INDEX NO. 124754/95

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

GEORGE LINDEMANN, JR., MARION HULICK, CELLULAR FARMS INC.,

Plaintiffs,

-against-

THE AMERICAN HORSE SHOWS ASSOCIATION, INC.,

Defendant.

Judgment

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Due and timely service of a copy of the within is hereby admitted.

Dated, N.Y.,

Attorney For

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Index No.: 124754/94 002

Motion Submitted May 5, 1995

Greenfield, J.:

Plaintiffs, Lindemann and Hulick, have moved for a preliminary injunction to prevent defendant American Horse Shows Association, Inc. ("AHSA") from suspending them from membership in the Association and the rights appurtenant thereto.

As outlined in the prior decision of this court in December, 1994 (*Lindemann v. American Horse Shows Association, Inc.*, 624 NYS 2d 723), Lindemann and Hulick were indicted in the Federal District Court in Illinois for conspiring to collect insurance proceeds by arranging for a horse, Charisma, to be electrocuted. The indictment appears to have been based primarily, although not exclusively, on the information given by one Tommy Burns a/k/a Timmy Ray, the alleged hit-man, who claims that he had arranged to kill Charisma, as well as horses for other owners, so that they could collect the insurance. Largely on the basis of this indictment, AHSA charged Lindemann and Hulick, his horse trainer, with violation of the Association's rules in participating in a conspiracy to commit acts of cruelty or abuse to a horse, and

that they acted in an improper, unethical, dishonest and unsportsmanlike manner.

Lindemann and Hulick were notified that a Hearing Committee of AHSA would hold a hearing on whether they had violated the AHSA rules and as a result should be suspended. Requests to postpone the hearing for time to prepare were denied. Largely on the basis of the indictment, and the concerns of the Association as to the negative public image being cast on equestrian sports, the hearing panel found Lindemann and Hulick guilty of violation of the AHSA's rules, and suspended them from membership.

Lindemann and Hulick commenced an action in this court claiming that AHSA's structure and conduct constituted an unreasonable restraint of trade, a violation of the Donnelly Act, a breach of contract, a breach of fiduciary duty and a deprivation of due process. This court suggested, and both sides readily agreed, that the matter could more aptly be considered as an Article 78 proceeding.

This court, in its prior decision, rejected the argument of the Association that the indictment in and of itself was sufficient to justify suspension, and held that a meaningful hearing had to be afforded and that the Association had not done so. The court ruled that although the indictment would suffice to trigger a hearing, a true hearing would require much more than had been provided. Accordingly, the determination of the Association was nullified and it was enjoined from proceeding with any

suspension except after a full and meaningful hearing according to the principles laid out by the court.

A new hearing was then held on February 6-8, 1995 at the AHSA headquarters in New York City, resulting in a finding by the hearing committee that both Mrs. Hulick and Mr. Lindemann had committed the violations as charged. As a result thereof they were suspended from all privileges of membership until resolution of the charges pending against them in the United States District Court for the Northern District of Illinois.[1] Thereupon, plaintiffs Hulick and Lindemann brought on by order to show cause an application for a preliminary injunction, asking for a temporary restraining order to stay defendants from enforcing the decision suspending them from membership in the AHSA. After the court gave defendants an opportunity to be heard on the temporary restraining order, it was continued until a decision could be rendered on the underlying motion, but the TRO was narrowed to permit plaintiffs to participate only in specified "non-protected" events until the decision on the injunction motion.

The Issues

In their motion, Hulick and Lindemann have argued that the suspension imposed by AHSA should be nullified because the chairman of the Hearing Committee failed to disqualify himself

[1] It had been agreed to by the committee at the onset of the hearing, in response to objections by other members of the Lindemann family who co-own Cellular Farms with George Lindemann as to the lack of notice of the charges, that the Committee would not suspend horses owned by Cellular Farms, Inc. or by other members of the Lindemann family without a separate hearing on appropriate notice pursuant to the rules of the AHSA.

despite an appearance of bias; because the determination should have been delayed until the United States Attorney's Office in Illinois supplied the plaintiffs with possible exculpatory materials in July of 1995; and that in view of the conflicting evidence presented at the hearing, the determinatipn of the Committee was arbitrary and capricious.

The defendant Association, on the other hand, has argued that this court has no jurisdiction to review the Committee's findings because the USOC is to resolve the matter, with binding arbitration as the ultimate exclusive remedy, and that in any event there was no actual bias, and the evidence presented fully supported the Committee's findings.

