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Reforming 'Due Process' at the IHRC

By Jim Hartman, IBOP Vice-President

In the January edition of our newsletter, IBOP posed the question, "Is it possible that the IHRC will act to reform their system of due process?" based upon what we considered to be significant indictments of their rules and processes by the Indiana Inspector General (IG). (See: *Indiana Inspector General's Report-Part 1* in our newsletter archive at www.ibopindy.blogspot.com) More specifically, we wondered if the IHRC will take steps to modify their adjudication system that the IG suggested may be "detrimental to the horse racing community."

Adjudication is basically a system of resolving disputes. The IG's particular use of 'adjudication' goes directly to the IHRC's 'due process' and disciplinary system, a system they created to issue and to prosecute complaints against horsemen, licensed or unlicensed, for rules violations that could lead to fines, suspensions, or other disciplinary action. This article is IBOP's report card on how the IHRC is reacting to the IG's report through their first two meetings since the IG's report was made public.

At the IHRC's meeting on December 5th, Chairman Sarah McNaught opened the meeting by acknowledging the report with a one minute speech. She said in part, "The Inspector General has made some suggestions for our agency. And we will be looking at those suggestions in the coming months." At their January 24, 2012 meeting, the IHRC did take one very small step, and hopefully not their only step, in reforming their due process administrative rules. For grading purposes, we are going to use a **PASS, FAIL,** or **INCOMPLETE** grading scale for their action and inactions to-date.

IG Recommendation: Regarding the IHRC's current due process administrative rules, one major recommendation made by the IG was to "eliminate the initial and duplicate Disciplinary Hearings procedure." (Please note: While this particular recommendation suggested that the IHRC use its "statutory discretion" to make these changes, the recommendation was also a suggestion that the Indiana General Assembly could do so as well through the legislative process. At this point, there have been no legislative initiatives on this issue in the current session and none expected.) The IG's recommendation prefers that all administrative complaints against horsemen be heard by the commissioners themselves at a public meeting, or at minimum, by an Administrative Law Judge (ALJ) appointed by the IHRC, instead of the stewards and judges as the "initial" hearing and then on to "duplicate" hearings made necessary by additional IHRC rules.

First, we will provide a review and grade on the "eliminate the initial" disciplinary hearing process. The IG's concern is regarding the impartiality of a judge or a steward being able to issue a violation and then oversee a hearing on that same violation. To provide emphasis on this matter, the IG quoted a Supreme Court decision that stated that a "fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well as to courts." Simply put, the IG is im-

plying that the IHRC, as a bi-partisan administrative oversight agency, would provide some independence versus the use of commission employees for the initial hearing process where hearsay and unsworn testimony can be used to affect a horsemen's livelihood.

IBOP Grade: FAIL. In IHRC Chairman Sarah McNaught's written response to this recommendation, she states, "First, the Commission would consider and potentially ratify **all** fully adjudicated disciplinary matters at a public meeting. This would include:

1) All rulings issue by the Judges and Stewards;
2) All settlement agreements and recommended orders from Administrative Law Judges, and;
3) The Commission would continue to hear and decide all contested disciplinary matters."

In her response, Chairman McNaught mixes 'all,' which is an absolutely positive every-single-time type of word, with less definite words and phrases like "would consider" and "potentially." Clearly, 'ratifying' an administrative complaint against a horsemen and actually hearing the complaint, as per the IG's recommendation, are two different things. Chairman McNaught's remarks seem like a nice way to say 'no' to the IG's recommendation. Plus, actions always speak louder than words.

One of the agenda points at the IHRC's January 24th meeting was "Consideration of a policy on adjudication review." The IG recommended that a log be created for all administrative complaints against horsemen and their status to be "regularly shared" with the commission. Sadly, the commission staff was not sharing the administrative complaints with the commissioners. But, obviously, the commissioner's weren't engaged enough in their responsibilities to even have an established policy to be informed in the first place. Horsemen deserve better than this type of bury-your-head-in-the-sand apathy the commissioners have demonstrated in their version of regulation.

Sadly, the hand-out for the discussion on adjudication review was only two sentences long. "The Executive Director shall submit for the review of the Commission, on a semi-annual basis, copies of all final orders including copies of all judge's rulings, steward's ruling, settlement agreements and all rulings issued by the Executive Director. Such review shall be scheduled for a public meeting by the Chairman." The only positive we see from this policy is that one of the commissioners objected to a semi-annual review and changed the policy regarding the administrative complaints to review at every meeting "to the extent possible."

