Agenda Item #2.3

(Broken Into 3 Sections)

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

FILED

OCT 10 2014

SPECIAL SERVICES
ALJ

INDIANA HORSE RACING
COMMISSION STAFF,

Petitioner,

v.

THOMAS MURRAY AMOSS,

Respondent

In Re: Preliminary Report
(Administrative Complaint)
212001

RULING ON AMOSS'S MOTION TO DISMISS

Amoss's argument

When [redacted] finished [redacted] in a race at Hoosier Park on [redacted] 2011, an equine could not compete with any [redacted] in its system. During the pendency of this case, the Indiana Horse Racing Commission ("HRC") amended its rules to establish a "threshold" level for different enumerated substances including [redacted] Since May 2014, a horse could have [redacted] in its system while it was racing provided the amount of the substance did "[n]ot . . . exceed one (1) nanogram per milliliter of [redacted] in serum or plasma." 71 IAC 8.5-1-4.2[redacted]

Based on the change in the rules, Amoss claims that the disciplinary proceedings pending against him should be dismissed because

if [redacted] had any [redacted] in his system it was an amount no more than [redacted] in serum or plasma. He submits that the new rule is ameliorative, curative and/or remedial. For that reason it should be applied retroactively and the case should be dismissed.

The amount of [redacted]

Amoss takes the position that the legal foundation underlying the case against him has shifted. But whether that shift is of benefit to Amoss depends on the quantity of [redacted] in [redacted]'s system on race day. In its response to request for admissions, the Commission stated: "The Commission admits that the testing conducted by HFL laboratories in [redacted], approximately one year and eight (8) months after the race at issue was run and the blood was drawn, quantified the 'estimated' level of [redacted] in the serum at [redacted]." Response to Request for Admission No. 16. But in further responses to request for admissions the Commission stated that "[w]hile there is no way to know what the actual quantification of [redacted] would have been had the testing of the serum been performed . . . in February 2012, it is reasonable to assume that it would have been something in excess of [redacted]." Response to Request for Admission No. 17. The Commission's statement about the effects of the passage of time is only speculation and it may, or may not, be well grounded in science. But it raises a legitimate, *unanswered* question.

Although not denominated as such, the motion to dismiss is akin to an Indiana Trial Rule 12(B)(6) motion. Because of the new threshold rule, Amoss claims that the Commission's case against him is legally insufficient. One underlying component of that argument, the retroactive application of the rules, is legal in nature and will be discussed later. But the other element of the argument is based on an undetermined fact, that being *how much* [redacted] was in [redacted] system on October 21, 2011. The test for whether a dismissal is appropriate is when "[v]iewing the complaint in the light most favorable to the non-moving party, we must determine whether the complaint states *any facts* on which the trial court could have granted relief." *Allen v. Clarian Health Partners, Inc.*, 980 N.E.2d 306, 308 (Ind. 2012)(emphasis added). In this case, even if the rule change is applied retroactively, there is still an open question as to how much [redacted] was in [redacted] system on race day and that is a fact on which the Commission may be entitled to relief.

Interpretation of the threshold rules

"In construing an administrative rule, we use the same principles employed to construe statutes." *Indiana Department of Environmental Management v. Schnippel Construction, Inc.*, 778 N.E.2d 407, 415 (Ind. Ct. App. 2002). "Without strong and compelling reasons, statutes and statutory amendments will not be applied retroactively." *Clark County v. Indiana Department of Local Government Finance*, 12 N.E.3d 1000, 1005 (Ind. Tax Ct. 2014). "There is an exception to this general rule for remedial statutes,

that is, statutes intended to cure a defect or mischief that existed in a prior statute." A remedial statute "*may* be made to operate retroactively". *State v. Pelley*, 828 N.E.2d 915, 919 (Ind. 2005).

Basis for retroactive application

The doctrine of amelioration

The doctrine of amelioration is a component of criminal law.

