SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0651-20

JOCKEYS' GUILD, INC.,

Petitioner-Appellant,

v.

NEW JERSEY RACING COMMISSION,

Respondent-Respondent.

Argued January 19, 2022 – Decided April 13, 2022

Before Judges Rothstadt, Mayer and Natali.

On appeal from the New Jersey State Racing Commission.

Nancy A. Del Pizzo argued the cause for appellant (Rivkin Radler LLP, attorneys; Nancy A. Del Pizzo and Michael J. Jones, on the briefs).

Dominic L. Giova, Deputy Attorney General, argued the cause for respondent (Andrew J. Bruck, Acting Attorney General, attorney; Sookie Bae-Park, Assistant Attorney General, of counsel; Steven M. Gleeson, Deputy Attorney General, on the brief).

PER CURIAM

The Jockeys' Guild, Inc. (the Guild)[1] appeals from a final agency decision of the Commission, replacing the regulation in New Jersey regarding the use of a riding crop by jockeys during thoroughbred racing. The Guild contends that the Commission approved the new regulations without the statutorily required quorum and, in any event, the Commission's decision was arbitrary, capricious and unreasonable because it failed to consider the health and safety of horses and jockeys. We affirm as we conclude a quorum was present for the adoption

[1] The Guild is "a national association which represents the interests of member jockeys." Ruane v. N.Y. State Racing & Wagering Bd., 400 F. Supp. 819, 820 (S.D.N.Y. 1975). According to the Guild's president:

> The Guild represents jockeys in Thoroughbred and Quarter Horse racing throughout the United States. The Guild has more than 950 active members in the thirty-seven states which allow pari-mutuel horse racing. The vast majority of jockeys who engage in Thoroughbred racing in New Jersey at Monmouth and the Meadowlands are members of the Guild. The Guild has been designated by the New Jersey Racing Commission (the "Commission") as the representative of a majority of the active licensed thoroughbred jockeys in New Jersey pursuant to N.J.[S.A.] 5:5-129 "for the purpose of providing health and welfare benefits to active, disabled and retired New Jersey jockeys and their dependents based upon reasonable criteria."

of the new regulation and the Commission appropriately considered the health and safety of horses and jockeys in reaching its determinations.

The Commission is vested with broad authority to regulate "running and harness racing of horses" and to "advocate the growth, development and promotion of the horse racing industry in this State." N.J.S.A. 5:5-22. The Commission must handle problems inherent to an industry associated with gambling and maintain a reputation deserving of public confidence. Wendling v. N.J. Racing Comm'n, 279 N.J. Super. 477, 482 (App. Div. 1995).

As the New Jersey Supreme Court previously recognized, the Legislature granted the Commission

> full regulatory power over horse racing in this state. State v. Dolce, 178 N.J. Super. 275, 285 (App. Div. 1981); N.J.S.A. 5:5-22 to -109. In particular, the [Commission] is empowered to prescribe the rules, regulations, and conditions under which all horse races are conducted, N.J.S.A. 5:5-30, and to regulate the licensing of those connected with horse racing, N.J.S.A. 5:5-33. Furthermore, the State has a vital interest in maintaining the integrity of the horse-racing industry. Dolce, 178 N.J. Super. at 284.
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> [Delguidice v. N.J. Racing Comm'n, 100 N.J. 79, 90 (1985).]

On September 16, 2020, the Commission considered the new riding crop regulations at an open public meeting. At that time, although the Commission

was to be comprised of nine members of various backgrounds appointed by the Governor, see N.J.S.A. 5:5-23, there were five vacancies in its membership. At the conclusion of the meeting, all four sitting members of the Commission voted to adopt the new regulations as written with an effective date of October 19, 2020.[2]

As already noted, on appeal, the Guild contends the amendment to N.J.A.C. 13:70-11.12 is void as ultra vires because the Commission lacked the necessary quorum to approve the amendment. According to the Guild, the Commission could take no action without a majority of its nine members, i.e., at least five commissioners, serving as a quorum. We disagree.

According to N.J.S.A. 5:5-29, "[a] majority of the [C]ommission shall constitute a quorum for the transaction of any business, the performance of any duty, or for the exercise of any power of the commission." Under the common law quorum rule, "a majority of all the members of a . . . governing body constitute[s] a quorum; and in the event of a vacancy a quorum consists of a majority of the remaining members." N.J. Election Law Enf't Comm'n v. DiVincenzo, 445 N.J. Super. 187, 199 (App. Div. 2016) (alteration in original)

[2] The Commission agreed not to enforce the new regulations until May 1, 2021.