Alleged Exclusivity of Arbitration as Remedy

As a general proposition, the actual results of sporting events are best left for decision by those empowered to make decisions on the spot. See *Mercury Bay Boating Club v. San Diego Yacht Club*, 76 NY 2d 256, 265 and *Vaccaro v. Joyce*, 154 Misc 2d 643. Other questions involving sports (but not the results) may well wind up before the courts, with respect to associations which govern a particular area of athletic endeavor, as to their organization, financing, membership and elections.

To carry out the laudable objectives of having disputes involving athletes resolved swiftly within a knowledgeable sports framework, Congress in 1978 enacted the Amateur Sports Act, one of its purposes being to:

> "(8) provide for the swift resolution of conflicts and disputes involving amateur

> athletes, national governing bodies, and amateur sports organizations, and protect the opportunity of any amateur athlete, coach, trainer, manager, administrator or official to participate in amateur athletic competition."

A corporation designated as the United States Olympic Committee was empowered to provide for the resolution of disputes

> "involving any of its members and relating to the opportunity of an amateur athlete, coach, trainer, manager, administrator, or official to participate in the Olympic Games, the Pan-American Games, world championship competition, or other such protected competition as defined in such constitution and by-laws." 36 USCA § 382(b): Resolution of Disputes.

Accordingly, the United States Olympic Committee has a provision in its constitution (Art. IX) which provides that any amateur athlete who claims he or she has been unfairly denied the right to compete by a member organization can ask for resolution of the controversy, and compulsory arbitration is provided for.

AHSA, as the recognized national governing body for equestrian sport and competition within the United States, provides in its constitution that it will abide by the requirements of the United States Olympic Committee calling for compulsory arbitration. AHSA contends that inasmuch as the plaintiffs have never availed themselves of the remedy provided in the Amateur Sports Act, they are barred from seeking relief in court, claiming that every reported decision has held that an athlete contesting denial of eligibility has no private right of action.

It should be noted, however, that the Constitution of the United States Olympic Committee requires only arbitration of the

denial or threatened denial to an amateur athlete (as well as coach, trainer, etc.) of "the opportunity to compete in the Olympic Games, the Pan American Games, a World Championship competition or such other protected competition as defined in Article I, § 2(G)." Article IX, USOC Constitution. A "protected competition" is defined in Article I, § 2(G) of the USOC Constitution as being essentially a competition between athletes officially representing the United States and athletes representing a foreign country, or a domestic amateur athletic competition sponsored by an Olympic or Pan-American Sport organization member in which each successful competitor therein qualifies to represent the United States in international competition.

While, pursuant to 36 USCA 395(a)(1) and the governing rules of the United States Olympic Committee and AHSA, arbitration is provided for those unresolved disputes involving eligibility for international competition, there is no requirement for submission of purely local disputes that do not involve an athlete's (or trainer's) right to compete in the Olympic Games, the Pan American Games, a World Championship competition or such other protected competition, as that term is defined in the USOC's Constitution. Therefore, there is no obligation, nor even a right, for movants to appeal their suspensions to the USOC, even to the extent that the suspension involves a denial to compete or participate in non-protected competitions, let alone denial of any other rights to which membership in the suspending organization entitles them (i.e., participation in the group medical plan, attendance at local

competitions as a spectator, voting rights and the right to hold office in the suspending organization, etc.)

Every one of the cases cited by defendant in support of its arguments is concerned with the right of an athlete to compete in one of the designated types of competition enumerated in Article IX of the United States Olympic Committee Constitution.

In *Michaels v. United States Olympic Committee*, 741 F 2d 155, the issue involved the suspension of an athlete from international competition, and specifically the failure to name plaintiff to the 1984 U.S. Olympic Weightlifting Team. *Oldfield v. The Athletic Congress*, 779 F 2d 505, involved exclusion of the plaintiff from the Olympic trials (clearly a protected competition). *De Frantz v. United States Olympic Committee*, 492 F. Supp. 1181, aff'd. 701 F. 2d 221 and *Reynolds v. The Athletic Congress of the USA, Inc.*, 935 F. 2d 270, concerned suspensions from international competition. *Devereaux v. Amateur Softball Association of America*, 768 F. Supp. 618, dealt with the American Softball Association declaring certain players ineligible to compete in the national softball championships [which would presumably allow the winning team to represent the United States in international competition and therefore would be a protected competition]. Even in *Dolan v. United States Equestrian Team, Inc.*, 257 NJ Super 314 (NJ Super. Ct., App. Div. 1992) which involved this very association, the issue was the failure of defendants therein to choose plaintiff "as a member of the American

team which competed at the 1990 World Equestrian Championship in Stockholm."

