

1 appropriate. And that's what she did.

2 COMMISSIONER LAUCK: Thank you.

3 CHAIRMAN DIENER: Any further questions from  
4 any Commissioner? Thank you, Mr. Babbitt.

5 MR. BABBITT: Thank you.

6 CHAIRMAN DIENER: To reiterate, the Commission  
7 will now enter its own deliberations. The only  
8 people participating are the Commissioners and  
9 Mr. White. Mr. White, I'm going to take first  
10 crack at this. And when I got off kilter as an old  
11 lawyer that no longer practices, bring me back on  
12 track, please.

13 MR. WHITE: All right. Fair enough.

14 CHAIRMAN DIENER: The Commission is now  
15 functioning as the ultimate authority in the  
16 Administrative Orders and Procedures Act. We can  
17 affirm, modify, resolve, or remand the  
18 Administrative Law Judge's decision. Those are our  
19 options.

20 I have some threshold legal questions,  
21 concerns which I personally do not feel were  
22 adequately addressed by the Administrative Law  
23 Judge in this decision. The Administrative Law  
24 Judge found, and I believe the Commission Staff  
25 recommendation found that the license should be

1 suspended because of mistreatment of a horse.

2 The statute, our pari-mutuel statute and the  
3 mirrored Commission regulations are effectively the  
4 same. They have as a condition for suspension of a  
5 license the abandonment, mistreatment, abuse,  
6 neglect, or engagement in act of cruelty to a  
7 horse. That's the same language in the statute  
8 that's in the regulation.

9 That statute and that Commission regulation  
10 begin by saying "The suspension of a license may be  
11 made if it's 'In the public interest for the  
12 purpose of maintaining proper control over horse  
13 racing meetings or pari-mutuel wagering and'. The  
14 "and" refers to one of 21 separate conditions of  
15 which mistreatment of a horse is one. What I'm  
16 trying to say without being overly technical with  
17 my fellow Commissioners is, yes, there was an  
18 allegation, a found violation of mistreatment of a  
19 horse. But I believe the statute and our  
20 corresponding Commission regulation requires a  
21 preliminary conjunction of and that in the public  
22 interest for the purpose of maintaining proper  
23 control over horse racing meetings or pari-mutuel  
24 wagering.

25 I may be wrong. My point is the

1 Administrative Law Judge's decision didn't address  
2 this at all. Didn't address the statute or the  
3 regulation. If this was solely a matter of legal  
4 technicalities, I would say, Commissioners, we can  
5 go ahead and decide that. But depending upon the  
6 answer to those threshold legal questions, there  
7 will be an impact upon the Findings of Fact that  
8 are required to be made to support any Final Order  
9 of this Commission.

10 The third thing, and I'm looking as an  
11 outsider as a reviewing ultimate authority here,  
12 not one that feels constrained that they need to  
13 file through all the bankers boxes, entire  
14 transcript is that I believe the Commission  
15 regulation for disciplinary actions requires the  
16 staff to show by a preponderance of the evidence.  
17 And that's the specific Commission regulation.

18 I see no reference at all in the  
19 Administrative Law Judge decision that she has  
20 reviewed the evidence and found that by a  
21 preponderance of the evidence, Miss Adams' conduct  
22 violated the statute or the applicable Commission  
23 regulation. There is lots of references to  
24 substantial and reliable evidence, but the burden  
25 of proof requires preponderance of the evidence.

1 And that's a very different animal in this old  
2 lawyer's experience.

3 And the final thing that concerns me about the  
4 Administrative Law Judge decision is that there are  
5 two violations that have been found; two for the  
6 statutory violations of mistreatment of a horse,  
7 two for the violations of the mistreatment of the  
8 horse and the Commission's regulations. There are  
9 no separate Findings of Fact for each alleged  
10 violation. The Administrative Law Judge decision  
11 simply wraps everything up into one circumstance  
12 and finds multiple violations. I think any order  
13 of this Commission should have separate Findings of  
14 Fact for each alleged violation standing on its own  
15 and not being wrapped up into some conclusory-type  
16 finding.