While a "review" is not fully adhering with the IG's recommendation, the terms "consider and ratify" apparently didn't bridge the gap from the Chairman's response to the IG to the actual IHRC's new policy. **IBOP Grade: FAIL.** Witnessing exactly how the to-date nonchalant group of commissioners engage themselves in the process of reviewing and attempting to understand each case reviewed could potentially reopen this grade. Their witnessing of the use of hearsay and unsworn testimony could change their views on the process entirely. We can only hope.

The second part of this particular recommendation from the IG was to eliminate the "duplicative Disciplinary Hearing procedure." Indiana law allows for, but **does not require,** judges and stewards to process administrative complaints against horsemen at the race tracks. The law limits any penalty that judges and stewards can assess at $1,000 and/or a 60-day suspension. (Yet, we have in our possession an official Steward's ruling that shows an indefinite suspension of horsemen which conflicts with the 60 day maximum in Indiana law.) Once the stewards or judges ruled on an issue following a hearing, an aggrieved horseman could then have to navigate additional administrative procedures, hearings, etc. in a more formalize process.

The IG recommended that if the duplicative hearing procedures were kept (stewards and judges, then to commission staff) that "safeguards" be put in place "to improve its fairness in both appearance and substance." The only "safeguard," using the term loosely, that has been established is a policy whereby cases will be referred to the commission staff without a steward's or judge's hearing if the penalties involved could be greater than a 60 day suspension and/or over a $1,000 fine. Doing so COULD eliminate the need for a horseman to defend themselves in multiple hearings, but don't count on it.

In her own words, Chairman McNaught stated this policy change would move the current due process system "closer to the single adjudication process the Inspector General prefers." **IBOP Grade: FAIL.** Getting "closer" to something is not actually getting TO something. Plus, this adopted IHRC policy would still allow stewards and judges to issue immediate suspensions of a horsemen's license through a summary suspension and allow them to hold disciplinary hearings on those summary suspensions. Thus, a summary suspension hearing continues the duplication of the hearing process the IG challenged.

An immediate suspension of a license through a summary suspension is defined by the IHRC's rules as actions that "constitute an immediate danger to the public health, safety, or welfare, or are not in the best interest of racing,

or compromise the integrity of operations at a track or satellite facility." The IHRC controls this definition and can apply it to include almost any possible infraction. Logic would also suggest that if a licensee's actions required an immediate suspension, the nature of the offense would more than likely result in a greater than a 60 day suspension or $1,000 fine. This would mean a referral to the IHRC staff anyway. Even with this policy change, a summary suspension would require an accused horseman to challenge the steward's or judge's ruling in a hearing then starting over with disciplinary hearings prescribed by the IHRC. This new policy is still duplication of process, costs, and time referenced by the IG.

IG Recommendation: The most frequent complaint cited by the IG in his report was arbitrary increases in fines through what's called the use of a 'preliminary report' process. The IHRC has delegated to Executive Director Joe Gorajec, via an administrative rule titled Administrative Penalties, the ability to add on to fines or suspensions after a steward's or judge's ruling is final. The IG recommended that this enhanced penalty phase be eliminated or modified due to the arbitrary nature of the process.

IBOP Grade: FAIL. If the IG didn't think horsemen's complaints weren't valid, would this recommendation have been made in the first place? Doubtful. At their meeting on January 24th, the IHRC did approve a revised 'Administrative Penalties' rule. However, the only change in the rule was to change the wording from 'preliminary report' to 'administrative complaint' and change the title of the rule from Administrative Penalties to Administrative Complaints. We are quite confident that this is not the type of modification that the IG was suggesting.

IG Recommendation: Since the IHRC creates their own rules with no oversight, (See: *"Emergencies Rule"* in this newsletter.) the IG noted correctly that the administrative rules for appealing an IHRC decision really discouraged horsemen to do so. Any unsuccessful appeal to the IHRC triggered all costs of that appeal, which could be substantial, to be assessed to the person making the appeal, not the IHRC. Plus, a $500 deposit toward those possible expenses was a must just to register an appeal to the IHRC. The IG's recommendation was that the costs associated with any appeal be incurred by the IHRC with the elimination of the $500 deposit.

