IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

ARTY FOSTER :

C.A. No: 12A-02-004 (RBY)

Appellant, :

:

V.

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STATE OF DELAWARE,
DEPARTMENT OF AGRICULTURE

DELAWARE HARNESS RACING : COMMISSION :

:

Appellee. :

Submitted: September 17, 2012 Decided: November 9, 2012

Upon Consideration of Appellant's Appeal from the State of Delaware, Department of Agriculture Delaware Harness Racing Commission REVERSED AND REMANDED

OPINION AND ORDER

John R. Garey, Esq., Dover, Delaware for Appellant.

Stacey L. Cohee, Esq., Department of Justice, Dover, Delaware for Appellee.

Young, J.

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SUMMARY

Arty Foster (Appellant) appeals the Delaware Harness Racing Commission's (the Commission) determination that he does not qualify as a Delaware resident for the purpose of participating in the Delaware Owned Horse Racing Program. Because the Commission's determination, reversing its prior decision on the very same residency question in effect for some eight years, is not supported by substantial evidence, the decision of the Commission is **REVERSED** and **REMANDED**.

FACTS

Appellant owns real estate in three states: Delaware, Maryland, and Iowa. He has owned a 350-acre plot on Burnite Mill Road in Harrington, Delaware, since 1969. Appellant maintains a dwelling and a farm on which he keeps cows. In addition, he has owned a 120-acre plot on Church Lane in Cordova, Maryland, since 1954, where he maintains a dwelling-office and a farm. The Maryland property also includes a race track for horses and a barn in which Appellant keeps approximately 25-30 horses. Appellant resided in his Maryland home from 1954 to 2002, when he moved to his home in Delaware following his wife's passing.

Appellant maintains and races horses to generate income. In 2002, after what Appellant considered a permanent move to his Delaware home, Appellant began entering horses in the Delaware Owned Race Horse Program. Participants in Delaware Owned races are entitled to a 20% increase in purse winnings. The races are open only to Delaware residents who are able to meet certain residency requirements prior to participation. The Commission determines that eligibility. In 2002, the Commission determined that Appellant was eligible to participate in the

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Delaware Owned races.

Appellant's eligibility was challenged in 2010, when he was asked to reapply for the Delaware Owned Program. Pursuant to that request, Appellant was required to produce documentation proving that he resided in Delaware. On April 5, 2011, the Board of Judges (the Judges) determined that Appellant did not presently satisfy the residency requirement. Appellant appealed the Judges' decision to the Commission.

On January 10, 2012, the Commission conducted a hearing, during which that body considered Appellant's past eligibility together with his appeal of the Judges' decision. Prior to this hearing, on November 24, 2011, the Commission wrote Appellant requesting that Appellant produce a calendar marking the days during which he resided in Delaware. Appellant could not produce the calendar. Instead, Appellant presented the Commission with a series of his utility bills for both his Delaware and Maryland homes, along with witness testimony, all of which, Appellant felt, would suffice in lieu of the physical calendar.

Appellant testified that he resided in his Delaware home primarily, particularly that he was, in fact, physically present in his Delaware home for at least 183 days per calendar year during the time frame in question. Appellant explained that nobody lives in the Maryland home, but that his daughter uses the home as an office, and that the farm remains operational. All of Appellant's bills are forwarded to his daughter's attention at the Maryland home office address. The electric bills for the Delaware home were generally low, averaging between twenty-five and forty dollars per month in 2008. There was no fluctuation during the winter. These bills were smaller than those for Appellant's Maryland property. Appellant explained that his low electric

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bills in Delaware are due to his living below his means, and to his heating the home

with oil. Appellant also explained that the Maryland bills are substantially higher

than Delaware, because he runs a grain process that requires a great deal of

electricity.

In addition, Appellant presented many witnesses, including family members,

friends, and neighbors, to testify on his behalf. They invariably testified that

Appellant lived in Delaware. Although their testimony did not establish an exact

frequency with which Appellant stayed in Delaware, the witnesses testified to seeing

Appellant at his Delaware home at different times of the year, multiple times per

week.

