ORIGINAL

In the

Supreme Court of the United States

WILLIAM G. BARRY, AS CHAIRMAN OF THE NEW YORK STATE RACING AND WAGERING BOARD, ET AL.,

APPELLANTS,

V.

JOHN BARCHI,

APPELLEE.

No. 77-803

Washington, D. C.
November 7, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM G. BARRY, AS CHAIRMAN OF THE NEW YORK STATE RACING AND WAGERING BOARD, ET AL., Appellants,	
v.	No. 77-803
JOHN BARCHI, Appellee.	

Washington, D. C.
Tuesday, November 7, 1978

The above-entitled matter came on for argument at 11:53 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT S. HAMMER, ESQ., Assistant Attorney General, State of New York, Two World Trade Center, New York, New York 10047, on behalf of the Appellants.

JOSEPH A. FARALDO, ESQ., 125-10 Queens Boulevard, Kew Gardens, New York 11415, on behalf of the Appellee

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-803, Barry against Barchi.

Mr. Hammer, you may proceed.

ORAL ARGUMENT OF ROBERT S. HAMMER, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. HAMMER: Mr. Chief Justice, and may it please the Court:

The question presented by this case is whether a statute which provides for the summary suspension of the occupational license of a harness racing participant, prior to any hearing on disciplinary charges, denies such licensee due process or equal protection of the laws.

A statutory District Court for the Southern District of New York held that, indeed, it did.

We respectfully disagree. We have appealed, and we ask this Court to reverse.

On June 22, 1976, a horse named "BE ALERT" which was trained by the Plaintiff ran second in a race at Monticello Raceway. Prior to the race, a blood test was conducted to determine whether any drugs were in the horse's system. That test was passed. However, subsequent to the race, a urine test was conducted and traces of a drug called "Lasix" were found in the horse's urine.

At page 6A of the Jurisdictional Statement, Note 5

in the opinion of the three-judge court, the court pointed out that Lasix is a diuretic and may, in fact, enhance the performance of the animal. Under the Rules of the Racing and Wagering Board, no such drug may be given to a horse within 48 hours of a race.

As I indicated, this race was conducted on June 22nd. Two days later, the post-race test results came back and Mr. Barchi, the Plaintiff, was called before the Stewards. He was given word of this test results and was asked for an explanation. Subsequently, both at his initiative and at the initiative of the Racing Wagering Board, two separate polygraph tests were taken. Apparently, the polygraph indicated that Mr. Barchi was being truthful in his statements, and despite the efforts of the Board to find out exactly what happened to the horse an inconclusive investigation ensued.

On the 8th of July, the trainer's license was suspended on the basis of what is called the "Trainer's Responsibility Rule," which, as in the case of a ship's captain who is responsible for everything that goes on on board, the trainer, likewise, is responsible for the health and condition of his horse.

Now, he had the opportunity, as we indicated, for an informal conference at the time he was originally confronted with the results of the test. We suggest that this would come within the rule of Goss v. Lopez.

Under the statute, Section 8022 of our unconsolidated laws, he could have had a full quasi-judicial hearing within a few days. However, he did not avail himself of this opportunity to be heard and, as a result, this case was brought. Under Section 8022, a licensee is the prime mover of any hearing conducted as a result of disciplinary action taken against him. Only he may demand a hearing and he must demand it within 10 days.

QUESTION: Mr. Hammer, may I just ask one question. When they find the evidence of drug in the horse and it is presumed the drug affected the performance of the animal in the race, as I understand your rule, does that mean that something is done with the race itself where the results change? Is there anything to undo the harmful consequence to the public of the race itself?

MR. HAMMER: Well, Your Honor, nothing can be done at that time. The pari-mutuel payoff is immediate, and the results of the race are not affected.

QUESTION: Is there any discipline against anyone other than the trainer, as a result of that finding and that presumption?

MR. HAMMER: The presumption is a rebuttable presumption, which relates only to the trainer. However, Mr. Justice Stevens, -- if, for example, it were found that a third party, a track tout, or someone else's groom

drugged the horse, then, of course --

QUESTION: Supposing it is a mystery as to what really happened. From the presumption, itself, which includes a presumption that the performance of the animal was effected by it, which, of course, would affect the owner's record, and all the rest, nothing happens to anyone, except to the trainer, as a result of that presumption.

MR. HAMMER: That is correct, Your Honor.

QUESTION: Sometimes you see the inquiry sign go up on the tote board, and it stays on for about 20 minutes or a half an hour and then it is replaced by an official sign and they put up the odds. Do they have that at Monticello?

MR. HAMMER: Yes, that would be a standard part of the tote board.

I am advised by my colleague, Mr. Daly, that where, in fact, it is determined that the race was affected by drugging, then it is in within the power of the Racing and Wagering Board to take back the purse. However, the pari-mutuel results aren't affected because of the immediate payoff on pari-mutuel bets.

QUESTION: I think you may have been over-broad -- at least I should think you were -- in responding to Mr. Justice Stevens. If it was demonstrated affirmatively that the owner, and not the trainer, had drugged the horse, and that the owner had done this without the trainer's

knowledge, then, surely the trainer would not be finished, would he?

MR. HAMMER: Yes, in fact, I made that point to Mr. Justice Stevens, that this relates where, in fact, it is found that a third person, a third party or an outsider, whether it be from another owner --

QUESTION: What this is is a presumption to get the matter started and that can be rebutted by other evidence.

MR. HAMMER: Absolutely, Your Honor. This is a permissive presumption. It is a rule of evidence, nothing more.

QUESTION: General Hammer, may I also clear up one thing. Does the purse automatically become forfeited, just on the basis of the presumption? You said he had power to forfeit the purse, but is it the routine practice. For example, in this case, was the purse forfeited, do we know?

MR. HAMMER: No, Your Honor, it was not.

MR. CHIEF JUSTICE BURGER: We will resume at 1:00 o'clock.

(Whereupon, at 12:00 o'clock, noon, oral argument was suspended, to resume at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: You may resume, Mr. Hammer.

