

**STATE OF INDIANA  
INDIANA HORSE RACING COMMISSION  
2018 TERM**

Re: Bobby Brower  
7281 S 400 W  
Muncie, In 47302

ADMINISTRATIVE COMPLAINT NO.  
216005

**RESPONDENT, BOBBY BROWER'S, OBJECTIONS TO FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND RECOMMENDED ORDER DENYING HIS MOTION  
TO DISQUALIFY ADMINISTRATIVE LAW JUDGE**

Respondent, Bobby Brower, by counsel, Peter J. Sacopulos, pursuant to IC 4-21.5-3-29 respectfully submits his Objections and Exceptions to the ALJ's proposed Findings of Fact, Conclusions of Law, and Recommended Order of January 29, 2018 denying Mr. Brower's Motion to Disqualify Administrative Law Judge. In support of Respondent, Brower's, Verified Objections and Exceptions set forth herein, Respondent, Brower, states:

I. Respondent, Bobby Brower's objections and exceptions to this Administrative Law Judge's Recommended Order of January 29, 2018, and specifically that portion of the same that is untitled and found on pages one (1) and two (2) of said Order and that precedes the section of said Order entitled "Relevant Procedural History."

1. The ALJ, in his recitation of the facts and circumstances surrounding Respondent, Brower's, filing to disqualify him as Administrative Law Judge, begins with a statement that requires clarification for purposes of accuracy. ALJ Pylitt states that Mr. Brower "emailed" the subject Motion to Disqualify on January 4, 2018. In fact, Mr. Brower properly filed said motion.

This is significant because the scheduling Order issued by ALJ Pylitt, dated November 29, 2017, is reflective of the bias and prejudice Brower has and will continue to face if Bernard Pylitt is not disqualified and removed as the Administrative Law Judge in this matter. Specifically, regarding service, it is required that both mailed/hard copies be filed with the IHRC while on the same date service be perfected by email to the Administrative Law Judge and counsel. This is not an issue for the IHRC Staff Counsel that simply walks across the office and file stamps all IHRC Staff filings and then makes a return trip across the room to a desk where a button is pushed perfecting electronic service, via email. It is another story for Mr. Brower. It is an issue for Mr. Brower. He has and continues to be required to either physically deliver the hard copy of each filing to the IHRC's office in Indianapolis, making the trip from either Anderson to Indianapolis or Terre Haute to Indianapolis, or, alternatively, incurring an additional cost to send his filings, via Federal Express, with a tracking feature to

assure mid-day deadlines that are established for filing and, upon confirmation of delivery, serving the pleadings electronically by way of email to opposing counsel and to the ALJ. This discrepancy in the time, cost and effort to file documents with the IHRC in this case has resulted and continues to result in bias and prejudice and cost to Mr. Brower, all as a direct of the ALJ's Order of 11/29/17. Had, instead, the ALJ simply referred to Indiana Trial Rule 5 and allowed electronic filing, as most county court systems, administrative agencies and our Indiana Court of Appeals accept and honor, this bias and prejudice would not have been and continued to be visited upon Mr. Brower.

2. Next, the Administrative Law Judge incorrectly states that Mr. Brower's claims of bias and prejudice are shown only by the Recommended Order of Default Judgment. That is incorrect. In fact, Mr. Brower's claims prejudice and bias not only by way of his Recommended Order, which the Madison Circuit Court 6 found to be in error, but also by way of his failure to follow defined rules, by the ALJ's failure to recognize and exercise discretion, by the ALJ's failure to assign and afford Mr. Brower's timely Answer its true meaning—a request for hearing, by the ALJ's expanding, beyond the parameters of the rule of law and his authority, the bases by which Mr. Brower may be subject to default while not equally expanding the grounds by which the IHRC/IHRC Staff's Administrative Complaint may be subject to dismissal, and by this ALJ's repeated denials of all motions and requests filed by and on behalf of Mr. Brower while, to the contrary, granting and accommodating all requests made by and on behalf of the IHRC Staff. ALJ Pylitt's bias and prejudice as to Mr. Brower is clear.
3. Next, this Administrative Law Judge takes issue, incorrectly, with Mr. Brower's position that he (the Administrative Law Judge) failed to follow the IHRC rules. Mr. Brower's position is substantiated by a review of the Madison Circuit Court 6's Order. In that Order the Honorable Mark Dudley states that the Indiana Horse Racing Commission (this ALJ) failed to follow the IHRC rules by disregarding Mr. Brower's timely filed responsive pleading and failing to give it proper status. This failure, on the part of the ALJ, resulted in a biased and prejudicial recommended order.
4. The ALJ also seems to argue that he was not the cause of Mr. Brower being excluded from the 2017 racing season and, alternatively, that it was the mistake of the Indiana Horse Racing Commission. It is a disingenuous argument advanced by the Administrative Law Judge to say he is without fault or cause for the failure of this agency to properly follow the rules that lead to the severe and ongoing economic hardship visited upon Mr. Brower by a failure to follow the IHRC rules. It is well known that the IHRC routinely grants/approves the Recommended Order of the ALJs. It was this ALJ's recommended order, in error, that on judicial review was found not to be only erroneous but contrary to the IHRC's own rules,

which it had not followed. The result of which was Bobby Brower being excluded from the Indiana racing program for the 2017 racing season and, because of reciprocity, being excluded from racing in general for that racing season.

5. Next, this ALJ attempts to deflect his error and failure to follow the IHRC rules. His attempt is to deflect the error of having recommended Mr. Brower be defaulted from his actions to those of the Indiana Horse Racing Commission. It must be remembered that it was the ALJ that failed to properly follow the Indiana Horse Racing Commission's rules and failed to give Bobby Brower timely filed Answer, its proper status. Had this ALJ followed the Indiana Horse Racing Commission's rules, rules that he was charged to fairly and uniformly enforce, the only proper recommended order in response to the IHRC Staff's Motion for Default Judgment would have been one of denial.
6. Further, this ALJ is apparently of the practice and belief that bias and prejudice may only be visited upon a person in person or via direct communication. That, of course, is not the case and was not the case here.
7. Finally, this ALJ incorrectly states that Mr. Brower offered no additional "facts" by way of his Reply brief to show bias or prejudice. That too is incorrect: Respondent, Brower's, reply brief does, in fact, offer additional facts evidencing bias and prejudice against him and his reply brief speaks for itself.

## II. RESPONDENT, BOBBY BROWER'S, OBJECTIONS AND EXCEPTIONS TO THE SECTION OF ALJ PYLITT'S RECOMMENDED ORDER OF JANUARY 29, 2018 ENTITLED "RELEVANT PROCEDURAL HISTORY"

Respondent, Bobby Brower, objects to ALJ Pylitt's account of the relevant procedural history of this matter. He does so because it is both incomplete and inaccurate. This is because Mr. Brower timely filed an Answer, pursuant to 71 IAC 10-3-21(a) denying the allegations set forth in the IHRC Staff's Administrative Complaint. Additionally, said history is incomplete in that it fails to reference Respondent's request for modification of the ALJ's Order of November 29, 2017.

The history presented by ALJ Pylitt is incomplete and inaccurate because it fails to include the fact that Respondent timely filed an Answer denying the allegations set forth in the IHRC/IHRC Staff's Administrative Complaint. This is not only significant, it is astonishing given the Order issued by the Madison Circuit Court 6, a copy of which was provided to the ALJ, and that states this ALJ failed to follow the IHRC's rules in improperly recommending that Mr. Brower be defaulted. It was Mr. Brower's timely filed Answer that ALJ Pylitt ignored in improperly recommending Mr. Brower be defaulted. ALJ Pylitt likewise ignores the fact that Mr. Brower timely filed an Answer in his Recommended Order of January 29, 2018. This is further evidence of the bias and prejudice that this ALJ has visited upon Mr. Brower and further reason

why he should be disqualified as ALJ sitting in judgment of Mr. Brower's case.

