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December 23, 1987

Harry L. Buch, Chairman
West Virginia Racing Commission
Suite 310
Charleston, West Virginia 25301

Dear Mr. Buch:

This will acknowledge receipt of your letter of October 9, 1987, in which you request the opinion of the Attorney General with respect to the authority of the West Virginia Racing Commission. The specific question raised is whether or not the West Virginia Racing Commission may through the promulgation of rules and regulations regulate the fees paid to jockeys.

The authority of the West Virginia Racing Commission to regulate the racing of horses generally is found in Chapter 19, Article 23 of the Code of West Virginia of 1931, as amended (hereinafter Code). The West Virginia Racing Commission is established by Code 19-23-4. The powers and authority of the Racing Commission are found in Code 19-23-6 which provides in full as follows:

"The racing commission shall have full jurisdiction over and shall supervise all horse race meetings, all dog race meetings and all persons involved in the holding or conducting of horse or dog race meetings, and, in this regard, it shall have plenary power and authority:

"(1) To investigate applicants and determine the eligibility of such applicants for a license or permit or construction permit under the provisions of this article;

"(2) To fix, from time to time, the annual fee to be paid to the racing commission for any permit required under the provisions of section two [§ 19-23-2] of this article;

"(3) To promulgate reasonable rules and regulations implementing and making effective the provisions of this article and the powers and authority conferred and the duties imposed upon the racing commission under the provisions of this article, including, but not limited to, reasonable rules and regulations under which all horse races, dog races, horse race meetings and dog race meetings shall be held and conducted, all of which reasonable rules and regulations shall be promulgated in accordance with the provisions of article three [§ 29A-3-1 et seq.], chapter twenty-nine-A of this Code;

"(4) To register colors and assumed names and to fix, from time to time, the annual fee to be paid to the racing commission for any such registration;

"(5) To fix and regulate the minimum purse to be offered during any horse or dog race meeting;

"(6) To fix a minimum and maximum number of horse races or dog races to be held on any respective racing day;

"(7) To enter the office, horse racetrack, dog racetrack, kennel, facilities and other places of business of any licensee to determine whether the provisions of this article and its reasonable rules and regulations are being complied with, and for this purpose, the racing commission, its racing secretary, representatives and employees may visit, investigate and have free access to any such office, horse racetrack dog racetrack, kennel, facilities and other places of business;

"(8) To investigate alleged violations of the provisions of this article, its reasonable rules and regulations, orders and final decisions and to take appropriate disciplinary action against any licensee or permit holder or construction permit holder for the violation thereof or institute appropriate legal action for the enforcement thereof or take such disciplinary action and institute such legal action;

"(9) By reasonable rules and regulations, to authorize stewards, starters and other racing

officials to impose reasonable fines or other sanctions upon any person connected with or involved in any horse or dog racing or any horse or dog race meeting; and to authorize stewards to rule off the grounds of any horse or dog racetrack any tout, bookmaker or other undesirable individual deemed inimicable to the best interests of horse and dog racing or the parimutuel system of wagering in connection therewith;

"(10) To require at any time the removal of any racing official or racing employee of any licensee, for the violation of any provision of this article, any reasonable rule and regulation of the racing commission or for any fraudulent practice;

"(11) To acquire, establish, maintain and operate, or to provide by contract for the maintenance and operation of, a testing laboratory and related facilities, for the purpose of conducting saliva, urine and other tests on the horse or dog or horses or dogs run or to be run in any horse or dog race meeting, and to purchase all equipment and supplies deemed necessary or desirable in connection with the acquisition, establishment, maintenance and operation of any such testing laboratory and related facilities and all such tests;

"(12) To hold up, in any disputed horse or dog race, the payment of any purse, pending a final determination of the results thereof;

"(13) To require each licensee to file an annual balance sheet and profit and loss statement pertaining to such licensee's horse or dog racing activities in this State, together with a list of each such licensee's stockholders or other persons having any beneficial interest in the horse or dog racing activities of such licensee;

"(14) To issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of any books, records and other pertinent documents, and to administer oaths and affirmations to such witnesses, whenever, in the judgment of the racing commission, it is necessary

to do so for the effective discharge of its duties under the provisions of this article;

"(15) To keep accurate and complete records of its proceedings and to certify the same as may be appropriate;

"(16) To take such other action as may be reasonable or appropriate to effectuate the provisions of this article and its reasonable rules and regulations;

"(17) To provide breeders' awards, purse supplements and moneys for capital improvements at racetracks in compliance with section thirteen-b [§ 19-23-13b] of this article.

"The racing commission shall not interfere in the internal business or internal affairs of any licensee."

It is a clear rule of law in West Virginia that administrative agencies such as the West Virginia Racing Commission have only those powers which are expressly conferred upon them by statute or which arise out of necessary implication from those powers expressly conferred upon them by statute. Mohr v. County Court of Cabell County, 145 W. Va. 377, 115 S.E.2d 806 (1960).