ORAL ARGUMENT OF ROBERT S. HAMMER, ESQ., (RESUMED)

ON BEHALF OF THE APPELLANTS

MR. HAMMER: Thank you, Mr. Chief Justice.

If the Court please, just prior to the luncheon recess, Mr. Justice Stevens asked about what happens when a horse is found to have been drugged.

I took the opportunity to look up the rule of the Racing and Wagering Board. It is Rule 4120.10, and it does provide for a mandatory forfeiture of the purse, where a horse has, in fact, been drugged and the drugging could have affected the outcome of the race.

QUESTION: Was the purse forfeited here?

MR. HAMMER: I believe it was, Your Honor.

QUESTION: We can assume that it was.

MR. HAMMER: This was not in the case, but I would assume that it was forfeited.

Now, the statute in question is Section 8022 of the New York Unconsolidated Law, and it is reproduced at page 3 of the Appellant's brief. It provides that where the Stewards impose any sanction, such as a fine or suspension, the licensee may demand a hearing within 10 days. Thereafter, the Racing and Wagering Board must schedule a prompt hearing

and must render a final decision within 30 days. This administrative determination is reviewable in a special proceeding under Article 78 of the New York Civil Practice Log Rules, which would be in the nature of certiorari.

The statute provides that, pending the final determination, the suspension or revocation remains in effect. However, there is no specific prohibition upon the Racing and Wagering Board, sui sponte, in its own discretion, granting a stay of its own punishment.

The statutory history of Section 8022 and the rest of the racing laws is a rather interesting one, and we have set it out at pages --

QUESTION: Just so I have it in mind, what was imposed here?

MR. HAMMER: A 15-day suspension, Your Honor.

QUESTION: That was the total punishment?

MR. HAMMER: That is all, sir.

QUESTION: It was not a permanent --

MR. HAMMER: Absolutely not.

QUESTION: So by the time there could be any review, the suspension -- the entire punishment would have been over?

MR.HAMMER: Not necessarily, Your Honor.

QUESTION: Well, 15 days is 15 days. Well, there were 30 days for a review, I take it.

MR. HAMMER: The statute grants the Board up to 30

days to render its decision. What happens in practice, in cases of this kind, is that the process is accelerated to a much greater degree. In this instance, and there is a companion case, Daigneault, which we refer to. He was offered a hearing within two days and turned it down. Plaintiff here never even requested a hearing.

QUESTION: Let me go back to your administrative hearings. If he had requested a hearing, he could have asked for and could have received a stay of the suspension until the decision was made, is that right? Is that what you were telling us?

MR. HAMMER: It is our position, Your Honor, that although the statute, itself, is somewhat unclear --

QUESTION: It says the suspension shall stay in effect, doesn't it?

MR. HAMMER: That's what it says. However, in practice and -- there was an offer of proof on the record, Your Honor, which the District Court did not see fit to take us up on. We were prepared to show, and it is contained in part in the affidavit of John Daly, who at that time was Chief Counsel for the Racing and Wagering Board, that in practice, the Board does, in a proper case, stay its own action.

QUESTION: I suppose the Board could say -- tell somebody, "We are considering a suspension," and just not

impose it until there is a hearing, or until there is an investigation.

MR. HAMMER: Well, the harness -- In harness racing, this doesn't work that way. The sanction is imposed, initially, by the State Steward. At that point, the licensee has the right, with 10 days, to demand a hearing.

QUESTION: The language is rather explicit, isn't it, that pending such hearing the action suspending a license shall remain in full force and effect. And you say that doesn't mean what it says.

MR.HAMMER: That's correct, Your Honor.

Anomalous as it sounds --

QUESTION: Where does that appear, other than you telling us so?

MR. HAMMER: It appears in the record in the affidavit of John Daly, which appears --

QUESTION: Is that in the offer of proof?

MR. HAMMER: Yes, and also on the record, the transcript of the hearing.

QUESTION: Is it just that they regularly disobey the statute, is that it?

MR. HAMMER: Put it this way: That the statute is construed, administratively, to -- in such a way as to achieve substantial justice in meritorious cases.

QUESTION: And you are representing the State of New

York, I take it?

MR. HAMMER: That's correct, Your Honor.

To further answer Your Honor's question, Mr. Justice White, at page 20 of our brief, we cited Mr. Daly's affidavit, page 34A of the Appendix. Reference was also made at page 28A of the Jurisdictional Statement, as well. And we made the offer of proof on pages 27 through 30 of the transcript of the argument before the three-judge court.

QUESTION: What is the significance of a regulation and a statute, or any other provision, which says one thing and we have assurance that the present people in office won't enforce it? What effect does that have on this Court?

MR. HAMMER: If it were merely an assurance that the present people in office do not --

QUESTION: Is there anything in there that says what the future people will do? There is no way you can predict what a future official will do.

MR. HAMMER: Except, Your Honor, by the established administrative practice of the agency, which I think, had we been given the opportunity, we could have proven, as a matter of fact.

QUESTION: Proven what?

MR. HAMMER: That, as a matter of well-established administrative interpretation, stays were, indeed, granted.

QUESTION: Always?

MR. HAMMER: As a matter in the discretion of the Board.

QUESTION: Oh, in the discretion?

MR. HAMMER: Your Honor, when I apply to this Court for stays of lower court judgments and Your Honor has, as Circuit Justice,has had to exercise his discretion. Your Honor has the power.

QUESTION: I have never suspended a jockey.

MR. HAMMER: What I am suggesting, Your Honor, is that, in your capacity as Circuit Justice, you have the discretionary authority to grant me a stay --

QUESTION: I have the discretionary authority to ignore a statute?

MR. HAMMER: Not ignore it, Your Honor, interpret it.

QUESTION: To interpret it as saying no when it says yes?

MR. HAMMER: Well, statutes --

QUESTION: That's larger than the chancellor of the foot. I have never seen a chancellor of the foot that large before.

MR. HAMMER: Well, I can only suggest, Your Honor, that the record, as established below, indicates that we offered to prove this as a matter of fact.

