

Opinion No. 63-115

September 9, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Harvey Foster Executive Secretary State Racing Commission P. O. Box 8576, Station C Albuquerque, New Mexico

QUESTION

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What are the powers that the State Racing Commission has in regulating the business of horse racing in this State?

CONCLUSION

See Analysis.

OPINION

{*259} ANALYSIS

(1) Licensing powers.

It is to be noted initially that it is "unlawful for any person, firm, association or corporation to hold public horse races or race meetings for profit or gain in any manner unless license therefor has first been obtained from the state racing commission." Section 60-6-1, N.M.S.A., 1953 Compilation, **Ross v. State Racing Commission**, 64 N.M. 478, 330, P. 2d 701.

When a license to hold a race or a race meet is applied for, the commission may grant or refuse to grant such license. Section 60-6-2, N.M.S.A., 1953 Compilation. The commission has broad discretion in the matter of granting licenses, but, like other administrative agencies, it may not act in an arbitrary, unreasonable or capricious manner. **Ross v. State Racing Commission**, supra; Attorney General Opinion No. 59-173. The commission may require an applicant for a license to state the full name of the person, association or corporation and the name of the state in which incorporated, as well as the nationality and residence of the members of the association and the names of the stockholders and directors of the corporation. The Commission may also require a statement of the assets and liabilities of the applicant, the kind of racing to be conducted, the time period involved, **and such other information as the Commission shall demand.** Section 60-6-2, supra. The Commission **shall** require the exact location of the proposed race meet and a specification of the days on which the horse races are to be held. Section 60-6-3, N.M.S.A., 1953 Compilation. It may also require information

as to whether the race track or plant is owned or leased and, if leased, the name and residence of the fee owner, or, if a corporation, the names of the directors and stockholders. Section 60-6-2, supra. The application for a license shall be in writing and signed by the applicant or applicants and the facts therein recited shall be sworn to. Section 60-6-3, supra.

Section 60-6-4, N.M.S.A., 1953 Compilation, sets out the time when applications must be filed and the license fees required. Section 60-6-5, N.M.S.A., 1953 Compilation, provides that the Commission **may** have a hearing on the application for the purpose of hearing proof **as to the responsibility** (not only financial but general) **and eligibility of the {260} applicant**. The Racing Commission may require, as a condition precedent to the issuance of a license, a bond executed by a corporate surety qualified to do business in New Mexico in an amount not to exceed \$ 5,000 and **conditioned for the payment by the applicant of all fees and taxes**. In view of certain recent difficulties in the collection of admission taxes this latter provision is important.

After the hearing on the application, the Commission shall determine whether or not the license is to be issued. Section 60-6-5, supra. If the Commission refuses to issue the license, it shall publicly state its reasons therefor and such reasons shall be included in the minute book of the Commission. Section 60-6-2, supra. If the license is not issued, the license fees tendered with the application shall be returned to the applicant. Section 60-6-5, supra. While this latter section provides that a determination as to whether a license shall issue is "final and conclusive and not subject to any appeal," an applicant who is arbitrarily, unreasonably, or capriciously denied a license can get the matter litigated in the courts. Attorney General Opinion No. 4810 (1945-46); **Ross v. State Racing Commission**, supra.

Since a license must be obtained prior **to each** race meet, the requirements for the "renewal" of a license are exactly the same as those for the initial issuance of a license. Furthermore, since horse racing is permitted in this State only under highly regulated conditions, the yearly application for "renewal" of licenses held by existing licensees, and the hearing thereon, should not be a pro forma matter. At each such "renewal" hearing the same matters should be thoroughly explored that are considered in an initial application hearing.

The Commission is also empowered, after hearing, to revoke a license. Section 60-6-2, supra. Such a revocation is justified if, as a matter of fact, reasons exist which would have justified a refusal of the license in the first instance. Attorney General Opinion No. 59-29. A license can also be revoked if it was obtained by fraud or deceit. Since the Commission "is empowered to exclude or compel the exclusion, from any and all race courses, any person whom the Commission shall deem detrimental to the best interests of racing **or any person who shall willfully violate the racing laws or any rule, regulation or order of the Commission or any law of the United States or of this state,**" it is clear that a license can be revoked for the same reasons. In fact, this power of revocation is specifically spelled out in Section 60-6-7, N.M.S.A., 1953 Compilation.

