Agenda Item #2.2

(Broken Into 3 Sections)

BEFORE AN ADMINISTRATIVE LAW JUDGE
APPOINTED BY THE INDIANA HORSE RACING COMMISSION

INDIANA HORSE RACING COMMISSION STAFF,	)	
	)	**Administrative**
Petitioner,	)	**Complaint No.: 212001**
v.	)	
THOMAS MURRAY AMOSS,	)	
	)	
Respondent.	)	

RESPONDENT THOMAS AMOSS'S OBJECTIONS TO THE ADMINISTRATIVE LAW JUDGE'S RULING ON MOTION TO DISMISS AND REPORT AND RECOMMENDATION

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Respondent Thomas Amoss ("Amoss") respectfully submits his objections, pursuant to 71 IAC 10-3-15(3), to the Administrative Law Judge's (i) Ruling on Amoss's Motion to Dismiss, dated October 10, 2014 (hereafter, the "October 10 Ruling"),[1] and (ii) Recommended Findings of Fact, Conclusions of Law, Ultimate Finding of Fact and Order, dated January 28, 2015 (Docket – Vol. II, No. 68) (hereafter, "Report and Recommendation")

[1] The October 10 Ruling presently does not appear on the ALJ's Docket. We assume the oversight will be corrected and/or that a copy of the Ruling will be provided the Commission pursuant to 71 IAC 10-2-9(d).

FIRST OBJECTION

THE RECOMMENDED SIXTY (60) DAY SUSPENSION IS EXCESSIVE AND AN ABUSE OF DISCRETION IN THAT THE ALJ (A) CONSIDERED THE WRONG FACTORS IN DETERMINING THAT PENALTY, (B) FAILED TO CONSIDER MITIGATING CIRCUMSTANCES, AND (C) PROVIDED AN INVALID EXPLANATION FOR THE RECOMMENDATION

Amoss's first objection to the Report and Recommendation challenges the ALJ's recommendation of a sixty (60) day suspension and a fine of $5,000. The recommended penalty is excessive and it resulted from the ALJ's disregard and/or misconstruction of the ARCI *Uniform Classification Guidelines for Foreign Substances and Recommended Penalties and Model Rule* (hereafter, the"ARCI Guidelines").

The ALJ *misconstrued* the ARCI Guidelines when his penalty determination was guided by his belief that, "[t]he primary factors in determining the severity of a licensed trainer's penalty are the number and recency of any past violations." [Report and Recommendation at 12] In fact, the ARCI Guidelines direct instead that "pharmacological effect" of the drug is the primary determinant of penalty. [ARCI Guidelines, Preamble at ii]

The ALJ *ignored* the ARCI Guidelines when he imposed penalty without considering mitigating circumstances. Yet, here again, the ARCI Guidelines expressly direct that, "[t]he facts of each case are always different and there may be mitigating circumstances which **should always be considered**." [*Id* (emphasis added).]

But there is more, because the ALJ also disregarded applicable penalty precedent and proffered an invalid and illogical explanation for his choice of penalty.

Any one of the foregoing errors shows the ALJ's recommended penalty to be excessive. When those errors are considered cumulatively they reveal a penalty that is unsupported in fact

or law and an abuse of discretion. The ALJ's penalty recommendation therefore now must be rejected.

A. The ALJ Misconstrued the ARCI Penalty Guidelines and Applied the Wrong Factors in Determining the "Severity" of Penalty

According to the ALJ, the penalty recommendation was predicated exclusively on his understanding that, "[t]he primary factors in determining the severity of a licensed trainer's penalty are the number and recency of any past violations." [Report and Recommendation at 12]

This was error because it flatly is untrue that the number and recency of past violations are the "primary factors in determining the severity" of penalty. To the contrary, the ARCI Guidelines expressly direct that the "pharmacological effects" of a drug be considered "prior to any decisions with respect to penalties to be imposed." [ARCI Guidelines, Preamble at ii] This is so, the ARCI instructs, because "[t]he ranking of drugs is based on their pharmacology, their ability to influence the outcome of a race, whether or not they have legitimate therapeutic uses in the racing horse, or other evidence that they may be used improperly." [*Id.*]

Despite these clear directives, the ALJ's penalty analysis gave no consideration to the "pharmacological effects" of [redacted] – including, in particular, the [redacted] concentration that is at issue in this case. Yet, the ARCI and the Commission now acknowledge that the [redacted] concentration of [redacted] has no pharmacological effect on the horse. [4/30/14 IHRC Meeting at 31-32;[2] *see also infra* at 13-15 (discussing hearings at which Commission agreed to create a permissible [redacted] threshold level for the therapeutic medication [redacted]]

Further on this point, the ARCI Guidelines also direct that, "[w]here the use of a drug is specifically permitted by a jurisdiction, then the jurisdiction's rule **supersedes these penalty guidelines**" [*id.* (emphasis added)], and that "drugs may be reclassified when appropriate." [*Id.*]

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[2] The referenced Commission hearing minutes are available at http://www.in.gov/hrc/2336.htm.

See also 71 IAC 8-1-7 ("Drug classification and penalties") ("the judges **shall** consider the classification level of the violation **as currently established** by the ARCI … and impose penalties and disciplinary measures consistent with the recommendations contained therein") (emphasis added).

Despite these further clear directives, the ALJ's penalty analysis gave no consideration to the fact that this jurisdiction now authorizes the presence of the [redacted] concentration of [redacted] that is at issue in this proceeding. 71 IAC 8.5-1-4.2[redacted] Yet, per the ARCI, this rule now trumps the penalty guidelines that the ALJ purported to apply

In short, the foregoing provisions of the ARCI Guidelines are mandatory and they govern determination of penalty in these proceedings. Because the ALJ ignored those provisions, his recommended penalty is unlawful, an abuse of discretion, and now must be rejected by this Commission.

B. The ALJ Impermissibly Failed To Consider Mitigating Circumstances In Calculating Penalty

The ALJ's recommended penalty also must be rejected because he failed to consider mitigating circumstances. This, too was a clear violation of the ARCI Guidelines.