QUESTION: Mr. Hammer, it does seem to me that we

do have a problem of New York Law here, that reading this language that some of my brethren have quizzed you about, "pending such hearing and final determination thereon, the action of the Commission refusing to grant and revoking or suspending a license or an imposing of monetary fine, shall remain in full force and effect," seems kind of incongruous with the Commission's initial determination.

Is it possible that that pending sentence is directed at the courts of New York, rather than to the Commission?

MR. HAMMER: It is conceivably a possible interpretation of the statute. There simply has been relatively little case law on this point.

QUESTION: General Hammer, could I ask another question about this language. You point out that the affidavit of John Daly indicates there is a practice. Now, the statute refers to an action of the Commission remaining in effect, but Daly's affidavit refers to a suspension of any penalty imposed by track judges, pending administrative review. What are track judges?

MR. HAMMER: Track judges are the state Stewards who make the initial determination. What the statute is referring to.

QUESTION: Are they the Commission?

MR. HAMMER: No, the statute refers to the determination of the Commission after a hearing.

QUESTION: What I am suggesting is that there is no inconsistency between the statute and the affidavit, because the affidavit talks about staying a penalty imposed by track judges, whereas the statute refers to an order of the Commission remaining in effect.

MR. HAMMER: I think that is correct, Your Honor.

QUESTION: So then, we just accept the statute and there is no conflict in the record at all?

MR. HAMMER: I think that, indeed, resolves the problem.

QUESTION: Mr. Hammer, may I get a question in, too.

This particular sentence in the statute has not been construed by your state courts, has it?

MR. HAMMER: We have the Tappas case, which was referred to in the opinion of the three-judge district court. The Tappas case involved merely a fine. It did not involve a suspension.

QUESTION: Well, in your jurisdictional statement, you made an extension argument based on the Pullman case.

MR. HAMMER: Right.

QUESTION: I see no similar argument in your brief on the merits here. Have you abandoned this approach now?

MR. HAMMER: We have not entirely abandoned it. It was felt, after some review and discussion within the office, that perhaps the abstention argument was not quite

as strong as we initially thought it was. I think abstention -- my personal view is that, perhaps, abstention might, indeed, be appropriate.

I don't think Tappas, which was the New York Court of Appeals opinion, really addressed itself to the issue at hand.

QUESTION: Tappas didn't deal with 8022, did it?

MR.HAMMER: Tappas was a harness licensee, and I think Tappas did deal with 8022.

QUESTION: Do you think the Pullman issue is before us now?

MR. HAMMER: I think the issue remains before Your Honors.

QUESTION: Why? You don't argue it.

MR. HAMMER: Well, it was raised in the jurisdictional statement. I don't think it is the most important issue in the case. I think arguably it is a position that Your Honor might find appropriate.

QUESTION: Even though you don't press it here?

MR. HAMMER: I don't press it vigorously, but I do believe it is in the case.

QUESTION: What happens if the judgment of this Court noted it just on the Pullman point? You don't know, do you? I am talking about alleging something in your jurisdictional statement and then not following it.

MR. HAMMER: I think, frankly, Your Honor, insofar as following it up, the cases on point, Pullman, Carey v. Sugar, lay out a very simple and rather straightforward rule of law. I don't think I could have added anything.

What I think is terribly important here and really is the cornerstone of our argument, is the fact that the stringent racing laws that prevail in New York were adopted after a legislative finding based upon its investigation and upon the Governor's Moreland Act investigation, which demonstrated a need for the strictest kind of policing and supervision. It is interesting to note that until 1940 there was no pari-mutuel betting on harness racing. It was a county fair pastime. In 1940, pari-mutuel betting was legalized and within less than 15 years the criminals had moved in, the labor racketeers had moved in. There were cases of kick-backs, a number of homocides and, in order to police the sport, in order to preserve public confidence in the sport, the Legislature had to act. And one of the ways in which they acted was to crack down hard, to impose what to some may seem even a Draconian form of regulation.

We think it is justified as a matter of constitutional law. We are not dealing with the common occupations or professions. We are not dealing with the license of a plumber. We are not dealing with a situation where -- We don't take pari-mutuel bets on the outcome of surgery or whether -- or the

size of my colleague's next verdict. But we do take bets on horses.

QUESTION: Are you suggesting that this is analogous to the summary proceedings that are sometimes employed to take a dangerous drug off the market, or a medicine, or a food stuff, when it is doscovered that it is dangerous, that there is a summary suspension and then a hearing?

MR. HAMMER: I would suggest, Mr. Chief Justice, that the state interest is in taking a probably -- a licensee who has probably misconducted himself -- off the track is of equal constitutional value and dimension here. I think your analogy is quite apt.

QUESTION: I am not making an analogy. I was inquiring about it.

MR. HAMMER: I think your inquiry presents the proper analogy.

We would go so far, although we don't rely upon it entirely. We would go so far as to suggest that the plurality of this -- the plurality opinion of this Court in Arnett v. Kennedy, provides a proper framework.

Parimutuel racing is an activity which would have been illegal, but for legislative sanction. The licensee didn't have to become a harness trainer. He could have been a shoe salesman. But he chose to be a harness trainer and he takes the limitations of his license when he applies for it.

QUESTION: Under what section did the steward issue the suspension? What authorized him to issue the suspension?

MR. HAMMER: The steward suspended the license under the racing regulations, as found in Title 9 of the New York Codes, Rules and Regulations, which is the State analog for the CFR, and it is reprinted --

QUESTION: Who issued the regulations?

MR. HAMMER: The Racing and Wagering Board.

QUESTION: So, is that the Commission?

MR. HAMMER: The steward is the agent of the Board.

QUESTION: Is that the Commission? Is that -- In Section 8022, it refers to a Racing Commission. That's the Board?

MR. HAMMER: That's correct.

QUESTION: And they have issued regulations?

MR. HAMMER: The Harness Racing Commission was subsumed under the State Racing and Wagering Board.

QUESTION: And the stewards are their agents, authorized to make these suspensions?

MR. HAMMER: Yes, sir.

QUESTION: So, the suspension, in effect, was issued by the Commission here?