> Generally speaking, the sentencing statutes in effect at the time the defendant committed the offense govern the defendant's sentence. *Barber v. State*, 863 N.E.2d 1199, 1209 (Ind. Ct. App. 2007). However, the doctrine of amelioration provides an exception to this general rule where a defendant who is sentenced after the effective date of a statute providing for more lenient sentencing is entitled to be sentenced pursuant to the statute rather than the sentencing statute in effect at the time of the commission or conviction of the crime.

*Marley v. State, No. 15A01-1403-CR-R7, 2014 WL4472750, *3* (Ind. Ct. App. Sept. 11, 2014)

Amoss submits that although the doctrine of amelioration concerns sentencing and is therefore a creature of criminal law, it is a "principle" which may be applied in a civil matter. Amoss's argument, however, does not a have a strong foundation in Indiana law

Amoss refers the ALJ to the case of *Indiana Department of Environmental Management v. Medical Disposal Services, Inc.*, 700 N.E.2d

500 (Ind.Ct.App.1998), *rev'd and vacated by, IDEM v. MDSI*, 729 N.E.2d 577 (Ind.2000) where the Court of Appeals applied the doctrine of amelioration in a civil proceeding. The *Medical Disposal* case has a long history but essentially the Indiana Department of Environmental Management ("IDEM") was seeking to sanction the operator of a medical waste transfer facility and during the pendency of the action against the operator the General Assembly passed legislation "legalizing" the activity that the operator was undertaking. The Court of Appeals held that IDEM could not sanction the operator because the statutory change was "ameliorative" and should be applied retroactively. But our Supreme Court *vacated* that decision and observed that the lower court likened the action of the General Assembly "to a change in criminal penal statutes justifying the use of the doctrine of amelioration." *Indiana Department of Environmental Management v. Medical Disposal Services, Inc.*, 729 N.E.2d 577, 581, n. 8 (Ind. 2000). The Court went on to hold that,

> The legislature's subsequent legalization of MDSI's activities . . . did not relieve MDSI of the obligation it faced at the time. As a general rule, the law in place at the time an action is commenced governs.

Medical Disposal at pg. 581.

Regardless of the language quoted above, Amoss submits that civil cases decided after *Medical Disposal* have borrowed the "principle" of amelioration. But in both of those cases the courts held that the doctrine

did not "strictly apply". *Renfro v. State,* 743 N.E.2d 299, 301 (Ind.Ct.App.2001); *Cotton v. Ellsworth,* 788 N.E.2d 867, 871 (Ind.Ct.App.2003). And in the case of *Winbush v. State*, 776 N.E.2d 1219, 1226 (Ind.Ct.App.2002) the court declined to "expand its application until authorized by our Supreme Court." As Amoss points out, *Winbush* was a criminal matter but the court's reluctance to expand a principle without direction from the Supreme Court is very significant.

The decisions from the court of appeals cited above do not provide an adequate legal foundation for applying the doctrine of amelioration in an administrative proceeding. To the contrary, the ruling from Indiana's highest court disapproves of its use in civil cases. The ALJ, therefore, will not apply the doctrine of amelioration to this litigation.

Curative statutes

As the name implies a curative statute is legislation adopted to cure a defect in exiting law. It is a principle, however, that has a very narrow scope.

> A curative act is a statute passed to cure defects in prior law, or to validate legal proceedings, instruments, or acts of public and private administrative authorities. In the absence of such an act the statute would be void for want of conformity with existing legal requirements . . .

2 *Norman J. Singer, Statutes and Statutory Construction*, § 41.11, at 466-67 (6th ed.2001).

Amoss argues that the language from *Singer* quoted above is not in sync with long standing legal doctrine or even in previous editions of that treatise. The specific language however, has been cited as authority by our Supreme Court in *State ex rel. The Attorney General v. Lake Superior Court*, 820 N.E.2d 1240, 1252 (Ind. 2005). One could argue the merits of the older rule concerning methocarbamol but it was certainly not void. The ALJ will not ignore clear direction from the Supreme Court and concludes that the May 2014 amendments cannot be seen as a curative act.