The governing principle set forth in *Dolan*, and even quoted by defendant, is that "[p]articipation in international sports competitions on behalf of this country is governed by the federal Amateur Sports Act, 36 U.S.C.A. § 371 *et seq.*" (Emphasis supplied). Nowhere in the Amateur Sports Act, the Olympic Constitutions and by-laws or in any of the citations furnished by defendant has it been shown that participation in local non-unprotected competition or the denial of other privileges of membership in a national governing body, are areas to which either the federal Amateur Sports Act or the United States Olympic Committee Constitution or By-Laws apply.

Defendant seems to make the argument that since Lindemann has stated that his goal is ultimately to participate as a member of the 1996 Olympic Equestrian Team, this makes his right to compete in non-qualifying local competitions and all other rights of membership in AHSA subject to the United States Olympic Committee grievance procedures. But, as noted above, the jurisdiction of the United States Olympic Committee is limited essentially to eligibility to compete in international events in which the chosen athletes represent the United States (or selection and qualifying competitions for such international events).

It is clear, therefore, that exclusive jurisdiction for the procedures under the rules of the United States Olympic Committee extends only to eligibility to compete in protected

competitions, i.e., Olympic Games, Pan American Games, World Championships or Qualifying Competitions. There are many other aspects of membership which are not affected by such eligibility.

The Association concedes that 95% of the events and competitions it sponsors do not fall within the rubric of "protected competitions." In addition to the right to compete in non-protected competitions, a suspension of membership bars a member from other rights and privileges which are not subject to the USOC procedures. The Hearing Committee findings enumerate at least six other privileges of membership which are to be denied to the plaintiffs. These include:

(1) The ability to hold or exercise office in the Association;

(2) The right to attend or participate in Association meetings;

(3) The right to hold a license as an AHSA or FEI judge;

(4) The right to receive AHSA automatic insurance coverages or to participate in AHSA group insurance programs;

(5) The right to compete or take any part in recognized competitions, even where no Olympic or international level classes are held;

(6) Exclusion from all competition grounds as an exhibitor, participant or spectator. (The Committee explicitly found that horses owned by Mr. Lindemann or

Mrs. Hulick, in whole or in part, were not suspended at this time).

Thus, while the court recognizes the paramount and exclusive jurisdiction of the USOC procedures for determining eligibility in international events, and in meets which determine qualifications therefor, there remains a very substantial area of membership rights and privileges which are not within the ambit of the procedures called for under the United States Olympic Committee rules. The right to compete and coach in local and non-protected events and the other membership rights and privileges are appropriately reviewable by this court within the scope of an Article 78 proceeding. With respect to eligibility to participate in protected competitions, plaintiffs must seek relief pursuant to the Amateur Sports Act and the United States Olympic Committee Constitution and by-laws.

Standard of Review

With respect to those areas of determination by a private organization which are subject to judicial review, the questions which are reviewable under appropriate Article 78 standards are limited by CPLR 7803:

> "(3) whether a determination was made in violation of lawful procedure, was effected by error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
>
> (4) whether a determination made as a result of a hearing held, and at which evidence was taken pursuant to direction by law, is, on the entire record supported by substantial evidence."

The objections raised by plaintiffs to the Association's determination relate both to procedural aspects of the hearing, and the question of whether the findings are supported by substantial evidence. The procedural questions clearly are reviewable by this court, including the question of abuse of discretion and whether the determination was arbitrary and capricious. Even the question of whether the determination was "supported by substantial evidence" is for this court to decide, for it is not a matter which must be transferred to the Appellate Division pursuant to CPLR 7804(g).

The matters required to be transferred to the Appellate Division in the first instance for review are those in which the hearing was held "pursuant to direction by law." That applies to the large body of administrative hearings, quasi-judicial in nature, which are prescribed by law as necessary to be held. When the question presented is the rationality of a determination even after a hearing, CPLR 7803(4) applies only when there is statutory law requiring the evidentiary hearing. *Matter of Colton v. Berman*, 21 NY 2d 322, 329. The hearing accorded to the plaintiffs here was not mandated by statutory law, but was granted pursuant to the by-laws of a private association. When the hearing is required by the organization's internal by-laws, it is not "pursuant to direction by law" and therefore is not transferable in the first instance to the Appellate Division. *Matter of Mehdi v. Board of Managers of Jones Memorial Hospital*, 116 AD 2d 1024, 1025. A transfer of an Article 78 review to the Appellate Division would be error when the

hearing is not "pursuant to direction by law." *Burrell v. Ortiz*, 128 AD 2d 391, 392; accord, *Shapiro v. N.Y.C. Police Department*, 157 Misc. 2d 28, aff'd. 201 AD 2d 333.