(quoting Ross v. Miller, 115 N.J.L. 61, 63 (Sup. Ct. 1935)). "[A]ny position left vacant, . . . is not counted to determine what the legal quorum is." Id. at 200.

The common law "applies absent a 'pertinent statute to the contrary.'" Ibid. (quoting King v. N.J. Racing Comm'n, 205 N.J. Super. 411, 415 (App. Div. 1985), rev'd on other grounds, 103 N.J. 412 (1986)). Such a statute could require a specific number for a quorum, i.e., five members of a nine-member board, or state that a quorum is a majority of "all" members of a board or a majority of the "full" or "whole" board. Hainesport Twp. v. Burlington Cnty. Bd. of Tax'n, 25 N.J. Tax 138, 147-48 (Tax 2009) (discussing statutes requiring a "majority of all the members" as "evidenc[ing] a legislative intent to modify the common law rule").

Here, N.J.S.A. 5:5-29 does not contain any language that would override the common law rule. It does not state that a quorum must consist of a particular number of Commission members, or that a majority of "all" the Commission members or the "full" Commission is necessary for a quorum. It also does not include partisan requirements for any quorum. Thus, the Commission here needed only any three of its four sitting members to constitute a quorum. See King, 205 N.J. Super. at 415-16 (applying the common law rule with respect to

N.J.S.A. 5:5-29 and holding that three of four sitting Commission members constitute a quorum for voting purposes, but two alone were not enough).

It is undisputed that all four members of the Commission attended the subject meeting and all four voted in favor of the regulations' adoption. There was no issue as to whether a quorum was present.

Having determined that the vote to adopt was valid, we turn to the Guild's remaining argument that the Commission's decision was arbitrary capricious, and unreasonable. Specifically, the Guild contends that the amended rule was not supported with sufficient evidence in the record. We again disagree.

At the outset, we observe that our "review of agency regulations begins with a presumption that the regulations are both 'valid and reasonable.'" N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 548 (2012) (quoting N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 385 (2008)).

A party challenging the validity of a regulation bears the burden of proving that the regulation is unreasonable. N.J. State League of Muns. v. Dep't of Cmty. Affairs, 158 N.J. 211, 222 (1999). That burden may be satisfied by proving "[a]n agency's action [failed to] rest on a reasonable factual basis, but [the agency's] choice between two supportable, yet distinct, courses of action

'will not be deemed arbitrary or capricious as long as it was reached "honestly and upon due consideration."'" In re Att'y Gen. Directive, 246 N.J. 462, 491 (2021) (quoting In re Adoption of Amends. & New Regul. at N.J.A.C. 7:27-27.1, 392 N.J. Super. 117, 135-36 (App. Div. 2007)).

Our deference extends to the extent an agency acts within its sphere of delegated functions. In re Stallworth, 208 N.J. 182, 194 (2011). We will uphold an agency's decision "unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." J.B. v. N.J. State Parole Bd., 229 N.J. 21, 43 (2017) (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007)). In evaluating whether a decision was arbitrary, capricious, or unreasonable, we examine:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [Stallworth, 208 N.J. at 194 (quoting In re Carter, 191 N.J. 474, 482 (2007)).]

Similarly, we accord substantial deference to an "agency's interpretation of statutes and regulations within its implementing and enforcing

responsibility." E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 355 (App. Div. 2010) (quoting Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001)). In our review, we defer to an agency's expertise. As we have observed:

> "[J]udicial deference to administrative agencies stems from the recognition that agencies have the specialized expertise necessary to . . . deal [] with technical matters and are 'particularly well equipped to read and understand the massive documents and to evaluate the factual and technical issues . . . .'" "[W]here there is substantial evidence in the record to support more than one regulatory conclusion, it is the agency's choice which governs." The court "may not vacate an agency determination because of doubts as to its wisdom or because the record may support more than one result," but is "obliged to give due deference to the view of those charged with the responsibility of implementing legislative programs."
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> [In re Adoption of Amends. to Ne., Upper Raritan, Sussex Cnty. & Upper Del. Water Quality Mgmt. Plans, 435 N.J. Super. 571, 583-84 (App. Div. 2014) (alterations in original) (citations omitted).]

For those reasons, where an agency's expertise is a factor, we will defer to that expertise, particularly in cases involving technical matters within the agency's special competence. See Allstars Auto Grp. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 158 (2018). This deference is even stronger when the agency, "has been delegated discretion to determine the specialized and

technical procedures for its tasks." City of Newark v. Nat. Res. Council, Dep't of Env't Prot., 82 N.J. 530, 540 (1980). We are therefore "obliged to give due deference to the view of those charged with the responsibility of implementing legislative programs." In re Reallocation of Prob. Officer, 441 N.J. Super. 434, 444 (App. Div. 2015) (quoting In re N.J. Pinelands Comm'n Resol. PC4-00-89, 356 N.J. Super. 363, 372 (App. Div. 2003)).

