

NEW YORK STATE RACING AND WAGERING BOARD
DIVISION OF THOROUGHBRED RACING

IN THE MATTER OF RICHARD E. DUTROW, JR.

BOARD
FINDINGS AND ORDER
MO 44-2011

The respondent, licensed thoroughbred trainer Richard E. Dutrow, Jr., having been served an Order to Show Cause why he should not be fined, have his license(s) to participate in pari-mutuel thoroughbred racing suspended or revoked, and/or be expelled from all New York State tracks whether as a licensee, participant, or patron, pursuant to New York State Racing, Pari-Mutuel Wagering and Breeding Law ("Racing Law") §§ 220(2) and 250 and various Board rules, in that, as amended: (1) he trained a horse, "Fastus Cactus," that competed in the 3rd race at Aqueduct Racetrack on November 20, 2010, with the controlled substance butorphanol having been administered to it within 96 hours before the scheduled post time of its race, in violation of 9 NYCRR §§ 4043.2(g)(4) and 4043.4 [AQ 25-2011]; (2) he had and possessed in his desk at Aqueduct Racetrack on November 3, 2010, three unauthorized syringes usable for hypodermic injection into a horse, in violation of 9 NYCRR § 4012.1(a)(1) [AQ 26-2011]; (3) he had and possessed in his desk at Aqueduct Racetrack on November 3, 2010, three unlabeled syringes loaded with the drug xyzaline, in violation of 9 NYCRR § 4012.1(c); (4) he committed these and previous rule violations and therefore should be expelled from all New York racetrack premises as a person whose conduct at race tracks in New York State and elsewhere has been improper, obnoxious, unbecoming, and detrimental to the best interests of racing, pursuant to 9 NYCRR § 4003.46; and (5) his character and general fitness are such that his participation in pari-mutuel racing is inconsistent with the public interest, convenience and necessity and with the best interests of racing generally,

based on the foregoing and his lengthy and persistent history of rule violations in racing, contrary to Racing Law § 220(2) and 9 NYCRR §§ 4002.8 and 4002.9; respondent having timely appealed the rulings of the State Steward regarding the first two charges; and respondent having received proper notice and participated by his attorneys Greenberg Traurig, LLP at a de novo adjudicatory hearing of all charges conducted on May 31, June 2, and June 3, 2011; and the Hearing Officer having rendered his Report on September 22, 2011, which is attached hereto and incorporated herein; the Board, after due deliberation, hereby adopts the Hearing Officer's findings of fact and conclusions of law, except as noted below.

THEREFORE, upon the record, the Report of the Hearing Officer and the findings and conclusions herein, it is hereby

ORDERED, that the Board determines that, although the Hearing Officer did not expressly find and conclude that the facts, as he found them, establish that the charged statutes and rules were violated, and only implied this in his Report, the Board, for the sake of clarity and to avoid any ambiguity, hereby expressly finds and concludes that such facts establish that the charged statutes and rules were violated by respondent;

ORDERED, that on November 20, 2010, respondent Richard E. Dutrow, Jr. violated 9 NYCRR §§ 4043.2(g)(4) and 4043.4, in that, the horse "Fastus Cactus," trained by him, competed in the 3rd race at Aqueduct Racetrack with the drug butorphanol (a/k/a torbugesic) having been administered within 96 hours before the scheduled post time of its race; and the ruling (AQ 25-2011) of the State Steward at Aqueduct Racetrack that he committed this violation is affirmed;

ORDERED, that in addition to the other portion of his penalty, which is set forth below, the Board imposes for this violation a fine of twenty-five thousand dollars (\$25,000);

ORDERED, that on November 3, 2010, respondent Richard E. Dutrow, Jr. violated 9

NYCRR § 4012.1(a)(1), in that, while not a veterinarian and having no written permission from the stewards, he had and possessed on the premises of a franchised race track equipment usable for infusion and hypodermic injection into a horse, to wit, three syringes in his desk in Room J, Barn 10, at Aqueduct Racetrack; and the ruling (AQ 26-2011) of the State Steward at Aqueduct Racetrack that he committed this violation is affirmed;

ORDERED, that on November 3, 2010, respondent Richard E. Dutrow, Jr. violated 9 NYCRR § 4012.1(c), in that, he had and possessed on the premises of a franchised race track an unlabeled container of drugs, to wit, three unlabeled syringes loaded with the drug xyzaline (a/k/a rompun) in his desk in Room J, Barn 10, at Aqueduct Racetrack;