MR. HAMMER: It was issued by an authorized agent of the Commission, subject to review at the request of the licensee, either full Commission or full Board.

QUESTION: I am not sure you completed your answer to Justice White. Precisely what section of the regulations authorize the suspension? I think you started to tell us.

MR. HAMMER: The suspension was authorized -- It was for violation of Sections 4116.11, 4120.05 and 4120.6 of the Rules of Harness Racing. They are reprinted at page 5A of our Jurisdictional Statement.

QUESTION: But none of those sections refer to suspension of the trainer.

MR. HAMMER: There is an earlier section of the Racing Rules, which authorized suspension for violation of these other rules. I think that this is not contested.

QUESTION: But is there a standard set forth in that earlier regulation of when there shall be a suspension? Is it automatic? Is it after a finding that he had something to do with it, or what is the standard?

MR. HAMMER: This is within the discretion of the stewards.

QUESTION: So do you have the section?

MR. HAMMER: It is Section 8009 of the Unconsolidated Laws.

QUESTION: I take it, that refers tothe Board or the Commission?

MR. HAMMER: It refers to the judges who have been appointed by the Racing and Wagering Board.

QUESTION: I gather it is not printed anywhere here?

MR. HAMMER: No, sir.

QUESTION: That's all right. We can get it.

Just to make one point clear, you do not contend that there is any flat rule that requires suspension of the trainer whenever a drug is found in a horse that he trained?

MR. HAMMER: We contend that this is a rule that is enforced as a matter of discretion, that while the trainer's responsibility rules are rules of law, in practice-- and this was our contention before the three-judge court, which appears in the transcript which is filed with Your Honors, that the stewards, nevertheless, have discretion in enforcing it.

QUESTION: Does that mean, just to put it bluntly, that if the track judges, or the Commissioners had decided to believe the lie detector results,and thought this man was totally innocent, they could have not suspended him without violating any statute.

Then, does the record tell us why they did suspend him?

MR. HAMMER: The record does not so show. It is something that would have, had a hearing been held, and if the Plaintiff had, indeed, requested a hearing, it could have been developed at that hearing.

I think what's important here is to remember that even though there is some possible element of irreparable injury

-- and we don't deny it -- how much injury through loss of earnings, we can, of course, not tell. Not with any accuracy, it is speculative. But this Court, in its decisions in the Bob Jones case and the Enochs case which we cite, has laid down a rule that even where irreparable injury, even total destruction of the enterprise may result. You can establish a law here in that case, for mere administrative convenience, which would preclude prehearing stays or prehearing injunctions against a determination.

I just want to touch briefly on the equal protection question. It is our position that it should not even have been decided by the district court, since they had already held the statute unconstitutional on other grounds. This was a matter of constitutional overkill, as it were. It was unnecessary under the rule of Peters v. Hobby.

As we have indicated in our brief, there is a rational basis for the statute in terms of its statutory history. On the other hand, in practice, both harness and thoroughbred trainers are treated alike. In a section of the thoroughbred rules, the thoroughbred licensees are treated in the same way -- this is Section 4013.13 -- under the rules, all penalties imposed by the stewards remain in effect, pending judicial or administrative review.

If the Court please, I'll simply reserve the last few minutes for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Faraldo.

ORAL ARGUMENT OF JOSEPH A. FARALDO, ESQ.,

ON BEHALF OF THE APPELLEE

MR. FARALDO: Mr. Chief Justice, and may it please the Court:

I represent John Barchi, the Appellee in this case, and seek the affirmance of the decision of the three-judge constitutional court below, which struck down New York's Section 8022 of the Unconsolidated Laws, as unconstitutional, both as a deprivation of due process of law and equal protection of the law.

Mr. Barchi had a very substantial interest in continuing in his livelihood, something which he had built up over a long period of time.

The race that we are talking about occurred on June 22, 1976, and on June 24th, Mr. Barchi was called to the track steward's office, and the track steward, as my brother has stated, is an arm or extension or agent of the Commission, itself. The actions of that judge and the actions of the Commission are, for all intents and purposes, the same.

On the 24th, he was called into the office and informed by the judge that he had had a positive "Lasix." In other words, "Lasix," a foreign substance, was found in the horse's urine. He denied any knowledge or participation in the event. The next contact that we had in this case was

on or about the 27th day of June, when we were requested to take a polygraph exam. We did take a polygraph exam, I believe it was on the 29th day of June. My client voluntarily took a polygraph exam, in order to profess his innocence, which he had professed from the very beginning. He passed the polygraph exam that was given privately, and on the following day, at the request of the New York State Racing and Wagering Board, he took and passed a second polygraph exam.

QUESTION: You say, he took a polygraph exam. What questions relevant to this inquiry was he asked and did he answer?

MR. FARALDO: I believe that they are part of the Appendix in this case.

QUESTION: Could you summarize?

MR. FARALDO: He was asked whether or not he had given Lasix to this horse, whether or not he had directed anyone to give Lasix to this horse, whether or not he knew if anyone, indeed, had given Lasix to this horse, or if he knew any of the circumstances how this prohobited substance got into this particular horse.

QUESTION: If the Commission believed him as to all those answers, would that make Rule 4120.6, the trainers responsibility rule, inapplicable to him?

MR. FARALDO: The way it has been interpreted by the New York State Racing and Wagering Board in some of the

jurisdictions around the nation, the answer to that is no. It has been my experience that this has been interpreted as an absolute rule of liability, in some of the jurisdictions, not all.

QUESTION: Didn't the District Court, which generally ruled in your favor, say that was a proper rule?

MR. FARALDO: They said it was a rebuttable presumption, or at least some of them were rebuttable. However, there is a presumption in one of the rules under which my client was suspended, which says "It shall be presumed the trainer administered the drug to the horse, with the intent to effect the speed or outcome of a horse race." In addition, it says, "And upon the mere finding of the presence of a drug in the horse's system, there is a presumption that it was given to the horse within 48 hours of his race."

How anyone could rebut those presumptions is beyond me, since we have never seen the sample, we were never confronted with the sample that was taken from the horse --

QUESTION: Did you ask for it in an administrative hearing?

