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MEMORANDUM

TO: Committee on Legal Services

FROM: Kip Kolkmeier, Office of Legislative Legal Services

DATE: October 4, 2017

SUBJECT: Rules of the Colorado Racing Commission, Department of Revenue, concerning human drug testing of occupational licensees, 1 CCR 208-1 (LLS Docket No. 170180; SOS Tracking No. 2016-00672).¹

Summary of Problems Identified and Recommendation

No statute authorizes the Colorado Racing Commission (commission) to promulgate rules regarding warrantless alcohol and drug testing of licensees and warrantless drug testing programs have been found to be unconstitutional. Commission Rule 3.437 establishes a comprehensive warrantless human alcohol and drug testing program including random testing of licensees. **Because the commission lacks statutory authority to promulgate Rule 3.437 and similar programs have been found unconstitutional, we recommend that commission Rule 3.437 concerning licensee alcohol and drug testing not be extended.**

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2018, unless the General Assembly acts by bill to postpone such expiration.

Analysis

1. The amendment to Rule 3.437 requires a review of the authority of the commission's underlying alcohol and drug testing program.

The commission has had an alcohol and drug testing program for licensees in effect since at least 1999. The specific rule under review included an amendment to this alcohol and drug testing program to add detection of "masking agents." Masking agents are substances that provide a false negative result from an alcohol or drug test. In reviewing whether the commission has statutory authority to test for masking agents, our office reviewed whether there is statutory authority for a human alcohol and drug testing program itself. The complete text of the rule is in **Addendum A**, and the pertinent part of the rule is as follows:

3.437 - (Modified Effective date May 15, 2017) The Division may conduct random testing, as well as testing based on reasonable suspicion or probable cause. Other qualified or certified persons designated by the Division may conduct testing for the use of alcohol or controlled substances when reasonable suspicion or probable cause exists. The Commission shall determine by policy the testing procedures and the license categories to be included in testing as permitted by law. Said policies and procedures shall be made available to all licensees. Any Licensee who refuses to submit to an alcohol or drug (controlled substance) test shall be presumed to have tested positive.

2. The commission has statutory authority to promulgate rules regarding licensing of persons engaged in racing, but it does not have statutory authority to conduct human alcohol and drug testing.

Section 12-60-503 (1)(a), C.R.S., authorizes the commission to promulgate rules licensing and regulating persons involved with racing. Section 12-60-501 (2)(a), C.R.S., prohibits such persons from working at a racetrack unless licensed and in compliance with commission rules. Section 12-60-503 (4), C.R.S., specifically authorizes the commission to collect licensee applicant fingerprints for the purpose of background checks as well as allowing further checks on an applicant's background. The full text of the section is in **Addendum B**, and the pertinent part is as follows:

12-60-503. Rules of commission - licensing. (1) (a) The commission shall make reasonable rules for the control, supervision, fingerprinting, identification, and direction of applicants, registrants, and licensees, including rules providing for the supervising, disciplining, suspending, fining, and barring from racing of all persons required to be licensed or registered by this article and for the holding, conducting, and operating of all races, race meets, racetracks, in-state simulcast facilities, and out-of-

state wagering on simulcast races conducted pursuant to this article...

(2) (a) Every person holding a license or registration under this article, every person operating an in-state simulcast facility, and every owner or trainer of any horse entered in a racing contest under this article shall comply with the commission's rules and orders. It is unlawful for a person to work upon the premises of a racetrack without first obtaining from the commission a license or registration under this article; except that the commission may waive this licensing or registration requirement for occupational categories that the commission, in its discretion, deems unnecessary to be licensed or registered...

(4) With the submission of an application for a license granted pursuant to this article, each applicant shall submit a set of fingerprints to the commission. The commission shall forward such fingerprints to the Colorado bureau of investigation for the purpose of conducting a state and national fingerprint-based criminal history record check utilizing records of the Colorado bureau of investigation and the federal bureau of investigation. Only the actual costs of such record check shall be borne by the applicant. Nothing in this subsection (4) shall preclude the commission from making further inquiries into the background of the applicant.

The authority to regulate licensees under the act includes the authority to collect biometric information in the form of fingerprints. Moreover, the collection of fingerprint information does not prevent "further inquiries into the background of the applicant." However, biometric information is typically used only for identification purposes and, with the exception of "DNA fingerprinting," is limited to externally visible characteristics.²

While collecting fingerprint information from applicants is specifically authorized in the statute, collecting blood or urine for drug testing is not. There is simply nothing in the Colorado statutes that authorizes or even references a human drug test for any type of state licensee, including those related to racing.