In that regard, the ARCI Guidelines expressly direct that, "[t]he facts of each case are always different and there may be mitigating circumstances which **should always be considered.**" [ARCI Guidelines, at ii (emphasis added); *see also id.* at 27-30 (recommended penalty for every one of the Drug and Penalty Classes contains the express limitation of "absent mitigating circumstances"); 71 IAC 8-1-7 ("Drug classification and penalties") (mandating consideration of "mitigating circumstances")]

The ALJ's failure to consider mitigating circumstances cannot be passed off as mere "oversight" or excused as some form of "harmless error". This is so because multiple meritorious grounds for mitigation are presented:

First, this jurisdiction now authorizes the presence of the [redacted] concentration of [redacted] that is at issue in this proceeding. 71 IAC 8.5-1-4.2[redacted] Although that permissible threshold rule was enacted subsequent to the methocarbamol positive in this case, Indiana's highest court has held that the "principles" that underlie retroactive application of "ameliorative"[3] amendments of this type may be applied in mitigation of civil penalty in administrative proceedings. *Indiana Department of Environmental Management ["IDEM"] v. Medical Disposal Services, Inc. ["MDSI"]*, 729 N.E.2d 577 (Ind. 2000) (hereafter, "*MDSI*"). Amoss urged those principles and that authority as a basis for mitigation of penalty in this case. [Memorandum in Support of Amoss's Cross Motion to Dismiss, dated June 10, 2014 (Docket – Vol. II, No. 57], at 16] The ALJ ignored that request.

Second, the Commission created a permissible [redacted] threshold for [redacted] precisely because that concentration has been shown to have no pharmacological effect on the horse. [4/30/14 IHRC Meeting at 31-32] Per the ARCI, such absence of pharmacological effect is of paramount importance in determining an appropriate penalty. [ARCI Guidelines, Preamble at ii] The ALJ ignored this factor.

Third, during the pendency of this case, the Commission disregarded established regulations and imposed a 15-day suspension in the case of a "Tramadol" positive. The ARCI Guidelines classify Tramadol in Penalty Category "A", as it is deemed to have the "highest

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[3] The "doctrine of amelioration" allows a defendant, who is sentenced after the effective date of a statute that reduces penalty, to take advantage of that statute rather than be sentenced under the more harsh statute that was in effect when the defendant committed the offense. *See Lunsford v. State*, 640 N.E.2d 59, 60 (Ind. Ct. App. 1994) (citation omitted).

potential to affect performance" and, therefore, carries a minimum penalty of one-year suspension for a first time offense.[4] The Commission publicly declared that it mitigated penalty in the case because it expected the ARCI at some future point to reclassify Tramadol to "reflect the current science." In other words, the Commission applied an *anticipated* amendatory regulation retroactively. Although the ALJ acknowledged this "Tramadol Precedent" [October 10 Ruling at 9 ("it is evident that the Commission reduced a penalty as the result of a new rule")], he failed to apply the precedent in mitigation of the recommended penalty.[5]

Fourth, during the pendency of this case, the Commission has mitigated penalty where, as here, multiple positive tests for the same medication occur prior to receipt of "official notice" of the earlier positive(s). *See, e.g., In the Matter of Genaro Garcia*, IHRC Ruling No. 14681, dated October 29, 2014 (expressly mitigating penalty in the case of multiple Dexamethasone positives where "the second violation occurred before he was notified of the first"); *In the Matter of Amanda Lynn Welch*, IHRC Ruling No. 1465, dated September 25, 2014 (expressly mitigating penalty in the case of multiple Clenbuterol positives where "the second clenbuterol positive on August 28, 2014 was reported before she knew about the first [July 5, 2014] clenbuterol positive"). Moreover, these mitigating circumstances expressly are contemplated in Indiana's rules of racing. 71 IAC 8-1-7.1(d) ("multiple medication violations") ("[m]ultiple positive tests for the same medication incurred by a trainer prior to delivery of official notice by the commission may be treated as a single violation").

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[4] In marked contrast [redacted] is classified in Penalty Category "C" because it is accepted as a legitimate therapeutic agent in the equine and has less potential to affect performance. A first time offense carries a fine and no penalty.

[5] The "Tramadol Precedent" is discussed in greater detail, *infra* at 17-21, where we urge that precedent as grounds for dismissal of the proceeding.

Mitigation on grounds of the "multiple positives/prior to notice" consideration was appropriate in this case because two of Amoss's [redacted] positives were implicated by that rule and precedent. That is:

- On October 7, 2011, the Kentucky Horse Racing Commission ("KHRC") reported a [redacted] positive at Keeneland;
- On October 21, 2011, this Commission reported the [redacted] positive at Hoosier Park which is the subject of this proceeding;
- On October 22, 2011, KHRC reported another [redacted] positive at Keeneland.

The timing of these positives is significant because, in January, 2012, the KHRC stewards fined Amoss $2,500 after determining that the October 22 [redacted] positive was his third Class 4 violation within 365 days. However,

> [a]t the KHRC's February 15 meeting, commissioner Alan Leavitt questioned whether the Oct. 22 violation should have been deemed only a second offense because **Amoss was not given official notification of the October 7 positive until Oct. 22**. Acting chief steward Rick Williams explained that the stewards took into consideration the mitigating circumstances in imposing a fine but no suspension for Amoss.

[3/7/2012 *Blood-Horse* (available at http://www.bloodhorse.com/horse-racing/articles/67860/amoss-faces-stiff-fine-suspension-in-indiana) (emphasis added)] Consistent with the KHRC ruling, the Commission Staff in this case ostensibly declined to "take[ ] this [October 22 methocarbamol positive] into account in the recommended penalty" in the Amended Administrative Complaint. [Docket – Vol. I, No. 3 (Amended Administrative Complaint), at 3]

The foregoing circumstances supported mitigation in this case. This is so because both the KHRC and the Commission Staff recognized and applied the "multiple positives/prior to notice" rule, principal and/or precedent in mitigation of the *October* [redacted] positive.