MR. FARALDO: It is never given, Your Honor.

QUESTION: Did you ask for it?

MR. FARALDO: No, we did not ask for it.

QUESTION: Then you can't rightly complain about not getting it, can you?

MR. FARALDO: We were not aware of the fact that they were going to suspend my client without any type of a hearing whatsoever, at that point in time. They led us to believe that they were continuing some sort of an investigation, and then in the latter part of the week we were hit with the notice of suspension. We never saw or were confronted with how the sample was taken, what the analysis showed --

QUESTION: If you had gone into an administrative hearing, you would have been able to challenge that right away, wouldn't you?

MR. FARALDO: That is correct, Your Honor, but at that point in time, I think the administrative remedy is meaningless, if there is no stay. And while there has been an allusion made to this Court that they do possess the discretion to grant a stay --

QUESTION: You say that very rapidly, but how are we to know now that if you had asked for the administrative hearing that the statute provides for, that you might not have had your man cleared, and there never would have been any lawsuit?

MR. FARALDO: Your Honor, since I stopped grooming horses and became a lawyer, I have never seen one instance where a stay was granted by this Board. After this particular case was argued before the Honorable Mr. Justice Catell in the District Court, seeking the convocation of a three-judge

court, I had a client suspended for 15 days. I requested a stay in that case. That is the Daigneault case which my brother makes reference to. The stay was refused. They did say to me on that occasion that "We will give you a prompt hearing," but if there is no stay -- and Daigneault had a 15-day suspension, identical to Barchi, then the question would be moot. They are not providing my client with an opportunity for -- a meaningful opportunity to be heard in a meaningful time. That's all I asked for. That was not given to Barchi. I agree we did not ask. In Daigneault when we did ask, two days after argument on Barchi, we were flatly refused again.

I have represented a number of harness horse trainers. In the record before this Court in May of 1976, five trainers were suspended up at Monticello on the same facts. Proof of the presence of a drug in the system is a suspension to the trainer. Now, they hold out a reed of justice by saying to us "Come file your notice of appeal within 10 days, and we shall promptly schedule you a hearing." That has never happened. None of the five trainers at Monticello Raceway suspended in May of 1976 -- not a single solitary one of them -- availed themselves of this so-called meaningful opportunity to be heard. This is not a meaningful opportunity.

QUESTION: I am not sure what this has to do with this case; but let me ask you another question.

Neither of you, as far as I observe, has cited the

case of Securities and Exchange Commission v. Sloan, which was decided in this Court in May of this year. There, the Federal statute in the Securities Act authorized 10 days suspension, summary proceeding for violation of certain trade provisions. How would you distinguish what New York does here in the racing area from the Securities suspension procedure of 10 days?

MR. FARALDO: Not having the case before me, Your Honor, it makes it pretty difficult. However, there is one thing in Barchi which is very significant and that is the irremedial loss to Mr. Barchi, the fact -- different from the cases in this Court --

QUESTION: Well, if a trader is suspended from trading for 10 days, that's quite a loss to him, isn't it, in the stock market?

MR. FARALDO: Yes, I would agree, but this bears upon an individual's right to earn a livelihood. In the horse-racing business, as soon as you are suspended as the trainer, the owner automatically loses the purse. If the owner wishes to continue with you, he is barred also from racing. Barchi is barred from racing all throughout the United States of America. He cannot earn his livelihood anywhere. All of the owners that he has accumulated over a course of years, as a result of his own expertise in this area, are gone. He is stigmatized --

QUESTION: Isn't a part of that his refusal to ask for a hearing?

MR. FARALDO: I would agree with that if the hearing were meaningful, but if he did ask for the hearing without a provision for a stay given to harness racing licensees, while there is one given to thoroughbred racing licensees, then the hearing is meaningless at that point in time.

QUESTION: The suspension here was for 15 days.

MR. FARALDO: That is correct, but during that period of time, Your Honor --

QUESTION: I understand, but after the 15 days expired, he was free to practice his trade again.

MR. FARALDO: Yes, he is, but during the 15 days he loses all the owners whose horses have to race during that 15-day period, because so long as they employ him as trainer, their horses will not race. So he cannot earn a portion of the purse which the trainer gets. And once those horses are given to another trainer -- It would be like an attorney suspended from the practice of law. He is not going to hold onto his clients during the interim. If it is in the middle of a trial, he has to get himself another attorney.

QUESTION: But if you want a stay, you are going to have to have some sort of a hearing on the stay, aren't you?

MR. FARALDO: A hearing on the issue of the stay?

QUESTION: Yes. You say that the invalidity of this rule and statute is that it doesn't allow the Commission to grant a stay of a suspension. Are you saying that the stay

should be automatic?

MR. FARALDO: I am saying that parallel to Section 401 of the State Administrative Procedure Act, that there certainly are instances where stays do not have to be given, in emergency situations.

QUESTION: If there are instances where stays don't have to be given, then there must be some sort of a hearing that the Commission would have to hold to decide whether your client is one of those instances or not. Inevitably, you are going to have a certain lapse of days in there, are you not?

MR. FARALDO: I would believe so, yes.

QUESTION: But you just say 15 is too many?

MR. FARALDO: Well, 15 causes an irremedial loss to the trainer.

QUESTION: How about 10 days?

MR. FARALDO: Ten days would probably not work as great a detriment, but it would come very close. Because these horses race once a week. So if you lose 15 days, you are losing two weeks of racing. The owners will not tolerate it.

QUESTION: What you are really arguing is there can't be any suspension by a summary process.

MR. FARALDO: I am arguing that from the decision in this case below, and from the due process decisions of this Court before, where there is no ability for retroactive payment, where there is not something that can be restored by a post-

termination hearing, I think that due process would require some kind of hearing. What was given to my client was absolutely no hearing.

I have heard my brother refer to it as a "conference type informal hearing." But we were not given, at that stage, if that is indeed what that was, any evidence of the positive. We still don't know whether or not this horse had the substance they claim in its system. We have no way of knowing that. And if we had been given some kind of hearing, maybe we could have at least established that fact.