However, despite our deference, we are "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." U.S. Bank, N.A. v. Hough, 210 N.J. 187, 200 (2012) (quoting Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep't of Env't Prot., 191 N.J. 38, 48 (2007)). "When 'the issue involves the interpretation of statutes and regulations, it is a purely legal issue, which [is] consider[ed] de novo.'" Pinelands Pres. All. v. N.J. Dep't of Env't Prot., 436 N.J. Super. 510, 524-25 (App. Div. 2014) (quoting Klawitter v. City of Trenton, 395 N.J. Super. 302, 318 (App. Div. 2007)).

Applying our deferential standard to the Commission's actions in this case, we discern no basis to conclude that its actions over the course of a year developing and promulgating the challenged revision to its regulations resulted in a final decision that was unsupported by any evidence or otherwise arbitrary, unreasonable or capricious.

The proposed revision to the crop regulations was initially considered at the Commission's October 23, 2019, meeting. There, it considered and approved the publication of a regulation proposal eliminating the use of riding crops, i.e., whips, for encouragement purposes in thoroughbred racing. During this meeting, Executive Director Judith A. Nason noted that The Jockey Club[3] had made a public call for states to move forward with rules banning the use of riding crops for encouragement purposes, and that New Jersey would be in the forefront with the passage of the proposed rules. Dennis Drazin, Chairman and CEO of Darby Development, LLC, wondered what the rules were in other states as he did not know "that much about thoroughbred industry." Executive Director Nason stated that the new rules were based upon rules proposed, but not yet passed, in California.

On December 2, 2019, the Commission published a proposal in the New Jersey Register for the repeal and replacement of N.J.A.C. 13:70-11.12. At the

[3] The "Jockey Club, [is] apparently an organization composed of owners, trainers and breeders of thoroughbred horses." Ruane, 400 F. Supp. at 823 n.2. According to its website, "it is not an organization for jockeys" and refers jockeys to the Guild. The Club's membership is by invitation and includes about "100 individuals distinguished by their contributions to Thoroughbred breeding and racing." FAQ, Jockey Club, https://www.jockeyclub.com/default.asp?section=Contact&area=1#Member (last visited Apr. 1, 2022).

time, N.J.A.C. 13:70-11.12, entitled "Abusive whipping by a jockey," provided as follows:

> Every jockey shall be responsible for the proper use of his or her whip during the running of a race. Whips may be used for the purpose of encouraging a horse to give forth its best effort during the running of a race, but shall not be used in an abusive or reckless manner. The stewards shall take cognizance of the manner in which a whip is used during the riding of a race and at all times thereafter and shall make such determinations as they deem appropriate with respect to whether or not there has been an abusive use of a whip and/or reckless use of a whip. If, in the opinion of the stewards, an abusive use of the whip or a reckless use of the whip has been committed, the offending jockey shall be fined and/or suspended by the stewards.

The proposed replacement for this regulation was comprised of three separate provisions, N.J.A.C. 13:70-11.12, -11.12A, and -11.12B, the third of which detailed the physical characteristics, i.e., length, weight, and material of permitted crops. Proposed N.J.A.C. 13:70-11.12, entitled "Riding crop prohibited," stated as follows:

> (a) No jockey or exercise rider may use a riding crop at any time, or for any reason, except when necessary to control the horse for the safety of the horse or rider.
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> (b) If a jockey or exercise rider uses the riding crop in a manner contrary to this section:
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> 1. The jockey or exercise rider may be suspended and/or fined by the stewards; and

> 2. The jockey's share of the purse shall be forfeited if, in the opinion of the stewards, the unauthorized use of the crop caused the horse to achieve a better placing.

Proposed N.J.A.C. 13:70-11.12A, entitled "Emergency use of riding crop," stated that:

> (a) Only riding crops, as permitted, and as defined at N.J.A.C. 13:70-11.12B, shall be allowed. The riding crop shall only be used when necessary to control the horse to avoid injury to the horse or rider.
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> (b) In all races where a jockey will not ride with a riding crop, an announcement shall be made over the public address system.
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> (c) The riding crop shall never be used on the head, flanks, or on any other part of the horse other than the shoulders or hind quarters.
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> (d) A jockey or exercise rider shall not contact the horse with anything except the soft tube of the riding crop.
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> (e) A jockey or exercise rider shall not strike a horse in a manner that causes any visible sign, mark, welt, or break in the skin of the horse, or that is otherwise excessive.
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> (f) The riding crop should be shown to the horse before use, whenever possible.
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> (g) If the riding crop is used, under the supervision of the stewards, there shall be a visual inspection of each horse following each race for evidence of excessive or brutal use of the riding crop.

