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FILE NO. S-405

HORSE RACING:
Licensee Qualifications
Applicability to Corporate Officers

Honorable Alexander MacArthur
Chairman
Illinois Racing Board
Room 1000
State of Illinois Building
160 North La Salle Street
Chicago, Illinois 60601

Dear Chairman MacArthur:

We have received your letter of December 20, 1971 in which you inquire as follows:

1. As indictments are now pending against some of the officials and major stockholders in a Harness Racing Association licensed by the Illinois State Racing Board, is it mandatory that the Board hold hearings toward the revocation of the license of the Association whose officials are under indictment immediately?

   This would mean, in effect, holding hearings to revoke the licenses during the running of a Harness Racing Meet which is in process and which has been duly licensed for the 1971-72 season at a time when there is no reasonable way to substitute another racing association for the association whose officials are under indictment.

2. Looking in to the 1972-73 racing season, if the indictments against the officials of a Harness Racing Association are still pending or the charges against the racing associations are not resolved at the time of the issuance of licenses for the 1972-3 season (for which dates have been allotted) may the Board issue the license for allotted dates or must the Board refuse to license an association whose officials have pending criminal charges against them?

This question involves not only the mandatory and discretionary powers of the Board; but, in essence, asks your opinion of the constitutionality of Section 8(e) of the Illinois Harness Racing Act.

In answer to your inquiry please be advised as follows:

Section 8 of the Illinois Harness Racing Act reads, in pertinent part:

> No licenses may be granted to conduct a harness racing meet; . . . (e) *** To any person that has been convicted of the violation of any law of the United States or any State Law, which law provided, as all or part of its penalty, imprisonment in any penal institution; to any person against whom there is pending any state of federal criminal charge; to any person who is or has been connected with or engaged in the operation of any illegal business; to any person who does not enjoy a general reputation in his community of being an honest, upright, law abiding person;

(Illinois Revised Statutes 1971, Ch. 8, Sec. 37s.7).

Section 13 of the Illinois Harness Racing Act reads:

> The Board may revoke any license issued by it if the licensee violates any condition of the license, violates any of the provisions of any rule or regulation promulgated by the Board pursuant to any of the provisions of this Act, or if the licensee, or

> its officers or directors as the case may be, knowingly permits the conduct of lotteries, pool selling, bookmaking or any other kind of gambling in violation of law on the grounds or within the enclosure at which the harness racing meet is being conducted.

(Illinois Revised Statutes 1971, Ch. 8, Sec. 37s.12).

In cases of revocation of license the Illinois Harness Racing Act requires that the licensee be notified of the proposed revocation and be given an administrative hearing with an opportunity to be heard. (Illinois Revised Statutes 1971, Ch. 8, Sec. 37s.13).

The questions you raise involve both the granting of a license and the revocation of an existing license.

I.

The threshold issue is one of the constitutionality of section 8(e) of the Illinois Harness Racing Act, i.e., whether it is constitutional to deny or revoke a license because applicant or licensee is subject to a pending state or federal criminal charge.

It is well established that the Attorney General must presume all statutes to be constitutional until a court rules to the contrary. See 1929 Op. Atty. Gen. 250; 1929 Op. Atty. Gen. 496; 1929 Op. Atty. Gen. 591; 1932 Op. Atty. Gen. 528; 1962 Op. Atty. Gen. 228, 231.

The same presumption of constitutionality which the Attorney General must accept is binding upon administrative agencies such

as the Illinois Racing Board.

Administrative bodies are required to find the source of their authority in the statute conferring that authority upon them and may only exercise the power with which they are invested in conformity with the statute. See 1968 Op. Atty. Gen. 133, 134. It is the official view of the Attorney General of the United States that it would be improper for an administrative agency to question the validity of the statute creating and defining its power unless the statute itself contained a specific provision authorizing the agency to decide constitutional questions. Op. U.S. Atty. Gen. 252, 253-55 (1935). There is no such statute authorizing the Racing Board to decide such constitutional questions. Moreover if such a statute existed, it would present serious problems. The deciding of constitutional questions is a judicial function. See Rosemont Building Supply v. Highway Trust Authority, 45 Ill.2d 243, 249 (1970); People v. Bruner, 343 Ill. 146 (1931). See also Illinois Constitution of 1970, Art VI, Sec. 5; Illinois Constitution of 1970, Art VI, Sec. 4(c). An administrative agency cannot exercise judicial functions. See Midland Trail Bus Line Co. v. Staunton-Livingston Motor Transport Co., 336 Ill. 616 (1929); People v. Peoria and P.U. Ry Co., 273 Ill. 440 (1916).

