JACQUES PRIMEAU,  
Petitioner,  
v.  
NEW JERSEY RACING COMMISSION,  
Respondent.  

Initial Decision: September 17, 1985  
Final Agency Decision: October 23, 1985  

Approved for Publication by the New Jersey Racing Commission: October 24, 1985  

SYNOPSIS  

Petitioner appealed the New Jersey Racing Commission’s denial of his application to be licensed as a harness driver.  
The administrative law judge assigned to the case rejected the petitioner’s arguments that the Commission’s denial was arbitrary or capricious or that petitioner had been treated in a disparate manner. The judge determined that pursuant to N.J.A.C.13:71-7.7, the petitioner had failed to carry his burden to demonstrate that he is qualified in every respect to receive his license, especially in light of the five suspensions he had received for disciplinary violations. In addition, the petitioner had failed to demonstrate that individuals with comparable or worse driving records had been licensed since evidence demonstrated that licensing decisions are based upon the individual’s record and not a comparative test and thus other licensing decisions were not relevant to petitioner’s application.  

Accordingly, the judge determined that petitioner’s application had been properly denied.  

Upon review, this initial decision was adopted by the New Jersey Racing Commission.  

Robert W. Gluck, Esq., for petitioner (Gluck & Kelso, attorneys)  
Nancy B. Stiles, Deputy Attorney General, for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)  

Initial Decision  
PERSICHLI, ALJ:  

Jacques Primeau appeals the adverse ruling of the New Jersey Racing Commission which denied his application to be licensed as a harness driver in New Jersey.  

Following the petitioner’s hearing request, the matter was trans-
mitted to the Office of Administrative Law for determination, as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A hearing was conducted at the Office of Administrative Law, Trenton, New Jersey, on August 7, 1985.

The petitioner contends that the Commission's denial was arbitrary, unreasonable and/or capricious. Thus, the focal issue in this appeal is whether the respondent properly denied petitioner's application for a harness driver license under N.J.A.C. 13:71-7.3. Petitioner further maintains that he has been treated in a disparate manner, asserting that other licensed New Jersey harness drivers have driving records either comparable or less favorable than his own driving record. Respondent disputes these allegations and maintains that petitioner failed to satisfy his affirmative burden of proof for licensure. The relevant portion of N.J.A.C. 13:71-7.7 provides that:

1. Steward shall ascertain if the applicant is qualified as to ability and integrity, and shall report its [sic] findings to the New Jersey Racing Commission.
2. The burden shall be upon the applicant to show that he is qualified in every respect to receive the license applied for.
3. Ability, as well as integrity, must be clearly shown by the applicant in order to receive the steward's recommendation to the New Jersey Racing Commission for the granting of the license.

The relevant facts in this case are uncontested.

Harold G. Handel, Executive Director of the State Racing Commission, notified Mr. Primeau, by letter dated July 27, 1984, that his application for a harness driver's license was denied because of his prior record, specifically observing:

Two major suspensions of 15 days each were imposed against you at Freehold Racing Association in 1982; one for driving in an inconsistent manner, the second for driving in an unsatisfactory manner.

Your prior record shows in excess of 25 additional violations on matters as diverse as abusing an official, violation of the trainer responsibility rule and bringing unauthorized persons into the paddock.

In the same notice, the Executive Director placed Mr. Primeau's "other licenses" in a probationary category for three years, effective July 27, 1984. Mr. Primeau was further advised by the Director that "any additional major violation defined as a full suspension of ten days or more within this period in any racing jurisdiction, will result in a revocation proceeding against you."

By letter dated February 22, 1985, Director Handel notified Robert W. Gluck, Esq., attorney for Jacques Primeau, that he "reviewed the contents of Mr. Gluck's letter along with State Steward Richard O'Donnell's memorandum of January 19, 1985, as well as the NASRC of Jacques Primeau's violations record." Based on his review, the
Director made the following determination:

I see no reason at this time to disregard Mr. O'Donnell's recommendation and would represent to you that Jacque Primeau's status in New Jersey remains unchanged from 1984 (letter of July 27, 1984 attached). I would, of course, look more favorably on the application for a driver's license from Mr. Primeau at such time as he fulfills and completes the probation period he is currently licensed under. (referring to Mr. Primeau's "other licenses.")

Thus, based upon his prior harness driving record, Mr. Primeau's New Jersey harness driver's applications were denied in 1984 and 1985.

The petitioner, 38 years old, has been driving since 1968; he has been licensed in New Jersey since 1974. Mr. Primeau last participated in a New Jersey harness race in January 1983. The petitioner has never been convicted of a crime nor has he been convicted of egregious racing offenses such as drugging a horse or "fixing a race." Mr. Primeau believes he is of good moral character and, therefore, he is entitled to be licensed as a harness driver. The petitioner testified that his driving record is no worse than any of the drivers licensed by the New Jersey Racing Commission.