On January 24, 2012, the Commission reconvened to issue an oral decision.

That determination was memorialized in a written decision released February 14,

2012. The Commission's written order lists its findings of fact together with its

determination that Appellant fails to qualify as a Delaware resident.

Appellant has appealed the Commission's decision to this Court. Hanging in

the balance are the Appellant's purse winnings from 2009, 2010, and 2011. Those

earnings total \$332, 717. Appellant has been ordered to return that money pursuant

to the Commission's ruling. In addition, Appellant has been made subject to a \$5,000

fine and a two-year racing suspension.

STANDARD OF REVIEW

_____"In reviewing a decision by the Delaware Harness Racing Commission, the

Court's function is to determine whether the Commission's decision is supported by

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substantial evidence and is free from legal error." Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." It is more than a scintilla, but less than a preponderance of the evidence. It is a low standard to affirm and a high standard to overturn. If the record contains substantial evidence, then the Court is prohibited from re-weighing the evidence or substituting its judgment for that of the agency. Questions of law are reviewed *de novo*. ___

DISCUSSION

_____Appellant presents four arguments on appeal: 1) the Commission's decision is not supported by substantial evidence; 2) the Commission failed to apply the law to the facts; 3) the Commission's decision is arbitrary and capricious, and constitutes an abuse of discretion; and 4) the Commission committed legal error.

Residency requirements for the Delaware Owned Program are set forth in 3 *Del. C.* § 10032, and are adopted, verbatim, by the Commission's regulations, codified in 3 *Del. Admin. C.* § 501-6.6.5.⁶ All horses entered into the Delaware

¹Callahan v. State, 2012 WL 2106943, at *1 (Del. Super. May 8, 2012) (citing *Delaware Harness Racing Comm'n v. Mitchell*, 442 A. 2d 77, 79 (Del. 1982)).

²Olney v. Cooch, 425 A.2d 610, 614 (Del. Super. 1981) (citing Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620 (1966)).

³Breeding v. Contractors-One-Inc., 549 A.2d 1102, 1104 (Del. 1988) (citing DiFilippo v. Beck, 567 F. Supp. 110 (D. Del. 1983)).

⁴Janaman v. New Castle County Bd. of Adjustment, 364 A.2d 1241, 1242 (Del. Super. 1976).

⁵Anchor Motor Freight v. Ciabattoni, 716 A.2d 154 (Del. 1998).

⁶ *Id.* at *3.

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Owned Program must be owned by a Delaware resident or sired by a Delaware

stallion.⁷ The Commission determines eligibility.⁸ "In determining whether a person

is a Delaware resident, the term 'resident' shall mean the place where an individual

has his or her permanent home, at which that person remains when not called

elsewhere for labor or other special or temporary purposes, and to which that person

returns in seasons of repose." "[T]he term 'residence' shall mean a place a person

voluntarily fixed as a permanent habitation with an intent to remain in such place for

the indefinite future."10

To be eligible as a Delaware resident, an individual "must have resided in the

State of Delaware in the preceding calendar year for a minimum of 183 days." In

addition, the Commission considers the individual's expressed intention together with

the following factors, the list of which is non-exhaustive:

"(1) where the person lives and has been living;

(2) the location of the person's source(s) of income;

(3) the address used by the person for the payment of taxes, including federal,

state and property taxes;

(4) the state in which the person's personal automobiles are registered;

⁷ 3 *Del. C.* § 10032(a).

⁸ 3 Del. C. § 10032(e).

⁹ *Id*.

¹⁰ *Id*.

¹¹ 3 Del. C. § 10032(f).