QUESTION: What would you think the standard would be in a pre-suspension hearing, or hearing within 48 hours of a suspension? Pending some full evidentiary hearing, would the standard be simply probable cause to believe? That's all it was in Bell v. Burson.

MR. FARALDO: I think there would be a question of probable cause to believe, at the very minimum, yes.

QUESTION: That would satisfy, do you think?

MR. FARALDO: I think at the very minimum, but I think that in view of the type of injury that is caused --

QUESTION: I know, but in Bell v. Burson probable cause to believe that you are at fault in an accident and you lose your driver's license, you may lose your job, because you can't get there.

MR. FARALDO: Yes, but under the presumption, if the

Court accepts the presumptions, as irrebuttable presumptions, then the probable cause that something was found in the system would end the entire case. Innocence or guilt of the party would not be relevant at that juncture.

QUESTION: Suppose he showed that he was in the hospital for the past three days?

MR. FARALDO: Under the terms of the rule, as interpreted by New York and some other jurisdictions, he would be suspended no matter where he was, no matter what --

QUESTION: At least he could show that at a hearing.

MR. FARALDO: Yes, he could show that at a hearing, but so long as he was the trainer of the horse, he, again, would be suspended under the interpretation of the statute.

Now, my brother has argued that, as a matter of course, these stays are given to trainers and the Board has the power and its discretion to grant stays. I think that was in response to a question of Mr. Justice Rehnquist. In the cases that I have had with this Board, they have argued vigorously before state courts that the statute absolutely prohibited their granting a stay, under any circumstances. They have also argued to the courts of our state that the statute prohibited the courts from issuing a stay.

QUESTION: What have the state courts responded to those arguments?

MR. FARALDO: In some instances, the state courts

have gone along with the argument of the New York State Racing and Wagering Board and refused to grant any stay.

QUESTION: What about in the other instances?

MR. FARALDO: In the instances of thoroughbred racing, the stays are commonly granted in New York. Section 401 of the State Administrative Procedure Act, which became effective after this case, says that summary suspensions are allowed in instances where there is a finding made that an emergency exists or that the health, welfare of society commands a summary suspension. So, what we have been given in Barchi by the three-judge court below, has now been modified in our own State law.

My brother makes reference to a case, Gerard v Barry which applied Section 401 to another racing incident. That case he notes in his brief was an application by the Appellate Division of that section to this horse racing industry, which was erroneous. And he points to the fact of the Court of Appeals -- there was an appeal pending in that case to the Court of Appeals. That decision of the Court of Appeals, they have dismissed the application of the Attorney General in that court to construe that statute otherwise.

QUESTION: Did that have the result of overturning the decision of the Appellate Division?

MR. FARALDO: The Appellate Division, which went in the same vein as Barchi in the three-judge court below, was

sustained by the Court of Appeals of the State of New York on the dismissal of this appeal of Gerard v. Barry.

QUESTION: Was that a construction of the statute?

MR. FARALDO: That was a construction of a statute which has come into existence paralleling the decision of Barchi, Section 4013 of the State Administrative Procedure Act, and that has been given the official imprimatur of our courts, our highest court of appeals.

QUESTION: So, the statute involved here is no longer in effect?

MR. FARALDO: The statute has not been changed by the New York State Legislature, but Section 401 of the State Administrative Procedure Act, which gives the same kind of guarantees that the three-judge constitutional court gave to these licensees, has now been made the law in the State of New York.

QUESTION: Would you suggest it would be unconstitutional if New York simply made trainers liable for the condition of the horse and suspended them without proof of fault?

MR. FARALDO: I believe that in each situation --

QUESTION: If a trainer has custody of the horse, the state says if the horse is proved to have drugs in it, that's the end of the matter, that's the trainer's responsibility.

MR. FARALDO: I think that you have made one assumption in your statement and that is: if the trainer had control of the horse. Had the trainer the exclusive care, custody and control of the horse, I would have no objection --

QUESTION: Or, if the state made him responsible for the exclusive care and custody.

MR. FARALDO: Well, by legislative fiat, I don't think that they could deprive him of his constitutional rights. In other words, if they establish such a presumption, or enacted such a statement of strict liability, they still would have to show some control.

QUESTION: As I understand the District Court, it didn't say the presumptions were irrebuttable. It said they were rebuttable, which means that it turns on some kind of fault, doesn't it, rather than some absolute liability?

MR. FARALDO: Yes, it does, but I think that the section the court below was taking into consideration was the one that says the trainer is responsible and must guard and care for his horse.

Upon oral argument, when I was asked if that were rebuttable, I myself agreed that that were a rebuttable presumption, but the presumptions that the drug -- just finding a foreign substance in the horse's urine, was -- raises a presumption that it was administered within 48 hours of a race. I find no rational connection with that on the mere fact of the

finding of a foreign substance in the horse's urine.

QUESTION: Mr. Faraldo, my home state of Arizona has a statute that makes the registered owner of an automobile liable for damage caused by anyone operating it, unless it is actually stolen, and you don't have to show that he loaned it to anybody. You don't have to show that he had anything to do with the operation of it or knowledge of it. Do you think that sort of a statute is unconstitutional?

MR. FARALDO: Well, I think that that has been dictated to us by insurance considerations and other considerations. It doesn't become then a taking from that individual, per se. Unless Arizona has something other than mandatory --

QUESTION: Arizona is bound by the United States Constitution in the same way New York is and the same way the District Court -- the same Constitution that the District Court was interpreting in this case. Do you think New York can't make a trainer absolutely liable for any horse which he undertakes to train?

MR. FARALDO: No, I do not, because I do not see a rational connection with the fact of his control. All of these statutes, on strict liability, in my opinion, are based upon the fact that the person who is held liable or responsible, has the control or -- has the control of the thing which caused the injury in a particular case. Now, it may be a little more remote in the case of an automobile, but in the case of a

harness racing trainer, or any trainer of horses, the facts show that many people have access, many people have control, many people, for whatever reason, can, in some way, get some substance to a horse. If a trainer slept with the horse for 24 hours a day -- the dissent in Sandstrom v. California, which was a California Supreme Court decision -- if he slept with his horse 24 hours a day, I could see a rational basis to do it, but it is not within human experience to do such a thing.