But because they did so, the ALJ logically should have applied the same rule, principal and/or precedent to the *October* [redacted] Hoosier Park [redacted] positive. This is so because the late-notice of the October [redacted] positive impacted *both* the [redacted] positives, and did so in the precise same manner. Specifically, in the absence of such notice, Amoss had no reason to suspect that his training and therapeutic medication routines risked contravening any rule of racing. Put differently, the absence of timely notice negated any suggestion of culpability and excused any failure to implement prophylactic changes in Amoss's training and care for his equine charges. *See also* Sams, et al., *The Pharmacokinetics of Methocarbamol, etc.*, J. Vet. Pharmacol. Therap. 17, 25-34 (John Wiley & Sons Ltd. 2013) (undertaking study to "establish a regulatory threshold" for [redacted], because the frequency of positives in racing "suggest[ed] that the time required for [redacted] to decline to undetectable concentration in blood or urine samples after the last dose may be poorly understood or difficult to predict").

In sum, the **only** factor that informed the ALJ's penalty recommendation was the fact of Amoss's past violations. This was error because the ARCI Guidelines and the Commission's own rules required that he also consider mitigating circumstances. Because the ALJ did not, his penalty recommendation now should be rejected as unlawful and an abuse of discretion.

C. The ALJ's Recommended Penalty Is Not Remotely "Consistent" With the ARCI Guidelines

The ALJ's recommended penalty also should be rejected because it was founded on a false and illogical premise – *viz.*, that it somehow was "consistent with" the ARCI Guidelines. [Report and Recommendation at 15]

The ALJ's recommended penalty is not "consistent" with the ARCI Guidelines because, as indicated, it was imposed in blatant disregard of the Guideline's mandatory requirements that pharmacological effect and "mitigating circumstances" be considered.

The ALJ's premise was not logical because the proffered explanation consisted only of an observation that

> [t]he ARCI Uniform Guidelines' recommendation for a horse owner facing a third violation in a 365-day period in any jurisdiction related to a Class C violation is the loss of purse, minimum $5,000 fine, and horse placed on the veterinarian's list for 60 days and must pass examinations before being eligible to run again.

[Report and Recommendation at 15] But the logic of this observation is impenetrable, in that it fatuously equates a 60-day veterinarian's "watch list" with a 60-day license suspension. The two are not remotely comparable. *Cf. Barry v. Barchi*, 443 U.S. 55, 66 (1979) (recognizing that "the consequences to a [horse] trainer of even a temporary suspension can be severe").

For all the foregoing reasons, the ALJ's recommended penalty must be rejected.

SECOND OBJECTION

THE ALJ ERRED WHEN HE DENIED AMOSS'S MOTION TO DISMISS BECAUSE AGENCY PRECEDENT AND LEGISLATIVE HISTORY REQUIRE THAT THE METHOCARBAMOL THRESHOLD AMENDMENT BE APPLIED RETROACTIVELY

Amoss's Second Objection is addressed to the ALJ's October 10 Ruling. Amoss now urges that the ALJ erred when he denied his motion to dismiss the proceeding. That motion was predicated upon a showing that 71 IAC 8.5-1-4.2(16) (the "[redacted] Threshold Amendment") applies retroactively and that, consequently, the [redacted] "positive" charged in the case no longer violates the Commission's regulations.

The ALJ denied Amoss' motion to dismiss on grounds that, *inter alia*, there purportedly was an "open" or "unanswered question" as to the actual quantification of [redacted]

[October 10 Ruling at 2-3], and it either was "not clear" that the Commission intended the Amendment to apply retroactively [*id.* at 8] or the Commission purportedly "expressed [its] view that the rule only have prospective application[.]" [*Id.*]

In this OBJECTION we will demonstrate that the ALJ misconstrued the law on retroactivity analysis and ignored the relevant portions of the legislative record which govern determination of the issue. For these reasons, and for the additional reasons that follow, the Commission now should reject the ALJ's October 10 Ruling and grant Amoss's motion to dismiss the proceeding.

A. The ALJ Ignored the Purpose of the [redacted] Threshold Amendment and Misconstrued the Amendment's Legislative History

Amoss's motion to dismiss accurately explained that legislative purpose is the *sine qua non* of retroactivity analysis. [Memorandum of Law in support of Cross Motion to Dismiss, dated June10, 2014 (Docket – Vol. II, No. 57), at 19-24] That is, when determining whether an amendatory statute applies retroactively, a court must construe it to "effect the evident purpose for which it was enacted[.]" *Bourbon Mini-Mart, Inc. v. Gast Fuel & Servs., Inc*, 783 N.E.2d 253, 260 (Ind. 2003). *See also Groves v. Groves*, 704 N.E.2d 1072, 1076 (Ind. Ct. App. 1999) ("[w]hen interpreting a statute, we must ascertain the policies underlying the statute and the goals to be achieved so as to effect the same") (citation omitted); *Martin v. State*, 774 N.E.2d 43, 44 (Ind. 2002) ("remedial"[6] statutes will be applied retroactively to carry out their legislative purpose).

The ALJ's October 10 Ruling is entirely silent on the determinative issue of legislative purpose. The ALJ instead searched for evidence of the Commission's "intent" [October 10

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[6] An statute is "remedial" when it is "intended to cure a defect or mischief that existed in a prior statute," *Brown v. State*, 947 N.E.2d 486, 490 (Ind. Ct. App. 2011), or when it has been "enacted in response to case law," *id.*., or when it is a "particular type of law which are inherently remedial." *Id.*

Ruling at 8], and concluded that it was "not clear that the Commission desired the threshold rule to be applied retroactively." [*Id.*] *Cf. Kleaving, et al. v. Middlefork Watershed Conservancy District*, 508 N.E.2d 574 (Ind. Ct. App. 1987) ("[i]ndispensible to ascertaining the legislature's intent is a consideration of the goals sought to be achieved and the reasons and policy underlying a statute").

The ALJ next professed, however, that the Commission had in fact "expressed [the] view" that the amendments would "only have prospective application[.]" [October 10 Ruling at 8] He explained:

> [w]hen the new rule was adopted, Executive Director Joe Gorajec explained to the Commission that they would not apply to races run before the effective date of the rule and Commission Chairman William Diener directed staff to file the rules "as soon as practical" with the appropriate agency so that they would have an effective date on the day they were filed. The Commission's expressed view that the rule only have prospective application should be given great weight.