Mr. Primeau holds an owner's license in New York State and, recently, he secured his driver's license in the state of Massachusetts. Because he was denied licensure in New Jersey, the U.S. Trotting Association (USTA) also denied his application.

Richard O'Donnell, a State Steward for the past five years, testified on behalf of the New Jersey Racing Commission. The witness has 17 years of professional harness racing experience at Freehold Raceway. Mr. O'Donnell enjoyed the positions of paddock judge, assistant race secretary, race secretary, associate judge and presiding judge. Among other duties as the senior official representing the New Jersey Racing Commission, the state steward examines owner, driver and trainer license applications and makes recommendations to the Commission. In this case, Mr. O'Donnell testified that he reviewed Mr. Primeau's application and his driving record as reported by the National Association of State Racing Commissioner, and the U.S. Trotting Association.

Since "Mr. Primeau's record was the same in 1985 as it was in 1984," denial was again recommended. It was Mr. O'Donnell's judgment that Mr. Primeau was "not giving the public a fair shake" and that Mr. Primeau "had a lack of respect for the rules of harness racing." Steward O'Donnell emphasized some of the violations which appear on the petitioner's harness driving record. Specifically, he noted the following major violations:
March 1, 1975—suspended 30 days and denied use of the grounds of the Association for failure to obey instructions and for using abusive language to the presiding judge.

June 12, 1982—suspended 15 days for an unsatisfactory drive by lack of effort, carelessness in Race 7 on June 2 at Freehold Raceway.

September 23, 1982—suspended 15 days for driving in an inconsistent manner at Freehold.

The witness also regarded a five-day suspension (February 24, 1979) “for causing confusion” and a three-day suspension (August 17, 1980) for allowing another horse “to improve his position” as serious driving violations. Steward O’Donnell also believed the following infractions displayed a lack of respect for the rules and for the sport:

June 19, 1981—failure to be in paddock on time for Race 10, June 18, Foxboro

August 6, 1981—illegal parking in barn area, Freehold

June 14, 1982—failure to name proper driver, Freehold

The petitioner maintains that the Commission’s decision was arbi-
trary, unreasonable and/or capricious because he asserts that he was treated disparately by the State Racing Commission. Exploring this assertion, Steward O’Donnell was requested to examine the NASRC driving records of Donald Dancer, Ronald Turcotte, Rocco Vinci, James King, Fernand Paquet, and Herve Filion. Mr. O’Donnell was requested to compare the driving record of each individual to that of Mr. Primeau’s. In his comparisons, the witness differentiated among training violations, driving violations and those violations which affect the integrity of racing. He did not think that Mr. Filion’s driving record was as bad as Mr. Primeau’s, and he testified that Mr. Paquet’s record was different, not better or worse than Mr. Primeau’s. Similarly, Mr. Turcotte’s record differed from Mr. Primeau’s. He regarded this individual’s driving record as “on the borderline.” The witness testified that Mr. Paquet and Mr. Turcotte may hold probationary driver licenses. In the case of Donald Dancer, the witness supported the Commission’s judgment although he could not comment on the licensing procedure per se because the Commission directly licensed Mr. Dancer. Focusing upon Mr. Vinci’s record, Mr. O’Donnell testified that Mr. Vinci’s violations occurred “not on the racetrack itself” but were training violations which he regarded as “bad” (but not worse than an inconsistent drive). Mr. Vinci is on probation and in Steward O’Donnell’s judgment, even a minor problem will provide cause to revoke Mr. Vinci’s license. After reviewing James King’s record, the witness testified that Mr. King’s record is
definitely worse than Mr. Primeau's. However, Mr. King has appealed two suspensions and is "driving in New Jersey under court order." Apparently, the suspensions were stayed pending appeal.

Steward O'Donnell felt that Mr. King's driving record was the only record similar or worse than the petitioner's record. Notwithstanding these comparisons, which he was compelled to make during the hearing, the witness testified that he does not compare driving records to determine whether an applicant has a "bad" record. While his evaluation is admittedly subjective, Mr. O'Donnell testified that his judgments are based on the nature of the violation. He relies upon his extensive experience in the field of harness racing.