IBOP Grade: PASS. The IHRC voted to amend **71 IAC 10-2-9 Appeals** by subtracting 10 lines from the administrative rule to fully conform to the IG's recommendation. No longer will horsemen be assessed $500 just to appeal a judge's or steward's decision to the IHRC and horsemen are not under the threat of having to pay for all of the costs of an unsuccessful appeal. With that said, the overall process has changed very little.

The efforts of the IHRC to reform themselves have included one substantive change (appeal costs) with the balance being cosmetic (everything else). **Overall IBOP Grade: FAIL.** Very little has changed, and we expect very little to change moving forward.

Jim Hartman is a past board member and Treasurer of the Indiana Thoroughbred Owners and Breeders Association as well as a past member of the Indiana Thoroughbred Breed Development Advisory Committee.

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Emergencies Rule

By Jim Hartman, IBOP Vice-President

Indiana law allows for most administrative agencies, which are part of the executive branch of Indiana's government, to establish administrative rules. This particular article is going to focus on the process called "rule-making" and more specifically, how the Indiana Horse Racing Commission (IHRC) avoids oversight of their administrative rules through the use of what are called "Emergency Rules."

Each agency's rulemaking is dictated by Indiana law through either a regular rulemaking process or by an emergency rulemaking process. All administrative rules must first fall within the agencies' statutory limits of authority. While administrative rules are not laws, administrative rules have the same effect of a law. With this type of authority, the rulemaking process is normally a fairly structured process. Emergency rules are the exception. The State of Indiana's "Administrative Rules Drafting Manual" states, "An Emergency Rule adopted under the emergency rulemaking statue is exempt from certain requirements for public notice of rulemaking. In most cases, an emergency rule is a temporary rule." While this is not a statutory definition of emergency rules, the sentiment is fairly clear that an emergency rule doesn't have to follow what is an extensive rulemaking process.

All of the IHRC's administrative rules are put on the books by the emergency rulemaking process. At a recent IHRC meeting, Executive Director Joe Gorajec said, "With regard to emergency rules, every rule that we've ever made since 1993 has been an emergency rule." So, why are all of the IHRC rules emergency rules? To understand the answer to this very important question, you may have to get a feel for the regular rulemaking process. Once you understand the regular rulemaking process, the answer will be quite evident.

With the regular rulemaking process, a proposed rule has to negotiate a number of steps which begins with filing a Notice of Intent to Adopt a Rule with the Indiana Register. The best way to explain the Indiana Register is this is where all proposed rules, active rules, and their assorted documents are published as a part of Indiana's Legislative Services Agency. The Notice of Intent to Adopt a Rule is required to include the "intent and scope of the proposed rule and the statutory authority for the rule." The Notice of Intent to Adopt a Rule must be filed with the Indiana Register twenty-eight days before the next step which is a Public Hearing.

We've all seen the Public Notice section of our local newspaper and the regulatory agency involved must use this section of a newspaper to announce the Public Hearing. The proposed rule's Notice of Public Hearing, which besides the date, time, place, etc. of the public hearing, is to describe "any requirement or cost" imposed by the rule to any "regulated entity" AND not expressly required by law to be adopted. (Most IHRC rules are not expressly required by Indiana law.) The Notice of Public Hearing must be placed in a newspaper at least 21 days before the hearing date.

Before the Public Hearing, the agency proposing an administrative rule that would impose requirements or costs on small businesses must prepare a statement that describes the annual economic impact of the rule. The regular rulemaking process is very sensitive to the impact of rule on small businesses, which describes a very significant portion of the horse racing industry in Indiana. This economic impact statement must be submitted to the Indiana Economic Development Corporation for their comments no later than seven days before the Public Hearing. These written comments become part of the Public Hearing record.

Only after the Public Hearing can the agency actually adopt the proposed rule. Indiana law does not allow for an agency to adopt a rule that is substantially different from the rule originally submitted to the Indiana Register. Once adopted by the agency, the proposed administrative rule is submitted to the Attorney General's (AG) office. The AG reviews the "legality" of the proposed administrative rule and is required to disapprove an agency's proposed administrative rule if there is no statutory authority to create such a rule or the rule violates another law. The AG's office has

45 days to approve or disapprove the rule with expiration of the 45 days being considered an approval.