When the evidentiary hearing is not mandated by law, the proper test on review of the determination is whether the action taken is arbitrary and capricious, or whether there is a rational basis for the determination. *City of Rome v. New York State Health Department*, 65 AD 2d 220, 224. Whether a reviewing court applies a substantial evidence standard, or whether it finds that a determination was arbitrary and capricious, essentially what is reviewed under both standards is whether there is a rational basis for the determination. See *Matter of Pell v. Board of Education*, 34 NY 2d 222, 231.

Claims of Procedural Defects

Plaintiffs claim they were treated unfairly and that the Hearing Committee abused its discretion in two respects. First, they claim it was arbitrary and capricious and an abuse of discretion for the Hearing Committee to proceed in the light of their request for delay pending the receipt of discovery material from the government in the criminal case. The Federal Court has directed that the government produce that material to the defendants on July 7, 1995. That does not require that everything be held in abeyance until that date, since the nature of the material and whether or not it was exculpatory is totally speculative. Indefinite or extended waits are not required. It is to be noted that plaintiffs informed this court in December, 1994

that they were prepared to proceed with the hearing in January of 1995. No discretion was abused by going ahead.

Second, the claim that the Committee Chairman, Alan Balch, should have been disqualified because of an "appearance of bias" is without merit. The fact that he participated in the drafting of Rule 302.6 of the Association under which plaintiffs were charged, does not render him incapable of holding hearings thereunder. The fact that he may have been of the opinion that an indictment should lead to automatic suspension was corrected by the prior opinion of this court, holding that suspension did not automatically follow indictment but that a meaningful hearing had to be afforded. Mr. Balch indicated that he was prepared to abide by the court's decision. That makes him no more biased than a judge whose interlocutory ruling has been reversed by an appellate court, and who has the case remanded to him. Similarly the fact that Balch had provided design service for the Association's legal defense fund solicitation was no indication that he could not be open-minded in the hearing. A mere allegation of possible bias will not suffice, for "there must be a factual demonstration to support the allegation of bias and proof that the outcome flowed from it." *Warden v. Board of Regents*, 53 NY 2d 186, 197.

Factual Determination

It is a basic rule that in an Article 78 review, the court may not substitute its own judgment for that of the hearing body if there is substantial evidence to support it. *Matter of Purdy v. Kreisberg,* 47 NY 2d 354. The court will not weigh the

evidence anew, nor make its own choice as to the resolution of conflicting evidence. *Matter of Berenhaus v. Ward*, 70 NY 2d 436, 443-444. If, however, the conclusions of the hearing body are not founded on "substantial evidence", then the determination lacks rationality and must be considered arbitrary and capricious. *Pell v. Board of Education*, 34 NY 2d 222.

"While the quantum of evidence that rises to the level of 'substantial' cannot be precisely defined, the inquiry is whether 'in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs'." (*National Labor Relations Bd. v. Remington Rand*, 94 F. 2d 862, 873 [Hand, J.], cert. denied 304 US 576). Put another way, substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact'. (*300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 NY 2d 176, 180 . . .)" *People, ex rel Vega v. Smith*, 66 NY 2d 130, 139.

Cause of Death

There was sufficient evidence in the record to permit the Hearing Committee to conclude that the death of the horse, Charisma, was not the result of natural causes, but, as charged in the indictment, the result of electrocution. Colleen Fitzpatrick, former barn manager, working under Mrs. Hulick's supervision, found Charisma dead in his stall with no signs that he had been struggling for life or that he had thrashed about before expiring. The indications were that he had dropped in his tracks and blood

was found in the manure. The Committee found the affidavits of Doctors Edwards and King, veterinarians, opining that the physical facts reported were consistent with electrocution to be persuasive and that was also the opinion of Dr. Baden. The Committee was entitled to find that the depositions of Doctors Bradley and Urban, who observed the horse the day after death, and found the death to be of natural causes, to be inconclusive. Further, John O'Rourke, the AHSA investigator, stated that Tommy Burns had, in fact, asserted that he had electrocuted Charisma.