[*Id.* at 8] In fact, the Commission "expressed" no such "view", and the referenced Gorajec explanation does not support the ALJ's analysis and conclusion:

First, the issue of "effective date" adds little to retroactivity analysis, because *all* statutory amendments have an effective date – including every amendment that ever judicially has been examined to determine whether it should apply retroactively. This no doubt is why the courts have deemed the issue "meaningless" in this context. *See Ninth Avenue Remedial Group, et al. v. Fiberbond Corp., et al.*, 946 F. Supp. 651 (N.D. Ind. 1996) ("[m]ost of the case law supports the conclusion that the effective date clause is **meaningless** in interpreting the intent of Congress with regards to the [retroactive] application of [a] statute") (emphasis added); *Landsgraf v. USI Film Products*, 511 U.S. 244, 257 (1994) (statements concerning when a statute will become effective do not resolve issue of retroactivity).

Second, it simply is not true that the Commission "express[ly]" determined that the [redacted] Threshold Amendment would "only have prospective application[.]" [October 10 Ruling at 8] No citation to any portion of the legislative record is offered to support the naked pronouncement – and none exists.

It likewise is untrue that Executive Director Gorajec pronounced that the new amendments "would not apply to races run before the effective date of the rule[.]" [*Id.* at 8] What he said instead was that races *that had yet to be run* "would race" under "current regulations" until the effective date of the amendments. [4/30/14 IHRC Meeting, at 32] That way, he explained,

> Doctor Demaree can do her best to communicate to the horsemen and veterinarians when the shift is going to be because we agree that we don't want to put the horsemen in harm's way where they're operating in good faith with one set of rules, only to find out that they're being, another set of rules are [being enforced. ...

[*Id.*]

Executive Director Gorajec's comments add nothing to the instant retroactivity analysis because they contain no reference to races, like Amoss's, that already had been run and that now are pending on appeal. *Cf. McGill v. Muddy Fork of Silver Creek Watershed Conservancy District*, 370 N.E.2d 365 (Ind. Ct. App. 1977) (retroactive application of a statute means the statute "will be applied to all *cases pending* and subsequent to its effective date") (italics added). Gorajec's comments further have no logical application to a completed race that was "pending" on appeal, because it would be impossible to safeguard such horseman from the "harm's way" of a past event. Finally, and at best, Gorajec's comments evince a common-sense understanding that those of the Commission's amendments that create stricter standards could not legally be applied retroactively. *See, e.g.*, *Martin v. State*, 774 N.E.2d at 44 ("remedial statutes will be

applied retroactively to carry out their legislative purpose *unless* to do so violates a vested right") (italics added). The [redacted] amendment does not create stricter standards – it *eases* those standards. As such, application of the amendment would not "violate[ ] a vested right" and, therefore, there is no legal impediment to its retroactive application.

Third, the October 10 Ruling nowhere addresses Amoss's analysis of the agency record on the point – leaving that analysis entirely unchallenged.

In that regard, the agency record makes clear that the proposed threshold amendments were based on the most recent and "best" science;[7] they were intended to enhance the integrity of the sport;[8] and they were intended to ensure fairness toward the horsemen.[9] More specifically, IHRC Executive Director Gorajec articulated the intended purpose when he recommended enactment of the ameliorative threshold levels for specific therapeutic medications – including [redacted]:

> [i]f the Commission would choose not to adopt these rules, then on all these drugs, which we previously did not have thresholds for, we would not have any thresholds. [Concerns were expressed] about positive tests may be in small minute quantities. To the extent that a drug is on this list, and there is no threshold, then a **horseman runs the risk of having a positive called on him for a drug that has been demonstrated by the research of the RMTC and approved by the RCI not to have pharmacological effect on the horse.**
>
> [T]he horsemen as a whole have been clamoring for years for guidance in thresholds. And now, got guidance, and they got thresholds. …

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[7] *See* 3/5/14 IHRC Meeting at 84 ("the best available science is what the RMTC has proposed and the RCI has approved"); *id.* at 87 ("best science"); *id.* at 65 ("proposed amendments were "based on the most recent science").

[8] *See* 4/10/14 IHRC Meeting at 24, 26 (pronouncement that both the new and the previously adopted therapeutic medication threshold rules were promulgated to "enhance the integrity of racing in the state of Indiana").

[9] *See* 4/30/14 IHRC Meeting at 32 (purpose of threshold amendments was to eliminate the risk that horsemen would get "positive tests that need not be called positives").

The option of doing nothing is having the horsemen run the risk of getting **positive tests that need not be called positives**

[4/30/14 IHRC Meeting at 31-32 (emphasis added)]

The foregoing legislative history of the therapeutic medication threshold amendments is clear - and was not controverted by the ALJ. That history reveals a legislative purpose to implement the "best science" to "enhance integrity" and "ensure fairness" and eliminate the "risk of getting positive tests that need not be called positives." Purposes of this type unquestionably support a finding of retroactivity. *Brown*, 947 N.E.2d at 490 (statute may be applied retroactively when its purpose is to "cure a defect or mischief that existed in a prior state," or when it has been enacted in response to case law," or when it is a "particular type of law which are inherently remedial"). In this case, the "defect" was a statute that painted with too broad of a brush, in that it punished any level of therapeutic medications even though (i) the medications were administered for necessary therapeutic purposes, and (ii) science since has established that trace amounts of the medications have absolutely no performance-altering effect in the equine. In turn, the amendments were "enacted in response to" findings and recommendations of an advisory group whose objectives include, *inter alia*, safeguarding the health and safety of the equine. And the amendments are a "particular type of law which is inherently remedial" because they are predicated upon the "best" and "most recent" science. [3/5/14 IHRC Meeting at 65, 87] This nod to "the most recent science" marks the amendments as the type of law which is "inherently remedial" because it can be expected to require periodic revisions to conform with evolving developments in science. [*See supra*, at 5-6 (Executive Director Gorajec predicting future amendments to "Tramadol" penalty classification to "reflect the current science"); *infra* at 17 (same)]

Finally, failure to apply the threshold amendments retroactively would be illogical and would frustrate the stated purposes of the amendments. That this is so can be illustrated by altering and conflating Director Gorajec's statements, above-quoted: "**Basically what we're saying is that we are seeking sanctions regarding a drug that has been demonstrated by the research of the RMTC and approved by the RCI not to have pharmacological effect on the horse. We are pursuing sanctions for a positive test that need not be called positive.**" It would "strain[ ] logic" to conclude that is what the Commission intended. *Wooley v. Commissioner of Motor Vehicles*, 479 N.E.2d 58, 61 (Ind. Ct. App. 1988).