Respondent, Bobby Brower, further objects and takes exception to this ALJ's position that he is properly appointed. This is because I.C. 4-21.5-3-9 requires that an ALJ be appointed by the agency's ultimate authority. While true that the ALJ was properly appointed by former IHRC Chairman, Tom Weatherwax, on December 16, 2016, he was not so properly appointed following Respondent's successful Petition for Judicial Review and remand of this matter to the IHRC. Upon remand to this agency (IHRC), I.C. 4-21.5-3-9 requires appointment of an Administrative Law Judge by its ultimate authority. Subsequent to being remanded, opposing counsel in this case issued a letter, dated November 16, 2017, requesting ALJ Pylitt conduct a hearing. Opposing counsel's letter attempting to "reappoint" (without involving the ultimate authority) ALJ Pylitt did not and does not comply with I.C. 4-21.5-3-9. Respondent, Bobby Brower, therefore objects and takes exception, as he did prior to, during and after the November 29, 2017, hearing that ALJ Pylitt has been properly appointed and has authority to rules and/or preside over Mr. Brower's defense.

On Monday, February 5, 2018, the IHRC Staff served responses to Mr. Brower's Request for Production of Documents. Included in those responses and production is a letter authored by IHRC Staff General Counsel, Lea Ellingwood, to former IHRC Chairman, Tom Weatherwax, dated December 9, 2016. This letter is significant for the reason that General Counsel, who in the case of Mr. Brower is opposing counsel, is selecting the ALJ and requesting confirmation. A true and exact copy of General Counsel, Ellingwood's, letter to former Chairman Weatherwax of December 9, 2016, is attached hereto, made a part hereof, and marked as Exhibit "A." Given the ALJs are appointed by the Indiana Horse Racing Commission, paid by the Indiana Horse Racing Commission, retained by the Indiana Horse Racing Commission, the selection of the ALJ by the opposing attorney seems, at the very least, a conflict of interest for the IHRC/IHRC Staff/ALJ. Unquestionably, the selection of the ALJ by the opposing attorney is not in the spirit of IC 4-21.5-3-9 that requires the appointment of the ALJ by the agency's ultimate authority. Additionally, opposing counsel's selection of the trier of fact, when the Respondent is not afforded the opportunity to move for a change of ALJ, brings into clear focus, issues of integrity and fairness. Additionally, the Indiana Horse Racing Commission and the Indiana Horse Racing Commission Staff have historically refused and denied requests for mediation pursuant to the Administrative Orders and Procedures Act. In short, the system of appointing the ALJ is biased, prejudiced and without integrity when the opposing attorney selects the judge.

Mr. Brower further objects and takes exception with this ALJ's statement that the undersigned counsel's correspondence of November 20, 2017, had as its purpose finding: "...a mutually agreeable date to reschedule the Prehearing Conference...." The purpose of said correspondence was to inform this ALJ that the Respondent questioned his appointment and authority to conduct the Prehearing Conference requested by opposing counsel and to advise this ALJ of his intention of filing a Motion for Disqualification of the ALJ pursuant to I.C. 4-21.5-3-10, a motion that Respondent, Bobby Brower, filed of record on January 4, 2018.

Additionally, Respondent, Bobby Brower, objects and takes exception to ALJ Pylitt's statement that: "...when asked by the ALJ during the Telephonic Prehearing Conference to provide any specific reason or evidence to support his claim that the ALJ is prejudiced or biased which would require disqualification, counsel provided none...." Mr. Brower does so for two reasons. First, for the reason that it misstates counsel's position on this issue during the November 29, 2017, Telephonic Prehearing Conference. The undersigned counsel was asked by the ALJ if he/they would share, at that time, the basis for Mr. Brower's future motion to disqualify him pursuant to I.C. 4-21.5-3-10. The undersigned counsel advised/responded that they elected not to discuss or share the bases for disqualification at that time. Counsel's position not to share or provide a position on behalf of their client in advance of filing a motion to disqualify does not equate to Mr. Brower not having a basis for disqualification as implied by this ALJ in his Recommended Order of January 29, 2018. The second reason, Respondent, Bobby Brower, takes exception and objects to such statement is that he had not, as of November 29, 2017, filed his motion to disqualify ALJ Pylitt and, therefore, the same was not an issue or ripe for discussion during the November 29, 2017, hearing.

The fact that the Administrative Law Judge chose to imply that Mr. Brower/Respondent's counsel did not have, as of November 29, 2017, a basis for a motion to disqualify him as Administrative Law Judge further reflects his bias and prejudice as to Mr. Brower.

While the ALJ includes in his "relevant procedural history" counsel's correspondence of November 20, 2017, he omits a second and significant letter from counsel to the ALJ. A true and exact copy of the undersigned counsel's email to this ALJ of December 15, 2017, addressing issues and exceptions relative to his Order of November 29, 2017 and the ALJ's disingenuous response are attached hereto, made a part hereof, and marked as Exhibits "B" and "C." Counsel's correspondence to the ALJ of December 15, 2017 (Exhibit "B") points out issues and exceptions Mr. Brower had/has relative to factual accuracy, concerns over the ALJ expanding, without authority, the basis for which Respondent may be defaulted and his inappropriate comment relative to a future motion to default. ALJ Pylitt's response of the same date fails to address Respondent's written request that a nunc pro tunc order be issued to reflect those inaccuracies. Instead, the ALJ's response to Mr. Brower was/is that his order "...remains as is...." (*See Exhibit "C"*)

Exhibits "B" and "C" are significant in showing and establishing prejudice and bias on the part of the ALJ as to Mr. Brower for two reasons. First, it was prejudicial to the Respondent to use an Order that contains only a portion of the "Relevant Procedural History." The selective omission of Exhibits "B" and "C" supports Mr. Brower's argument that this ALJ must be disqualified and further evidence of prejudice and bias. Secondly, the ALJ's dismissive response, a response that fails to address the issues raised in counsel's correspondence of December 15, 2017, is further evidence of this ALJ's prejudice and bias as to Brower.

Next, this Administrative Law Judge incorrectly suggests that having never personally met or spoken with Mr. Brower is somehow proof that he (ALJ Pylitt) is incapable of being

biased or prejudiced against Mr. Brower. That, of course, is not correct. Nor is the ALJ's statement that "nothing in the record" demonstrates prejudice and bias against Mr. Brower. ALJ Pylitt's statement is extremely self-serving and it should be noted that ALJ Pylitt is paid by the IHRC/IHRC Staff and that he (Pylitt) has an economic incentive to continue serving as ALJ in this case. A review of the administrative record includes a timely filed Answer denying the allegations set forth in the Administrative Complaint. A review of reported case law in Indiana reveals that at no time in Indiana recorded case history has a party that timely filed a responsive pleading has been defaulted. Contrary to this ALJ's belief that "nothing in the record" suggests prejudice or bias, the administrative record itself is compelling evidence of just the opposite.

#### RELEVANT STATUTES

Respondent, Bobby Brower, has no objection to this ALJ's recitation of the relevant statute, that being I.C. 4-21.5-3-10.

#### RESPONDENT, BOBBY BROWER'S OBJECTIONS AND EXCEPTIONS TO THE ALJ'S RECOMMENDED ORDER OF JANUARY 29, 2018, AND SPECIFICALLY THE SECTION ENTITLED "REASONS FOR DETERMINATION AND RECOMMENDED ORDER DENYING BROWER'S MOTION TO DISQUALIFY ALJ PYLITT"

Respondent, Bobby Brower, agrees that he was not afforded the opportunity or right to request a change of judge. He further agrees that he bears the burden of proving this Administrative Law Judge should be disqualified pursuant to I.C. 4-21.5-3-10. However, he objects to this ALJ's statement that he has offered no evidence of bias or prejudice. A review of Respondent, Brower's, Motion to Disqualify Administrative Law Judge and Reply Brief together with corresponding exhibits to the same and the arguments set forth in this Petition, clearly and convincingly show just the opposite.