Opportunity

The Committee relied on the testimony of Mrs. Fitzpatrick that on the night of the horse's death the barn dogs had been brought inside and Mrs. Hulick invited her off the farm premises and out to dinner. As further corroboration, the Committee relied on the double-hearsay affidavit of Ira Finkelstein, AHSA's counsel, who said that he had spoken to Joanne Anderson, Sheperd's former wife, and she told him that Sheperd had told her that he had been at the farm (where he was seen by Mrs. Fitzpatrick) and that he saw Mrs. Hulick showing Burns around. She said that he said that Mrs. Hulick had identified Charisma and had showed Burns the way to get in.

Motivation

The Committee relied on testimony that Charisma's performance had been inconsistent, that Lindemann disliked him and that he stood to gain $250,000 in insurance proceeds if the horse died. Plaintiffs contend that there was contrary evidence that the

horse was not mistreated, that it was being developed and that other more expensive and more disappointing horses did not meet this dire fate. Mrs. Fitzpatrick had testified that upon finding Charisma dead, she "had no reason to believe that anything untoward had been done to that horse . . ."

Credibility

While the evidence adduced might not have reached the level required in a criminal trial for proof beyond a reasonable doubt, such a standard is not required for a hearing determining whether a member should be suspended pending such trial. Tommy Burns, the "hit man", was in prison and so his statements could only be presented second hand, and, of course, there is no bar to hearsay in such a hearing. While his credibility may be suspect, and there was some evidence that his accusations might have been considered part of a "shakedown", the Committee found enough corroboration as to his assertions to warrant giving credence to his statements. The Committee found it significant that neither plaintiffs chose to give testimony to refute these statements. Of course, since a criminal trial was upcoming, it might well have been legally prudent not to expose Hulick and Lindemann to examination prior to the trial. The Committee, however, was entitled to draw negative inferences from the failure to offer denials.

Under the circumstances, the Hearing Committee's conclusion that Mrs. Hulick had met with Tommy Burns and arranged to have Charisma killed is supported by the statements of Burns and

the evidence that she had both telephone and personal contact with him, that she pointed out the horse and how to get access to him, and that she had arranged for minimum security at the barn on the night that Burns was to perform his foul deed.

Under the circumstances, there being evidence and some corroboration to sustain a finding that Mrs. Hulick was involved in the execution of the horse, this court declines to interfere with that finding and the suspension of the membership of Mrs. Hulick that followed.

The same conclusion does not follow with respect to plaintiff George Lindemann, Jr. He was out of the country at the time of Charisma's death. Tommy Burns did not claim ever to have met or spoken with him, and there is no evidence that Lindemann ever made any payments to Burns. The only evidence connecting him with the killing is that O'Rourke said that Burns said that Hulick said that Lindemann told her he wanted it done, and that he would pay. While some degree of hearsay may be permitted, triple hearsay of this nature on the key issue in the case makes the evidence so attenuated as to be of little actual value.

The Hearing Committee leaped to a conclusion by drawing the inference that Mrs. Hulick would not have arranged for the killing except on the instructions of Lindemann. Such an inference is not a substitute for evidence. If Mrs. Hulick did make arrangements with Burns, she may have done so as a matter of her own misjudgment, for vengeance, for profit, or for a host of other motives. She may even have believed this is what Lindemann wanted

even in the absence of any express direction. The Hearing Committee also jumped to the conclusion that because Lindemann had an alibi -- i.e, he was out of the country at the time -- the existence of the alibi warranted an inference that he must have planned and arranged for the killing. Such leaps of logic to fill evidentiary gaps can hardly be said to be founded upon "substantial evidence", or indeed upon any evidence at all. The court therefore concludes that insofar as Lindemann is concerned, there was an insufficient evidentiary basis for finding that he had arranged to kill his horse and thereby violated the Association's rules. Accordingly, this court finds that the Association's determination with respect to him was arbitrary and capricious, and his suspension from membership must be nullified, except with respect to his eligibility to compete in international events and other protected competitions where such eligibility is to be determined under the rules of the United States Olympic Committee. Disqualification of Lindemann to compete even in purely local events until after the criminal trial will, under the circumstances, present an irreparable injury since those events can never be repeated, and as an athlete he can lose his competitive edge.

Accordingly, the application for injunction to stay the nullification of membership privileges except for "protected competition" is granted as to plaintiff George Lindemann, Jr.,

pending the outcome of the criminal trial, and otherwise denied.

The foregoing constitutes the decision and judgment of the court.

Dated: JUN 6 1995

J.S.C.

Norman Goodman
Clerk

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