17 As a result of my own independent review of  
18 this matter, I'm not ready to recommend that the  
19 Commission issue a final decision, a final order  
20 today. It's my recommendation that we remand this  
21 decision to the Administrative Law Judge with  
22 specific instructions: One, to look at the  
23 specific legal issues as to the statutory  
24 interpretation and the mirrored interpretation of  
25 the applicable Commission regulation as to whether

1 or not there is a conjunction between preliminary  
2 statements in each and the separate allegations of  
3 mistreatment of a horse.

4 Secondly, I want the Administrative Law Judge  
5 who has observed the hearings, has observed the  
6 credibility and demeanor of the witnesses to relook  
7 at her Administrative Law Judge Decision and decide  
8 whether or not staff has proven the violations by a  
9 preponderance of the evidence. I don't feel as if  
10 the Commission is equipped to do that. I think  
11 that's what the Administrative Law Judge is  
12 qualified to do and should be sitting there and she  
13 has seen the evidence. She knows the standard that  
14 should be applied.

15 Lastly, that separate findings of fact are  
16 necessary for each alleged separate violation. You  
17 don't lump them together. Just as a personal  
18 concern, which is not substantive, I loathe  
19 recommended orders that simply say, oh, I  
20 incorporate by reference whatever that other party  
21 said.

22 I want a freestanding recommended final order,  
23 not something that just says I agree with staff.  
24 I'm going to adopt all that stuff. And then  
25 somebody has to go find that stuff and figure out

1       what the Commission did.

2               Sorry to take so long, Commissioners, but  
3       that's my recommendation. And each of you have to  
4       make your own independent assessment. Anybody who  
5       would like to speak?

6               COMMISSIONER GRIMES: Mr. Chairman, I'm  
7       inclined to agree with you. One of the issues for  
8       me is it sounds as though the question is does the  
9       evidence support the conclusion and decision by the  
10      ALJ. That's why I asked the question about whether  
11      the core concerns related to sufficiency of the  
12      evidence. I think that there is a broader question  
13      here as well that goes to the breadth of the  
14      construction of the statute. So that's the concern  
15      that I have, but I endorse the Chairman's  
16      recommendation.

17              CHAIRMAN DIENER: Commissioner Barclay.

18              COMMISSIONER BARCLAY: Well, you may not have  
19      been practicing law for the last couple years, but  
20      it was a pretty darn good legal analysis. I  
21      concur, and I will support a motion for remand.

22              You know, I will say that I personally have an  
23      issue with proportionality of the sanction. You  
24      know, I'm somebody that practices law in the  
25      criminal area. And I can tell you that the neglect

1 of a human wouldn't result in a ten-year penalty of  
2 any kind. In fact, I'm not sure it would  
3 necessarily result in active prison time. It may  
4 result in a sentence of, you know, a year or so,  
5 but, again, that's on a case-by-case basis and  
6 dictated by statute.

7 So ten years for the neglect of a horse, and I  
8 do think there's substantial evidence of that,  
9 whether or not there is a preponderance, we'll see.  
10 But I do think there is substantial evidence of  
11 that. I just question whether ten years is the  
12 right penalty, especially since this appears to be  
13 the first such sanction issued by the Commission  
14 Staff and by the Commission itself. And I  
15 understand there may be prior parallels. But ten  
16 years is a significant period of time to deny  
17 somebody their livelihood, especially since I'm not  
18 sure we have seen a consistent pattern of this over  
19 a period of time or with other animals.

20 So I have that concern. I will certainly wait  
21 until the decision comes back up on remand. And,  
22 perhaps, we can have that discussion then.

23 CHAIRMAN DIENER: Thank you. Vice Chair  
24 Schaefer.

25 COMMISSIONER SCHAEFER: Well, as the only