Fourth, the ALJ's refusal to apply the threshold amendments retroactively was inconsistent with and in direct conflict with other provisions of the Commission's statutory scheme – including, in particular, 71 IAC 8-1-7 ("Drug classification and penalties"). That statute expressly directs that,

> upon a finding of a violation of this rule, the judges shall consider the classification level of the violation **as currently established** by the Uniform Classification Guidelines of Foreign Substances and Recommended Penalties and Model Rule as revised by the ARCI in August 1996 **and any other subsequent revision effective after said date**, which are incorporated by reference herein, and impose penalties and disciplinary measures consistent with the recommendations contained therein. ...

71 IAC 8-1-7(a) (emphasis added).

Here, too, it "strains logic" to conclude that the ARCI and the Commission intended that outdated rules would apply to determine the *fact* of a violation, but that "currently established" Classification Guidelines simultaneously would govern determination of the *level* of such violation. The conclusion not only is illogical – it also would contravene settled principles of statutory construction and retroactivity analysis. *See Brown v. State*, 947 N.E.2d 486 (in determining whether a statutory provision should apply retroactively, courts "look to the act as a

whole and consider each section with reference to all the other sections ..."). The ALJ did not abide by this rule of statutory construction, nor did he abide by the settled principle of retroactivity analysis. Instead, he simply ignored them.

Fifth, the fact that the Commission enacted the [redacted] Threshold Amendment as an "emergency" rule reinforces the conclusion that it should be applied retroactively. *See Wooley*, 479 N.E.2d at 61 ("[o]ur view [that amendatory statute applied retroactively] is further bolstered by the emergency clause contained in the act. If the legislature intended to delay the practical operation of [the amendment] ... it would not appear that they would have attached the language of emergency"). This argument, too, was presented on Amoss's motion to dismiss [Memorandum of Law in Support of Amoss's Cross Motion to Dismiss, dated June 10, 2014 (Docket – Vol. II, No.57), at 23], but went unanswered by the Commission Staff and ignored by the ALJ.

In short, the remedial purposes of the [redacted] Threshold Amendment easily are gleaned from the legislative history of that amendment. The ALJ erred when he failed to consider that purpose and when he instead selectively parsed and misconstrued the legislative record. For these reasons, the October 10 Ruling factually and legally was flawed. The Commission therefore now should reject the October 10 Ruling and grant Amoss's motion to dismiss this case.

B. The ALJ Failed to Apply Agency Precedent Involving Retroactive Application of the Medication Amendments

Amoss's motion to dismiss also identified Commission precedent (the February 2014 "Tramadol Precedent") that conclusively established the necessity and appropriateness of retroactive application of the [redacted] Threshold Amendment. [Memorandum of Law in

Support of Amoss's Cross Motion to Dismiss, dated June 10, 2014 (Docket – Vol. II, No.57), at 23]

Precisely like this case, the Tramadol Precedent involved an infraction that preceded the recent medication amendments. Unlike this case, the Tramadol Precedent involved a Penalty Category "A" substance that is deemed to have the "highest potential to affect performance" and therefore carries a minimum penalty of one-year suspension.[10] Despite this, the Commission imposed a 15-day suspension. Executive Director Gorajec explained the rationale for departing from operative standards:

> Gorajec said that scientists have come to the conclusion that Tramadol has **little if any effect on a horse** and should not fall into a category that yields a one-year penalty. In an upcoming meeting, Racing Commissioner's International is *expected* to deal with Tramadol and lower it to a "B category" drug. Positives for "B category drugs normally yield 15-day suspensions.
>
> "The commission and the staff [have] done their due diligence reviewing the positive test and a determination was made that the current RCI classification on this particular drug **doesn't reflect the current science** which shows that the drug is better considered a penalty category B drug," he said. "And our penalty is consistent as a B drug."

[HarnessRacingUpdate.com, 2/7/14 at p. 2 (available at http://harnessracing update.com/restricted/pdf/hru/hru020714.pdf?CFID=92249922&CFTOKEN=21362692) (emphasis and italics added)]

Amoss presented the Tramadol Precedent in his motion to dismiss – both in his Opening and Reply memoranda. [Memorandum of Law in Support of Amoss's Cross Motion to Dismiss, dated June 10, 2014 (Docket – Vol. II, No.57), at 23; [Reply in Further Support of Amoss Cross Motion to Dismiss, dated 7/22/14 (Docket – Vol. II, No. 62), at 2-3]

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[10] In marked contrast, [redacted] is classified in Penalty Category "C" and the applicable penalty for a first violation is a fine with no suspension. Beyond that, and by reason of 71 IAC 8.5-1-4.2[redacted], the [redacted] methocarbamol "positive" charged in this case no longer is violative of the Commission's regulations.

The Commission Staff neither challenged nor attempted to distinguish the Tramadol Precedent; instead, it simply ignored it. Despite the Staff's deafening silence on the matter, the ALJ rejected the precedent as grounds for dismissal, reasoning that

> [t]he factual circumstances surrounding that case are not clear but if Amoss described the situation correctly, it is evident that the Commission reduced a penalty as the result of a new rule or change in policy.
>
> Reducing a penalty, however, is one matter but completely dismissing a case is another. Dismissal is the remedy which Amoss is seeking here and the Commission's decision on the Tramadol case is certainly not authority for disposing of this case before it is considered on the merits.

[October 10 Ruling at 8-9]

The ALJ's analysis of and refusal to apply the Tramadol Precedent in this case was wrong on the facts, on the law, and on the procedure. This is so for the following reasons:

First, the observation that the Commission "reduced a penalty as the result of a new rule" both begs the question and is factually incorrect. The observation begs the question, because the Tramadol positive *preceded* the Commission's rule changes. This being so, it represents a retroactive application of the amendments – precisely what Amoss urged on his motion. Beyond that, the ALJ's observation was factually incorrect, because ARCI *still* has not reduced Tramadol from a Category "A" Penalty Classification.