This provision also imposed the same penalties as N.J.A.C. 13:70-11.12(b).

In its proposal, the Commission included a summary which explained the reasoning behind the replacement provisions:

> Existing N.J.A.C. 13:70-11.12 allows the use of the riding crop to encourage the horse. The proposed repeal and replacement of this section will ban that usage, as the new rules prohibit the use of riding crops by jockeys and exercise riders at any time and for any reason, except when necessary for the safety of the horse or rider. The proposed repeal and replacement of N.J.A.C. 13:70-11.12 prohibits the use of the riding crop to encourage a horse to run faster under any circumstances. Protection of the equine participants is of the utmost importance and it is incumbent upon the [Commission] to ensure the health, safety, and welfare of the racehorses that compete in this State. For this reason, the Commission believes it is necessary to make substantive changes to the rules governing the use of riding crops in thoroughbred racing.
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> The riding crop can be an important tool in controlling a horse's focus and running direction. The Commission has the responsibility to ensure the safety, health and welfare of all human and equine racing participants and, for that reason, the proposed repeal and new rules must allow the use of a riding crop when necessary to control the horse to avoid injury to the horse or rider.
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> The language of existing N.J.A.C. 13:70-11.12 is proposed for repeal. As stated . . . the former industry practice of encouraging a horse to run faster through use of a riding crop is no longer in the best interests of the sport. Therefore, the proposed repeal and new rule clearly prohibit the use of the riding crop, except when

> necessary for safety, and specify the penalties that shall be assessed when a violation occurs.
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> Proposed new N.J.A.C. 13:70-11.12(a) states that no jockey or exercise rider may use a riding crop at any time and for any reason, except when necessary for safety. Jockeys and exercise riders will need to encourage horses by means that do not involve actual or perceived harm to the horse.

The Commission stressed that the new regulations, intended to eliminate "excessive or brutal use of the riding crop," would have a positive social impact:

> The prohibition of the use of riding crops, except when necessary for the safety of the horse or rider, will be perceived in a positive light by the general public. The proposed repeal and new rules are of the utmost importance in adapting the industry to avoid the currently negative public perception of whipping a horse. It is possible that members of the industry will initially be resistant to such change; however, the proposed repeal and new rules will apply equally to all competitors, such that all race participants will be adjusting to the proposed repeal and new rules at the same time. Moreover, the public is essential to horse racing and the industry must learn to adapt if it is to survive. The proposed repeal and new rules allow the limited use of the riding crop, when necessary, for the health, safety, and welfare of the racing participants.
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> Further, the new required specifications of the riding crop itself will greatly reduce any real or perceived harm to the horse should the crop be needed in an emergency.

The Commission did not foresee that the new regulations would have any negative impact on the industry, other than a de minimis impact on jockeys and exercise riders having to purchase new riding crops to conform to the specifications of the new regulations. It authorized a sixty-day public notice period for members of the public to submit written comments on the proposed rules.

Representatives from People for the Ethical Treatment of Animals (PETA), Monmouth Park Racetrack, and The Jockey Club's Thoroughbred Safety Committee (the Committee), as well as Hall of Fame jockey Ramon Dominguez, several horse breeders, and various members of the public submitted comments on the proposed regulations.

The Committee, which was charged with studying safety in horse racing, supported the new regulations, which were in line with the Committee's own recommendations. PETA was in favor of the regulations as they offered additional protection for racehorses. Monmouth Park Racetrack was largely in agreement with the new rules, but expressed a preference for a uniform regulation regarding riding crop usage across all thoroughbred racing jurisdictions. Dominguez believed that additional input from riders was needed before any new regulations went into effect.

The Guild had numerous comments regarding the proposed new regulations. First, it took issue with the Commission's opinion that it was inappropriate to use a riding crop to encourage a horse and try to maximize placement. The Guild maintained that the existing rule regarding riding crop use was adequate and humane, noting that no jockey had been disciplined in the last five years for abusive whipping. It agreed that a jockey should cease to whip a horse that was out of contention, that horses should only be struck on limited areas of their bodies, and that there should be post-race inspections of racehorses. The Guild generally supported standards on the type of crop permitted, although it felt that it should have been consulted on these standards and that some variation should be allowed.

