

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

111

TP 08-01711

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

IN THE MATTER OF JOHN LEGGIO, PETITIONER,

V

MEMORANDUM AND ORDER

DANIEL D. HOGAN, AS CHAIRMAN, AND MICHAEL J. HOBLOCK, JR., AND JOHN B. SIMONI, AS MEMBERS OF NEW YORK STATE RACING & WAGERING BOARD, DIVISION OF HARNESS RACING, AND NEW YORK STATE RACING & WAGERING BOARD, RESPONDENTS.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Kevin M. Dillon, J.], entered August 7, 2008) to annul a determination of respondents. The determination, inter alia, revoked petitioner's license to participate in pari-mutuel harness racing as an owner and trainer.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the amended petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that he violated 9 NYCRR 4120.13 (a) by permitting one of his horses to race with a total carbon dioxide level (TCO₂) in excess of 37 millimoles per liter, according to TCO₂ blood sample testing. Contrary to petitioner's contention, the determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182). Also contrary to petitioner's contention, the penalty of revocation of petitioner's license is not "so disproportionate to the offense as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 237; *see Matter of Patistas v New York State Racing & Wagering Bd.*, 1 AD3d 1003, lv denied 1 NY3d 508; *see generally Matter of Kelly v Safir*, 96

NY2d 32, 38-40, *rearg denied* 96 NY2d 854).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court