The prevailing case law seems clear in its rulings that constitutional questions cannot be decided by administrative agencies. In Bright v. City of Evanston, 10 Ill. 2d 178 (1956), the

Court held that a person challenging the constitutionality of a zoning ordinance in its entirety need not first make his challenge before the administrative agency but may go directly to court. The Bright opinion has been consistently followed in a number of cases. These decisions were analyzed in People v. Village of Maywood, 22 Ill. App. 2d 283, 289-90 (1959), where the Court stated:

> The reason underlying these holdings is that the board of appeals has no power to pass on constitutional questions should a constitutional question be involved and the courts under the constitution have such right.

Other jurisdictions reach the same result; thus in Panitz v. District of Columbia, 112 F.2d 39, 41, 42 (D.C. Cir. 1940), Judge (later Chief Justice) Vinson declared:

> Decision as to the authority of the assessor requires consideration of two questions. The first - Did the assessor, as an administrative official, have inherent power to rule on constitutional objections to the tax? It has been said that the necessities of our system require the judiciary to determine the constitutionality of Acts of the legislature. There can be little doubt that it represents the highest exercise of judicial power, and one that even the judiciary is reluctant to exercise. Interruption of the machinery of government necessarily attendant on this function not only cautions the judiciary but argues as well against its exercise by other agencies. It is this consideration for the orderly, efficient functioning of the processes of government which makes it impossible to recognize in administrative officers any inherent power to nullify legislative enactments because of personal belief that they contravene the constitution. Thus it is held that ministerial officers cannot question

> the constitutionality of the statute under which they operate. Likewise, it has been held that an administrative agency invested with discretion has no jurisdiction to entertain constitutional questions where no provision has been made therefor. In respect to taxation it is frequently stated that one need not pursue his administrative remedy where the tax is void. Here again is apparent a reluctance to invest non-judicial agencies with jurisdiction to rule on the validity of statutes.
>
> From the above we think it clear that the assessor had no inherent authority to consider constitutional objection to the Tax.

See also Buder v. First Nat. Bk., 16 F.2d 990, 993 (8th Cir. 1927), cert den. 274 U.S. 743; Simpson v. La Prade, 248 F.Supp. 399, 401 (W.D. Va. 1965); Schwartz v. Essex County, 129 N.J.L. 129, 28 A.2d 482 (1942); and East Ohio Gas Co. v. Public Utilities Commission, 137 Ohio St. 225, 28 N.E.2d 599,606 (1940) in which the Ohio Supreme Court said: "It was the manifest duty of the commission to proceed under and in accordance with the terms and provisions of the statute and with the assumption of its constitutionality. Constitutionality is a question for the courts and not for a board or commission."

Thus it appears clearly that the Illinois Racing Board has no power to rule upon the constitutionality of the statutory provisions of the Illinois Harness Racing Act. To do so would be to exercise a judicial function. Furthermore, as a matter of policy, it would be unwise for an agency, such as the Illinois Racing Board whose members need not be, and in most cases are not, lawyers

to decide questions of constitutional law.

II.

Assuming, as we must, that the Illinois Harness Racing Act is constitutional in all of its aspects, the next question concerns the "mandatory and discretionary powers of the Board" with respect to granting and revoking licenses under the Act.