#### FINDINGS OF FACT

1. Respondent does not object to Finding of Fact number one (1).
2. Respondent does not object to Finding of Fact number two (2).
3. Respondent, Brower, objects to Finding of Fact number three (3) for the reason that it fails to consider and acknowledge that Respondent, Brower, had timely filed a responsive pleading/answer and that pursuant to 71 IAC 10-3-21(a), he was entitled to a hearing. Respondent, Brower's, timely filed Answer does address the merits of this case by denying the allegations against him. As such, there was mention of the merits by way of Respondent, Brower's, Answer and the same occurred during ALJ Pylitt's involvement in this matter and in advance of his inappropriate Order recommending default of Mr. Brower.

4. Respondent does not object to Finding of Fact number four (4).
5. Respondent does not object to Finding of Fact number five (5)
6. Respondent does not object to Finding of Fact number six (6).
7. Respondent, Brower, objects to Finding of Fact number seven (7) for the reason that the Honorable Mark Dudley, Judge of Madison Circuit Court 6, did hold/state that the IHRC failed to follow its own rules and, in doing so, held that this ALJ incorrectly and inappropriately failed to follow the IHRC's rules by defaulting a licensee that had timely filed a responsive pleading. Further, Judge Dudley's Order **denying** the IHRC's Motion to Dismiss is attached hereto, made a part hereof, and marked as Exhibit "D." (Respondent, Brower, calls the IHRC/Commissioner's attention to page four (4), line 5 of said exhibit).
8. Respondent, Brower, objects to Finding of Fact number eight (8) for the same reasons as set forth in his objection to the preceding Finding of Fact number seven (7) and incorporates by reference his response and objection to the same.
9. Respondent, Brower, does not object to Finding of Fact number nine (9).
10. Respondent, Brower, does not object to Finding of Fact number ten (10).
11. Respondent, Brower, does not object to Finding of Fact number eleven (11).
12. Respondent, Brower, does not object to Finding of Fact number twelve (12).
13. Respondent, Brower, does not object to Finding of Fact number thirteen (13).

#### CONCLUSIONS OF LAW

1. Respondent, Brower, objects to Conclusion of Law number one (1). Respondent, Bobby Brower both objects and takes exception to this Administrative Law Judge's position that he has been/is properly appointed. This is because I.C. 4-21.5-3-9 requires that an ALJ be appointed by the agency's ultimate authority. ALJ Pylitt was not properly appointed following Respondent, Brower's, successful Petition for Judicial Review and remand of this matter to the IHRC. This is because the matter was remanded to the agency (IHRC) and not to ALJ Pylitt. IC 4-21.5-3-9 requires appointment of an ALJ by the agency's ultimate authority. The ultimate authority in this case is the Indiana Horse Racing Commission and/or its Chairman. Instead of the ultimate authority, opposing counsel issued a letter dated November 16, 2017, requesting that ALJ Pylitt conduct a hearing. That letter was not and is not a proper appointment of ALJ Pylitt pursuant to I.C. 4-21.5-3-9 following remand of this matter to the Indiana

Horse Racing Commission. Respondent, Bobby Brower, therefore objects and takes exception to the position that this ALJ has authority, because he has not been properly re-appointed subsequent to the matter being remanded to the agency by the Madison Circuit Court 6.

2. Respondent, Brower, admits that the initial appointment by way of former IHRC Chairman, Tom Weatherwax, dated December 16, 2016, has not, to the best of his knowledge, been modified, withdrawn, or revoked. Respondent, Brower, does object to the extent that Conclusion of Law number two (2) suggests that this ALJ was properly appointed subsequent to this matter being remanded by the Madison Circuit Court 6 to the IHRC. Respondent, Brower, incorporates by reference his objection to Conclusion of Law number one (1).
3. Respondent, Brower, has no objection to Conclusion of Law number three (3).
4. Respondent, Brower, has no objection to Conclusion of Law number four (4).
5. Respondent, Brower, has no objection to Conclusion of Law number five (5).
6. Respondent, Brower, objects to Conclusion of Law number six (6). For his objection to Conclusion of Law number six (6), Respondent, Brower, incorporates his objections set forth in this petition and all of them as well as the evidence in set forth in his Motion to Disqualify Administrative Law Judge and his Reply Brief and all exhibits to each as well as the exhibits to this Petition.
7. Respondent, Brower, has no objection to Conclusion of Law number seven (7).
8. Respondent, Brower, objects to Conclusion of Law number eight (8) for the reason that this Conclusion of Law suggests and implies that this ALJ was properly appointed subsequent to the denial of the IHRC's Motion to Dismiss Respondent, Brower's, Petition for Judicial Review and this matter being remanded to the IHRC. Further, Respondent, Brower, incorporates by reference his objections to Conclusions of Law numbers 2 and 6 as set forth above.
9. Respondent, Brower, does not object to Conclusion of Law number nine (9).

#### ULTIMATE FINDING OF FACT

Respondent, Bobby Brower, objects to the Ultimate Finding of Fact. Respondent, Brower's, basis for his objection to the Ultimate Finding of Fact is the argument, evidence, statutory provision, case law, and objections set forth in his January 4, 2018, Motion to Disqualify Administrative Law Judge as well as his subsequently filed Reply Brief and this Petition for Review and Denial of ALJ Pylitt's Recommended Order of January 29, 2018, as well



as all exhibits to the same.

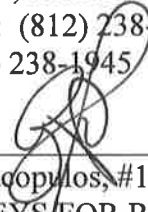
### CONCLUSION

The IHRC has as its charge promoting integrity in Indiana horse racing and fairly and uniformly enforcing the rules and regulations governing participants in our state's racing program. Integrity, fairness and impartiality are present when all steps are taken to ensure licensees, such as Bobby Brower, are afforded a fair hearing before an unbiased trier of fact. Participants/licensees' rights pursuant to Indiana state law and the AOPA are an important component to ensuring integrity in our program. The impartial and unbiased adjudication of cases is equally critical to the integrity of the Indiana horse racing program.

Respondent, Brower, has met his burden of proof in establishing prejudice and bias on the part of the ALJ. Bernard Pylitt should be disqualified and replaced by another IHRC-approved and selected Administrative Law Judge. ALJ Pylitt's recommendation to default Respondent, Brower, in the face of a timely filed Answer, his denial of Mr. Brower's request for additional time to serve third party discovery, his refusal to amend, correct, complete and enter a nunc pro tunc order relative to the incorrect, inaccurate, incomplete and bias scheduling order of November 29, 2017, as evidenced by the undersigned counsel's letter of December 15, 2017, and ALJ Pylitt's dismissive response of December 15, 2017, his expanding the grounds and basis, beyond Indiana law and his authority, to potentially default Mr. Brower in his Order of November 29, 2017, his recommendation of a lifetime ban from Indiana racing (effectively all racing) for fifteen (15) years, as well as a punitive fine of \$40,000, without any evidence or any testimony, is all evidence advanced by Respondent, Brower, in establishing his position that the IHRC must disqualify Bernard Pylitt and appoint, pursuant to I.C. 4-21.5-3-9 a fair, impartial, unbiased and unprejudicial ALJ to decide this matter.