ORDERED, that in addition to the other portion of his penalty, which is set forth below, the Board imposes for respondent's two violations on November 3, 2010, another fine of twenty-five thousand dollars (\$25,000);

ORDERED, that based on the foregoing and his extensive history of rule violations, respondent Richard E. Dutrow, Jr. is a person whose conduct at race tracks in New York State and elsewhere has been improper, obnoxious, unbecoming, and detrimental to the best interests of racing, pursuant to Racing Law § 220(2) and 9 NYCRR § 4003.46 and, therefore, he shall not enter or remain upon the premises of any licensed New York race track and upon discovery or recognition he shall be forthwith ejected from any such premises;

ORDERED, that this exclusion and/or expulsion of respondent Richard E. Dutrow, Jr. from licensed New York race tracks shall take effect on October 18, 2011;

ORDERED, that based on the foregoing and his extensive history of rule violations, respondent Richard E. Dutrow, Jr.'s character and general fitness are such that his participation in pari-mutuel racing is inconsistent with the public interest, convenience and necessity and with the

best interests of racing generally, contrary to Racing Law § 220(2) and 9 NYCRR §§ 4002.8 and 4002.9;


ORDERED, that based on his foregoing violations and his extensive history of rule violations, and as another portion of his penalty herein, respondent Richard E. Dutrow, Jr.'s occupational license(s) to participate in pari-mutuel racing are hereby revoked, and the effective date of his revocation, to permit an orderly transfer of horses by their owners, is October 18, 2011;

ORDERED, that based on his foregoing violations and his extensive history of rule violations, and as the last portion of his penalty herein, respondent Richard E. Dutrow, Jr. shall be and hereby is declared ineligible to reapply for any license issued by the Board for ten years, to wit, until October 19, 2021; and that the Board has determined to provide this more lenient period of ineligibility, rather than the permanent license revocation recommended by the Hearing Officer, in order to provide for the possibility that the respondent may rehabilitate himself and deserve reconsideration notwithstanding the severity of his misconduct to date; and

ORDERED, that during the period of his revocation, respondent Richard E. Dutrow, Jr. shall not directly or indirectly participate in New York pari-mutuel horse racing, he is denied the privileges and use of the grounds of all racetracks, and he is forbidden to participate in any share of purses or other payment. Every horse is denied the privileges of the grounds and shall not participate in pari-mutuel racing in New York, further, that is (a) owned or trained by him, or any individual who serves as his agent or employee, during his revocation; or (b) for which he, during his revocation, is involved, directly or indirectly, with its training, including but not limited to any arrangements made to care for, train, enter, race, invoice, collect fees or payments, manage funds, employ or insure workers, provide advice or information, or otherwise assist with any aspect of the training of the horse;

DATED: SCHENECTADY, NEW YORK
October 12, 2011

FOR THE NEW YORK STATE RACING AND WAGERING BOARD,


KRISTEN M. BUCKLEY
ACTING SECRETARY TO THE BOARD

TO: Richard E. Dutrow, Jr.
Respondent

Michael L. Koenig, Esq.
Attorney for Respondent
Greenberg Traurig, LLP
54 State Street, 6th Floor
Albany, NY 12207

NEW YORK STATE RACING AND WAGERING BOARD
DIVISION OF THOROUGHBRED RACING

IN THE MATTER OF RICHARD E. DUTROW, JR.

HEARING
OFFICER
REPORT

MO # 44-2011

This matter involves the Order to Show Cause of the New York State Racing and Wagering Board (the "Board") dated March 2, 2011 (as amended in accordance with the Hearing Officer's ruling on May 31, 2011), which seeks "...fines, not to exceed Twenty-Five Thousand Dollars (\$25,000.00) for each violation imposed against [Dutrow]; the suspension or revocation of [Dutrow's] occupational license; and [Dutrow's] expulsion from all pari-mutuel racetracks in New York State" because of the following:

1. The horse "Fastus Cactus" trained by Dutrow competed in the third race at Aqueduct Racetrack on November 20, 2010 with the drug butorphanol (a/k/a torbugesic), having been administered within 96 hours before the scheduled post time of its race, in violation of 9 NYCRR §§4043.2(g)(4) and 4043.4;
2. While not a veterinarian and having no written permission from the stewards, Dutrow had and possessed on the premises of a franchised racetrack equipment usable for infusion and hypodermic injection into a horse; to wit, three syringes in Dutrow's desk in Room J, Barn 10, at Aqueduct Racetrack on November 3, 2010, in violation of 9 NYCRR §4012.1(a)(1);
3. Dutrow had and possessed on the premises of a franchise racetrack an unlabelled container of drugs; to wit, three unlabelled syringes loaded with the drug xyzaline (a/k/a

rompum) in Dutrow's desk in room J, Barn 10 at Aqueduct Racetrack on November 3, 2010, in violation of 9 NYCRR §4012.1(c);

