

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Rebecca Kelly Slaughter
Alvaro M. Bedoya
Melissa Holyoak
Andrew Ferguson

In the Matter of)
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Luis Jorge Perez,) Docket No. 9420
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Petitioner.)
)
)

**DECISION OF THE COMMISSION ON APPLICATION FOR REVIEW UNDER
15 U.S.C. § 3058**

Pursuant to the Horseracing Integrity and Safety Act, 15 U.S.C. § 3051 *et seq.* (“the Act”), veterinarian Luis Jorge Perez (“Dr. Perez”) has petitioned the Federal Trade Commission (“the Commission” or “the FTC”) to review the decision issued on February 7, 2024, by FTC Administrative Law Judge D. Michael Chappell (“the ALJ”), affirming the finding of liability and final civil sanctions imposed on Dr. Perez by the Horseracing Integrity and Safety Authority (“the Authority” or “HISA”). For the reasons explained below, the petition is DENIED.

Factual Background and Arbitrator’s Decision

The operative facts in this case are not in dispute. In June 2023, the Horseracing Integrity and Welfare Unit (“HIWU”), which enforces the Authority’s Anti-Doping and Medication Control (“ADMC”) Program, issued an Equine Anti-Doping Notice of Alleged Anti-Doping Rule Violation (“Notice Letter”) to Dr. Perez based on his possession of two one-pound tubs of levothyroxine (“Thyro-L”), a banned substance, in alleged violation of the Authority’s ADMC Rule 3214(a). The Thyro-L was found in Dr. Perez’s trailer at Belmont Park by an investigator from the New York Racing Association, who alerted HIWU. Dr. Perez admitted in his written response to the Notice Letter that he did, in fact, possess the Thyro-L. Dr. Perez accepted responsibility for possessing the substance, stating that his offense was not intentional and that he “completely forgot it was there.” HIWU then formally charged Dr. Perez with Possession of a Banned Substance (“Charge Letter”), noting that Dr. Perez’s explanation of the circumstances did not satisfy his burden to establish a “compelling justification” that would excuse the possession of Thyro-L, as required by ADMC Rule 3214(a). In arbitration proceedings resulting

from the Notice Letter and the subsequent Charge Letter, the arbitrator found that Dr. Perez was aware that the substance was banned as of the date it was found in his trailer. Based on these facts and an application of the HISA ADMC Rules, the arbitrator determined that the appropriate sanctions for the violation should be a 14-month period of ineligibility and a \$5,000 fine.¹ See ADMC Rules 3223, 3225.

The ALJ's Decision

On November 9, 2023, Dr. Perez appealed the arbitrator's decision to the FTC's ALJ and requested a stay of the civil sanctions imposed. See 15 U.S.C. § 3058(b); FTC Rules 1.146(a), 1.148(b)(1). On November 28, the ALJ entered an order denying Dr. Perez's request for a stay.² On November 30, the ALJ issued an order directing Dr. Perez to submit a statement of facts found by the arbitrator that Dr. Perez wished to contest in any evidentiary hearing.³ See FTC Rule 1.146(c)(2). Dr. Perez, represented by counsel, filed nothing with the Office of the Secretary in response to that order.⁴

Therefore, relying upon the written record developed in the arbitration proceeding, the ALJ issued a decision affirming the arbitrator's findings and the civil sanctions imposed.⁵ Upon de novo review of the record, the ALJ first concluded that Dr. Perez, as a veterinarian treating Covered Horses under the Act, was a "Covered Person" under the Act. The ALJ then affirmed HIWU's finding that Dr. Perez possessed Thyro-L at Belmont Park in violation of ADMC Rule 3214(a). The ALJ determined that Dr. Perez's principal contention in his defense – that the Authority lacks jurisdiction over non-covered horses and therefore Dr. Perez cannot be held liable for possessing a banned substance because his practice includes non-covered horses – was not supported by an analysis of ADMC Rule 3214(a). Contrary to Dr. Perez's jurisdictional or due process claims, the ALJ found that simply claiming, without providing further evidence, that a veterinarian's practice includes non-covered horses does not create a blanket exemption to ADMC Rule 3214(a). Rather, AMDC Rule 3214(a) sets forth a "compelling justification" standard that requires an analysis of the evidence on a case-by-case basis. Dr. Perez, in fact, provided no evidence, before either the arbitrator or the ALJ. Rather, he rested on the mere

¹ *In the Matter of the Arbitration Between Horse Racing Integrity and Welfare Unit v. Luis Jorge Perez*, ¶¶ 7.29, 7.32 (Oct. 9, 2023) ("Arbitrator's Decision").