The Guild made a number of arguments directly against the proposed regulations: (1) jockeys needed to use riding crops to keep a horse's attention, prevent it from veering, and get an instantaneous response when acceleration was needed to safely advance on a moment's notice; (2) jockeys had limited aids to maintain control of their horses, and eliminating the crop would further reduce their ability to communicate with their mount; (3) jockeys could not control their horses with their feet; and (4) by relying upon the reins for encouragement,

jockeys risked "throwing away the horse's head" thereby resulting in a loss of control over the horse.

The Guild insisted that the proposed regulations would result in a "drastic and dangerous change in the conduct of horse racing," which would destroy the horse racing industry in New Jersey because trainers would enter their horses elsewhere to avoid the new regulations. It claimed that the new regulations would also: (1) be confusing to jockeys riding in multiple jurisdictions; (2) wrongly penalize a jockey for using a crop to avoid a dangerous situation; and (3) unfairly penalize only the jockey, while still allowing trainers and owners to collect purse monies.

The Guild was in favor of universal regulations regarding crop usage. It approved of the riding crop regulations adopted in Great Britain which simply limited the number of times a jockey could strike a horse during a race. Finally, the Guild asserted that the Commission, which then consisted of four sitting members and five vacancies, lacked the necessary quorum to vote on the new regulations.

After the September 16, 2020 meeting adopting the change in the regulations, on October 19, 2020, the Commission published a "Summary of Public Comment and Agency Response." As to the concerns expressed by the

Guild, the Commission responded that: (1) the prior riding crop regulation was outdated and inadequate; (2) The Jockey Club supported the new regulations; (3) in order to maximize equine welfare it was necessary to eliminate the use of the riding crop to encourage a horse to run faster; (4) the new regulations would minimize negative public perception of the sport; (5) jockeys had the ability to communicate encouragement to their mounts in other safe and permissible ways; (6) jockeys had always faced differing regulations in different racing jurisdictions and would adapt here; (7) it was aware of and had considered actions being taken in other racing jurisdictions regarding riding crop use and would consider later amendments if appropriate; (8) although it was in favor of a consensus on this subject, it did not want to undermine progress in equine welfare with unnecessary delay; (9) it was of the opinion that the new regulations would promote and benefit horse racing in New Jersey, rather than result in the demise of the racing industry; and (10) it did not believe that jockeys would be pressured by owners, who were not penalized under the new regulations, to violate the new regulations, as this would be a regulatory violation.

The Commission emphasized that a jockey would be penalized only if he or she used a riding crop for reasons other than control of the horse or safety of

the horse or rider. If a jockey were to lose control of a horse because it suddenly spooked or veered, or while using the reins for encouragement, the jockey could use the crop to regain control. Similarly, if suddenly confronted with a dangerous situation or the need to perform a risky maneuver, a jockey could still use his or her crop to navigate the situation. Last, the Commission stated, "[a] majority of the sitting members of the Commission constitutes a quorum that may legally vote at a public meeting." With that, the Commission implemented its revisions to the crop regulations.

Based on these events and the procedures followed by the Commission we have no cause to disturb its action. An agency is required to provide notice and an opportunity to be heard to affected persons and parties of proposed agency action. Woodland Priv. Study Grp. v. State, Dep't of Env't Prot., 109 N.J. 62, 73 (1987). To accomplish this an agency must, after giving notice of the intended action, afford all interested persons a reasonable opportunity to submit comments, including data, opinions, or arguments. N.J.S.A. 52:14B-4(a)(3); N.J.A.C. 1:30-5.4(a). In addition, the agency shall conduct a public hearing when sufficient public interest is shown. N.J.S.A. 52:14B-4(a)(3); N.J.A.C. 1:30-5.5(a). Here, there is no dispute that the Commission followed these requirements.

Although the Guild insists that the Commission's ruling was the "product of a flawed process" because there was no evidentiary hearing, we conclude the Commission complied with all statutory requirements for exercising its rule-making authority. All the safety concerns raised by the Guild were addressed by the Commission, which emphasized that a riding crop could be used for safety purposes. The Commission was entitled to rely upon the calls for change made by The Jockey Club, and in particular upon the views of the Committee, which conducted research in the area of horse and rider safety. Moreover, it was rightly concerned about the well-being of racehorses and the negative public perception of racing based upon practices such as whipping a horse to make it run faster.

The Commission's decision was not arbitrary, capricious , or unreasonable and it was based upon substantial input from all interested parties, including the Guild's.

Affirmed.