4. Dutrow is a person whose conduct at racetracks in New York State and elsewhere, has been improper, obnoxious, unbecoming, and detrimental to the best interests of racing, pursuant to 9 NYCRR §4003.46, based on the foregoing violations and his history of rule violations; and

5. Dutrow's character and general fitness are such that his participation in pari-mutuel is inconsistent with the public interest, convenience and necessity and with the best interests of racing generally, contrary to Racing Law §220(2) and 9 NYCRR §§4002.8 and 4002.9, based on the foregoing violations and his history of rule violations.

The charge relating to the three syringes in Dutrow's desk drawer are the subject of a violation notice ("Notice of Violation") issued by State Steward Carmine Donofrio on February 16, 2010 (Notice Number AQ 25-2011). In that Notice of Violation, the State Steward suspended Dutrow for thirty (30) days. The charge related to the post race positive for butorphanol was the subject of a Notice of Violation issued by State Steward Carmine Donofrio on February 16, 2010 (Notice Number AQ26-2011). In this second Notice of Violation, the State Steward suspended Dutrow for sixty (60) days. Both suspensions were stayed because the State Steward had previously received a letter (dated February 11, 2010) from Mr. Dutrow's then attorney, Gerard Romski which Donofrio deemed a Notice of Appeal (see Board Exhibit 4).

MATTERS PRELIMINARY TO HEARING

By Notice of Motion dated April 25, 2011 Dutrow made a motion to this Hearing Officer for an Order remanding the proceeding to the "Board of Stewards" because, Dutrow argued, his then attorney had not been given an adequate opportunity to represent him before the State Steward had issued the Notices of Violation. The motion was opposed by Office of Board Counsel and, after hearing argument on the motion from Attorney Ronski and Attorney Goodell, I denied Dutrow's request to remand the matter to the Steward. After having granted Dutrow's first request for an adjournment of the scheduled hearings for this matter, the hearings were held at the Board offices on May 31, 2011, June 2 and June 3, 2011. At the hearing, and preliminary to the presentation of any testimony, Dutrow's new attorney, Michael Koenig, Esq. made an oral motion for an Order dismissing the Order to Show Cause in its entirety; or, in the alternative striking and dismissing the revocation penalty sought in the Order to Show Cause and for an Order recusing the New York State Racing and Wagering Board Chairman John Sabini from participating in this matter because of alleged comments made by Chairman Sabini and because a letter dated February 17, 2011 from the Racing Commissioners International to the Racing and Wagering Board requested that the Board commence a proceeding to revoke Mr. Dutrow's license.

I reserved decision with respect to those oral motions to provide both Dutrow's counsel and Board Counsel an opportunity to provide written submissions. In that regard, and post hearing, Dutrow filed a Notice of Motion dated June 10, 2011 for an Order "(1) dismissing the Order to Show Cause in its entirety; or in the alternative, (2) striking and dismissing the

revocation penalty sought in the Order to Show Cause; and (3) recusing the New York State Racing and Wagering Board Chairman John Sabini from participating in this matter". This motion was opposed by Office of Board Counsel in an answering Affirmation of Rick Goodell date June 17, 2011. By decision dated September 12, 2011, I denied in all respects Respondent's motion except with respect to that portion of Dutrow's motion that seeks to recuse Chairman Sabini from participating in this matter. With respect to that portion of the motion that seeks recusal of Chairman Sabini, I advised Dutrow's Counsel that I do not have authority to grant such a motion and that a decision concerning recusal of a Board Member is a determination that must be made by the Board Member and not by the Hearing Officer. (See Hearing Officer Decision dated September 12, 2011 which is enclosed with the case file).