It is my opinion that the Board has no power to grant a license to a person against whom a federal or state criminal charge is pending. The statutory language is clear and explicit in this respect, stating that "no licenses may be granted to conduct a harness racing meet *** to any person against whom there is pending any state or federal criminal charge." (Ill. Rev. Stat. 1971, Ch. 8, Sec. 37s7(e)). Both my predecessors and I are in agreement that such statutory language when it occurs in a statute designed to protect the public interest is mandatory and leaves the appropriate public official no choice but to comply with its express terms. See 1953 Op. Atty. Gen. 104, 105. Hence no license may be granted to a person presently under indictment.

The revocation of an existing license presents a different problem. The statute in pertinent part provides (Ill. Rev. Stat. 1971, Ch. 8, Sec. 37s.12) that the Board "may revoke any license issued by it if the licensee violates any condition of the license, violates any of the provisions of this Act, violates the provisions of any rule or regulation promulgated by the Board pursuant

to any of the provisions of this Act . . ." Under this language it is obvious that the Board has the power to revoke an existing license if, as just indicated, the licensee violates any license conditions or any provision of the Harness Racing Act or any rules or regulations of the Board. One question, of course, is whether a license may be revoked because, at a subsequent occasion, the licensee becomes a member of a class specifically prohibited from holding a license. It is my opinion that the Board may, in such an instance, revoke such a license. A fair reading of the statutory language leads to the conclusion that it is a necessary condition of the license that the licensee remain eligible in terms of the qualifications required when he originally received his license. His subsequent ineligibility to receive an initial license makes his continued holding of a license a violation of the requirements of Section 8(e) of the Illinois Harness Racing Act and, therefore, a violation of the provisions of the Act, which violation also constitutes cause for revocation.

It ought to be noted, however that the Board is required to hold a proper hearing on the question of revocation whenever a licensee becomes ineligible under the terms of Section 8(e) of the Act or under the Board's rules and regulations. In the case of pending indictment, it is my opinion that the Board may properly proceed with license revocation proceedings if the facts underlying or surrounding the indictment implicate or demonstrate,

independently from the criminal proceedings and their eventual outcome, a violation of the Act's provisions or the Board's regulations. Thus, whenever the criminal charges cast doubt on the integrity of a licensee and reflect on his general reputation as an honest, upright, law abiding person, the Board has, in my opinion, an independent statutory duty to inquire into the facts and circumstances of those charges and to reevaluate and reassess the suitability of the licensee to hold his license in the light of the circumstances. The Board may, of course, determine that the licensee ought to retain his license but the Board should make that determination promptly and independently of judicial resolution of the criminal charges.

It might be mentioned in this connection that the "presumption of innocence" is merely a paraphrase of the requirement that in criminal cases the level of proof of guilt be proof beyond a reasonable doubt. See Cleary, Handbook of Illinois Evidence, p. 69. The requirement of proof beyond a reasonable doubt is present only in cases in which a person is accused of a crime and faces either criminal charges or accusations of juvenile delinquency. See In re Winship, 397 U.S. 358(1970). It is not present in administrative hearings.

III.

The final issue implicit in the questions you present is whether indictments against some of the officials and major

stockholders of a licensee may be considered to be pending against the licensee for purposes of the granting or revoking of licenses under the terms of the Illinois Harness Racing Act.

The Illinois Harness Racing Act speaks in terms of granting licenses to a "person". The Act defines "person" as "any individual, firm, association, partnership, corporation, trustee or legal representative" (Illinois Revised Statutes 1971, Ch. 8, Sec. 37s.(c)). There are several points in the Act where a distinction is seemingly drawn between a licensee and its officers or owners.

Section 6 of the Act states in part:

> The Board, however, has no authority to determine who shall be officers, directors, or employees of any licensee, or the salaries thereof except that the Board may, by rule, require that all or any officials or employees in charge of or whose duties relate to the actual running of races be approved by the Board. (Ill. Rev. Stat. 1971, Ch. 8, Sec. 37s.5).

Section 10 of the Act prescribes the form of the license application and directs:

> . . . If the applicant has not previously held a license to conduct a harness racing meet under this Act, the application shall also specify the name and post office address of the person or persons, association, trust or corporation making such application, and if applicant is a trustee, the name and post office address of each cestui que trust; if a corporation, the name of the State of its incorporation and the names and post office addresses of all stockholders and directors

> or if the stockholders hold stock as a nominee or fiduciary, the names and post office addresses of the persons, partnerships, corporations or trusts who are the beneficial owners thereof or who are beneficially interested therein; and if a partnership, the names and post office addresses of all partners, general or limited.