(2) Statutory controls and powers which the Commission exercises over its licensees and their lessees or licensees.

(a) Initially it should be observed that the commission is empowered to promulgate rules and regulations governing the holding, conducting and operating of all horse races held in this State for gain or profit. Sections 60-6-2, 60-6-1, supra. Of course, in promulgating such rules the Commission must not exceed its basic statutory authority. These rules must be in writing and must be filed with the Supreme Court librarian. The purpose of such rules is to insure that the public is protected against any and all kinds of unfair conduct or practices.

(b) The Commission fixes {*261} and sets racing dates.

(c) The Commission, by its members, agents or representatives is to supervise and check the making of parimutuel pools and the distribution therefrom. The Commission has complete supervision and control of the parimutuel machines and equipment at all races held or operated by the State or any agency or Commission thereof (present example: State Fair).

(d) The Commission is empowered to cause the various places where race meets are held to be visited **and inspected** at reasonable intervals. It should also be noted that this inspection power goes to the entire area, horse barns, etc.; it is **not** limited to the grandstand area. The Commission has full investigatory powers including the authority to place attendants and other persons at any place on the licensed premises. Such persons are to oversee the races and require strict observance of the Commission's rules to the end that violations and want of integrity are not present.

(e) The Commission is specifically empowered to regulate the rate of charges by a licensee and the licensee's lessees or licensees (concessionaires) for: services, admissions, and sales of any articles on the licensed premises. This means that the Commission has full power to regulate such charges by the Jockey Club at Ruidoso, just as it can regulate charges by the licensee and his concessionaires.

(f) The Commission is authorized to approve (or disapprove) all **proposed** extensions, additions, or improvements to the buildings, stables or tracks upon property owned or leased by the licensee.

(g) The Commission may require the removal of any employee or official employed by the licensee. Necessarily implied from this authority is the authority to require the removal of any employee of a lessee or licensee of the person or firm licensed by the Commission.

(h) The Commission **shall** approve (or disapprove) all agreements and contracts for the payment of money and all salaries, fees and compensations by any licensee. In connection with this statutory power and duty you specifically ask whether concession contracts between the licensee and a proposed concessionaire are subject to

commission approval. Our answer is an emphatic "yes". Simply because the arrangement between the licensee and the concessionaire is on a percentage basis does not mean that the Commission's power to approve contracts for the payment of money is not applicable. The licensee **is** contracting for the payment of money, i.e., the percentage of the receipts that the concessionaire is allowed to retain. This conclusion is reinforced by the provision previously mentioned granting to the Commission the power to regulate the prices on all sales made on licensed premises. Necessarily implied from this power (as well as from others) is the power to require reports from the licensee's lessees and licensees (concessionaires) as to earnings. Further, the Commission is authorized to adopt rules governing, restricting or regulating bids on leases.

(i) The Commission may regulate the size of any purse, stake or reward for any race.

(j) We have already mentioned {262} the Commission's power to exclude persons from licensed premises.

(k) The Commission has the power to compel the production of **all** documents showing the **receipts and disbursements** of any licensee. It may even decree the manner in which such financial records are to be kept.

(l) The Commission has the power to summon witnesses and administer oaths. Section 60-6-2, supra. Records of the licensee relating to admission taxes, commissions, total amounts wagered, breakage, **and such other matters as the Commission shall determine** must be complete and accurate and such records are subject at all reasonable times to inspection and audit by the Commission or its authorized representatives. If the licensee fails to keep such records in an accurate manner which may be readily understood, the Commission may prescribe the method in which such records shall be kept. Section 60-6-9, N.M.S.A., 1953 Compilation (P.S.).

The quite obvious intent of the legislature was to grant broad and sweeping powers to the particular State Commission which regulates horse racing and wagering thereon. Probably no other state agency or commission, including the Division of Liquor Control, has as much power to regulate a particular business - this for the simple reason that it is deemed by the Legislature to be absolutely imperative that the public be fully protected from illegal or unfair conduct on the part of any licensee and/or his lessees or licensees.

By: Oliver E. Payne

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