MATTERS AT ISSUE IN THE HEARING

The matters that were "at issue" at the hearing were the following:

1. Did Mr. Dutrow have and possess on the premises of a franchised racetrack equipment usable for infusion and hypodermic injection into a horse (without permission from the Stewards and without being a veterinarian) on November 3, 2010;
2. Did Dutrow have and possess on the premises of a franchised racetrack an unlabelled container of drugs on November 3, 2010;
3. Did the horse Fastus Cactus, trained by Dutrow, compete in the third race at Aqueduct Racetrack on November 20, 2010 with the presence of the drug butorphanol having been administered within 96 hours prior to the scheduled post time of that race;

4. Do the alleged foregoing violations --if proved-- and Mr. Dutrow's prior history of rule violations, constitute conduct improper, obnoxious, unbecoming and detrimental to the best interest of racing; and

5. Is Dutrow's character and general fitness such that his participation in pari-mutuel racing is inconsistent with the public interests, convenience and necessity and with the best interests of racing generally.

REVIEW OF THE EVIDENCE PRESENTED

At the hearing in this matter, Mr. Dutrow was represented by Attorney Michael L. Koenig, of the offices of Greenberg Traurig and the Board was represented by Rick Goodell of the Office of Board Counsel. The hearing was held on a full stenographic record which consists of three volumes. The Board presented the following witnesses: John Jones who is employed by the New York State Racing and Wagering Board as an assistant to the supervisor in the test barn of the NYRA tracks (transcript pages 32 -115); Angel L. Gonzales who is employed as an investigator with the New York State Racing and Wagering Board (transcript pages 117-172); Joel Leveson, Director of Investigations for the New York State Racing and Wagering Board (transcript pages 193-302); and George Maylin, DVM PhD who is the Director of the New York Drug Testing and Research Program (transcript pages 306-378 and pages 539-540). Dutrow called the following witnesses: Angel Cordero, Jr. (transcript pages 388-404); Steven Andrew Barker, PhD (transcript pages 405-441 and pages 459-473); Kenneth Eugene Page, a horse owner, (transcript pages 445-458); Lawrence R. Bramlage, DVM, a veterinarian used by Dutrow (transcript pages 476-481); Samantha Siegel, Managing Partner of JMS Stables for which Dutrow trains (transcript page 484-492); and, Mr. Dutrow himself (transcript pages 493-533).

In addition to the testimony of the witnesses, the following exhibits were received into evidence:

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| Exhibit | 1 | Order of Reference |
| Exhibit | 2 | Order to Show Cause with Proof of Service |
| Exhibit | 3 | Track Rulings (AQ 25-2011, AQ 26, 2011) |
| Exhibit | 4 | Appeal (alleged) (02/11/2011) |
| Exhibit | 5 | Applicant History Report (NYSRWB, ARCI) |
| Exhibit | 6 | Program (excerpt) and Chart for third race, November 20, 2010 |
| Exhibit | 7 | "Fastus Cactus," NYRA records November 20, 1010 |
| Exhibit | 8 | Collection Records for Fastus Cactus, Urine Card, Blood Card, Collection Log, Random list of samples, Transmittal Memorandum, UPS Receipt, and Shipping Log |
| Exhibit | 9 | Veterinary Records for Dutrow horses |
| Exhibit | 10A | Statements of Dutrow, employees, veterinarians (re: 11/03/10) |
| Exhibit | 11 | Statements of Dutrow, employees, veterinarians (re: 11/20/10) |
| Exhibit | 12 | Request for Independent Lab Analysis (01/20/11) |
| Exhibit | 13 | Photocopied Chain of Custody Records (re: 11/03/10) |
| Exhibit | 14 | Dr. George Maylin, CV |
| Exhibit | 15 | Morrisville lab records for syringes |
| Exhibit | 16 | Evidence Bag Syringes and Needles (re: 11/03/10) |
| Exhibit | 17 | Morrisville Lab Records for "Fastus Cactus" |
| Exhibit | 18 | Select prior rulings and testimony, Richard Dutrow |
| Exhibit | 18A | Transcript of Kentucky Proceedings of April 13, 2011 |
| Exhibit | 19 | Transmittal Memorandum, (11/05/10) |
| Exhibit | 20 | UPS shipping documents |
| Exhibit | 21 | Not offered or received |
| Exhibit | 22 | E-mail from Joel Leveson to Dr. George Maylin dated November 8, 2010 |
| Exhibit | A | Not received into evidence |
| Exhibit | B | Photo of the office, desk and "Mouse" (Dutrow's Assistant) |
| Exhibit | C | Photo of the desk drawer |
| Exhibit | D | Not offered or received |
| Exhibit | E | Dr. Barker's CV |
| Exhibit | F | Published article (Spurious Urine Excretion....) |
| Exhibit | G | Published article (Contamination by Bedding: Experimental Demonstration) |
| Exhibit | H | Published article (The Feasibility of Sample Contamination by Stable Bedding) |
| Exhibit | I | Published article (Pharmacokinetics and Urinary Excretion of Naproxen...) |