Indeed, under Colorado statutes, the authority to require alcohol and drug testing is very limited. For example, criminal offenders may be tested as a condition of release. Vehicle drivers consent to being tested as a condition of receiving a driver's license, but only when there is probable cause that they are impaired. A few workers in safety-related positions may be tested, but this is a condition of employment and not licensure. And individuals voluntarily agreeing to participate in some state and local

² Electronic Frontier Foundation, Biometrics Overview, see https://www EFF.org/sls/tech/biometrics/faq#_ftnref1.

programs must also agree to be tested.³ In each of these cases, there is either an individualized suspicion of illegal use or an acceptance of testing as a condition of securing a benefit. However, unlike the horse racing alcohol and drug testing program, each of these testing situations is specifically authorized by statute.

3. While the Colorado Racing Act creating the commission includes a broad legislative declaration, legislative declarations are only relevant when the statute is ambiguous.

The commission relies on the act's general legislative declaration to support its authority to promulgate rules allowing suspicionless random human drug and alcohol testing. The act's legislative declaration is as follows:

12-60-101. Legislative declaration. The general assembly declares that the provisions of this article are enacted in the exercise of the police powers of this state for the protection of the health, peace, safety, and general welfare of the people of this state; for the purpose of promoting racing and the recreational, entertainment, and commercial benefits to be derived therefrom; to raise revenue for the general fund; to establish high standards of sport and fair play; for the promotion of the health and safety of the animals involved in racing events; and to foster honesty and fair dealing in the racing industry. To these ends, this article shall be liberally construed.

Section 2-4-203 (1)(g), C.R.S., provides that a legislative declaration may assist a court in discerning the intent of the general assembly.⁴ However, a court will not look to a legislative declaration unless the statute itself is ambiguous.⁵ The act is not ambiguous; it does not include any reference to human alcohol or drug testing.

³ § 16-4-105 (8)(e), C.R.S., periodic drug testing as a condition of release on bond; § 18-1.3-212, C.R.S., random drug testing of persons during presentence investigation and probation; § 19-2-302 (4)(d), C.R.S., periodic drug testing of juveniles in pre-adjudication service program; § 42-4-1301.1, C.R.S., creating a statutory consent to testing by motor vehicle drivers suspected of driving under the influence of drugs or alcohol; § 26-2-708(2)(d), C.R.S., acceptance of random drug testing pursuant to a contract to participate in the Colorado Works Program; § 22-33-111 (1)(f), C.R.S., acceptance of drug testing to participate in pilot schools for expelled students, however § 22-38-112 (2), C.R.S., of the same act is limited to circumstances where there is a "reasonable belief that a student is using drugs", and as such would not include a random testing program. There are two statutory provisions that relate to testing for individuals in safety related positions: § 22-32-110.7, C.R.S., drug testing of school personnel in safety sensitive positions and § 40-2-115, C.R.S., permitting testing of pipeline safety personnel.

⁴ **Addendum C.**

⁵ *Portofino Corp. v. Board of Assessment Appeals*, 820 P.2d 1157, 1159 (Colo. App. 1991), and *Hallam v. City of Colorado Springs*, 914 P.2d 479, 482 (Colo. App. 1995). See also Sutherland Statutory Construction §20.13 (4th ed).

In contrast, the act does contain a specific reference to "animal" drug or medication testing. In section 12-60-202 (3)(c), C.R.S., the director has statutory obligations to promulgate rules for the conduct of physical examinations of animals, requirements for drug testing, and a prohibition on allowing unfit animals to engage in racing.⁶

The fact that the general assembly provided specific authority for animal testing but no authority for human testing supports the conclusion that the statute is not ambiguous as to the commission's authority to conduct drug tests on license applicants. The commission's general authority to supervise racing should not be construed to overcome the plain language of the statute as it relates to a specific subject provided for in the statute. In such a case, it is not necessary or appropriate to look to the legislative declaration for whether human testing is authorized by statute.