If the West Virginia Racing Commission has the power to establish regulations governing the fees paid to jockeys, that power must be expressly conferred upon it by statute or arise by necessary implication from a power conferred upon the West Virginia Racing Commission by statute.

The Legislature has the authority to regulate horse racing. Hubel v. West Virginia Racing Commission, 376 F. Supp. 1 (S.D. W. Va. 1974); aff'd, 513 F.2d 240 (4th Cir. 1975). The Legislature by enacting Code 19-23-1 et seq. permitted horse racing under the supervision and control of the State of West Virginia through the West Virginia Racing Commission. State ex rel. Morris v. West Virginia Racing Commission, 133 W. Va. 179, 55 S.E.2d 263 (1949); State ex rel. Spiker v. West Virginia Racing Commission, 135 W. Va. 512, 63 S.E.2d 831 (1951); Santiago v. Clark, 444 F. Supp. 1077 (N.D. W. Va. 1978). In delegating its authority to regulate horse racing to the West Virginia Racing Commission, the Legislature is not required to "set up standards for the guidance of such boards and commissions in the use and the application of the power granted." State of W. Va. ex rel.

Morris v. West Virginia Racing Commission, *ibid*, at 192-193. "As enacted, our racing laws delegated the management (of horse racing) to a racing commission, and gave it complete power to adopt rules and regulations therefor." State of West Virginia ex rel. Morris v. West Virginia Racing Commission, *ibid*, at 201. The adoption of a regulation by the West Virginia Racing Commission is a "plain exercise of naked, but necessary, power to control a business which, in its very nature requires strict control."

Code 19-23-6 provides, in pertinent part, as follows:

"The racing commission shall have full jurisdiction over and shall supervise all horse race meetings, all dog race meetings and all persons included in the holding or conducting of horse and dog race meetings, and, in this regard, it shall have the plenary power and authority:

* * *

"(3) To promulgate reasonable rules and regulations implementing and making effective the provisions of this article and the powers and the duties imposed upon the racing commission, under the provisions of this article, including, but not limited to, reasonable rules and regulations under which all horse races, dog races, horse race meetings and dog race meetings shall be held and conducted, all of which reasonable rules and regulations shall be promulgated in accordance with the provisions of article three * * *, chapter twenty-nine-A of this Code;

* * *

"(16) To take such other action as may be reasonable or appropriate to effectuate the provisions of this article and its reasonable rules and regulations; * * *" (Emphasis added.)

It was the clear intention of the Legislature to give the West Virginia Racing Commission broad powers to regulate the horse racing industry. The Legislature has the authority to delegate broad police powers to regulate the horse racing industry to the West Virginia Racing Commission without providing or setting up standards for the guidance of the Commission. State ex rel. Morris v. West Virginia Racing Commission, *supra*. The

express authority granted to the Commission is broad enough to permit the West Virginia Racing Commission to promulgate rules and regulations establishing a minimum fee to be paid to jockeys.

Although the Supreme Court of West Virginia has never addressed the issue, several other jurisdictions have addressed the issue of whether or not a racing commission under color of a general statute may regulate jockey fees. These jurisdictions have uniformly held that the test of whether or not a racing commission with general powers to regulate the horse racing industry may promulgate regulations regarding the fee to be paid jockeys is whether or not the regulation has a direct relation to horse racing. State Racing Commission v. Robertson, 172 N.E.2d 628 (Ohio, 1960); Brann v. Mahoney, 48 A.2d 605 (Md., 1946); Euster v. Eagle Downs Racing Association, 677 F.2d 992 (1982); Horsemen's Benovolent and Protective Association v. Pennsylvania Horse Racing Commission, 530 F. Supp. 1098 (1982); Gilligan v. Pennsylvania Horse Racing Commission, 432 A.2d 275 (1981); Gilligan v. Pennsylvania Horse Racing Commission, 422 A.2d 487 (1980); Collella v. State Racing Commission, 274 N.E.2d 331 (1971); Department of Business Regulation v. Vandervoort, 273 So.2d 66 (1972). The jurisdictions are split with the majority of jurisdictions holding that the payment of fees to a jockey is an appropriate matter for regulation. However, Florida has held that the payment of fees to a jockey is not a subject of regulation. Department of Business Regulation v. Vandervoort, id.

The West Virginia Racing Commission is authorized to make a determination that a minimum fee for jockeys is necessary and directly related to the conduct of horse racing. Accordingly, the West Virginia Racing Commission has the authority under its general enabling act to promulgate a regulation establishing a minimum fee for jockeys. Further, the language of Code 19-23-6 emphasized above expressly authorizes the West Virginia Racing Commission to regulate all aspects of the conduct of horse races. It is the opinion of the Attorney General that the West Virginia Racing Commission may regulate the minimum fee paid to jockeys by administrative regulation.

Very truly yours,

CHARLES G. BROWN
Attorney General

By  Solicitor General
STEPHEN D. HERNDON