Post hearing, I received the following into evidence (see Hearing Officer Decision dated September 12, 2011):

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| Exhibit | J | CV of William Kelly |
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Exhibit K Polygraph Report by William Kelly
Exhibit L Canadian Pari-Mutuel Agency study concerning butorphanol

POSSESSION OF SYRINGES

Testimony involving the allegations regarding possession of the three syringes by Dutrow in violation of Board Rule 9 NYCRR §4012.1(a)(1) was heard from Board witnesses Jones, Gonzales, Leveson and Maylin. Mr. Dutrow also testified regarding the syringes, but his testimony consisted solely of a general denial of any knowledge of how the syringes made their way into his desk drawer and his barn at Aqueduct.

While conducting a barn inspection to train new NYRA inspectors, Director of Investigations Leveson found three syringes with needles in a wormer paste container in the top left desk drawer in Dutrow's office at Aqueduct Racetrack, Barn 10, Room J. He testified that he placed them in an evidence bag and kept it in his possession when he left the office and then locked it in his own car. After completing his barn search Leveson took the syringes to the Board's offices at Aqueduct and showed it to the State Steward, Assistant State Steward and Board Investigator Gonzales. He testified that he placed the syringes in the wormer box in which they were found to prevent an accidental depression of the syringes' plungers during shipment. He photocopied the evidence bag and made notations on the bag exterior. Under the "chain of custody" entries on the bag exterior he stated that he put his name and the date that the syringes were obtained, as well as a notation that the evidence bag was brought to the Board offices. He stated that he left the evidence bag in a locked cabinet at Investigator Gonzales' office and asked Investigator Gonzales to have Board employee John Jones take the bag after he stopped by the Board's offices the following day and to ship with it the race samples to the State Laboratory.

Board Investigator Gonzales testified that he locked the evidence bag in his cabinet and the next race day delivered the bag to John Jones on November 5, 2010. Jones testified that he placed the bag on the top of the race day blood samples at the end of that day in a locked refrigerator. And that the bag remained in the locked refrigerator while the offices were closed. He testified that he made a notation in his shipping journal that an evidence bag was shipped with the November 5th race day samples on November 8, 2010. He further testified that there was a return of the November 5th race day samples on November 10, 2010 by the shipping company because of a mistake on the shipping labels (the shipping labels had the former Cornell Laboratory address and the State Laboratory had moved to Morrisville). Jones testified that while the boxes remained on the delivery truck he completed replacement shipping labels for the shipments for November 5th, 6th and 7th.

When the November 5, 2010 race day samples arrived at the State Laboratory, Dr. Maylin testified that the shipping container and evidence bag were in good condition and that the evidence bag containing the wormer box with the three syringes remained sealed. The Laboratory photographed the contents of the sealed evidence bag and then cut open the evidence bag and removed the syringes from the wormer box.

Although the State witnesses conceded during cross examination by Dutrow's attorney that the proper protocol for completing the "chain of custody" documentation on the evidence bag would have been to have listed each individual who handled the evidence bag and make a notation as to when he handled the evidence bag on the "chain of custody" form, this discrepancy is overcome by the fact that each individual that did in fact handle the bag testified at the hearing and specifically recollected their participation in the collection, receipt, storage, and forwarding of the evidence bag to the next person in the chain of custody. Thus, there was

testimony from Board employees of an unbroken chain of custody of the syringes from the time they were located within Dutrow's desk drawer at Room J, Barn 10 of the Aqueduct Racetrack through Dr. Maylin's receipt of the evidence bag within a box delivered by common carrier to the State Laboratory. Furthermore, the syringes within the wormer box were found in the presence of Dutrow's Assistant Trainer Juan Rodriguez ("Mouse"). Mr. Leveson immediately displayed the syringes to Mouse who had admitted to Mr. Leveson that the wormer box had been in the desk drawer for several days. Mr. Rodriguez was not called as a witness for Respondent Dutrow in this matter and there was no other testimony, -- other than Dutrow's denial of any knowledge of the syringes in his desk drawer -- from other Dutrow witnesses regarding the presence of the syringes in Mr. Dutrow's desk drawer at the Aqueduct barn.

The Board witnesses testified that the the syringes were unlabelled. The syringes do not indicate the presence of xylazine. Dr. Maylin testified that the syringes contained xylazine. Xylazine is an analgesic and tranquilizer and it can enhance performance by alleviating lameness or calming a nervous horse.