QUESTION: Now, we are dealing with doping of horses. How would you handle it, to prevent it?

MR. FARALDO: Well, I think the state of the scientific art in horse racing and chemistry is sufficient enough to place the time of administration within fixed parameters. I believe within those fixed parameters a trainer who generally is at or in attendance of his horse during certain periods of time can be held liable upon proof of administration during the period of time when he generally is about and has control of the horse.

QUESTION: Prove that he administered the drug?

MR. FARALDO: No, I think on that basis --

QUESTION: I have never heard of them out in the public doing it.

MR. FARALDO: I think what you would have to prove, sir, is that the drug was apparently administered during a period of time when he had control and/or custody of the horse.

QUESTION: We aren't here to review the medical question, Counsel. I am sure you know that. This regulation is presumptively valid, and we have to assume it was based on some medical veterinarian's advice. So, that's not an issue in this case here.

MR. FARALDO: No, but the assumption, as far as the question -- the presumption, so far as it puts the liability from the mere finding of the substance in the horse's urine, I think, is part of the case, as a result of the inquiry by Mr. Justice White as to whether or not a probable cause hearing would suffice.

I think since the State of New York has established procedures to give a full adjudicatory proceeding, although at not a meaningful time, that there is no additional cost or expense or burden to the State of New York. In this particular case, they let 18 days go by, while they espouse in this Court the need for summary action, for 18 days there was no action taken by this Commission in this case.

QUESTION: They gave you a couple of tests, or at least one, and as far as we know, they investigated.

MR. FARALDO: And as far as I know, they did absolutely nothing. So far as I know, they asked us if we would take a polygraph exam, and as is customary in racing commissions, if a person should fail a polygraph exam, they will hold him responsible, and if he does pass a polygraph exam

they will discard the results.

QUESTION: How did you know you passed the exam? What did they say to you?

MR. FARALDO: They said we passed the exam and that they knew we had nothing to do with it, but they insisted on suspending us anyway. They alleged the need to protect the public.

QUESTION: Is that part of the record, what they said to you?

MR. FARALDO: In the affidavit of Mr. Daly, which has been alluded to before, there is a statement that when it was not able to be determined who was responsible for this incident, Mr. Barchi was suspended under the basis of the trainer's responsibility rule. I think that's pretty much a fair quote of his statement.

QUESTION: I am not sure I am clear about the change in the New York procedure -- what did you call it?

MR. FARALDO: The State Administrative Procedure Act, sir.

QUESTION: Now, what is the effect of that? Does that mean in the future 8022 suspensions must be preceded by a hearing?

MR. FARALDO: Well, what it -- Yes, sir, that is in essence what it means. It means that unless there is a finding that the public welfare or safety is in jeopardy, by

continuing this licensing --

QUESTION: Help me out this way. Suppose that law, that amendment had been in effect when all this happened. What would Mr. Barchi have got?

MR. FARALDO: Mr. Barchi would have got a full adjudicatory hearing prior to the taking.

QUESTION: When would that have been? In the context of this case.

MR. FARALDO: I don't understand --

QUESTION: There was an 18-day period of investigation before the suspension, was there not?

MR. FARALDO: Yes.

QUESTION: And what would have happened if that amendment had been in effect in this case?

MR. FARALDO: Well, Mr. Barchi would have been given notice of charges and an opportunity to respond.

QUESTION: Sometime in that 18-day period, I take it.

MR. FARALDO: Yes, sir.

QUESTION: Before there was any suspension. There would have been a full adjudicatory hearing?

MR. FARALDO: That is correct. As is now provided for, but only post-termination. It would have been pre-termination. That is the effect of that statute.

QUESTION: Unless they make a finding.

MR. FARALDO: Unless they make a finding that

public welfare, safety, or health is in jeopardy by continuing the license of that individual.

QUESTION; Finding, based on what?

MR. FARALDO: That is a question that has not been answered by the New York State courts.

QUESTION: A finding, I gather, that the Commission could make without giving you any hearing.

MR. FARALDO: If they could substantiate that,then in a court action for a violation under Section 4013 of the State Administrative Procedure Law, I would agree with that. Yes, sir.

QUESTION: All you asked for here was the declaratory judgment that the then existing New York procedures were unconstitutional?

MR. FARALDO: On the grounds of due process and on the grounds of violation of equal protection of law. I would like to address myself to that issue.

The thoroughbred statute, or the statute that governs thoroughbred racing is New York Unconsolidated Law 7915. It is identical to the language of Section 8022, but in 7915 one very serious sentence is left out. And that is: "Pending full review by the Commission, the action of the judges or the agents of the Commission, shall remain in full force and effect." That section is completely omitted from that which governs thoroughbred racing in the State of New York.

Now, the Attorney General argues that they need the summary power, while they waited 18 days in this case, the parallel section governing thoroughbred racing to which the state should have the same interest, does not contain the statutory prohibition. And on that basis an equal protection argument was made on the grounds that it denied equal protection of law to people engaged in harness racing. It is the same industry. The only difference is one man sits behind the horse and another sits at the top. It is gambling. It is pari-mutuel wagering. It is everything that is involved in thoroughbred racing.

To take one class of thoroughbred racing personnel and give them just about the rights that I feel are guaranteed under the Due Process Clause of the United States Constitution, and take another group in the same industry, with all the same considerations and the same ramifications, and say that they should not be given due process of law --

QUESTION: Isn't there some suggestion, though, that there has been an aura of corruption around harness racing that has not been true of thoroughbred racing?

MR. FARALDO: The statement made by the Attorney General is that in 1954 there were some labor union disruptions or activities at Yonkers Raceway, I think it was, or in harness racing in the State of New York, what that has to do with trainers and owners who participate at the race track itself, I

cannot understand. If it had some rational relationship, if, as they say, harness racing were more corrupt than thoroughbred racing, then I could see a need for some more severe modes of procedure, vis-a-vis harness racing licensees. But I don't see a rational connection between what is asserted to be labor union activities in the 1950s and the denial of a hearing to a harness racing trainer. I cannot make that connection.

