State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: March 12, 2026 CV-25-0283

In the Matter of TODD A. PLETCHER,
Petitioner,
v MEMORANDUM AND JUDGMENT

NEW YORK STATE GAMING COMMISSION,
Respondent.

Calendar Date: January 6, 2026

Before: Garry, P.J., Reynolds Fitzgerald, McShan, Powers and Mackey, JJ.

Andrew J. Mollica, Garden City, for petitioner.

Letitia James, *Attorney General*, Albany (*Jonathan D. Hitsous* of counsel), for respondent.

McShan, J.

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Schenectady County) to review a determination of respondent, among other things, suspending petitioner's license to participate in thoroughbred racing for 14 days.

Capensis, a thoroughbred racehorse trained by petitioner, placed sixth in the tenth race at Saratoga Race Course on July 30, 2022. A postrace blood sample taken from the horse was sent to the New York State Drug Testing and Research Program and tested positive for phenylbutazone (hereinafter bute), a legal substance permitted below the

specified concentrated threshold of 0.3 mcg/ml in plasma (*see* 9 NYCRR 4043.3 [a] [26]). The sample contained 1.56 mcg/ml. Petitioner sought testing of a split-sample, which was sent to the Kenneth L. Maddy Equine Analytical Chemistry Laboratory in California. The results of that testing confirmed the presence of bute at 1.8 mcg/ml.

Based upon the overage, respondent, through the state steward, issued a notice to petitioner suspending him from participating in thoroughbred racing for 14 days and imposed a fine of $2,000. Petitioner filed an appeal and a hearing was held. The Hearing Officer thereafter determined that petitioner violated the equine drug threshold rule and recommended that petitioner's license to participate in thoroughbred racing be suspended for 14 days, that he be fined $2,000 and that Capensis be disqualified from the race that precipitated the postrace testing. Respondent adopted the Hearing Officer's findings of fact and conclusions of law and affirmed the decision. Petitioner then commenced this CPLR article 78 proceeding challenging respondent's determination and the enhanced penalty, which proceeding has been transferred to this Court pursuant to CPLR 7804 (g).

Petitioner argues that respondent did not meet its burden to demonstrate a violation of the restrictions on bute concentration in Capensis. Petitioner specifically contends that respondent failed to introduce competent evidence establishing the reliability of the testing that was conducted on the postrace samples that purportedly demonstrated the presence and concentration of bute. Particularly, petitioner challenges the admission and reliance on a letter signed by, among others, George Maylin, the Director of the New York State Drug Testing and Research Program, providing the result of testing from the postrace sample. The objection lodged by petitioner's counsel to the letter was that it could not be properly admitted through Scott Palmer, the medical director for respondent, as he had not reviewed the testing data and was not involved in the testing process. Similarly, in objecting to the letter received by respondent concerning the split-sample testing from the California laboratory, counsel raised the same objection and noted that Palmer "probably [did not] have any questions about the underlying testing data." Initially, we agree with respondent that petitioner's objections were insufficient to preserve petitioner's challenge to the validity of the scientific testing that was performed since he did not assail the chain of custody or methodology employed in either test (*see Matter of Monje v Geoghegan*, 108 AD3d 957, 957-958 [3d Dept 2013]; *Matter of Ortiz v Fischer*, 64 AD3d 1111, 1112 [3d Dept 2009]).[1] However, although we find that a

[1] Although petitioner did not expressly challenge the scientific methodology of the testing, he did not concede the findings of the tests during the hearing and objected to

direct challenge to the scientific methodology of the testing is unpreserved, the admission and reliance on those letters raises concerns regarding the fundamental fairness of the hearing, which underpins the substance of petitioner's appeal.

To be sure, in most instances, "hearsay evidence can be the basis of an administrative determination and, if sufficiently probative, it alone may constitute substantial evidence" (*Matter of 670 Riv. Realty Corp. v New York State Div. of Hous. & Community Renewal*, 242 AD3d 543, 544 [1st Dept 2025] [internal quotation marks, brackets and citation omitted]; *see Matter of ExceedLLC, LLC v Department of State Div. of Licensing Servs.*, 233 AD3d 1392, 1394 [3d Dept 2024]). However, "[a] court reviewing the substantiality of the evidence upon which an administrative agency has acted exercises a genuine judicial function and does not confirm a determination simply because it was made by such an agency" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]; *see Matter of Diotte v Fahey*, 97 AD2d 653, 653 [3d Dept 1983]). The question is whether such proof is sufficiently relevant and probative so as to constitute substantial evidence on its own (*see People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]; *Matter of Sleiman v New York State Cent. Register of Child Abuse & Maltreatment*, 193 AD3d 1323, 1323 [4th Dept 2021], *lv denied* 38 NY3d 905 [2022]; *Matter of Kordasiewicz v Erie County Dept. of Social Servs.*, 119 AD3d 1425, 1426 [4th Dept 2014]; *Matter of Saporito v Carrion*, 66 AD3d 912, 912-913 [2d Dept 2009]), akin to "the standard of sufficiency such as to require a court to submit it as a question of fact to a jury" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d at 181). Thus, we must account for the nature of the hearsay proof offered in assessing whether an administrative hearing was inherently fair (*see Matter of Tufariello v Barry*, 60 AD2d 813, 814 [1st Dept 1978]; *Matter of Strain v Sarafan*, 57 AD2d 525, 525 [1st Dept 1977]; *see also Matter of Fusco v New York State Racing & Wagering Bd.*, 88 AD3d 1240, 1243 [3d Dept 2011], *lv denied* 18 NY3d 809 [2012]; *Matter of Shuman v New York State Racing & Wagering Bd.*, 40 AD3d 385, 388 [1st Dept 2007]).