POST RACE POSTIVE FOR BUTORPHANOL

Under New York Law the trainer is strictly responsible to ensure that no horse in his care receives any drug or other restricted substances by any means, within specified periods of time prior to a race (Matter of Pletcher v. New York State Racing and Wagering Board, 35 A.D.3d, 920-21 [3rd Dep't 2006, leave denied 9 N.Y. 3d 802 2007] and 9 NYCRR § 4043.4). Once the Board establishes a proper chain of custody and positive drug test, the burden of proof is shifted to the trainer to rebut by substantial evidence his responsibility for the positive drug test (See Matter of Zito v. New York State Racing and Wagering Board, 300 A.D.2d, 805 [3rd Dep't 2002,

leave denied 100 NY 2d 502 [2003]). As explained in Matter of Guarino v. New York State Racing and Wagering Board, 45 A.D. 3d 1096, 1097 (3rd Dep't 2007), leave denied, 100 NY 3d 370 (2008):

The rule creates a presumption of trainer responsibility when a horse tests positive, which can be rebutted if the trainer provides substantial evidence that neither the trainer nor any employee or agent is responsible for the drug's presence in the horse's body. *****

The presumption is rebutted only when the trainer comes forward with substantial evidence that neither the trainer nor any employee or agent was responsible for administration of the drug or other restricted substance. (emphasis supplied)

“Speculation will not rebut the presumption” of trainer responsibility, Matter of Pletcher, 35 A.D. 3d at 922.

Within this legal framework the Board presented evidence by its witnesses regarding the sampling and chain of custody procedures concerning the post race positive for butorphanol for Fastus Cactus. Board witness Jones testified in detail as to the normal and customary practices for documenting and obtaining blood and urine samples. He testified that the horses are taken by a Board inspector (chosen at random), with an attendant for each horse directly from the track after the race. The horses are under direct surveillance by a Board inspector until it is ready to urinate. A urine sample is collected using a clean cup by a Board inspector and it is collected within view of the trainer's representative. The urine sample is verified by the trainer's representative signing the sample card. The Board inspector puts a lid on the sample cup while in the stall and the sample is sealed with an evidence seal that both secures the top of the sample card and the top of the evidence cup and the trainer's representative signs the urine sample card and initials the seal. With respect to blood samples, the blood samples are drawn immediately after the urine is taken. The blood samples are drawn by a Board Veterinarian in the presence of a Board Inspector. Similar to the urine sample, a trainer's representative is present while the

blood sample is taken. The name of the representative is put on the back of the blood sample card. In the same manner as the urine sample, a sample card with a unique numeric identifier is completed for each horse that is tested. The top portion of the sample card is attached to the sample by an evidence seal but does not identify the horse or owner or trainer. The top portion of the sample card identifies the sample by the unique number. The bottom portion of the sample test card is then removed from the blood and urine samples and placed into a sealed envelope to be sent to the Stewards. In this manner, the samples that are sent to the State Laboratory cannot be identified by anyone as belonging to any specific horse, owner or trainer. The urine and blood samples are kept in a secure location (locked freezer and refrigerator) in the Board offices. The Board offices are locked when Board employees are not present. Mr. Jones personally packages the frozen urine samples and blood samples inside shipping containers which are sealed with evidence tape. The shipments are sent to the State Laboratory with seals on the box, blood samples and urine samples. If there is any evidence of tampering of any of the seals, any such tampering is noted by laboratory personnel prior to testing the samples.

The post race urine and blood samples taken from Fastus Cactus after the third race at Aqueduct Racetrack on November 20, 2009, were analyzed at the State Laboratory under the supervision of the Laboratory Director Dr. George Maylin. He testified that, to a reasonable degree of certainty, there were no detectable drugs in the blood sample and the urine sample contained butorphanol (transcript page 335-336, 341). The post race positive tests results of the State Laboratory was corroborated by independent analysis in accordance with a split sample requested by Dutrow (see Board Exhibit 12).

It was Dr. Maylin's opinion that Fastus Cactus received a clinical administration of butorphanol within 96 hours before the race (transcript page 343-44). This was Dr. Maylin's

opinion because there was not evidence of a large dosing of butorphanol in the veterinary records.

Dr. Maylin reported the positive test result to Board Investigator Gonzales by reporting the sample number to Mr. Gonzales. Mr. Gonzales opened the sealed race day envelope which then identified the horse with the corresponding unique number and verified that the butorphanol positive was from a urine sample collected from Fastus Cactus after the horse participated in the third race at Aqueduct Racetrack on November 20, 2010.