Second, the ALJ offers no authority to support his apparent belief that different retroactivity analyses apply to "penalty-mitigation" amendments (as in the case of Tramadol) versus "offense reclassification" amendments (as in the case of a 1 ng. concentration of methocarbamol). No such authority exists and, in fact, the law is exactly to the contrary. *See, e.g.*, *Blake v. Commonwealth*, No. 2010-CA-000987-MR, 2012 WL 410019 (Ky. Ct. App. Feb. 10, 2012)) (post-offense but pre-sentence amendment that **increased** the monetary **threshold** for offense of conviction, resulting in lowered reclassification of offense from felony to

misdemeanor status, applied retroactively); *Weissbuch v. Board of Medical Examiners*, 41 Cal. App.3d 924 (Cal. Ct. App. 1974) (during pendency of appeal from license revocation based upon marijuana possession conviction, legislature removed marijuana from narcotic drug classification; relying upon the statutory revision, the Court reversed the administrative revocation order, stating, "[s]ince [the] mitigating amendment was enacted prior to the Board's decision becoming final … petitioner is entitled to the benefit thereof …").

Third, because the Staff proffered no explanation for the Commission's inconsistent treatments of the Tramadol versus [redacted] rule changes, Amoss was entitled to judgment as a matter of law. This is so because an agency's unexplained departure from its own precedent renders its decision arbitrary and capricious and therefore reversible. *See* 2 Am. Jur.2d *Administrative Law*, § 530 ("What Constitutes an Arbitrary or Capricious Act") (whenever an administrative body fails to conform to prior precedent, policy or procedure without adequate explanation for the change, the resulting determination must be reversed on the law) (collecting cases); *accord Community Care Centers, Inc. v. Indiana Department of Public Welfare*, 523 N.E.2d 448 (Ind. Ct. App. 1988). It also is so because an agency's failure to articulate a compelling governmental interest in treating licensees disparately violates equal protection. *See Brown v. State*, 322 N.E.2d 708, 711 (Ind. 1975) (sustaining equal protection challenge where State failed to articulate a "compelling governmental interest" in denying retroactive effect to remedial statute which affected fundamental liberty interests).

Fourth, both parties submitted matters outside the pleadings – including portions of the legislative record for the amendatory threshold statutes, and Gorajec's extrajudicial admissions concerning the Tramadol Precedent. In the circumstances, the ALJ was required to treat

Amoss's motion as one for summary judgment, Indiana Trial Rule 12(B),[11] and he erred when, instead, he applied the more deferential standards that apply to a motion to dismiss for failure to state a claim. [October 10 Ruling at 2-3 (erroneously characterizing Amoss's motion to dismiss as "akin to an Indiana Trial Rule 12(B)(6) motion," and applying the wrong "test" for determining the motion)] *See Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind. 2003) ("[u]nlike a motion to dismiss for failure to state a claim upon which relief can be granted – which tests the legal sufficiency of a claim and not the facts supporting it – the purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law").

Fifth, it simply was not true that "[d]ismissal is the [only] remedy which Amoss [was] seeking here." [October 10 Ruling at 9] This is so because Amoss's motion expressly urged that, "[a]t a minimum, the [redacted] Threshold Amendment] ... supports mitigation of penalty." [Memorandum of Law in Support of Amoss's Cross Motion to Dismiss, dated June 10, 2014 (Docket – Vol. II, No.57), at 16] Consequently, the ALJ erred when he failed to consider *either* the Tramadol Precedent or the [redacted] Threshold Amendment in mitigation of penalty.

For these reasons, too, the ALJ's analysis was contrary to law and fact. The Commission therefore now should reject the October 10 Ruling and grant Amoss's motion to dismiss this case.

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[11] Indiana Trial Rule 12(B) provides:

> [i]f, on a motion, asserting the defense number (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. In such case, all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

THIRD OBJECTION

THE ALJ's DECISION TO DECIDE THE CASE BY WAY OF SUMMARY JUDGMENT CONTRAVENED DUE PROCESS, VIOLATED INDIANA'S "RESIDUUM RULE", AND WAS IMPERMISSIBLE UNDER THE INDIANA RULES OF RACING

Amoss's third objection is addressed to the Report and Recommendation, and it concerns the ALJ's improper summary disposition of the proceeding.

In that regard, Amoss opposed the Commission Staff's motion for summary judgment because it presented documents and hearsay[12] - and nothing more. Because Amoss objected to the hearsay evidence and summary procedure, any decision predicated solely on hearsay evidence would violate Amoss's due process rights, the common law and statutory "residuum rule" (I.C. § 4-21.5-3-26), and Article 10 of the Indiana Administrative Code (71 IAC 10-1-1 through 71 ISC 10-5-7). [*See* Amoss Memorandum of Law In Opposition to Commission Staff's Motion for Summary Judgment, dated June 10, 2014 (Docket – Vol. II, No. 57), POINT I at 2-6]

The ALJ did not address Amoss's particularized arguments, nor acknowledge any of the case law and statutory authority presented in support thereof. Instead, the ALJ endorsed the Staff's bid for summary disposition on grounds that

> [b]y law, disciplinary proceedings before the Commission are governed by the Administrative Orders and Procedures ACT ("AOPA"). IC 4-31-6-9. By challenging the summary judgment procedure itself, Amoss is essentially claiming that not only does he have a right to due process, the Commission rules entitle him to *more* due process than other civil litigants whose cases are governed by the rules of civil procedure, be they before an administrative body or a trial court. Amoss unquestionably has due process rights in defending the status of his license, *Barry v. Bachi* [sic], 433 U.S. 55 (1979). And Amoss is being afforded all the procedural safeguards to which any civil litigant is entitled. But to conclude that his due process rights are *enhanced* by 71 IAC 10 leads to an absurd

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[12] *See Indianapolis Newspapers, Inc. v. Fields*, 259 N.E.2d 651, 687 (Ind. 1970) ("[T]he law is plain. Admission of hearsay of this type [*e.g.*, affidavits] prevents cross-examination and confrontation. These elements are important to credible evidence. Under these principles mere affidavits are inadmissible") (*citing* Wigmore 3rd Ed., §§ 1709 & 1384).

result. The ALJ is not obliged to interpret the Commission's rules in such a manner and will not do so. ...

