetrack or is it different? Mr. Koch replied there is a structure where it is based on a racetrack's previous year's purses and then combined with membership in the NTRA. Mr. Phillips asked Mr. Koch if he has looked at what the fee would be for the 2 WV tracks to engage in getting this process towards safety and integrity? Mr. Koch replied yes. Based on the definition he just gave Mountaineer would be \$10,000 and Charles Town would be quite a bit more, but he will move it backwards to \$15,000. Mr. Phillips replied that seems like a small amount of money to have safety. Ms. Talbott asked when they do their review, do they identify areas the track has to do something to achieve accreditation? Mr. Koch replied yes. Mr. Phillips asked Ms. Talbott if she could include in her research if a track is required to make an improvement, could we use capital improvement money to pay for that safety enhancement? Ms. Talbott replied yes. Mr. Koch added the Code of Standards is available so it's very simple to look at the Code of Standards and the Commission and the racetrack have a pretty clear idea of where they are hitting it and where they are not.

Mr. Phillips asked Mr. Koch if the Joint Commission accreditation was a part of this process? Mr. Koch replied no. He likes to use that as an example of how the concept was designed but there are no relationships. Mr. Phillips then asked how long does an initial survey take? Mr. Koch replied if a very thorough application is handed to them and all the contents are there, that's a wonderful head start and they know what they are getting into. Typically, the process is he will bring the team to the racetrack and they will attend the track for 2 full race days. Mr. Phillips added he knows the Jockey Guild and the University of Kentucky have just launched a program related to concussions, how does this help with moving something like that along, which is a serious issue? Mr. Koch replied with the Code of Standards, they are pretty careful to not be the ones inventing new Standards. They are here to distribute and implement those new Standards, but they are engaged with those groups and are on a lot of those boards and committees. Mr. Phillips inquired they come in and do the initial survey and they find improvements that need to be made, those improvements are in fact made before they get the provisional accreditation, or how does that work? Mr. Koch replied ideally they work with the racetrack and get them to full accreditation. He would work with the racetrack if they wanted to be provisionally accredited but normally getting them to full accreditation is the target. Ms. Talbott asked if sometime during the process does the Alliance actually identify that there needs to be Rule changes in the jurisdiction to achieve accreditation at the track? Mr. Koch replied yes. Ms. Talbott stated our Rule making process is quite lengthy and can't enact new Rules on a dime so the Commission would have to work with the Alliance on that. Mr. Koch responded there's allowance in the Code of Standards in many cases that they allow for advocacy in process over an amount of time. Then occasionally through the Code of Standards you will find hard deadlines that are a deal breaker.

Mr. Phillips asked that this matter be continued on the September agenda to allow Counsel to do research on the fundamental questions asked today. He added he wanted to thank Mr. Koch for his presentation and to commend the National Thoroughbred Racing Association Safety & Integrity Alliance for the work they are doing to try and bring safety and integrity that will protect our jockeys, our track personnel and our customers that we serve.

Public Comments

Randy Funkhouser stated the horsemen at Charles Town have talked about the safety issues and support the Safety & Integrity Alliance. He thanked the Commission for their interest in looking into this for the future.

Mr. McDermott asked if he is correct in understanding that as part of our exploratory process, we are inviting the stakeholders to inform us of their position, with respect to NTRA accreditation? Chairman Rossi replied yes we definitely are.

Adjournment

Motion was made by Mr. Phillips to adjourn, seconded by Mr. McDermott. Meeting adjourned.