Respectfully submitted,

SACOPULOS JOHNSON & SACOPULOS  
676 Ohio Street  
Terre Haute, Indiana 47807  
Telephone: (812) 238-2565  
Fax: (812) 238-1945

By:   
Peter J. Sacopulos, #14403-84  
ATTORNEYS FOR RESPONDENT

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing has been served upon the following counsel of record by email transmission and Certified U.S. Mail, postage prepaid, this 9<sup>th</sup> day of February, 2018:

Attorney Lea Ellingwood  
General Counsel  
Indiana Horse Racing Commission  
1302 North Meridian  
Indianapolis, IN 46202  
[lellingwood@hrc.in.gov](mailto:lellingwood@hrc.in.gov)

Bernard L. Pylitt  
Administrative Law Judge  
Katz Korin Cunningham PC  
334 North Senate Avenue  
Indianapolis, IN 46204  
[Bylitt@kkclegal.com](mailto:Bylitt@kkclegal.com)



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Peter J. Sacopulos

**From:** [Ellingwood, Lea](#)  
**To:** [Pennycuff, Dale L](#)  
**Subject:** FW: ALJ Assignments  
**Date:** Friday, February 02, 2018 9:48:53 AM

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**From:** Tkwx [mailto:tkwx@comcast.net]  
**Sent:** Friday, December 09, 2016 6:46 PM  
**To:** Ellingwood, Lea  
**Cc:** Smith, Michael D  
**Subject:** Re: ALJ Assignments

\*\*\*\* This is an EXTERNAL email. Exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email. \*\*\*\*

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Good choices , please proceed as requested.

Chairman

Sent from my iPad

On Dec 9, 2016, at 11:34 AM, Ellingwood, Lea <[LEllingwood@hrc.IN.gov](mailto:LEllingwood@hrc.IN.gov)> wrote:

Good morning, Tom!

I hate to bother you while you're taking care of Kay, but we need to assign an ALJ to two pending cases. Based on the schedule of each judge, we'd recommend assigning the first (which is a complaint against [REDACTED]) to Judge Ernie Yelton and the second (which is a complaint against Bobby Brower) to Judge Buddy Pylitt. Can you confirm these assignments?

Best,  
Lea

Lea Ellingwood  
General Counsel  
Indiana Horse Racing Commission  
1302 N. Meridian St.  
Suite 175  
Indianapolis, IN 46202  
317-233-3119

BATES NO. IHRC00072



**PLA**

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**From:** PLA  
**Sent:** Friday, December 15, 2017 11:00 AM  
**To:** 'Bernard Pylitt'  
**Subject:** IHRC/IHRC Staff v. Bobby Brower

Dear ALJ Pylitt:

I am writing to address issues and exceptions my client, Bobby Brower, Attorney Greg Carter and I have relative to the Prehearing Order of November 29, 2017. I apologize for not addressing these issues more promptly but have been out of my office on other business matters. These issues are:

1. Your Order states: "...Bernard L. Pylitt, was requested to conduct a prehearing conference and schedule deadlines...." This suggests that Mr. Brower requested or jointly requested the same. That is not the case. In fact, Mr. Brower has challenged whether you have been appointed to serve as ALJ in this matter. The Madison Circuit Court remanded this matter to the Indiana Horse Racing Commission. I.C. 4-21.5-3-9 requires an Administrative Law Judge be appointed by the agency's (IHRC) ultimate authority. Subsequent to the trial court's Order, no such notice of your appointment has been provided or received.
2. The final paragraph of your Order adds a basis of default relative to Mr. Brower only that is not set forth or included in I.C. 4-21.5-3-24, specifically, your statement is: "...If Mr. Brower fails to attend the scheduled hearing or cooperate during discovery, he may be held in default...." Your statement supersedes the statute governing default by adding a basis for default.
3. The Order does not resolve or decide the disputed issue of whether you have properly been appointed and have jurisdiction over this matter. The Order summarizes Mr. Brower's position as well as that of the Agency but stops short of setting forth why you have jurisdiction pursuant to Chapter 9 and/or Chapter 15. My client requests clarification of this issue.
4. Mr. Brower, prior to November 29, 2017, had not filed a Motion to Disqualify. You have included, in the Prehearing Scheduling Order statements as to a Motion to Disqualify that has not yet been filed. Those statements are biased against Mr. Brower. Disqualification pursuant to I.C. 4-21.5-3-10 was not an issue of the Pre-Hearing Conference. Further, your statement that Mr. Carter: "...refused to provide any specific reason or evidence to support his claim that the ALJ is prejudiced or biased which would require his being disqualified..." is inappropriate and incorrectly implies that Mr. Brower has no basis for a Motion to Disqualify. That is not the case. Mr. Brower, Attorney Carter, and I take exception to the same and request that that statement be removed from the Order.

My client, Bobby Brower, respectfully requests that the Prehearing Order of November 29, 2017, be re-issued to reflect the modifications, changes, and deletions referenced above.

Yours Sincerely,

Peter J. Sacopulos  
SACOPULOS, JOHNSON & SACOPULOS  
676 Ohio Street  
Terre Haute, IN 47807  
Telephone: (812) 238-2565  
Facsimile: (812) 238-1945  
pete\_sacopulos@sacopulos.com



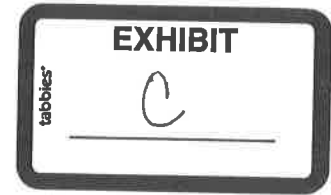
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**PLA**

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**From:** Bernard Pylitt <bylitt@kkclegal.com>  
**Sent:** Friday, December 15, 2017 1:13 PM  
**To:** PLA  
**Cc:** Lea Ellingwood  
**Subject:** Re: IHRC/IHRC Staff v. Bobby Brower



It does not appear that you copied Lea so I am including her with my response. Please refrain from any future ex parte communications.

My Prehearing Order needs no clarification and remains as is.

If you intend to file a Motion to Disqualify me as ALJ in this matter, please do so without delay so the issue may be resolved given the pending deadlines.

On Dec 15, 2017, at 11:00 AM, PLA <[pla@sacopulos.com](mailto:pla@sacopulos.com)> wrote:

Dear ALJ Pylitt:

I am writing to address issues and exceptions my client, Bobby Brower, Attorney Greg Carter and I have relative to the Prehearing Order of November 29, 2017. I apologize for not addressing these issues more promptly but have been out of my office on other business matters. These issues are:

1. Your Order states: "...Bernard L. Pylitt, was requested to conduct a prehearing conference and schedule deadlines...." This suggests that Mr. Brower requested or jointly requested the same. That is not the case. In fact, Mr. Brower has challenged whether you have been appointed to serve as ALJ in this matter. The Madison Circuit Court remanded this matter to the Indiana Horse Racing Commission. I.C. 4-21.5-3-9 requires an Administrative Law Judge be appointed by the agency's (IHRC) ultimate authority. Subsequent to the trial court's Order, no such notice of your appointment has been provided or received.
2. The final paragraph of your Order adds a basis of default relative to Mr. Brower only that is not set forth or included in I.C. 4-21.5-3-24, specifically, your statement is: "...If Mr. Brower fails to attend the scheduled hearing or cooperate during discovery, he may be held in default..." Your statement supersedes the statute governing default by adding a basis for default.
3. The Order does not resolve or decide the disputed issue of whether you have properly been appointed and have jurisdiction over this matter. The Order summarizes Mr. Brower's position as well as that of the Agency but stops short of setting forth why you have jurisdiction pursuant to Chapter 9 and/or Chapter 15. My client requests clarification of this issue.
4. Mr. Brower, prior to November 29, 2017, had not filed a Motion to Disqualify. You have included, in the Prehearing Scheduling Order statements as to a Motion to Disqualify that has not yet been filed. Those statements are biased against Mr. Brower. Disqualification pursuant to I.C. 4-21.5-3-10 was not an issue of the Pre-Hearing Conference. Further, your statement that Mr. Carter: "...refused to provide any specific reason or evidence to support his claim that the ALJ is prejudiced or biased which would

require his being disqualified..." is inappropriate and incorrectly implies that Mr. Brower has no basis for a Motion to Disqualify. That is not the case. Mr. Brower, Attorney Carter, and I take exception to the same and request that that statement be removed from the Order.