Even if the statute were ambiguous regarding human drug testing, humans are entitled to constitutional privacy protection, whereas animals are not.⁷ Human drug testing constitutes a personal search generally requiring probable cause and a warrant.⁸ The reliance on a legislative declaration alone is an even greater concern when used to justify conduct that undermines a constitutionally protected right to personal privacy and freedom from unreasonable searches.

4. The commission's human drug testing program for greyhound trainer licensees was invalidated by the court in *Timm v. Reitz*.

In *Timm v. Reitz*, the Colorado Court of Appeals held that Colorado Racing Commission regulations requiring suspicionless alcohol and drug testing of licensed greyhound dog trainers violated the Fourth Amendment of the United States Constitution's right against warrantless searches.⁹ The court noted that the Fourth Amendment requires a search warrant based on probable cause to conduct a search, that drug testing constituted a search, and, as such, that drug testing is presumed unreasonable if required without a warrant.¹⁰ The court further noted that the state

⁶ **Addendum D.**

⁷ U.S. Const. amend. IV; Colo. Const. art. II, § 7.

⁸ *Skinner v. Railway Executives' Ass'n.*, 489 U.S. 602, 616 (1989).

⁹ Please note that the court's analysis in *Timm v. Reitz*, 39 P.3d 1252, 1256 (Colo. App. 2001) of the Fourth Amendment of the United States Constitution would be substantially the same as an analysis under Section 7 of the Constitution of Colorado, see *People v. Rodriguez*, 945 P.2d 1351 (Colo. 1997).

¹⁰ *Timm v. Reitz*, 39 P.3d 1252, 1256 (Colo. App. 2001).

bears the burden to overcome the presumption of unreasonableness and must prove that there is a "special need" to conduct a warrantless search. The special need must be something more than a general interest in crime control. Even if a special need is articulated, the court must conduct a balancing test that considers "the nature of the privacy interest upon which the search intrudes, the character of the intrusion that is complained of, the nature and immediacy of the government concern at issue, and the efficacy of the means for meeting it."¹¹

The court noted that the Colorado Supreme Court has generally required a showing of a threat to public safety or national security to support drug testing. Moreover, a special need "must generally start with evidence of a drug abuse problem among the target group."¹² The court concluded that the trial court record did not contain evidence supporting a special need, reversed the trial court decision granting summary judgment for the state, and remanded the case. Following the appellate court's decision, the commission suspended random testing of licensed greyhound trainers.¹³

The primary argument by the commission in the *Timm v. Reitz* case was that the court should follow the reasoning in *Shoemaker v. Handel*.¹⁴ The court in *Shoemaker* also reviewed a challenge to a state suspicionless drug testing program required by the New Jersey racing commission. In *Shoemaker*, licensed horse racing jockeys challenged the constitutionality of a New Jersey Racing Commission regulation that required daily pre-race breathalyzer tests to detect alcohol and random post-race urine tests to detect controlled substances. The district court ruled that the regulations violated neither the Fourth Amendment prohibition on warrantless searches, nor the constitutional requirement of equal protection. The United States Court of Appeals for the Third Circuit affirmed the district court decision holding that the alcohol and drug testing regulations fell within the "administrative search" exception to the prohibition on warrantless searches because New Jersey had a strong state interest in maintaining the integrity of a highly regulated industry.¹⁵ The court reasoned that licensed jockeys knew they were entering a highly regulated activity that justifiably reduced their

¹¹ *Id.* at 1256.

¹² *Id.* at 1257.

¹³ Hartman, Dan, Director, Division of Racing Events. Interview by Kip Kolkmeier. Phone interview. May 3, 2017.

¹⁴ *Shoemaker v. Handel*, 795 F.2d 1136 (1986).

¹⁵ *Id.* at 1142.

expectation of privacy.¹⁶ The court also held that there was no equal protection violation even though jockeys were subject to more intensive testing than other licensees. The court concluded that "[S]ubstance abuse by jockeys, who are the most visible human participants in the sport, could affect public confidence in the integrity of that sport."¹⁷ The court held that the state need not subject all licensees to the same testing standards to meet equal protection requirements.