Remedial statutes

Remedial statutes are legislative enactments that *may* be applied retroactively.

> The general rule of statutory construction is that unless there are strong and compelling reasons, statutes will not be applied retroactively . . . Statutes are to be given prospective effect only, unless the legislature unequivocally and unambiguously intended retrospective effect as well.. . . . There is an exception to this general rule for remedial statutes, that is, statutes intended to cure a defect or mischief that existed in a prior statute.

Pelley at pg. 919..

But "even if a statute is remedial, we must also have 'strong and compelling reasons' to read a remedial statute retroactively, and, absent a clear legislative intent to the contrary, the general rule is that laws apply prospectively." *Brown v. State*, 947 N.E.2d 486, 491 (Ind. Ct. App. 2011).

It is apparent that the rule applicable to these circumstances has changed. But the fact that the government has "reversed course" does not mean that the prior law was defective and that the new law must be applied retroactively. *Brown* at 491. In addition, it is not clear that the Commission desired the threshold rule to be applied retroactively. When 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. "[W]hen the meaning of an administrative regulation is in question we give great weight to the interpretation put in place by the relevant agency – unless that interpretation would be inconsistent with the regulation itself." *Natural Resources Defense Council v. Poet Biorefining, et al.*, 15 N.E.3d 555,564 (Ind. 2014).

In support of his assertion that the Commission intended to apply the threshold rule retroactively, Amoss claims that the Commission has already done so in a case involving a horse with Tramadol in its system. According to Amoss the Commission imposed a more lenient penalty that was authorized by the threshold rule which had yet to go into effect as opposed to the more onerous penalty mandated by the rule as written at the time the matter actually appeared before the Commission. The factual

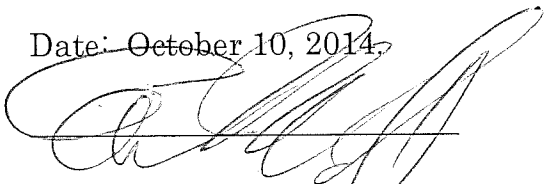
circumstances surrounding that case are not clear but if Amoss described the situation correctly, it is evident that the Commission reduced a penalty as the result of a new rule or a change in policy.

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.

ORDER

Based on the foregoing, Amoss's Motion to Dismiss is **DENIED.**

Date: ~~October~~ 10, 2014



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

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INDIANA HORSE RACING
COMMISSION STAFF,

OCT 10 2014
SPECIAL SERVICES
ALJ

Petitioner,

In Re: Preliminary Report
(Administrative Complaint)
212001

v.

THOMAS MURRAY AMOSS,

Respondent

NOTICE OF SUMMARY JUDGMENT HEARING

The Commission filed a Motion for Summary Judgment and Amoss responded thereto. Within 10 days of Amoss's last responsive pleading the Commission requested that the matter be set for a hearing. Amoss then filed a motion to quash the request for a hearing.

The Administrative Orders and Procedures Act provides that

> (a) A party may, at any time after a matter is assigned to an administrative law judge, move for a summary judgment in the party's favor as to all or any part of the issues in a proceeding.
>
> (b) Except as otherwise provided in this section, *an administrative law judge shall consider a motion filed under subsection (a) as would a court that is considering a motion for*

summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure.

Ind. Code § 4-21.5-3-23 (emphasis added).

Indiana Rules of Trial Procedure 56(C) states that "[u]pon motion of a party made no later than ten (10) days after the response was filed or was due, the court *shall* conduct a hearing on the motion which shall be held not less than ten (10) days after the time for filing the response." (emphasis added). See *Logan v. Royer*, 488 N.E.2d 1157, 1159, n. 6 (Ind.Ct.App.2006)

ORDER

For the foregoing reasons, the ALJ will set the Commission's Motion for Summary Judgment for a hearing on October 30, 2014 at 2:00 pm. The Hearing will take place at the ALJ's office and parties may participate by phone.

Date: October 10, 2014.

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