As a result of the above testimony, it was incumbent upon Dutrow to rebut the application of the trainer responsibility rule. Dutrow attempted to do so by the testimony of Dr. Stephen Barker. Dr. Barker is a professor in the Department of Comparative Biomedical Sciences and serves as the director of the Analytical Systems Laboratory for the School of Veterinary Medicine at Louisiana State University. He is also the director of Equine Medication Surveillance Lab which is an official drug testing laboratory for the Louisiana State Racing Commission and in that capacity serves as the State chemist to the Louisiana State Racing Commission. The essence of Dr. Barker's testimony is that the urine sample may have been contaminated by an unknown source not affiliated with Fastus Cactus and thus resulted in the low positive urine test and no positive in Fastus Cactus blood sample. He opines that it is possible that "...the urine collector or the test barn personnel or someone who handled the collection devices, even from the point of manufacture or perhaps even a technician in the laboratory contaminated the collection devices or the urine itself with just butorphanol... [which] is ...a drug that is sold as a nasal spray to treat migraine and severe headache. So the possibility that any of these people could have had it, even people that are not associated with the actual collection but people who could have helped in the manufacture, packaging or handling of the

collection devices, using a nasal spray like butorphanol, could have sprayed some into the air, could have gotten into it." (Transcript pages 425-426). In addition Dr. Barker opines that butorphanol could have been excreted by another horse into the test stall or surrounding area which Fastus Cactus was brought for the collection of its test sample.

In addition, Dr. Barker and Dutrow contend that a further test (a "differential analysis") should have been conducted by the Board to eliminate the possibility of contamination of the sample.

Dr. Barker referred to certain studies, which have been received into evidence, which indicate that cross contamination of horses may occur.

The Respondent's theories of the presence of butorphanol in Fastus Cactus do not rise to the level of substantial evidence rebutting the application of the trainer responsibility rule. The Board has established a proper chain of custody and positive drug test, thus, the burden of proof shifted to Dutrow to rebut by substantial evidence his responsibility for the positive drug test. Put simply, Dr. Barker's testimony regarding possible cross-contamination, or contamination by humans involved in the manufacturer of the urine container or in the collection of the urine sample is speculative, at best. In reviewing the testimony of Drs. Maylin and Barker, in total, I conclude that Dr. Barker's theories do not rise to the level of substantial evidence such that it would rebut the application of the trainer responsibility rule.

FINDINGS OF FACT WITH RESPECT TO THE CHARGES RELATING TO
POSSESSION OF SYRINGES AND THE POST RACE POSITIVE FOR
BUTORPHANOL

Upon the sworn testimony and the Exhibits introduced before me at the hearing of this matter and upon reviewing the post hearing written closing arguments by both counsel for Dutrow and the Board, both dated September 16, 2011, I make the following findings of fact relating to the allegations of possession of equipment for use for hypodermic injection, possession of an unlabelled container of drugs and the post race positive for butorphanol:

1. On November 3, 2009 three syringes were found by New York State Racing and Wagering Board personnel in the Respondent Richard E. Dutrow's desk drawer in Room J, Barn 10 at Aqueduct Racetrack;

2. Room J, Barn 10 at Aqueduct Racetrack was a room and barn, respectively, used by Respondent Richard E. Dutrow, Jr. as his office and barn at Aqueduct Racetrack;

3. Respondent Dutrow is not a veterinarian and did not have permission from the Stewards for possession of the three syringes;

4. The three syringes located within Respondent Dutrow's desk drawer on November 3, 2010 were not labeled and did contain the drug xyzaline;

5. As a result of the application of the trainer responsibility rule I find that the horse Fastus Cactus, trained by Dutrow, which competed in the third race at Aqueduct Racetrack on November 20, 2010 competed with the drug butorphanol having been administered within 96 hours before the scheduled post time of that race.

**ALLEGATIONS REATING TO EXPULSION FROM RACETRACKS FOR CONDUCT
DETRIMENTAL TO THE BEST INTERESTS OF RACING AND RELATING TO
CHARACTER AND GENERAL FITNESS OF RESPONDENT**

Dutrow's witnesses, apart from Dr. Barker, were all in the nature of character witnesses. Retired Hall of Fame jockey Angel Cordero, Jr. testified that in his opinion, Dutrow is "great for racing" (transcript page 397). In addition, Cordero testified generally as to the positive care and treatment Dutrow gives to his horses and his desire to place jockeys for which he is an agent with Dutrow.