(Illinois Revised Statutes 1971, Ch. 8, Sec. 37s.9).

The statutory language read very narrowly and in a vacuum would support a contention that a separation exists between a licensee and its "officials and major stockholders." Under this interpretation the Board would be powerless to revoke the license of a licensee, no matter what doubts the Board had with respect to the integrity of its owners and officials. Indeed a narrow reading of the statutory language would limit the Board's control of owners and officers to cases in which the owners and officers were involved in the actual running of races. For example, a licensed incorporated racing association might be wholly owned and operated by men who had been convicted of fixing horse races. Under a narrow and emasculating interpretation of the law, the Board would have no cause to revoke the license of the association so long as the association itself had not engaged in misconduct.

Such a statutory interpretation is plainly at odds with the statutory purpose and in violation of common sense and logic. The statutory purpose clearly requires that the Board evaluate

the qualifications of an applicant for a license in terms of the qualifications of its "officials and major stockholders". The statutory purpose clearly requires the Board to evaluate whether a license should be revoked in terms of the suitability of the licensee's "officials and major stockholders".

In addition to the obvious statutory purpose which supports the proposition that a licensee's or applicant's qualifications may be judged in terms of the qualifications of its officials and major stockholders, the statutory language, in some respects, leads to the same conclusion. For example, in Section 8(e) of the Illinois Harness Racing Act (Ill. Rev. Stat. 1971, Ch. 8, Sec. 37s.7(e)) the statute prohibits the granting of a license "to any person that has been convicted of the violation of any law . . . which law provided, as all or part of its penalty, imprisonment in any penal institution; . . . to any person who does not enjoy a general reputation in his community of being an honest, upright, law abiding person;" A corporation cannot be imprisoned nor, from a common-sense point of view, can a corporation be said to have a reputation as "an honest, upright, law abiding person." To separate the qualifications of a corporate licensee from those of its owners would be to allow virtual repeal of these statutory provisions by the simple expedient of incorporating all potential licensees. Furthermore, the statute requires that corporate applicants must provide the names and addresses of their stockholders and

directors. (Ill. Rev. Stat. 1971, Ch. 8, Sec. 37s.9). If an applicant is not to be judged in terms of the nature of the qualifications of stockholders and directors, then the statutory provision requiring their names and addresses to be filed serves no purpose. In fact, that statutory provision manifests the legislative intent that the qualifications of a corporate applicant must be judged in light of the qualifications of its owners and officers. Hence if an applicant's or licensee's official or major stockholder is in violation of the provisions of the Act or the rules and regulations of the Board, the Board may, as the case may be, refuse to grant a license or institute proceedings to have the license revoked.

IV.

Summarizing my previous statements, it is my opinion that the Illinois Racing Board has no power to question the constitutionality of the Illinois Harness Racing Act but must comply with the terms of the statute. It is my opinion that the Board has no power to grant a license to a person under a pending federal or state criminal charge. It is my opinion that the Board has the discretionary authority to revoke a license granted to a person who, after granting of the license, is charged with a state or federal criminal offense. It is my opinion that the Board has the statutory power to hold a hearing on the question of revocation of the license of a person charged with a state or

federal criminal offense and to determine, independently of any judicial resolution of the criminal charges, whether the license should or should not be revoked. It is my opinion that in the case of a corporate applicant or licensee, the question of eligibility and suitability to be granted a license or to continue to hold a license must be determined in light of the eligibility and suitability of its officials and major stockholders.

It should be noted that this Opinion does not consider the nature and effect of the Rules of the Illinois Racing Board upon the problems presented. Those Rules, which the Board is empowered by statute to make, may contain stricter provisions with respect to the granting and revocation of licenses than those discussed herein. As to the applicability and validity of those Rules, I give no opinion.

Very truly yours,

William J. Scott

ATTORNEY GENERAL