

FILED
Superior Court of California
County of Los Angeles

JUL 18 2016

Sherri B. Carter, Executive Officer/Clerk
By Michael Rivera Deputy
Michael Rivera

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ALEXANDER SHLEMENKO,

Petitioner,

vs.

CALIFORNIA STATE ATHLETIC
COMMISSION,

Respondent.

Case No. BS 157778

RULING RE: PETITION FOR MANDATE

Petitioner (Alexander Shlemenko) is a professional mixed-martial arts fighter. On February 13, 2015, Petitioner obtained a license to work as a professional fighter in California.

The Petition seeks a writ of mandate directing Respondent the California State Athletic Commission ("Respondent" or the "Commission") to set aside its decision to suspend his license for a period of three years and impose a \$10,000 fine. The Commission initiated disciplinary proceedings against Petitioner after a urine sample he gave shortly before a professional mixed-martial arts fight tested positive for steroids. Petitioner contends that the Commission failed to properly administer the urine test by not taking a "B" sample in a separate cup that would be opened and tested in his presence, that the discipline imposed exceeded that stated in the charging letters, and that the

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1 Commission imposed a fine that exceeded its authority. Petitioner also argues that he was
2 denied a fair hearing because the Commission improperly conducted its own research and
3 exhibited bias against Petitioner and his counsel. The Petition states a cause of action for a
4 writ of mandamus.

5 The Court reviews the Commission's decision under the substantial evidence test.
6 Bus. & Prof. Code § 18841.

7 Petitioner has cited the hyperlink to several websites in his opening and reply briefs.
8 This constitutes extra-record evidence that can only be considered under the narrow
9 exception provided for in CCP § 1094.5(e). *Helene Curtis Inc. v. Los Angeles County*
10 *Assessment App. Bd.* (2004) 121 Cal.App.4th 29, 37. Petitioner has not demonstrated any
11 of the grounds for an exception under CCP § 1094.5(e), and the Court therefore declines to
12 admit this extra-record evidence.

13 Following a hearing at which Dr. Anthony Butch and Petitioner's expert gave
14 testimony, the Commission voted 7-0 to suspend Petitioner's license for three years and
15 upheld fines of \$10,000. This appeal followed.

16
17 "B" Sample Test

18 Petitioner argues that the Commission's decision should be overturned because it
19 denied his right to have a second "B" sample of his urine taken, to be opened and tested in
20 his presence if the "A" sample tested positive for a banned substance. Essentially,
21 Petitioner's position is that the urine test results were unreliable in the absence of a "B"
22 sample, and that the Commission's decision is therefore not supported by the evidence.
23 The Court disagrees.

24 Petitioner argues that he was entitled to have a "B" sample taken and tested based
25 on the Commission's contract with the UCLA Lab and the World Anti-Doping Agency
26 ("WADA") International Standards for Laboratories. Neither is binding on the Commission.

27 The Commission is bound to follow its own regulations and other laws, not the
28 Commission's agreement with its testing lab. The applicable regulations specify that the

1 single positive test result is sufficient to show a violation of the anti-drug rules and does not
2 mention taking a "B" sample. 4 CCR § 303(c). Any contract between the Commission and
3 the UCLA Lab was intended to benefit the parties to that agreement and there is no
4 indication that the Commission intended—or had the authority—to create an additional
5 procedural protection for the fighters under its jurisdiction. See also *Hess v. Ford Motor Co.*
6 (2002) 27 Cal.4th 516, 524 (only a party or third-party beneficiary has standing to enforce a
7 contract).

8 Petitioner also contends that a "B" sample was required by the Substance Abuse and
9 Mental Health Service Administration Mandatory Guidelines for Federal Workplace Drugs
10 Testing Programs ("SAMHSA"). These guidelines are also incorporated into the agreement
11 between the Commission and the UCLA Lab. (AR 487). These are federal regulations that
12 do not apply to the Commission. And while SAMHSA testing procedures are mentioned in
13 the UCLA Lab contract, Petitioner cannot demand compliance with that provision for the
14 reasons just stated.

15 Finally, Petitioner appears to argue that the urine test was made unreliable by the
16 failure to take a "B" sample. This notion is dispelled by the testimony of Dr. Butch, an
17 undisputed expert, who testified to the UCLA Lab's testing procedures and stated that he
18 had "never" seen an "A" sample test positive without the "B" sample also testing positive.
19 (AR 96). Based on this evidence and the test results, the Commission could easily
20 conclude that the urine test was reliable.

21 The question here is whether the Commission was required to take a "B" sample test
22 to obtain a valid test result. It does not.

23 24 Due Process

25 In their initial letters imposing discipline, the Commission stated that Petitioner's
26 license was suspended for the remainder of its term, or until February 28, 2016 (*i.e.*, just
27 under one year), and imposed fines totaling \$10,000. (AR 9-10; 40-42). The Commission,
28 after a hearing, eventually imposed a three-year suspension in addition to the fines.