Having fully assessed the entire hearing record and in consideration of the petitioner's arguments, I CONCLUDE:

1. The petitioner has failed to affirmatively carry his burden, pursuant to N.J.A.C. 13:71-7.7; and,

2. The Commission's decision to deny licensure for 1984 and 1985 was neither arbitrary, unreasonable and/or capricious.

The Legislature vested in the Commission the power and duty to govern all aspects of horse racing in New Jersey, including all those employed in the industry. State v. Dolce, 178 N.J. Super. 275, 285 (App. Div. 1981). The State has had and continues to have a vital interest in the horse racing industry, particularly since the business itself and the legalized gambling which accompanies its activities strongly impact the public interest. Dolce, at 284; Jersey Downs, Inc. v. Div. of N.J. Racing Commission, 102 N.J. Super. 451, 457 (App. Div. 1968). The present matter involves the Commission's assessment of Mr. Primeau's integrity and ability and based upon Mr. Primeau's driving record, the Commission determined that he was unworthy to be licensed as a harness driver. I FIND no reason in this hearing record which would support a different determination. Mr. Primeau has offered no evidence that would cause one to evaluate his application differently between 1984 and 1985. While the petitioner indicated that he was licensed as a harness driver in Massachusetts, no additional testimony or documentation concerning this area was provided. Presumably, Mr. Primeau will be able to offer evidence addressing his ability and integrity, through his Massachusetts experience, in a 1986 Application to the State Racing Commission. Furthermore, the Director has strongly suggested that successful completion of petitioner's probationary period will be probative in the assessment of Mr. Primeau's harness driver's application. Petitioner's counsel argues that such remarks by the Director demonstrates at least a de facto
three-year license suspension (petitioner's "other licenses" are in a probationary category for three years). Since it is arguable that the Director was attempting to underscore the licensee's required behavior during the probationary period and/or suggest an important affirmative consideration, pursuant to N.J.A.C. 13:71-7.7(a)2, I decline to take any negative inferences concerning the Director's written comments.

The Commission has been granted the power to revoke or refuse to issue a license if the revocation or denial is in the public interest. N.J.S.A. 5:5-33. Thus, "strict and close regulation is therefore regarded as highly appropriate," and the Commission's expertise should receive substantial deference. Dare v. State, 159 N.J. Super. 533, 537 (App. Div. 1978). State Steward O'Donnell, an individual with 17 years of experience at Freehold Raceway, evaluated the petitioner's application and recommended a denial. Executive Director Handel concurred and denied the petitioner's application. Since Mr. Primeau's record did not change between 1984 and 1985, nor did Mr. Primeau offer anything new concerning his ability or integrity for the Commission to reconsider, the Commission properly denied his 1985 application.

Mr. Primeau advances an argument of disparate treatment. In assessing his position, I FIND that Mr. Primeau has failed to substantiate this allegation by a preponderance of credible proof. The petitioner attempted to demonstrate that individuals have been licensed notwithstanding records which are either comparable or worse than Mr. Primeau's. Of the named drivers, Steward O'Donnell believed only one individual had a record that may be described as comparable or worse than petitioner's. However, that individual apparently was permitted to drive pursuant to court order. The remaining individuals had distinctions sufficient to differentiate their driving records from Mr. Primeau's. Significantly, Mr. O'Donnell testified that his evaluations are based upon the individual's driving record, not by a comparative test to determine which individuals should not be licensed. Nevertheless, even if the petitioner had established his allegations as fact, the mere failure to enforce the law against others is insufficient to establish the defense of selective enforcement. State v. Boncelet, 107 N.J. Super. 444, 453 (App. Div. 1969). There must be a showing that the limited enforcement has been intentional or purposeful. State v. Saunders, 130 N.J. Super. 234, 241 (Law Div. 1974), aff'd, 142 N.J. Super. 287 (App. Div. 1976), rev'd on other grounds, 75 N.J. 200 (1977). Additionally, New Jersey law adds the requirement of showing
that the selection was "deliberately based on some unjustifiable standard; selectivity in enforcement by itself, absent a showing of invidious and arbitrary classification, does not constitute a violation of constitutional equal protection rights." State v. Savoie, 128 N.J. Super. 329, 337 (App. Div. 1974), rev'd on other grounds, 67 N.J. 439 (1975). See also, Hyland v. Smolock, 137 N.J. Super. 456 (App. Div. 1975), cert. den., 71 N.J. 328 (1976). In the present case, I CONCLUDE that the petitioner has not proven selective enforcement and even assuming, arguendo, that he had established selective enforcement as fact, he has not shown that it was intentional or purposeful or that the selection was based on an invidious and arbitrary classification.

Accordingly, having concluded that the respondent properly denied petitioner's application for a harness driver license, pursuant to N.J.A.C. 13:71-7.7, it is ORDERED that the Commission's action be AFFIRMED and that the petitioner's application be DENIED and the subject appeal be and is hereby concluded.

I hereby FILE my initial decision with the NEW JERSEY RACING COMMISSION for consideration.

FINAL DECISION BY THE NEW JERSEY RACING COMMISSION:

The New Jersey Racing Commission at its meeting of October 23, 1985, considered the initial decision of Administrative Law Judge J. Roger Persichilli with respect to the petitioner's pending appeal. The Commission expressly adopted both the Findings of Fact and Conclusions of Law as contained in Judge Persichilli's initial decision as the final decision of the New Jersey Racing Commission.

Accordingly, Mr. Primeau's application to be licensed as a driver in the State of New Jersey was denied.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey Courts.