[Report and Recommendation at 4 (italics in original)]

Amoss's arguments on the point did not remotely resemble the ALJ's characterizations. His arguments instead were based upon, *inter alia*, United States Supreme Court precedent that squarely holds that a trainer's license may not be revoked or suspended without affording the opportunity to confront and cross examine live witnesses. Even more specifically, other case law holds that a summary judgment motion is not permitted in a license revocation proceeding:

A. The ALJ's Disposition by Summary Proceeding Violated Amoss's Due Process Rights

The United States Supreme Court squarely has held that horse trainers have a constitutionally protected property interest in their occupational licenses, *Barry v. Barchi*, 443 U.S. at 64, and that license revocation proceedings therefore must comport with due process. *Id.* The Supreme Court further has held that due process in revocation proceedings "requires the opportunity to confront and cross-examine adverse witnesses[,]" *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970), and that "written submissions are a wholly unsatisfactory basis for decision" in such proceedings. *Id. Accord Oriental Health Spa v. City of Fort Wayne*, 526 N.E.2d 1019, 1022 (Ind. App. 1988) ("[t]he order of an administrative tribunal must be based on evidence produced at the hearing where there is an opportunity for all interested parties to offer evidence, cross-examine witnesses, and argue their positions").

No surprisingly, courts in other horse racing jurisdictions scrupulously have followed this Supreme Court precedent. They consequently have held that a decision to revoke or suspend a thoroughbred trainer's license may not be based solely on documentary or other hearsay

evidence – precisely because to do so would violate due process. See *Hall v. Louisiana State Racing Commission*, 505 So.2d 744 (La. App. 4th Cir. 1987).

In *Hall*, a trainer was disciplined because traces of a prohibited drug were found in post-race specimens. No witnesses testified in the proceeding and the only evidence presented consisted of "hearsay document[s]", including chemists' reports. Because the totality of the evidence against Hall was documentary and hearsay, the *Hall* court upheld the remand to the Racing Commission for an appropriate due process hearing:

> By this holding we do not intend to imply that hearsay evidence is inadmissible, or that documentary evidence is incompetent in an administrative hearing. However, where a finding is based solely on this type of evidence and where an adverse party is not able to inquire into the very basis of that evidence, **both substantive and procedural due process is violated**. At the very least Hall should have had the opportunity to cross examine the only evidence used against him.

505 So.2d at 747 (emphasis added).

Miller v. Louisiana State Racing Commission, 508 So.2d 585 (La. App. 4th Cir. 1987), presented the precise same circumstance, *viz.*, "a Commission ruling based entirely on documentary hearsay evidence, the basis for which the adverse party [was] not able to inquire into." Id. at 586. After *en banc* consideration, the Court adhered to the reasoning and conclusion of *Hall*. Id. *See also LaBorde v. Louisiana State Racing Commission*, 506 So.2d 634 (La. App. 4th Cir. 1987) (remanding for rehearing based on the rule adopted in *Hall*); *Barkley v. Louisiana State Racing Commission*, 506 So.2d 580 (La. App. 4th Cir. 1987) (same); *Bourque v. Louisiana State Racing Commission*, 611 So.2d 742 (La. App. 4th Cir. 1992) (same). *See also In the Matter of Donald E. Strain v. Sarafan, et al.*, 57 A.D.2d 525 (1st Dept. 1977) ("the hearsay letter of [Director of NY Racing and Wagering Board's Drug Testing Program] Dr. George A. Maylin lacked substantial probative evidentiary value since it was admitted without any proper

foundation to show the nature of the tests and the procedures utilized in ascertaining that the horse's urine contained [a regulated substance]. ... A fair hearing also required that the petitioner be given the opportunity to cross-examine Dr. Maylin or an informed associate with regard to these critical matters") (citations omitted).

Remarkably, the ALJ neither discussed nor made any effort to distinguish the foregoing authority. This may owe to the fact that the Commission Staff urged the ALJ to disregard the precedent as "inapplicable case law from other jurisdictions[.]" [Commission Staff's Reply in Further Support of Motion for Summary Judgment, dated June 12, 2014 (Docket – Vol. II, No. 59), at 3] This, however, was invited error because the Staff's view was at odds with Indiana law. *See, e.g., Hatfield v. La Charmant Home Owners Ass'n*, 469 N.E.2d 1218, 1221 (Ind. Ct. App. 1984) ("when construing an Indiana statute for the first time, it is appropriate to look to the decisions of other states which interpret statutory language which is identical or of similar import") (*citing McKenna v. City of Ft. Wayne*, 429 N.E.2d 664 (Ind. Ct. App. 1981).[13]

B. The ALJ's Disposition by Summary Judgment Also Violated the Common Law and Statutory "Residuum Rule"

The rule adopted by the Louisiana Courts in *Hall* most recently was discussed in *Clark v. Louisiana State Racing Commission*, 104 So.3d 820 (La. App. 4th Cir. 2013), where the Court described the rule as an iteration of the common law "residuum rule." Id. at 831 (citing Ernest H. Schopler, Annotation, "Hearsay Evidence in Proceedings Before State Administrative

[13] It also bears mention that elsewhere in the case the Staff expressly urged the ALJ to apply precedent from other racing jurisdictions. [IHRC Staff's Brief(s) in Support of Request for Leave to Conduct Additional Testing (Docket – Vol. II, Nos. 26 & 29)] In that instance, the ALJ did so, and then chided Amoss for failing to "address or distinguish" that extra-jurisdictional precedent. [Order For Additional Testing, dated March 18, 2013 (Docket – Vol. II, No. 30), at 4]

Agencies," 36 A.L.R.3d 12, § 6 (1971)). The Court explained:

> [t]he residuum rule is that "hearsay evidence, at least when not objected to, may be used in administrative proceedings for limited purposes such as corroboration, but that such evidence cannot form the sole basis of the decision." ... Under this rule, "a court determining sufficiency of evidence (which is a question of law) must find some competent evidence to support an administrative decision and cannot affirm the decision solely on hearsay evidence." ...