1 Petitioner argues that this violated "fundamental administrative principles" because the
2 Commission *increased* the punishment following his appeal. The Commission counters that
3 the imposition letters did not create a penalty "ceiling"; rather, the Commission was free to
4 increase or decrease the penalty at will. The Court agrees with Petitioner's contentions.

5 Petitioner has not identified any authority requiring the precise *penalty* to be
6 disclosed. However, at least one appellate decision has held that a court can vacate
7 administrative penalties where there has not been fair and adequate notice. See *Tafti v.*
8 *County of Tulare* (2011) 198 Cal.App.4th 891, 901. The Court agrees that under the
9 circumstances of this case, it violated Petitioner's due process rights to increase the
10 proposed penalty by three years. Petitioner could not have known that by appealing the
11 suspension of his license he was reopening the issue of the length of the suspension. The
12 Commission does not cite any authority or precedent that would allow them to increase the
13 penalty from the original term of approximately one year. Indeed, a three-year penalty was
14 not even discussed until the closing briefs on the penalty issue, and by that time Petitioner
15 was unable to respond. Accordingly, the Commission violated Petitioner's due process
16 rights by imposing a suspension that was longer than originally noticed.

17
18 4 CCR § 210--\$5,000 Fine

19 Petitioner contends that the Commission violated his due process rights by imposing
20 two \$2,500 fines for violations of 4 CCR § 210(b). That section provides for a fine of \$2,500
21 for any false statement made in an application for a license. 4 CCR § 210(b). The
22 Commission imposed two fines on Petitioner for false statements in his pre-bout
23 questionnaire and lab intake form relating to his non-use of drugs. Since these statements
24 were not made in connection with an application for a license, Petitioner argues that he
25 could not be fined for making those false statements. The Court agrees.

26 Petitioner points out, the questionnaire and lab form were not part of any application
27 for a license. Thus, the Commission erred when it fined Petitioner for two violations of
28

1 4 CCR § 210, which imposes fines for false statements *only* when made in connection with
2 a license application. 4 CCR § 210.

3 Respondent argues that any error in the charging letters was remedied because
4 Petitioner was informed of the substance of the charges—*i.e.*, that he was being fined for
5 falsifying information on the questionnaire and lab form. Not so. Business and Professions
6 Code section 18843(a), which gives the Commission authority to impose fines, only
7 authorizes a fine when the licensee violates any provision of this chapter or the “rules and
8 regulations” of the Commission. While lying on a form submitted to the Commission is most
9 likely prohibited by some rule or regulation, the Commission needed to specify which rule
10 formed the basis for discipline to satisfy due process. See *Wheeler v. State Bd. of Forestry*
11 (1983) 144 Cal.App.3d 522, 527 (“Disciplinary action cannot be founded upon a charge not
12 made.”). Indeed, the rules governing the Commission’s administrative hearing *expressly*
13 require the accusation to “specify the statutes and rules which the respondent is alleged to
14 have violated....” Gov. Code § 11503(a). The only violation cited in the charging letters
15 was 4 CCR § 210, which Petitioner did not violate. Accordingly, the fines based on the two
16 purposed violations of 4 CCR § 210 cannot stand.

17 Any error caused by the Commissioner’s statements concerning the penalties
18 imposed by other jurisdiction is moot.

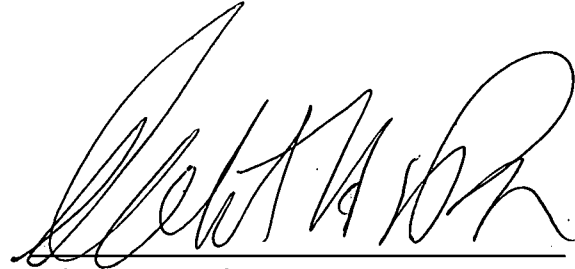
20 Bias

21 Bias and prejudice are never implied; the party seeking to show bias must support its
22 claim with “concrete facts.” *Nasha L.L.C. v. City of Los Angeles* (2004) 125 Cal.App.4th 470,
23 483.

24 Here, Petitioner claims decision maker bias based on a few offhand statements by
25 one of the Commissioners and his impression that they did not provide his counsel with as
26 much time as he asked for to present his case. This conduct falls far short of the “concrete
27 facts” showing bias that would be necessary to overturn the Commission’s decision on that
28 basis.

1 The Petition is granted in part. A writ shall issue directing the Commission to reduce
2 Petitioner's suspension to a period ending on February 28, 2016. The penalties imposed
3 shall be reduced by \$5,000. Otherwise, the Petition is denied.

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5 Dated: 7-18-16

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8 ROBERT H. O'BRIEN
9 Judge of the Superior Court
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