Kenneth Page is an automobile dealer in Florida, Georgia and Maryland and a horse owner. He testified that he has known Dutrow for nearly forty years and although he is aware of Dutrow's past violations, Mr. Page stated that he is "very confident that [Dutrow's] horses are getting the best care they can get" (transcript page 454).

Dr. Lawrence Bramlage, a Board certified veterinarian specializing in equine orthopedic surgery also testified on Dutrow's behalf. He testified that he has known Dutrow for five years in conjunction with treating horses that Dutrow sends to him for care and treatment. He testified that "...the health of the [Dutrow] horses are impeccable when we get them...his horses, from my examination of the horses, are impeccably cared for and most importantly, he is very good at picking out the problems early and being good to the horse getting them taken care of very quickly" (transcript page 479).

Mr. Dutrow's final character witness was Samantha Siegel, the managing partner of JMS Stables, who testified about her trust and confidence in Dutrow as a trainer. She stated she was aware of Dutrow's past violations but continues to trust Dutrow to train her horses and would continue to allow Dutrow to train her horses should he be permitted to keep his trainer's license (transcript page 490). She stated that "he pays a lot of attention [his] horses and seems to have a real knack of knowing which ones are doing really well and which ones are not doing well" (transcript page 47); "his horses are like his kids...he loves them" (transcript page 488); and "we

respect [Dutrow] and trust him, and we send him some of our best horses every year because he is very good at what he does" (transcript page 49).

Moreover, the Board's own employees, upon cross-examination, concede that Dutrow is "straight up", a "gentlemen" (testimony of John Jones transcript page 105, 107); a "fine gentlemen" who is "very polite, very courteous" (transcript of testimony of Investigator Gonzales at page 142); and "takes tremendous care of his horses...they always look well and come to you...[which] suggests the horses are happy....the horses are friendly...the horses expect to get affection from their handlers" (testimony of Joel Leveson transcript page 251).

Seemingly inconsistent with these glowing comments regarding Dutrow's character are numerous prior equine drug violations (See Board Exhibit 5). Since 2003, Dutrow has been fined and/or suspended for numerous drug violations. He has had his license suspended for more than 10 days on three separate occasions; in 2003 for a mepivacaine violation (\$3,000.00 fine and 45 day suspension); in 2004 for a clenbuterol violation (\$2,000.00 and 15 day suspension); and, in 2008 for a clenbuterol violation in Kentucky (15 days). In addition to those violations that warranted suspension, there are numerous other drug violations in Florida for the use of phenylbutazone (see Exhibit 18). Furthermore, his New York State racing application history report and RCI comprehensive ruling report (Board Exhibit 5) reveals a consistent inability to abide by regulatory rules including a lack of truthfulness in statements to regulators (the RCI records indicate he has falsified license applications in California [1979], Kentucky [1995], and Delaware [2000]).

Giving due consideration to the testimony of Dutrow's "character witnesses" (including favorable statements made by Board employees) that Dutrow provides fine care for the horses he trains; it is not inconsistent to also conclude that he will continue to violate the rules of racing

should he be permitted to keep his trainers license. As a result of his past history -- within this jurisdiction and others -- and my previous findings in this report that Dutrow violated Board rules with regard to possession of the syringes, unlabelled medication, and the post race positive for butorphanol in Fastus Cactus, I find that Respondent Dutrow is a person whose conduct at race tracks in New York State is detrimental to the best interests of racing and his character and general fitness are such that his participation in pari-mutuel racing is inconsistent with the public interests, convenience and necessity and with the best interests of racing generally.

HEARING OFFICER'S RECOMMENDATION

Based upon the evidence presented to me in this matter at the hearing held on May 31, June 2 and June 3, 2011, the papers received by me in connection with the motions made by Respondent Dutrow and the Office of Board Counsel, the receipt and review of the written closing arguments for Dutrow and Office of Board Counsel, it is my recommendation that Respondent Richard E. Dutrow, Jr.'s trainer's license be REVOKED and that he be fined Twenty-Five Thousand Dollars (\$25,000.00) for the violation relating to the post race positive for butorphanol for Fastus Cactus and Twenty-Five Thousand Dollars (\$25,000.00) for possession of the hypodermic syringes for a total fine of Fifty Thousand Dollars (\$50,000.00). I further recommend that Respondent Richard E. Dutrow, Jr. be permanently prohibited from obtaining any new license from the New York State Racing and Wagering Board.

Dated: September 22, 2011


Clemente J. Parente
Hearing Officer