Clark, 104 So.3d at 831 (citations omitted).

In Indiana the described common law "residuum rule" has been codified at IC 4-21.5-3-26. *Hinkle v. The Garrett-Keyser-Butler School District*, 567 N.E.2d 1173 (Ind. Ct. App. 1991) (noting that IC 4-21.5-3-26 is a "codification of the common law 'residuum rule'"). The Indiana Supreme Court has held that the rule applies to administrative proceedings. In *C.T.S. Corp. v. Schoulton*, 383 N.E.2d 293 (Ind. 1978).

In *Schoulton*, the Court considered whether an administrative agency's action may be premised on hearsay alone. The Court confirmed the applicability of the "residuum rule" – which, as indicated, permits receipt of hearsay in a proceeding but requires that there be a "residuum" of competent legal evidence to support the finding. The Court explained:

> [an administrative agency] can admit all hearsay evidence without fear of automatic reversal. If properly objected to at the hearing and preserved on review and not falling within a recognized exception to the Hearsay Rule, then an award may not be based solely upon such hearsay. But if not objected to, the hearsay (incompetent evidence) may form the basis for an award."

383 N.E.2d at 296.

The ALJ neither discussed nor made any effort to decide Amoss's "residuum rule" argument. This may be because he *sub silentio* adopted one or more of the Commission Staff's arguments on the motion, *viz.*, (i) the "residuum rule" purportedly applied only to "hearings" before an administrative law judge, and summary judgment proceedings purportedly are "not 'hearings'") [Staff's Reply in Further Support of Motion for Summary Judgment, dated June 24,

2014 (Docket – Vol. II., No. 59), at 2]; (ii) "multiple Indiana courts have addressed, without comment, administrative proceedings that were resolved by either partial or complete summary judgment by an administrative law judge")] [*id.*, at 3) (collecting cases)], and/or (iii) the documents submitted by the Staff in support of its summary judgment motion purportedly "fall within exceptions to the hearsay rule[.]" [*Id.* at 5 n.2 (citing Gorajec Aff., ¶ 16)]

Each of the foregoing Staff arguments were frivolous, however, because (a) the Staff expressly demanded a "hearing" on its summary judgment motion, and a hearing consequently was conducted [*see* Docket, Vol. III, Nos. 63-66]; (b) the absence of "comment" in the Staff's featured authority signals – at most - only that the issue was not raised in the case nor otherwise preserved for appellate review (and/or that the parties may have consented to summary disposition); and (c) the Commission is not in the "business" of chemical analysis, and the chemist's reports the Staff presented on its case were prepared in contemplation of litigation; this being so, the Commission Staff's evidence did not fall within any cognizable exception to the hearsay rule – be it "business" or "public" records exceptions or otherwise.

By reason of the foregoing, the ALJ's Report and Recommendation now must be rejected because Amoss preserved his objection to the Staff's hearsay evidence and to disposition by summary proceeding, and the summary proceeding therefore violated Indiana's common law and statutory "residuum rule" (IC-4-21.5-3-26).

C. The ALJ Erroneously Concluded That the AOPA Trumps Supreme Court Precedent, the Due Process Clause, and Article 10 of the Commission's Own Rules

In addition to ignoring Amoss's particularized objections to summary disposition of the proceeding, the ALJ also ascribed an imagined objection to Amoss [Report and Recommendation at 4 ("to conclude that [Amoss's" due process rights are Ienhanced by 71 IAC 10 leads to an absurd result")], and then rejected the straw argument on grounds that

"disciplinary proceedings before the Commission are governed by the Administrative Orders and Procedures Act ("AOPA"). [*Id.*] Beyond the fact that Amoss never made the argument the ALJ ascribed to him, the rationale behind the ALJ's ruling is flawed in at least three respects.

First, Amoss's entitlement to full due process protections – including the rights to confront and cross-examine witnesses – is not, in the first instance, a matter of statutory grace. Rather, the Supreme Court has made clear that this entitlement flows from the constitutionally protected property interest Amoss holds in his occupational trainer's license. *Barry v. Barchi*, 443 U.S. 55. In other words, it is that property interest which "*enhance[s]*" Amoss's due process rights and which distinguishes him from other hypothetical "civil litigant[s]." [Report & Recommendation, at 4]

Second, by its express terms the AOPA "creates *minimum* procedural rights and imposes *minimum* procedural duties." IC 4-21.5-2-1 (italics added). But, per the express holding in *Barchi*, "minimum" procedural rights and duties do not suffice in proceedings to revoke or suspend a thoroughbred trainer's license. 443 U.S. at 64.

Third, because the Commission promulgated express rules that define due process protections and procedures involving racing disciplinary actions, 71 IAC 10-1-1, *et seq.*, the ALJ was not entitled to disregard those specific rules in deference to the AOPA's more general provisions. The ALJ's duty was, instead, to harmonize the provisions. *See Mendenhall v. Skinner & Broadbent Co., Inc.*, 728 N.E.2d 140, 142 (Ind. 2000) (when interpreting statutes, courts must consider the statutory scheme as a whole and *may not construe terms in such a way as to render other provisions meaningless* unless no other interpretation is possible) (italics added); *Brown v. State*, 947 N.E.2d at 492 (rules of statutory interpretation include requirement that courts "look to the act as a whole and consider each section with reference to all the other

sections"). Here, the ALJ did precisely what *Mendenhall* tells he may not – the ALJ "construed [IC 4-31-6-9] in such a way as to render [71 IAC 10] meaningless[.]" 728 N.E.2d at 142.

In short, the AOPA clearly does not trump Supreme Court precedent, the Due Process Clause, or the Commission's Article 10 due process rules. The ALJ erred when he found otherwise. For this reason, too, the Report and Recommendation now must be rejected.

CONCLUSION

Respondent Thomas Amoss asks that Administrative Law Judge's October 10 Ruling and Report and Recommendations be rejected, and that his cross-motion to dismiss the proceeding be granted.

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Respectfully submitted,

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