The Colorado court of appeals in *Timm v. Reitz* specifically considered and rejected the reasoning in *Shoemaker v. Handel* stating:

We also question the continuing vitality of the holding of *Shoemaker v. Handel*, which upheld a random drug testing policy that targeted horse jockeys and others, including horse trainers. The decision, rendered before any of the Supreme Court drug testing cases, applied the administrative premises search exception. However, the Supreme Court has exclusively applied the special needs test in cases involving suspicionless drug testing of persons. In light of this authority, we conclude that the administrative search of premises exception has no application in personal drug testing cases, and we decline to follow *Shoemaker*.¹⁸

5. Mandatory drug testing has been ruled unconstitutional in numerous court decisions.

In addition to *Timm v. Reitz*, two other court decisions have invalidated random drug testing for racing licensees. In both *Dimeo v. Griffin*,¹⁹ and *Horsemen's Benevolent & Protective Association v. State Racing Commission*,²⁰ courts specifically invalidated programs in the highly regulated industry of horse racing.

Arguably, the leading case on mandatory drug testing is the United States Supreme

¹⁶ *Id.* at 1142.

¹⁷ *Id.* at 1144.

¹⁸ *Timm v. Reitz*, 39 P.3d 1252, 1259-1260 (Colo. App. 2001). The court's reasoning in *Shoemaker* regarding the administrative premises search exception has also been questioned by the courts in *Lovvorn v. Chattanooga*, 846 F.2d 1539, 1545 (1988), and *American Federation of Government Employees v. Weinberger*, 651 F.Supp. 726, 734 (1986). A Louisiana state court of appeals did uphold a random drug testing program by the Louisiana racing commission in *Holithus v. Louisiana State Racing Commission*, 580 So.2d 469 (La. App. 1991), however the decision relied on the flawed approach from *Shoemaker* and should therefore not be relied upon.

¹⁹ *Dimeo v. Griffin*, 924 F.2d 664 (1991).

²⁰ *Horsemen's Benevolent & Protective Association v. State Racing Commission*, 532 N.E.2d 644 (Mass. 1989).

Court decision in *Chandler v. Miller*.²¹ The Court held unconstitutional a requirement that candidates for public office in the state of Georgia must consent to and pass a drug test. The court applied the "special needs" analysis later adopted in *Timm v. Reitz*. The court noted that mandatory testing of candidates "does not fit within the closely guarded category of constitutionally permissible suspicionless searches."²²

In *University of Colorado ex rel. Regents of the University of Colorado v. Derdeyn*,²³ and *19 Solid Waste Dep't Mechanics v. City of Albuquerque*,²⁴ courts also invalidated random testing programs. Indeed, the circumstances in which such programs have been upheld by courts are limited.²⁵ The decision in *19 Solid Waste Dep't Mechanics v. City of Albuquerque*, is especially relevant because the required testing was a condition of securing a commercial driver's license. Although the applicants held positions directly affecting public safety, the court found that the special needs test had not been met.

Judicial decisions invalidating mandatory random drug-testing must be considered in evaluating the authority of the commission to grant, renew, suspend or revoke a license.²⁶ The absence of explicit statutory authority to conduct mandatory random alcohol and drug testing combined with judicial decisions invalidating random testing results in an agency rule inconsistent with the State Administrative Procedures Act.

6. There is precedent for the COLS to not extend a regulatory human random drug testing program not specifically authorized by statute.

The Committee on Legal Services has previously considered the issue of random drug testing. In 1991, the OLLS recommended that the COLS not extend a rule by the public utilities commission requiring random drug testing of employees who work

²¹ *Chandler v. Miller*, 520 U.S. 305 (1997).

²² *Id.* at 309.

²³ *University of Colorado ex rel. Regents of the University of Colorado v. Derdeyn*, 863 P.2d 929 (Colo. 1993).

²⁴ *19 Solid Waste Dep't Mechanics v. City of Albuquerque*, 156 F.2d 1068 (1998).

²⁵ *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989), upholding tests for railway employees involved in accidents; *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), upholding drug testing for border customs officials involved in drug interdiction or required to carry firearms; *Veronica Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), and *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002), both upholding a requirement on high school students participating in extracurricular activities to submit to drug testing because students have a lower expectation of privacy and the method of testing did not unreasonably infringe on privacy interests.