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(5) the state issuing the person's driver's license;

- (6) the state in which the person is registered to vote;
- (7) ownership of property in Delaware or outside of Delaware;
- (8) the residence used for U.S.T.A. membership and U.S.T.A. registration of a horse, whichever is applicable;
- (9) the residence claimed by a person on a loan application or other similar document;
- (10) membership in civic, community and other organizations in Delaware and elsewhere."¹²

The 183 day requirement is a necessary element, while the remaining factors are to be considered collectively.¹³ It is the Appellant's burden to show residency.¹⁴

A. "Resident" and "Residency" Requirements

"[T]he term 'resident' shall mean the place where an individual has his or her permanent home." Here, Appellant testified that, beginning in 2002, his permanent home was located in Delaware. Witness testimony confirmed this assertion, as multiple witnesses testified that they had been inside Appellant's Delaware home, that the home was inhabited, and that Appellant had made, and

¹² *Id*.

¹³ See Id.

¹⁴ *Id*.

¹⁵ 3 *Del. C.* § 10032(e)

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was continuing to make, improvements to the home.¹⁶ "Resident" also means the "place... at which that person remains when not called elsewhere for labor or other special or temporary purposes."¹⁷ Here, Appellant's daughter testified that her father did return to his Maryland property for some holiday celebrations with his family, and that he would sometimes stay at the Maryland property overnight, but that his permanent resident was in Delaware.

"Residence" is a "place a person voluntarily fixed as a permanent habitation with an intent to remain in such a place for the indefinite future." ¹⁸ Appellant expressed his intent to live permanently in Delaware in 2002, when he first applied to be part of the State Owned Program. ¹⁹ Since then, Appellant has not changed his habitation patterns, as confirmed by witness testimony, electricity bills, voter registration cards, Appellant's driver's license, and his car registrations.

¹⁶ Appellant replaced the bathroom floors, fixed his fences, upgraded furniture, and replaced his stolen Dish, among other improvements. *See* R. at 114, 118-19, 126, 140.

¹⁷ *Id*.

¹⁸ *Id*.

¹⁹As mentioned in *State v. McCrea*, it is acceptable for individuals to move to Delaware for the sole reason that they wish to participate in the Delaware Owned races. However, as explained in McCrea, it is not acceptable for individuals to willfully deceive racing officials into believing that they live in Delaware, when they actually live out of state. Here, the Appellant did not hide the fact that he owned property in states other than Delaware, and that he boarded his horses in Maryland. Appellant himself, however, resided in Delaware continuously, which satisfies the requirements for his horses to participate in the Delaware Owned races. *State v. McCrea*, 1999 WL 1427772, at *3 (Del. Super. Oct. 29, 1999).

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B. Factor List

Appellant provided the Commission with documentation that supports his assertion that he resides in Delaware. Appellant provided physical documents and testimony to show fulfillment of eight of the ten factors.²⁰

Appellant offered witness testimony to show that he lives and has been living at his Delaware property since 2002.²¹ The witnesses testified that Appellant's home was his Delaware property, and that his horses were kept in Maryland.

Next, Appellant's sources of income are located in Delaware, and also in Maryland and Iowa. Appellant owns multiple properties in these states, and thus makes income from renting out the properties.²² Appellant also generates income from various farming activities, including the raising of chickens for local chicken factories, and grain production at his property in Maryland.

Third, Appellant provided the Commission with his tax returns, all of which state that Appellant's residence was located in Delaware beginning in 2002. Appellant's accountant testified to the discrepancies in the state and federal returns, and also testified that he had been doing the Appellant's taxes for 30 years, and that

²⁰Appellant did not produce any documentation to show that he used his Delaware address on a loan application or similar document. Appellant has not taken out loans in the past, which is why such documentation does not exist. He also did not produce documentation to show that he was a member of any civic or community organizations.

²¹See R. at 90, 92, 103, 106-07, 116-17, 147, and 159.

²² See R. at 116-17 and 122.

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he has filed in Delaware since 2002.²³

All of Appellant's cars are registered in Delaware. Appellant also holds a Delaware driver's license, and is registered to vote in Delaware.²⁴ Appellant also uses his Delaware address for his U.S.T.A. membership.