² Order Denying Appellant's Request for Stay Pending Appeal, *In the Matter of Luis Jorge Perez*, Docket No. 9420 (Nov. 28, 2023). Dr. Perez did not seek Commission review of the order denying his request for a stay. See FTC Rule 1.148(b)(2).

³ Order, *In the Matter of Luis Jorge Perez*, Docket No. 9420, at 2 (Nov. 30, 2023).

⁴ On December 8, 2023, Dr. Perez's counsel confirmed in an email to the Office of the Administrative Law Judges that Dr. Perez was withdrawing his request for a hearing. See Order Setting Briefing Schedule, *In the Matter of Luis Jorge Perez*, Docket No. 9420, at 2 n.1 (Dec. 14, 2023).

⁵ Administrative Law Judge Decision on Application for Review, *In the Matter of Luis Jorge Perez*, Docket No. 9420 (Feb. 7, 2024) ("ALJ Decision").

assertion that his practice includes treating non-covered horses. As a result, the ALJ found that Dr. Perez was liable under ADMC Rule 3214(a).

Further, when reviewing the evidentiary record de novo, the ALJ found the sanctions imposed on Dr. Perez to be “in accordance with ADMC Rules, reasonable, and rationally related to [Dr. Perez’s] degree of fault.”⁶ The ALJ noted that Dr. Perez did not take any steps to ensure that the Thyro-L was disposed of after the ban went into effect and that Dr. Perez’s failure to act “was not due to his belief that he lawfully possessed the Thyro-L, but rather because he forgot he had it.” Dr. Perez now petitions the Commission for review of the ALJ’s decision.

Dr. Perez’s Petition for Review

The Act gives the Commission discretion to grant or deny an aggrieved person’s petition for review of an adverse ALJ decision. The Act provides:

In determining whether to grant such an application for review, the Commission shall consider whether the application makes a reasonable showing that—

- (I) a prejudicial error was committed in the conduct of the proceeding; or
- (II) the decision involved—
 - (aa) an erroneous application of the anti-doping and medication control or racetrack safety rules approved by the Commission; or
 - (bb) an exercise of discretion or a decision of law or policy that warrants review by the Commission.

15 U.S.C. § 3058(c)(2)(C)(ii); *see* FTC Rule 1.147(b)(4). Dr. Perez’s petition for review briefly sets forth three grounds for Commission review of the ALJ’s decision. His first argument is that “HISA and HIWU do not have jurisdiction over non-race horses even if said non-race horses are stabled on racetracks.” Given that Dr. Perez could treat both covered horses and non-covered horses at the same racetrack, his argument goes, he “could legitimately possess a medication, banned for race horses but not for non-race horses, for use upon non-race horses.” Dr. Perez finds fault with the ALJ’s treatment of this argument.

Second, Dr. Perez claims that HISA’s ADMC rules “fail[] to provide the necessary due process protections with respect to the issue of this case, *i.e.*, a veterinarian’s possession of a medication banned for race horses but not for non-race horses, which [Dr. Perez] could provide for non-race horses on a racetrack.” According to Dr. Perez, “neither HISA nor HIWU [has] promulgated any written procedure(s) or regulation(s) regarding prescribing and dispensing of a banned substance for a non-covered horse at a racetrack. No prohibition of said practice has been issued.”

⁶ Applying the standard of review in the statute, the ALJ found that Dr. Perez failed to demonstrate that the arbitrator’s sanctions determination was “arbitrary, capricious, an abuse of discretion, or not in accordance” with applicable law. *See* 15 U.S.C. § 3058(b)(2)(A)(iii); FTC Rule 1.146(b)(3).

Dr. Perez’s final argument is that “HISA’s regulatory scheme with respect to a designated banned substance, as applicable to this case, is vague as well as being arbitrary and capricious.” His single premise for this argument is a claim that the Act is “facially unconstitutional,” citing *NHBPA v. Black*, 53 F. 4th 869 (5th Cir. 2022).