On that, it is of particular note that the sole proof relied upon by respondent to establish that the bute concentration from postrace samples exceeded the permissible limit were the letters from the New York and California laboratories. The letter from the

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respondent's proposed stipulations to that effect (*compare Matter of Guarino v New York State Racing & Wagering Bd.*, 45 AD3d 1096, 1097 [3d Dept 2007], *lv denied* 10 NY3d 730 [2008]; *Matter of Zito v New York State Racing & Wagering Bd.*, 300 AD2d 805, 807 [3d Dept 2002], *lv denied* 100 NY2d 502 [2003]). However, petitioner conceded that he was not challenging the chain of custody of the postrace samples from Capensis.

New York laboratory indicated the overage in bute concentration but did not provide for the method of testing, and although the method of testing was provided in the letter from the California laboratory, neither letter gave any indication as to the reliability or general acceptance of the tests utilized to ascertain the presence and concentration of bute in the postrace samples (*see Matter of Brown v Murphy*, 43 AD2d 524, 525 [1st Dept 1973]; *compare Matter of Dutrow v New York State Racing & Wagering Bd.*, 97 AD3d 1034, 1036 [3d Dept 2012], *appeal dismissed* 19 NY3d 1064 [2012]; *Matter of Fusco v New York State Racing & Wagering Bd.*, 88 AD3d at 1242; *Matter of Czermann v New York State Racing & Wagering Bd.*, 68 AD3d 1580, 1581 [3d Dept 2009], *lv denied* 14 NY3d 709 [2010]; *Matter of Laterza v New York State Racing & Wagering Bd.*, 68 AD3d 1509, 1510 [3d Dept 2009]; *Matter of Case v New York State Racing & Wagering Bd.*, 61 AD3d 1313, 1314 [3d Dept 2009], *lv denied* 13 NY3d 705 [2009]; *see also Matter of Dutrow v New York State Racing & Wagering Bd.*, 18 AD3d 947, 947 [3d Dept 2005]).[2] The Hearing Officer noted that petitioner could call Maylin if he intended to challenge the testing results, however, the burden lies with respondent to "make an initial showing that a properly conducted test resulted in a positive finding of a prohibited substance" (*Matter of Case v New York State Racing & Wagering Bd.*, 61 AD3d at 1314; *see Matter of Mosher v New York State Racing & Wagering Bd.*, 74 NY2d 688, 690 [1989]). Thus, relying solely on the hearsay proof in this case to establish the rule violation rendered the hearing fundamentally unfair under the circumstances presented and persuades us to remand the matter for a new hearing (*see Matter of Riverton Funeral Home v Whalen*, 63 AD2d 887, 888 [1st Dept 1978]; *Matter of Tufariello v Barry*, 60 AD2d at 814; *Matter of Strain v Sarafan*, 57 AD2d at 525; *Matter of Brown v Murphy*, 43 AD2d at 525; *Matter of Erdman v Ingraham*, 28 AD2d 5, 8-9 [1st Dept 1967]; *compare Matter of Warner v New York State Racing & Wagering Bd.*, 99 AD2d 680, 681 [4th Dept 1984]).

Petitioner also argues that respondent's determination must be annulled and vacated because it convicts and punishes him for violating a rule that was not adopted pursuant to the rulemaking and notice requirements of the State Administrative Procedure Act owing to its failure to submit a notice of adoption for publication in the State Register

[2] Although, in the context of this administrative proceeding, the records in question were not required to be accompanied by testimony (*see generally* State Administrative Procedure Act § 306), a proper foundation must still be laid to establish that the records were sufficiently reliable and probative. Hence, in the absence of any explanation on the reliability of the testing process utilized in New York or California and the acceptance of those processes in the scientific community, the foundation of the stated results in both letters was lacking.

(*see* State Administrative Procedure Act § 202 [5]). However, in his petition, petitioner's State Administrative Procedure Act argument is directed at the lack of a public hearing. Accordingly, the argument he now raises is not properly before us (*see Matter of Independent Health Assn. v New York State Dept. of Social Servs.*, 210 AD2d 638, 641 [3d Dept 1994], *lv denied* 87 NY2d 803 [1995]; *Matter of R.W. Granger & Sons v State of N.Y. Facilities Dev. Corp.*, 207 AD2d 596, 598 [3d Dept 1994]).

In light of our determination, petitioner's arguments pertaining to the Hearing Officer demonstrating bias at the hearing, the need for an adverse inference and the discipline imposed are rendered academic.

Garry, P.J., Reynolds Fitzgerald, Powers and Mackey, JJ., concur.

ADJUDGED that the determination is annulled, without costs, petition granted in part, and matter remitted to respondent for a new hearing.

ENTER:

Robert D. Mayberger
Clerk of the Court