²⁶ § 24-4-104 (2), C.R.S.

with natural gas pipelines. The OLLS concluded that the commission did not have specific statutory authority to promulgate a drug testing rule. The commission argued that it was a necessary safety precaution and would be required by federal department of transportation rules. The OLLS argued that "whether or not the federal drug testing rules" applied, the commission's adoption of its own "rules goes beyond its general authority to promulgate rules."²⁷ The COLS agreed with the OLLS analysis and voted to not extend the rule. The general assembly followed the COLS recommendation and did not extend the commission's drug testing rule.²⁸

After the rule was invalidated by the general assembly, the commission sought legislative authority for a drug testing program. The general assembly passed Senate Bill 93-18 amending section 42-2-115, C.R.S., to explicitly authorize the public utilities commission to promulgate rules concerning pipeline safety drug testing.²⁹ The public utilities commission then promulgated Rule 4970 providing for drug and alcohol testing to ensure gas pipeline safety.³⁰ Neither the OLLS nor the COLS objected to the new rule.

7. In the absence of statutory authority for human alcohol and drug testing of licensees and the serious constitutional questions regarding the validity of such a program, Rule 3.437 should not be extended.

The decision in *Timm v. Reitz* should be applied to the commission's Rule 3.437. For the commission's rule to survive a judicial challenge under *Timm*, the commission must show evidentiary proof of a special need that would justify a warrantless search lacking individualized probable cause. The commission has the burden to overcome a presumption that such a search is unreasonable. The special need must be based on a showing of a specific threat to public safety or national security. The threat must be based on direct evidence of an existing drug abuse problem among tested licensees. This threat must also be balanced against the privacy interests of licensees. None of these requirements appear to have been met. In the absence of this evidence, the testing rule would likely not survive a judicial challenge.

In addition to the substantial constitutional problems with a warrantless, suspicionless human testing program, the issue of such testing is a public policy question best

²⁷ Summary of Meeting minutes, Committee on Legal Services, April 11, 1991, page 2 and 3.

²⁸ 1991 Colo. Sess. Laws, ch. 25, p. 146

²⁹ 1993 Colo. Sess. Laws, ch. 335, p. 2061.

³⁰ 4 CCR 723-4.

determined by the general assembly. Previously, the COLS concluded that without specific statutory authority a random drug testing program should not be permitted. This same issue is again before the committee. Just as in the case of the public utilities commission drug testing program, the racing commission statute itself would need to be amended to authorize rules implementing a human alcohol and drug testing program.

Recommendation

We therefore recommend that Rule 3.437 of the rules of the Colorado Racing Commission concerning licensee alcohol and drug testing should not be extended because Rule 3.437 lacks statutory authority and similar programs have been found unconstitutional.

Addendum A

3.437 - (Modified Effective date May 15, 2017) The Division may conduct random testing, as well as testing based on reasonable suspicion or probable cause. Other qualified or certified persons designated by the Division may conduct testing for the use of alcohol or controlled substances when reasonable suspicion or probable cause exists. The Commission shall determine by policy the testing procedures and the license categories to be included in testing as permitted by law. Said policies and procedures shall be made available to all licensees. Any Licensee who refuses to submit to an alcohol or drug (controlled substance) test shall be presumed to have tested positive.

No licensee while in a restricted or secured area or who, by licensure status, has accessed, will access, or may access a restricted or secured area during the reasonable course of the day shall:

- a) Have present within their system any controlled substance; or,
- b) Have any alcohol in excess of .05% in their system except that no jockey, apprentice jockey, exercise person, pony person, starter, assistant starter, outrider or any other licensee who performs the duties of these license categories while on association grounds shall have present within his/her body any amount of alcohol in excess of .02% prior to completing his/her duties required by the license.

A positive screening test or refusal to test is prima facie evidence that a violation of this rule has occurred. Licensees who test positive for alcohol or a prohibited substance shall immediately be suspended as set forth within this rule for the corresponding substance and offense. A Licensee who has been suspended in accordance with this rule may elect to have a split sample sent to the Division's confirmatory laboratory at Licensee's expense. Licensee may also request a hearing before the Board by written request. Licensee requests for hearing shall set forth the reason for appeal to the Board for review. However, Licensee shall remain suspended until such hearing is held.

If the confirmatory analysis indicates that the sample is negative for prohibited substances, Licensee shall be immediately reinstated and may return to work. If the confirmatory sample analysis detects the presence of any substance that is intended to dilute or mask the presence of another substance, Licensee may be subject to additional administrative action including fines and suspension.

Any Licensee who is required to provide a negative sample prior to return to work shall be tested at Licensee's expense. If the confirmatory analysis indicates that a prohibited substance was present in the sample, Licensee may be charged with an additional violation of this rule. If the result of the test indicates the presence of a

substance which is intended to dilute or mask the presence of another substance, Licensee shall be subject to additional administrative action including fines and suspension.