Assuming the AG approves the proposed rule, it then goes to the Governor's office for approval. Only after the Governor approves a proposed rule, the agency involved can file the administrative rule with Indiana Register. Upon the date of this filing with the Indiana Register, the proposed administrative rule becomes the effective Final Rule.

As you can see, the regular rulemaking process can take months to complete and requires quite a bit of public input, legal oversight and approvals. What about the emergency rulemaking process? Basically, emergency rules are the equivalent of going straight to the Final Rule. There's no publication of the intent to adopt a rule necessary, no public hearing necessary, no economic impact review necessary, no legal review and approval by the AG necessary, and no approval by the Governor necessary. Emergency rulemaking only requires the IHRC to approve the proposed rule and file the rule with the Indiana Register to be effective. The IHRC chooses to use the emergency rulemaking process instead of the regular rulemaking process.

Here's a great example of how the emergency rulemaking with the IHRC works. At their January 24th meeting, the IHRC voted to lower the threshold for phenylbutazone (bute) and voted to eliminate vitamin B1 and calcium, both naturally occurring substances in a horse, as permitted foreign substances. Those rules, plus about 30 other administrative rules approved by the IHRC that day, were filed with the Indiana Register and became effective on January 25th. One day after IHRC approval, these administrative rules had the rule of law.

The concept that all rules are emergency rules has serious implications for the every "regulated" person. What type of person, or group of people, defines everything as an emergency? Logic says that a single proposed rule could, by itself, be an emergency. But, how can any logical person believe that ALL proposed administrative rules are emergencies? The IHRC has been purposely choosing to use the emergency rulemaking process rather than going through the additional scrutiny, including legal scrutiny, involved with the regular rulemaking process.

Indiana's Attorney General, the highest legal authority in the state, has NO power under Indiana law to disapprove of any emergency rule created by the IHRC, even if they exceed the statutory limits of the IHRC's authority. Therefore, there are no legal checks and balances involved with the IHRC's continuous use the emergency rulemaking process. We are aware of a situation where an Indiana legislator requested that the AG review the legality of an IHRC administrative rule. The response from the AG's office was that they could not comment because in the event of a lawsuit they would be responsible to defend the IHRC.

With all this said, with the emergency rulemaking process, the IHRC is NOT acting outside of the law. The language in Indiana law that granted the IHRC the ability to use the emergency rulemaking process simply fails to define when an emergency exists! The law just says that the IHRC can create administrative rules under the regular way or by emergency rulemaking process which has now led to 19 years of only emergencies. Most emergency rules in Indiana expire 90 days after being filed with the Indiana Register at beginning of the regular rulemaking process.

With most agencies, if there is a real emergency, an emergency rule can go in effect, but that agency then has to start the regular rulemaking process. Just like the IHRC, the Indiana Gaming Commission (IGC) has the legal authority to use the emergency rulemaking process. The difference being that the language in the IGC authorizing statute attempts to define just what an emergency is, which is "the need for a rule is so immediate and substantial" that the regular rulemaking procedures are "inadequate." Should the IGC approve an emergency administrative rule, they are required by law to begin the regular rulemaking process within 30 days after adopting the emergency rule. In other words, their emergency rules can be in effect, but only temporarily until they provide public notice, hold a public hearing, get the AG's approval, etc., etc.

The newest appointee to the IHRC, Jason Barclay, believed the emergency rulemaking process at the IHRC worked like the IGC's. During the January 24th IHRC meeting, and perhaps for the first time ever, an objection was raised that a proposed rule was not an emergency. When the objection was raised, Commissioner Barclay asked the following question, "If it's passed as an emergency rule, (isn't the rule) supposed to go through the final rulemaking process, the emergency rule is only valid for 90 days?" Our concern with Commissioner Barclay's question is that he used to work in the Governor's office and acted as their liaison to the IHRC! Yet, he had no idea as to how their rulemaking process actually worked. Then, Commissioner Grimes asked, "What is the process for adopting?" and the commissioners were given a crash course in emergency rulemaking versus regular rulemaking. The commissioners had no idea, but should have!