My client, Bobby Brower, respectfully requests that the Prehearing Order of November 29, 2017, be re-issued to reflect the modifications, changes, and deletions referenced above.

Yours Sincerely,

Peter J. Sacopulos  
SACOPULOS, JOHNSON & SACOPULOS  
676 Ohio Street  
Terre Haute, IN 47807  
Telephone: (812) 238-2565  
Facsimile: (812) 238-1945  
[pete\\_sacopulos@sacopulos.com](mailto:pete_sacopulos@sacopulos.com)

**CONFIDENTIALITY NOTICE:**

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STATE OF INDIANA  
COUNTY OF MADISON

SS:

BOBBY BROWER  
Plaintiff

IN THE MADISON CIRCUIT COURT  
DIVISION 6

2017 TERM

CAUSE NO. 48C06-1703-MI-279

VS.

INDIANA HORSE RACING COMMISSION,  
INDIANA HORSE RACING COMMISSION  
STAFF

Defendants

**ORDER DENYING DEFENDANTS' MOTION TO DISMISS**

The parties appeared in person and by counsel on June 16, 2017, for a hearing on Defendants, Indiana Horse Racing Commission and Indiana Horse Racing Commission Staff's (collectively "IHRC"), Motion to Dismiss. The parties fully briefed the issue.

The issue is whether this court has jurisdiction to hear plaintiff, Bobby Brower's ("Brower"), Petition for Judicial Review. Brower is a horse trainer licensed by the State of Indiana and subject to administrative oversight by IHRC. On November 4, 2016, the IHRC filed an administrative complaint pursuant to 71 IAC 10-3-20 against Brower alleging he mistreated a horse. Brower received the administrative complaint on November 16, 2016. 71 IAC 10-3-20 requires a licensee to request a hearing within twenty (20) days if he wishes to contest the administrative complaint. The language of 71 IAC 10-3-20(d) reads:

(d) Not later than the twentieth day after the date on which the executive director delivers or sends the administrative complaint, the person charged may make a written request for a hearing or may remit the amount of the administrative penalty to the commission. Failure to request a hearing or to remit the amount of the administrative penalty within the period prescribed by this subsection results in a waiver of a right to a hearing on the administrative penalty as well as any right to judicial review. If the person charged requests a hearing, the hearing shall be conducted in the same manner as other hearings conducted by the commission pursuant to this article.

The administrative code covering the IHRC does not provide a specific form for making a written request for a hearing.



48C06-1703-MI-000279  
OOMTD  
Order Denying Motion to Dismiss  
1668209





Brower, through his attorney, filed an answer on November 29, 2016, pursuant to 71 IAC 10-3-21. This filing is within twenty (20) days of Brower's receipt of the administrative complaint. 71 IAC 10-3-21 is titled "Settlement Procedures". Brower followed the requirements of §21 and not §20. If the IHRC filed an administrative complaint pursuant to 71 IAC 10-3-21, then the licensee shall file an answer within twenty (20) days of service of the complaint. Following the filing of an answer, the parties can enter into a settlement agreement. If a settlement agreement is not reached, then an administrative complaint may be filed under 71 IAC 10-3-20.

The twenty (20) day window expired on December 6, 2016, and Brower filed a written request for hearing on December 7, 2016. Pursuant to the IHRC's administrative procedures, it filed a Notice of Proposed Default against Brower on December 16, 2016, because he failed to file a written request for hearing in the allotted time. Brower filed his objection to the Notice of Proposed Default on December 21, 2016. The assigned administrative law judge on January 3, 2017, recommended to the IHRC that it find Brower in default. Brower filed his objection to the administrative law judge's recommendation on January 12, 2017. The IHRC voted on March 7, 2017, and issued its final order finding Brower in default on March 14, 2017. Brower filed this case seeking judicial review of a final agency action on March 31, 2017.

I.C. 4-21.5-3-24 governs the process engaged in by the parties. The statute in full reads:

- (a) At any stage of a proceeding, if a party fails to:
- (1) satisfy the requirements of section 7(a) [IC 4-21.5-3-7(a)] of this chapter;
  - (2) file a responsive pleading required by statute or rule;
  - (3) attend or participate in a prehearing conference, hearing, or other stage of the proceeding; or
  - (4) take action on a matter for a period of sixty (60) days, if the party is responsible for taking the action;

the administrative law judge may serve upon all parties written notice of a proposed default or dismissal order, including a statement of the grounds.

- (b) Within seven (7) days after service of a proposed default or dismissal order, the party against whom it was issued may file a written motion requesting that the proposed default order not be imposed and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the administrative law judge may adjourn the proceedings or conduct them without the participation of the party against whom a proposed

default order was issued, having due regard for the interest of justice and the orderly and prompt conduct of the proceedings.

(c) If the party has failed to file a written motion under subsection (b), the administrative law judge shall issue the default or dismissal order. If the party has filed a written motion under subsection (b), the administrative law judge may either enter the order or refuse to enter the order.

(d) After issuing a default order, the administrative law judge shall conduct any further proceedings necessary to complete the proceeding without the participation of the party in default and shall determine all issues in the adjudication, including those affecting the defaulting party. The administrative law judge may conduct proceedings in accordance with section 23 [IC 4-21.5-3-23] of this chapter to resolve any issue of fact.

I.C. 4-21.5-3-24 requires one of four triggers prior to an agency seeking a default judgment. Subsection (a)(1) covers personnel actions in the State's Civil Service System and is inapplicable here. Subsection (a)(2) authorizes an agency to seek a default when a party fails to file a responsive pleading. This is the subsection at issue in this case. Subsections (a)(3) and (a)(4) are not implicated by the facts of this case.

The IHRC defines a "pleading" as:

(a) Pleadings filed with the commission include the following:

- (1) Appeals
- (2) Applications
- (3) Answers
- (4) Complaints
- (5) Exceptions
- (6) Replies
- (7) Motions

Regardless of an error in designation, a pleading shall be accorded its true status in the proceeding in which it is filed.

71 IAC 10-3-3. The IHRC does not define a request for a hearing. The IHRC does differentiate between an answer and a request for hearing. *Id.* It does recognize that one is a pleading and the other is not. The court's analysis can stop at this point because the IHRC's action contravenes I.C. 4-21.5-3-24(a). Brower never failed to file a "responsive pleading required by statute or rule" and as such, the IHRC cannot meet its burden that its procedures conform to the statutory mandate.

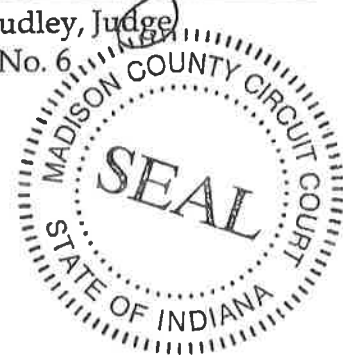
In further support of the court's conclusion are the IHRC's own rules. Even if the court was persuaded that a request for hearing is a required pleading, Brower's answer

clearly disputed the IHRC's allegations. The IHRC tells its licensees "regardless of an error in designation, a pleading shall be accorded its true status in the proceeding in which it was filed." 71 IAC 10-3-3(a). While Brower's document is titled, "Answer" its substance told the IHRC that he wished to contest the proposed fine and suspension. The IHRC must follow its own rules and accord Brower's "Answer" its true status as a timely request for a hearing. The court finds that Brower timely responded to IHRC's complaint. The parties are to contact the court to set a pretrial conference date to address the remaining issues of Brower's request to stay IHRC's suspension and his request to remand the case to the IHRC.

All of which is so ordered, this 28<sup>th</sup> day of July, 2017.