Penalty Schedule The timing of all offenses is determined on a rolling 365-day schedule.

For the presence of controlled substances or refusal to provide a sample for testing:

- First Offense: Licensee shall be suspended for fourteen (14) days and shall be required to provide a negative urine sample on the day licensee returns to work.
- Second Offense: Licensee shall be suspended for thirty (30) days. Licensee shall be required to provide a negative urine sample and proof of enrollment in a Commission approved drug rehabilitation program on the day licensee returns to work.
- Third Offense: Licensee shall be suspended for the remainder of the race meet, plus sixty (60) days. Licensee shall be required to provide a negative urine sample and supply proof of completion of a Commission-approved drug rehabilitation program on the day Licensee returns to work.

For the presence of alcohol or refusal to test:

- First Offense: Licensee shall be suspended for forty-eight (48) hours and shall be required to pass a breathalyzer test on the day Licensee returns to work.
- Second Offense: Licensee shall be suspended for five (5) days. Licensee shall be required to pass a breathalyzer test and provide proof of enrollment in a Commission approved alcohol abuse/rehabilitation program on the day Licensee returns to work.
- Third Offense: Licensee shall be suspended until Licensee provides the Division with documentation that Licensee has satisfactorily completed a Commission-approved alcohol abuse/rehabilitation program. Licensee shall be required to pass a breathalyzer test before returning to work.

For the presence of both prohibited substances and alcohol, the suspension period shall be equal to the longer period between the two categories for the offense. Presence of multiple prohibited substances and/or alcohol in a test sample shall be treated as a single offense.

The Division shall develop procedures for the collection and splitting of samples, and securing the chain of custody. The procedures shall address situations when there is an insufficient quantity of a sample for splitting and when the licensee desires to waive a split sample.

Addendum B

12-60-503. Rules of commission - licensing. (1) (a) The commission shall make reasonable rules for the control, supervision, fingerprinting, identification, and direction of applicants, registrants, and licensees, including rules providing for the supervising, disciplining, suspending, fining, and barring from racing of all persons required to be licensed or registered by this article and for the holding, conducting, and operating of all races, race meets, racetracks, in-state simulcast facilities, and out-of-state wagering on simulcast races conducted pursuant to this article. It shall announce the place, time, number of races per day, duration of race meets, as provided in section 12-60-603, and types of race meets.

(b) The commission may issue a temporary license or registration for up to a maximum of ninety days for any license or registration authorized under this article.

(2) (a) Every person holding a license or registration under this article, every person operating an in-state simulcast facility, and every owner or trainer of any horse entered in a racing contest under this article shall comply with the commission's rules and orders. It is unlawful for a person to work upon the premises of a racetrack without first obtaining from the commission a license or registration under this article; except that the commission may waive this licensing or registration requirement for occupational categories that the commission, in its discretion, deems unnecessary to be licensed or registered. This licensing or registration requirement does not apply to the members of the commission or its employees or to persons whose only participation is individually as spectator or bettor. It is unlawful for a person who owns or leases a racing animal to allow the animal to race in this state without first obtaining an owner's license or registration from the commission, as prescribed by the rules of the commission. The commission may extend the validity of a license issued for a period not to exceed three years, and the fee for the license shall be increased proportionately; except that no temporary license or registration may be issued for a period longer than ninety days. It is unlawful for a person to hold a race meet with pari-mutuel wagering without obtaining a license for pari-mutuel wagering. It is unlawful for a person to operate an in-state simulcast facility unless that person is a licensee that has been licensed within the year to hold a race meet or is a licensee that has a written simulcast racing agreement with the in-state host track or out-of-state host track from which the simulcast race is broadcast and has filed a copy of the written simulcast racing agreement with the commission before operating as an in-state simulcast facility.

(b) (Deleted by amendment, L. 93, p. 1210, § 1, effective July 1, 1993.)

(3) No person holding a license under this article shall extend credit to another person for participation in pari-mutuel wagering.

(4) With the submission of an application for a license granted pursuant to this

article, each applicant shall submit a set of fingerprints to the commission. The commission shall forward such fingerprints to the Colorado bureau of investigation for the purpose of conducting a state and national fingerprint-based criminal history record check utilizing records of the Colorado bureau of investigation and the federal bureau of investigation. Only the actual costs of such record check shall be borne by the applicant. Nothing in this subsection (4) shall preclude the commission from making further inquiries into the background of the applicant.