Appellant owns property in Delaware, Maryland, and Iowa. Although he owns property in multiple states, he testified that his Maryland property was used as a horse farm, and a grain storage facility, and that his daughter uses the house as an office.²⁵ Appellant's Iowa property is used as a source of income from rent payments, and Appellant does not have any other involvement with that state except for owning the property and receiving rent checks.

Although not mandatory, these factors do affect the Commission's ruling. Collectively, the documents Appellant produced show that he was a Delaware resident, had been a resident since 2002, and intended to remain a Delaware resident for the foreseeable future.

²³ Appellant's accountant also testified that he filed nonresident tax returns for Appellant in both Iowa and Maryland. Appellant's accountant testified that Appellant paid income taxes on all of his income, even that earned in other states, under the Delaware return. *See* R. at 72, 74. Compare to *Callahan*, where the Appellant filed Delaware tax returns just days prior to his hearing before the Commission. *Callahan v. State*, 2012 WL 2106943, at *2.

²⁴ See R. at 80.

²⁵The Commission questioned Appellant as to why he did not move his entire racing operation to Delaware. Appellant testified, and his witnesses confirmed, that a majority of his workers lived in close proximity to his Maryland property. Moving the racing operation to Delaware, then, would appear to be a large inconvenience for these workers, and it appears as though it is easier for Appellant to drive to Maryland from his home in Delaware to check on operations, rather than uproot his established business. *See* R. at 134-35.

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C. 183-Day Residency Requirement

Under 3 *Del. C.* § 10032(f), and individual must show that he lives in Delaware for at least 183 days per year to be eligible for the Delaware Owned races. Appellant did not keep track of the days he resided at his home, so he substituted witness testimony for the physical calendar. Appellant presented the Commission with testimony from numerous witnesses along with his electric bills to prove that he remained in his Delaware home for more than 183 days per year.

All of the "residence" evidence produced by Appellant is utterly without refutation. Tax documents, vehicle registration, voting registration, and driving licensure are office documents. The testimony of Appellant's accountant regards important matters testified to by a professional. The parade of witnesses would have to be presumed to be a collection of perjurors, without the slightest hint of any such thing, in order to be disregarded.

Nevertheless, the Commission focused solely upon Appellant's inability to produce a physical calendar with marks delineating on which days Appellant resided in his Delaware home. That is the single piece of "evidence" that few people maintain, and which could be fraudulently created with ease. The absence of such a "record" would appear to have an exceptionally slight impact on any consideration of this question, if any at all.

The standard of review for a Commission's decision is whether the decision is supported by substantial evidence and free from legal error. The Commission's reliance on Appellant's inability to produce a physical calendar to verify his residence is not substantial evidence. Instead, the lack of a calendar is, being

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generous, merely a scintilla of evidence when considered along with the witnesses' testimony and Appellant's expressed intent to remain in Delaware as a resident in order to participate in the Delaware Owned races. The Commission cannot reasonably rescind Appellant's license solely upon that basis, when the Appellant provided the Commission with undisputed witness testimony and documentation of his claim of residency.

This Court is not satisfied that the Commission applied the appropriate legal standards in reaching its conclusion. Indeed: "A reviewing court will not defer to such an interpretation as correct merely because it is rational or not clearly erroneous." To be clear, though, the reliance upon the <u>absence</u> of some chimerical piece of evidence in the face of dramatically opposed real evidence can hardly be considered either rational or free from clear error. The Commission, therefore, failed to show that its decision was based on, or supported by, substantial evidence. That determination is, therefore, reversed.

CONCLUSION

For the foregoing reasons, the administrative decision is **REVERSED**, and the case is **REMANDED** to the Commission for proceedings consistent with this decision.

²⁶ Callahan v. State, 2012 WL 2106943, at *1 (quoting Public Water Supply Co. v. DiPasquale, 735 A.2d 378, 382–83 (Del.1999)).

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SO ORDERED this 9th day of November, 2012.

/s/ Robert B. Young

J.

RBY/lmc

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