The Honorable Mark Dudley, Judge  
Madison Circuit Court No. 6



Copies to:

Peter Sacopulos  
John Shanks  
Robin Babbitt

BEFORE AN ADMINISTRATIVE LAW JUDGE  
APPOINTED BY THE INDIANA HORSE RACING COMMISSION

INDIANA HORSE RACING  
COMMISSION STAFF,  
Petitioner,

v.

BOBBY BROWER,  
Respondent.

In Re: ADMINISTRATIVE COMPLAINT  
NO. 216005

2018 APR 2 P 1:53  
INDIANA  
HORSE RACING COMM

**NOTICE OF OPPORTUNITY TO PRESENT BRIEFS AND ORAL ARGUMENT**

This matter is pending before the Indiana Horse Racing Commission (“Commission”) on the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER DENYING BOBBY BROWER’S MOTION TO DISQUALIFY BERNARD PYLITT AS ADMINISTRATIVE LAW JUDGE** dated and issued by ALJ Pylitt on January 29, 2018. On February 9, 2018, Bobby Brower (“Respondent”) filed his objections to the administrative law judge’s Recommended Order.

Notice is hereby given that the Commission will afford both parties an opportunity to present briefs concerning this case. Any briefs filed by Respondent or the Commission **MUST** be received at the offices of the Indiana Horse Racing Commission by noon (Indianapolis time) on Monday, April 16, 2018. No briefs received after this time and date will be accepted. In addition to any hard copies filed, any briefs filed **MUST** be filed electronically at [dpitman@hrc.in.gov](mailto:dpitman@hrc.in.gov). Briefs shall be served electronically on the opposing party.

The Commission will also consider oral argument on the objections at its meeting on April 18, 2018. The oral argument will be limited to 15 minutes per side.

SO ORDERED, 12th day of April 2018.

THE INDIANA HORSE RACING COMMISSION



By: \_\_\_\_\_  
Philip Borst, D.V.M.  
Chairperson  
Indiana Horse Racing Commission

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **NOTICE OF OPPORTUNITY TO PRESENT BRIEFS AND ORAL ARGUMENT** has been duly served via email and first-class United States mail, postage prepaid this 12th day of April, 2018, to the following parties of record:

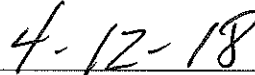
Peter Sacopulos  
Sacopulos Johnson & Sacopulos  
676 Ohio Street, IN 47807  
Terre Haute, IN 47807  
Email: [pete\\_sacopulos@sacopulos.com](mailto:pete_sacopulos@sacopulos.com)

Lea Ellingwood  
Indiana Horse Racing Commission  
1302 North Meridian, Suite 175  
Indianapolis, IN 46202  
Email: [lellingwood@hrc.in.gov](mailto:lellingwood@hrc.in.gov)

Service by Mail and Electronic Mail



Signature



Date

Indiana Horse Racing Commission  
1302 N. Meridian, Suite 175  
Indianapolis, IN 46202  
(317) 233-3119  
856776

**INDIANA HORSE RACING COMMISSION  
BEFORE AN ADMINISTRATIVE LAW JUDGE**

2018 JAN 17 P 12:48

INDIANA HORSE RACING COMMISSION  
STAFF,

Petitioner,

v.

BOBBY BROWER,

Respondent.

Administrative Complaint No. 216005

Before the Hon. Bernard L. Pylitt,  
Administrative Law Judge

INDIANA  
HORSE RACING COMM.

**COMMISSION STAFF’S OPPOSITION TO RESPONDENT, BOBBY BROWER’S  
MOTION TO DISQUALIFY ADMINISTRATIVE LAW JUDGE**

Respondent Bobby Brower's ("Brower") Motion to Disqualify Administrative Law Judge ("ALJ") Pylitt has no basis in fact or law. Instead, it relies on mischaracterizations of the Judge's previous rulings and ignores the provisions of the Indiana Code of Judicial Conduct and applicable Indiana case precedent. Brower has not presented any legitimate support for his motion to disqualify Judge Pylitt. Accordingly, his motion must be denied.

**PROCEDURAL HISTORY**

On December 16, 2016, Indiana Horse Racing Commission ("IHRC") Chairman Tom Weatherwax assigned ALJ Bernard Pylitt to hear the disciplinary action related to Administrative Complaint 216005. (See Exhibit 1.) Pursuant to 71 IAC 10-3-20(d), Indiana Horse Racing Commission Staff ("Staff") filed a Motion for Default Judgment on the basis that the appropriate pleading was not timely filed and therefore, default judgment was appropriate. Staff's Motion for Default Judgment was granted by ALJ Pylitt and was affirmed by the Indiana Horse Racing Commission at its March 7, 2017, meeting. Brower timely filed a Petition for Judicial Review in

the Madison Circuit Court. In response Commission Staff filed a Motion to Dismiss<sup>1</sup>, which was denied. In its denial, the Madison Circuit Court judge found that a responsive pleading had been timely filed.

Staff and Brower then entered into a settlement agreement, the terms of which were memorialized in an Agreed Entry, approved by the Madison Circuit Court on October 17, 2017. (See Exhibit 2.) Relevant portions of that Agreed Entry provide that:

- “the parties agree to the entry of a Judgment in Favor of Brower remanding the matter to the Commission for further proceedings relating to Administrative Complaint No. 216005 issued by the Commission’s Executive Director on Nov. 14, 2016 consistent and in compliance with the Indiana Administrative Orders and Procedures Act and Commission regulations.”
- “[E]ach party reserves all rights with respect to the previous appointment of Administrative Law Judge, Bernard Pylitt, to preside over this matter.”

### **ARGUMENT**

“The law presumes that a judge is unbiased and unprejudiced in the matters which come before the judge.” *Smith v. State*, 477 N.E.2d 857, 864 (Ind. 1985). Brower’s Motion to Disqualify does nothing to rebut this presumption. Rather, Brower cherry-picks quotations from the Madison Circuit Court’s denial of Staff’s Motion to Dismiss in a tiresome and unsuccessful

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<sup>1</sup> In his Motion to Disqualify, Brower states ““Commission Staff for reasons unknown to the Respondent and in direct contradiction to the Indiana Inspector General’s Report of September 2, 2011, retained private counsel, instead of assigning defense to its staff counsel or assigning the matter to the office of the Indiana General for representation in connection with Brower’s Verified Petition for Judicial Review.” First, Staff struggles to see the relevance of this statement to Brower’s position regarding disqualification. Second, the Indiana Inspector General’s Report is not a document that binds the Commission to particular action, and furthermore, the Office of the Attorney General is responsible for providing legal counsel for agencies at a trial court level, not in house counsel. Staff sought the Attorney General’s approval to use outside counsel in this case, and said approval was granted.

argument that Judge Pylitt cannot preside fairly over his case because in a prior Recommended Order, he concluded that Brower was in default for failing to timely file an answer. ALJ Pylitt interpreted the rules according to precedent at the time of the Recommended Order. Brower alleges that this interpretation based upon precedent evidences bias and prejudice. However, Brower fails to state *why* or *how* ALJ Pylitt showed bias or prejudice. Brower only claims that bias and prejudice are shown by the outcome, and not by the process or method used to reach the outcome. An unfavorable outcome to one's case is not evidence of bias or prejudice. There must be more, of which Brower has failed to demonstrate.

Brower essentially argues that ALJ Pylitt's decision on Staff's Motion to Dismiss is evidence that ALJ Pylitt is biased against him<sup>2</sup>. Brower's reference to IC 4-21.5-3-10(a)(4), which states that an individual may be disqualified for "any cause for which a judge of a court may be disqualified"<sup>3</sup> completely ignores that Indiana precedent makes clear that a judge need not be disqualified on the sole basis of a prior ruling.

Canon 2.11 of the Indiana Code of Judicial Conduct provides:

[A] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including...the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding[, or]...(5) The judge...has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

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<sup>2</sup> Brower argues that ALJ Pylitt failed to give Brower the hearing on the merits to which Brower believes he was entitled; however, that argument ignores that the appropriate procedural process after granting a Motion for Default Judgment is review by the agency's final authority, **not** a hearing on the merits.