I believe that the equal protection argument is a substantial argument and --

QUESTION: Your statutes did develop separately, didn't they?

MR. FARALDO: Yes, they did. As a matter of fact, the State Investigation Commission, in June of 1976, noted that there were procedural differences which did not have any rational basis, and that once the State Racing and Wagering Board was consolidated -- in other words, once the Harness Racing Commission and Thoroughbred Commission were brought under one roof, that the New York State Racing and Wagering Board ought to work to alleviate those differences where they appear. But there is no factual basis for treating the harness racing personnel different than thoroughbred racing personnel.

I think the equal protection argument is very substantial here.

QUESTION: I suppose equal protection doesn't demand identity, does it, all the way through. We can have some mild

differences.

MR. FARALDO: Yes, I would agree with that.

QUESTION: You don't agree that thoroughbred racing can be distinguished because it is for the improvement of the breed?

MR. FARALDO: No, I am sorry, I cannot. I have been involved in harness racing too long to think that there are any real differences between the licensees --

QUESTION: Why don't you do something to break down the inference that harness racing horses aren't thoroughbreds?

MR. FARALDO: Well, they are not thoroughbreds. They are a different breed altogether. They were developed in this country to do work. They were developed in this country to take people to and from --

QUESTION: I thought a thoroughbred meant you knew your momma and your father.

QUESTION: I am a little curious. Does Illinois have a similar provisions with respect to the racing at DeCoyne. Isn't the Hamiltonian --

MR. FARALDO: The Hamiltonian is at DeCoyne and it is under the jurisdiction of the Illinois Racing Board.

QUESTION: I am asking, do you know whether Illinois has statutes or regulations similar to those in New York?

MR. FARALDO: They do not. They have, as a matter of fact, struck down as unconstitutional the strict liability

provision, holding that in Brennan v. Illinois Racing and Wagering Board in 1969 -- Illinois struck it down, saying that the only thing that it protects against is something over which the trainer has no opportunity to guard against anyway, and has left Illinois with a rule based upon the negligence of the trainer or his actual culpable conduct.

QUESTION: I take it your New York trainers go to Illinois for the Hamiltonian?

MR. FARALDO: Yes, we do.

Thank you.

MR. CHIEF JUSTICE BURGER: You have just about one minute left, Mr. Hammer.

REBUTTAL ORAL ARGUMENT OF ROBERT S. HAMMER, ESQ.,

ON BEHALF OF THE APPELLANTS

QUESTION: Mr. Attorney General, before you start, let me ask you a question about Gerard. You mentioned it and your opponent also mentioned it.

I understand that your opponent takes the view that Gerard has held, in effect, that Section 4013 of the Administrative Procedure Act, as amended in 1976, and as construed by the Court in Gerard, qualifies 8022,so that the law in New York, State Law in New York is now in agreement with the decision of the three-judge court in this case.

MR. HAMMER: I would disagree with that, Mr. Justice Powell.

QUESTION: Have I stated his position correctly?

MR. HAMMER: I believe you have stated counsel's position correctly, but I believe he has misconstrued what the New York Court of Appeals did. The New York Court of Appeals simply dismissed an appeal and later denied leave to appeal on procedural grounds. This was a decision of an intermediate appellate court.

QUESTION: The Appellate Division.

MR. HAMMER: That's correct.

QUESTION: What did the New York Court of Appeals say?

MR.HAMMER: The New York Court of Appeals, on purely procedural grounds, unrelated to the substance of the statute --

QUESTION: Does the opinion make that clear?

MR. HAMMER: All you have are single orders, without any opinion whatever.

QUESTION: Does the order make that clear?

MR. HAMMER: As a matter of New York jurisprudence, any New York lawyer would understand this.

I think it would be clear from an examination of the New York statutes -- It would be Article 56 of the New York Civil Practice Law and Rules, relating to the jurisdiction of the New York Court of Appeals. I think Cohen and Carter, "Powers of the New York Court of Appeals," which is somewhat dated, but

is the definitive treatise, would also make this clear, just as a denial of certiorari --

QUESTION: General Hammer, would it be true that the decision of the Appellate Division of the New York Supreme Court was consistent with Mr. Justice Powell's understanding of New York Law, or suggested understanding?

MR. HAMMER: No, sir, I would have to disagree, because, in our view, a druged horse situation would automatically qualify as a ground for summary suspension of a licensee, even if the New York Administrative Procedure Act applies. And I think there is still a substantial question whether, as a matter of New York law whether the Administrative Procedure Act would apply to this case, notwithstanding Gerard.

QUESTION: And that would be your view, even if the Appellate Division decision had been by the Court of Appeals, rather than the Appellate Division?

MR. HAMMER: Well, if it had been the Court of Appeals, the Court of Appeals is the last word on New York law, but this was not.

QUESTION: You are saying the opinion itself doesn't hold what counsel says it holds.

MR. HAMMER: Counsel is correct in his summarization of what the Appellate Division held, but this is not, we submit, what New York law is, or should be.

QUESTION: Because the Appellate Division is not the

court of last resort?

MR. HAMMER: That is correct, Your Honor.

QUESTION: But it is the highest court of the State of New York which has spoken to this issue of state law.

MR. HAMMER: That is correct.

QUESTION: Is it also because the Appellate Division case did not involve a drugged horse?

MR. HAMMER: In this case, the Appellate Division involved the so-called "sting" case, a switching, where the veterinarian was ultimately convicted on some violation and, in fact, sentenced to prison for a year.

I would simply say that counsel in his presentation has alluded to many things which (inaudible) the record, or which really raise questions of fact. This we feel, as we had urged the three-judge court, should have held further hearings.

Yes, there is irreparable injury, perhaps, when a trainer is summarily suspended, but we would submit, Your Honors, that the decisions of this Court and, more important, the rationale of these decisions uphold such a suspension as a matter of due process. And we would accordingly urge that the judgment below be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:59 o'clock, p.m., the case in the above-entitled matter was submitted.)