Commission Decision

Upon our careful review of the entire record – the arbitration proceedings, the proceedings before the ALJ, the arguments made in Dr. Perez’s petition for review, and the Authority’s response to that petition – we conclude that Dr. Perez has failed to demonstrate that Commission review of the ALJ’s decision is warranted. First, Dr. Perez’s petition does not identify any prejudicial error in the conduct of the ALJ’s proceeding. Nor can we identify any such error. Dr. Perez, who has been represented by counsel throughout these FTC proceedings, was given ample opportunity to contest in a hearing the facts as found by the arbitrator, as well as the opportunity to supplement the record. He declined to do so. He also declined to invoke his right under 15 U.S.C. § 3058(c)(3)(C)(ii) to seek leave to supplement the record in our consideration of his petition. We therefore conclude that there was no prejudicial error in the conduct of this proceeding.

Dr. Perez has also failed to demonstrate “an erroneous application” of the ADMC rule prohibiting his possession of Thyro-L. 15 U.S.C. § 3058(c)(2)(C)(ii)(II)(aa). By his own admission, Dr. Perez violated ADMC Rule 3214(a)’s proscription against possession of Thyro-L. Although that rule does provide an exception for liability if the covered person can demonstrate facts showing a “compelling justification,” Dr. Perez has failed to adduce any such facts. In his petition for review, he posits a situation in which a covered veterinarian is treating both covered horses (to which the proscription applies) and noncovered horses (to which the proscription does not apply). The problem with his argument is that, despite having ample opportunities to correct and supplement the record, Dr. Perez submitted no evidence that he in fact needed the substance to, for example, treat noncovered horses at Belmont Park that day or because of some other compelling justification. Rather, he rested on the mere assertion that his practice includes treating non-covered horses. We therefore conclude that the ALJ and the arbitrator both properly applied the ADMC rule prohibiting possession of Thyro-L and correctly determined that Dr. Perez had not demonstrated a compelling justification for that possession.⁷

Finally, Dr. Perez has failed to show that the ALJ’s ruling or the arbitrator’s decision “involved . . . an exercise of discretion or a decision of law or policy that warrants review by the Commission.” 15 U.S.C. § 3058(c)(2)(C)(ii)(II)(bb). As for his claim that the Act is “facially unconstitutional” relative to rulemaking, the Fifth Circuit recently concluded that Congress had

⁷ Dr. Perez also faults HISA for less-than-clear guidance to veterinarians who practice on both covered and non-covered horses. We agree with ALJ Chappell that “[t]he fact that during the educational seminar HIWU’s Chief of Science did not explicitly mention the ‘compelling justification’ standard or describe in detail how this standard would be interpreted . . . does not support a finding of a due process violation.” ALJ Decision at 9. Indeed, Dr. Perez in his defense admits he did not rely on that presentation. See Arbitrator’s Decision at ¶ 7.28.

successfully amended the Act so that its delegation of rulemaking authority to the Authority is constitutional. *NHBPA v. Black*, No. 23-10520 (July 5, 2024). Under that permissibly delegated authority, the Authority prohibited the possession of Thyro-L. *See* 15 U.S.C. § 3055. And even before that statutory amendment, the Fifth Circuit did not conclude that HISA was vague, as Dr. Perez contends. The Commission acknowledges that the recent Fifth Circuit decision concluded that HISA unconstitutionally delegated *enforcement* power to the Authority. *NHBPA*, slip op. 13-29. However, that issue was not addressed in the decision Dr. Perez cites. Nor did Dr. Perez present that argument to the ALJ or in his application for review, and it was not discussed in the ALJ's decision. We therefore conclude that further review is not warranted.

Conclusion

Having evaluated Dr. Perez's petition for review, and having considered the entirety of the record in this proceeding, the Commission has determined, in its discretion, that Dr. Perez has not shown (1) prejudicial error, (2) that the ALJ erroneously applied the Authority's ADMC rules, or (3) that the ALJ's decision involved "an exercise of discretion or a decision of law or policy that warrants review by the Commission." 15 U.S.C. § 3058(c)(2)(C)(ii). Accordingly, the Commission DENIES Dr. Perez's petition for review.

By the Commission.

April J. Tabor
Secretary