What the commissioners weren't told is that the emergency rules adopted by the Indiana Horse Racing Commission, by

law, don't expire for up to seven years! (The State Lottery Commission has this distinction as well.) Plus, each time the IHRC amends a rule, using the same emergency rulemaking process, the life of the "emergency" is extended even further. Amending an administrative rule by one word extends the supposed emergency for another seven years. The emergency rule that involved the objection would have amended an existing rule that would have redirected certain simulcast revenues and breed development revenues from the standardbreds and thoroughbreds to the quarter horses. Luckily, what Commissioner Barclay did propose was a motion that a rule be drafted and that the regular rulemaking process be used on this controversial rule change. Commissioner Grimes concluded the discussion with "At the end of the day, it's the right approach." The vote was unanimous, yet isn't regular rulemaking usually the right approach unless there truly is an emergency?

We are not holding our collective breath; however, that the IHRC staff, and therefore the commissioners, will embrace a definition of an emergency and embrace the use of the regular rulemaking process. In fact, we believe that the IHRC staff will do everything in its power to avoid going through the regular rulemaking process on the administrative rule on this and any proposed rules in the future. Ultimately, a change in the Indiana law that authorizes the IHRC to solely use the emergency rulemaking process needs to take place.

On our blog at www.ibopindy.blogspot.com, you can find the IHRC's January 24th discussion about rulemaking, pages 106 through 110 of the transcript from their meeting. We have also posted examples of rulemaking miscues by the IHRC from the January 24th meeting where a proposed emergency rule had three different versions with the approved version not being filed as the Final Rule and another emergency rule that doesn't meet Indiana's legal standards for administrative rules.

The emergency rulemaking, as demonstrated by the IHRC, leaves the door open to mistakes in submissions and 'bait and switch'-type tactics with the language in their administrative rules. Their process, for administrative rules that carry the weight of a law, is significantly flawed and lacks in proper legal oversight.

According to Indiana law, "the attorney general is the legal advisor to all agencies in the drafting and preparation of rules." This should mean ALL administrative rules, emergency or otherwise. In the $300,000 per year part-time legal services contract between Bingham McHale LLP and the IHRC there is actually an approval from the AG allowing an outside counsel. In the scope of work in the contract, the AG includes the following: "The development of contracts and agency rules and other legal documents required by the commission." Clearly, per Indiana law, the AG is responsible to advise the IHRC regarding the drafting of all rules. We don't see how that responsibility can be delegated to an outside counsel. Especially, when considering the lack of statutory authority for the AG to disapprove any of the IHRC's emergency rules.

Is anyone watching the IHRC's continual use of emergency rulemaking? The Inspector General (IG) made a recommendation that the IHRC evaluate and consider hiring an inside counsel. The wording in the IG's recommendation seemed quite strange by saying, "internal general counsels provide the benefit of full-time employees more familiar with the many aspects of Executive Branch government." Keep in mind that administrative agencies are part of the executive branch of government! Initially, we thought that the IG's comment pertained to the different ethical standards of an outside contractor versus a state employee. Yet, could the IG have been referring to having an attorney more familiar with the regular rulemaking process involved with IHRC? Perhaps, but more importantly, does the IHRC care to follow the IG's recommendation to consider hiring an internal general counsel?

In her November 3, 2011, three page response to the IG's report, not once did IHRC Chairman Sarah McNaught comment on the internal counsel recommendation. Not one word was spoken about this particular recommendation in either of the December or the January IHRC meetings. The current $300,000 contract with Bingham McHale LLP expires on June 30, 2012. Tick tock, Chairman McNaught, tick tock. The people of Indiana and the horsemen participating in Indiana deserve better than what you are providing them.

Jim Hartman is a past board member and Treasurer of the Indiana Thoroughbred Owners and Breeders Association as well as a past member of the Indiana Thoroughbred Breed Development Advisory Committee.

Please don't confuse this article with IBOP's 'Administrative Rule of the Month' which can only be found on our blog at www.ibopindy.blogspot.com. Each month, IBOP takes an in-depth look at an Indiana Horse Racing Commission (IHRC) administrative rule. This month's 'Administrative Rule of the Month' has to do with the IHRC's rules regarding taking of test samples from your horses. Yes, test samples, as horse owners no longer have the right to witness any samples being taken from their own horses!

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