<sup>3</sup> Paragraph 24 of Brower's Motion to Disqualify states that ALJ Pylitt has demonstrated bias in favor of the state agency that selected and appointed him, as well as paid him. Respondent implies that the fact that the agency selects and pays for the ALJ's services are evidence of bias. IC 4-21.5-3-10(a), cited multiple times by the Respondent, specifically contemplates that ALJ may be employees of the agency. Furthermore, by that logic, no ALJ assigned by the IHRC would satisfy Brower's requirements.



(Emphasis added). *See also* Ind. Code § 4-21.5-3-10 (setting forth grounds for disqualification of an ALJ, which include “bias [or] prejudice,” or “any cause for which a judge of a court may be disqualified.”). As the Canon expressly contemplates, the fact that a judge makes a statement in a court proceeding or judicial decision does not compel the judge’s disqualification, even if the statement appears to commit the judge to reach a particular result.

Interpreting Indiana case law has repeatedly reinforced this principle. As a general proposition, “[a]dverse rulings and findings do not, in and of themselves, establish a judge’s bias or prejudice.” *Brown v. State*, 684 N.E.2d 529, 534 (Ind. Ct. App. 1997). For instance, the Indiana Court of Appeals in *Green v. State* observed that “[t]he fact that a determination was made by a judge...is not conclusive on the issue of neutrality [and] the law presumes that a judge is unbiased and unprejudiced in the matters before him.” 676 N.E.2d 755, 761 (Ind. Ct. App. 1996) (internal citations omitted). The court went on to specifically hold that “[t]he law does not prohibit a judge from trying a case on the merits after participating in a probable cause determination.” *Id.* Nor does it “require a trial judge to disqualify himself although he or she presided over a co-defendant’s bench trial,” even where the prior bench trial resulted in a conviction. *Id.* (citing *Jones v. State*, 416 N.E.2d 880 (Ind. Ct. App. 1981)). *See also* Ind. Code § 4-21.5-3-13(c), (d) (providing that disqualification of an ALJ is not required on the grounds that the individual made a determination of probable cause or other preliminary determination in a proceeding and authorizing an ALJ to preside at successive stages of the same proceeding).

This principle was reinforced by the United States Supreme Court in *Withrow v. Larkin*, 421 U.S. 35, 56 (1975), in which the Court wrote:

Judges repeatedly issue arrest warrants on the basis that there is probable cause to believe that a crime has been committed and that the person named in the warrant has committed it. Judges also preside at preliminary hearings where they must decide whether the evidence is sufficient to hold the defendant for trial. Neither of these pre-trial involvements has been thought to raise any constitutional barrier against the judges presiding over the criminal trial and, if the trial is without a jury, against making the necessary determination of guilt or innocence. Nor has it been thought that a judge is disqualified from presiding over injunction proceedings because he has initially assessed the facts in issuing or denying a temporary restraining order or a preliminary injunction. It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.

*Id.*

Following Brower's logic that a previous ruling against Brower is evidence sufficient to disqualify ALJ Pylitt from hearing the matter, the Commission itself, which held a hearing to evaluate, and subsequently adopt, ALJ Pylitt's Recommended Order granting default judgment against Brower would also be disqualified from hearing the matter.

Brower further argues that statements in ALJ Pylitt's Prehearing Conference Order<sup>4</sup> evidence "additional bias and prejudice against Brower." Specifically, Brower refers to a sentence in the November 29, 2017, Prehearing Order, which states "...If Mr. Brower fails to attend the scheduled hearing or cooperate during discovery, he may be held in default..." Brower alleges that this language "supercedes the language in I.C. 4-21.5-3-24 by adding a basis for default." Ind. Code 4-21.5-3-24 provides, in pertinent part, that "(a) At any stage of a proceeding, if a party fails to: (2) file a responsive pleading required by statute or rule; or (3)

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<sup>4</sup> Brower's Motion to Disqualify repeatedly confuses the nature of the November 29, 2017, pre-hearing teleconference between parties. That meeting was simply a conference, not a hearing, as he has mistakenly referenced in Paragraphs 30-32.

attend a prehearing conference, hearing, or other stage of the proceeding, the administrative law judge may serve upon all parties written notice of a proposed default or dismissal order, including a statement of the grounds.” ALJ Pylitt’s statement that Brower *might* be held in default for failure to attend hearings or cooperate during discovery (a stage of proceedings governed by rules of procedure for civil courts) fits squarely within I.C. 4-21.5-3-24 and is entirely appropriate.

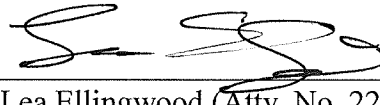
Irrespective of whether ALJ Pylitt’s statement is an accurate statement of the law, this statement isn’t evidence of bias against Brower. Again, Canon 2.11 of the Indiana Code of Judicial Conduct specifically carves out an exception for statements made by judges in court proceedings, judicial decisions, or opinions.

In short, Brower has not only failed to provide any evidence to support his spurious allegations of bias against Judge Pylitt, he has failed to acknowledge any legal authority in support of his arguments.

### **CONCLUSION**

Administrative law judges are “assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.” *U.S. v. Morgan*, 313 U.S. 409, 421 (1941). Judge Pylitt is entitled to the benefit of that presumption, and Brower has done nothing to establish that it should be reversed in this case. Accordingly, Brower’s Motion to Disqualify Administrative Law Judge Pylitt should be denied.

Respectfully submitted,



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Lea Ellingwood (Atty. No. 22346-49)  
INDIANA HORSE RACING  
COMMISSION  
1302 N. Meridian, Suite 175  
Indianapolis, IN 46202

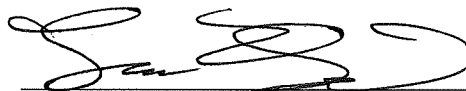
*Counsel for Indiana Horse Racing  
Commission Staff*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has been served via e-mail and deposited in the U.S. mail, first-class postage prepaid, on the 17 day of January, 2018, addressed to:

Peter J. Sacopulos  
Sacopulos, Johnson & Sacopulos  
676 Ohio Street  
Terre Haute, IN 47807  
[pete\\_sacopulos@sacopulos.com](mailto:pete_sacopulos@sacopulos.com)

Bernard L. Pylitt  
Administrative Law Judge  
Katz Korin Cunningham PC 334 North  
Senate Avenue  
Indianapolis, IN 46204  
[bpylitt@kkclegal.com](mailto:bpylitt@kkclegal.com)



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Lea Ellingwood



# State of Indiana Indiana Horse Racing Commission

Michael Pence, Governor

[www.in.gov/ihrcc](http://www.in.gov/ihrcc)

VIA U.S. MAIL and EMAIL to [bpylitt@katzkorin.com](mailto:bpylitt@katzkorin.com)

December 16, 2016

The Honorable Bernard Pylitt  
Katz & Korin, P.C.  
The Emelie Building  
334 North Senate Avenue  
Indianapolis, IN 46204-1708

Re: IHRC Staff v. Bobby Brower

Dear Judge Pylitt:

Please consider this letter as your appointment by the Indiana Horse Racing Commission's Chairman, Mr. Tom Weatherwax, as the Administrative Law Judge in the above-referenced matter.

Please find enclosed copies of the following:

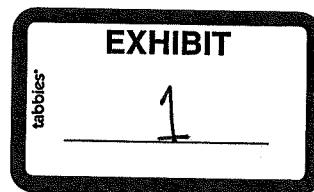
1. Administrative Complaint No. 216005 (as an attachment to the Motion for Default); and
2. IHRC Staff Motion for Default;

Commission Staff will be represented by Lea Ellingwood ([lellingwood@hrc.in.gov](mailto:lellingwood@hrc.in.gov)), who can be reached via telephone at 317-232-0397. In response to the administrative complaint, Brower has retained Pete Sacopulos ([pla@sacopulos.com](mailto:pla@sacopulos.com)) in this matter, and Commission Staff has accordingly served Mr. Sacopulos with paperwork relating to the administrative complaint and Motion for Default Judgment. Mr. Sacopulos be reached at 812-238-2565.