Addendum C

2-4-203. Ambiguous statutes - aids in construction. (1) If a statute is ambiguous, the court, in determining the intention of the general assembly, may consider among other matters:

- (a) The object sought to be attained;
- (b) The circumstances under which the statute was enacted;
- (c) The legislative history, if any;
- (d) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (e) The consequences of a particular construction;
- (f) The administrative construction of the statute;
- (g) The legislative declaration or purpose.

Addendum D

12-60-202. Director - qualifications - powers and duties. (1) The director shall be qualified by training and experience to direct the work of the division; and, notwithstanding the provisions of section 24-5-101, C.R.S., shall be of good character and shall not have been convicted of any felony or gambling-related offense.

(2) The director shall not engage in any other profession or occupation that could present a conflict of interest with the director's duties as director of the division.

(3) The director, as administrative head of the division, shall direct and supervise all administrative and technical activities of the division. In addition to the duties imposed upon the director elsewhere in this article, it shall be the director's duty:

(a) To investigate, supervise, and administer the conduct of racing in accordance with the provisions of this article and the rules of the commission;

(b) To attend meetings of the commission or to appoint a designee to attend in the director's place;

(c) To employ and direct such personnel as may be necessary to carry out the purposes of this article, but no person shall be employed who has been convicted of a felony or gambling-related offense, notwithstanding the provisions of section 24-5-101, C.R.S. The director by agreement may secure and provide payment for such services as the director may deem necessary from any department, agency, or unit of the state government and may employ and compensate such consultants and technical assistants as may be required and as otherwise permitted by law. Personnel employed by the director shall include but shall not be limited to a sufficient number of veterinarians, as defined in the "Colorado Veterinary Practice Act", article 64 of this title, so that at least one veterinarian employed by the director, or by the operator, as provided in section 12-60-705 (1), shall be present at every racetrack during weighing in of animals and at all times that racing is being conducted; and **the director shall by rule authorize any such veterinarian to conduct physical examinations of animals, including without limitation blood and urine tests and other tests for the presence of prohibited drugs or medications, to ensure that the animals are in proper physical condition to race, to prohibit any animal from racing if it is not in proper physical condition to race, and to take other necessary and proper action to ensure the health and safety of racing animals and the fairness of races.**

(d) To confer, as necessary or desirable and not less than once each quarter, with the commission on the conduct of racing;

(e) To make available for inspection by the commission or any member of the commission, upon request, all books, records, files, and other information and documents of the director's office;

(f) To advise the commission and recommend such rules and such other matters as the director deems necessary and advisable to improve the conduct of racing;

(g) To make a continuous study and investigation of the operation and the administration of similar laws which may be in effect in other states or countries, any literature on the subject which from time to time may be published or available, any federal laws which may affect the conduct of racing, and the reaction of Colorado citizens to existing and potential features of racing events in Colorado with a view to

recommending or effecting changes that will tend to serve the purposes of this article;

(h) To establish and adjust fees for all licenses and registrations issued pursuant to this article in an amount sufficient to generate revenue that approximates the direct and indirect cost of administering this article; except that an increase of more than ten percent in the fee for an occupational license or registration shall be subject to ratification by the commission. Such fees shall be credited to the racing cash fund created in section 12-60-205.

(i) To perform any other lawful acts which the director and the commission may consider necessary or desirable to carry out the purposes and provisions of this article.

(4) Repealed.

(5) If so directed by the commission, the director may, on behalf of this state:

(a) Negotiate, enter into, and participate in one or more interstate compacts that enable party states to act jointly and cooperatively to create more uniform, effective, and efficient practices, programs, and rules relating to:

(I) Live horse and greyhound racing; and

(II) Pari-mutuel wagering activities, both on-track and off-track, that occur in or affect a party state;

(b) Serve as this state's authorized representative on a commission to negotiate one or more interstate compacts as described in paragraph (a) of this subsection (5). If the compact commission undertakes to promulgate rules to be adopted by party states, the director shall endeavor to ensure that the process by which the rules are promulgated conforms substantially to the model state administrative procedure act of 1981, as amended, insofar as the terms of the model act are appropriate to the actions and operations of the compact commission. (emphasis added)