Sincerely,

Mike Smith  
Executive Director  
Enclosures

cc: Mr. Tom Weatherwax via email (enclosures omitted)  
Pete Sacopulos ( email, and First Class Mail)



STATE OF INDIANA  
COUNTY OF MADISON

SS: IN THE MADISON CIRCUIT COURT  
DIVISION 6

2017 TERM

BOBBY BROWER

CAUSE NO. 48C06-1703-MI-279

Petitioner,

vs.

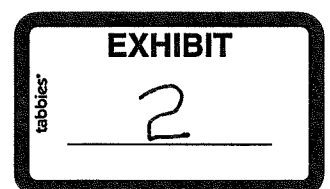
INDIANA HORSE RACING  
COMMISSION, INDIANA HORSE  
RACING COMMISSION STAFF,

Respondent.

**AGREED ENTRY**

The Indiana Horse Racing Commission/Indiana Horse Racing Commission Staff (the "Commission"), by counsel, Robin Babbitt, and the Petitioner, Bobby Brower ("Brower"), by counsel, Peter J. Sacopulos, subject to this Court's approval, agree as follows:

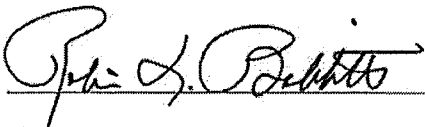
1. Under the facts of this particular case and consistent with this Court's ruling on the Commission's Motion to Dismiss dated July 28, 2017, the parties agree to the entry of a Judgment in Favor of Brower remanding the matter to the Commission for further proceedings relating to Administrative Complaint No. 216005 issued by the Commission's Executive Director on Nov. 14, 2016 consistent and in compliance with the Indiana Administrative Orders and Procedures Act (I.C. 4-21.5-3-1 et seq.) and Commission regulations (71 IAC 1-1-1 et. seq.). The parties agree that this stipulated judgment is limited to the specific facts of the Brower case and does not have precedential effect on any other judicial and/or administrative matter involving the Indiana Horse Racing Commission.
2. The parties agree that the Stay Petition filed by Brower with the Judicial Review Petition in this matter is hereby rendered as moot.
3. Upon the Court's entry of Judgment, the Commission will rescind Ruling No. 2017-1006 without prejudice to the rights of the Commission to prosecute Administrative Complaint No. 216005 issued by the Commission's Executive Director on Nov. 14, 2016. This action will lift the sanctions (subject to the outcome of further administrative proceedings) that were entered against Mr. Brower following and resulting from the entry of the Recommended Default Judgment by the Commission which is the subject of this Petition for Judicial Review;
4. Upon the Court's entry of Judgment, the Commission will review and consider any application by Brower as it would any other. The Commission's consent to this agreed judgment does not guarantee Brower's licensure and his application may be granted,



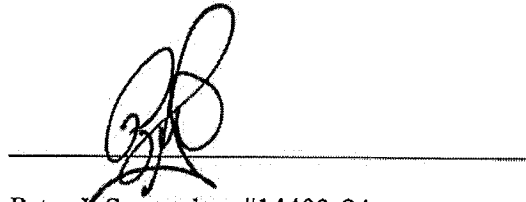
- denied, refused or placed in a probationary status.
5. Each party reserves all rights with respect to the previous appointment of Administrative Law Judge, Bernard I. Pylitt, to preside over this matter.
  6. Commissioner Lytle will recuse herself from any further involvement in the Commission's consideration of the issues relating to Administrative Complaint No. 216005 issued by the Commission's Executive Director on Nov. 14, 2016 including, but not limited, to any appeal of a recommended decision of the ALJ to the IHRC.

The above is agreed to subject to this Court's approval.

Dated this 17<sup>th</sup> day of October, 2017.



Robin Babbitt, #3765-49  
Attorney for Respondent



Peter J. Sacopulos, #14403-84  
Attorney for Petitioner

#### **ORDER ON AGREED ENTRY**

The Petitioner, Bobby Brower ("Brower"), by counsel, Peter J. Sacopulos, and the Respondent, Indiana Horse Racing Commission/Indiana Horse Racing Commission Staff (the "Commission"), by counsel, Robin Babbitt, having advised this Court that an agreed resolution has been reached and having submitted the above Agreed entry, and the Court having reviewed the same. and being duly advised in the premises, now finds that the Agreed Entry is meritorious and should be and hereby is granted.

Now, Therefore, IT IS ORDERED, ADJUDGED AND DECREED that:

1. Under the facts of this particular case and consistent with this Court's ruling on the Commission's Motion to Dismiss dated July 28, 2017, the Court enters Judgment in Favor of Brower remanding the matter to the Commission for further proceedings relating to Administrative Complaint No. 216005 issued by the Commission's Executive Director on Nov. 14, 2016 consistent and in compliance with the Indiana Administrative Orders and Procedures Act (I.C. 4-21.5-3-1 et seq.) and Commission regulations (71 IAC 1-1-1 et. seq.). The parties agree and the Court recognizes that this Judgment is limited to the specific facts of the Brower case and does not have precedential effect on any other judicial and/or administrative matter involving the Indiana Horse Racing Commission;
2. The Court hereby dismisses as moot the Stay Petition filed by Brower with the Judicial Review Petition in this matter;
3. The Commission is hereby Ordered to rescind Ruling No. 2017-1006 without prejudice to the rights of the Commission to prosecute Administrative Complaint No. 216005 issued by the Commission's Executive Director on Nov. 14, 2016. It is understood and agreed that this action will lift the sanctions (subject to the outcome of further

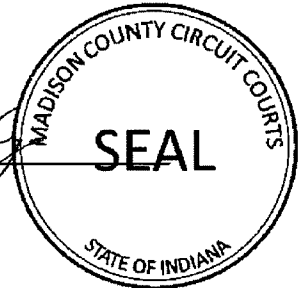
administrative proceedings) that were entered against Brower following and resulting from the entry of the Recommended Default Judgment by the Commission which is the subject of the Petition for Judicial Review that was filed in this action;

4. The Commission is hereby Ordered to review and consider any application submitted by Brower as it would any other. It is understood that this action will not guarantee Brower's licensure and his application may be granted, denied, refused or placed in a probationary status by the Commission; and
5. This Judgment recognizes that Brower and the Commission reserve all rights with respect to the previous appointment of Administrative Law Judge, Bernard I. Pylitt, to preside over Administrative Complaint No. 216005 and any matters that may be related thereto.

ALL OF THIS IS SO ORDERED this 17th day of October 2017.

*Mark Dudley*

The Honorable Mark Dudley, Judge  
Madison Circuit Court 6



JJ

Distribution to:

Robin Babbitt  
Peter Sacopulos  
Greg Carter  
John Shanks



**INDIANA HORSE RACING COMMISSION  
BEFORE AN ADMINISTRATIVE LAW JUDGE**

INDIANA HORSE RACING COMMISSION  
STAFF,

Petitioner,

v.

BOBBY BROWER,

Respondent.

Administrative Complaint No. 216005

Before the Hon. Bernard L. Pylitt,  
Administrative Law Judge

INDIANA  
HORSE RACING COMMISSION

2018 APR 14 P 3:03

**COMMISSION STAFF'S BRIEF IN SUPPORT OF ALJ PYLITT'S  
RECOMMENDED ORDERS DENYING RESPONDENT'S  
MOTION TO DISQUALIFY ALJ AND SECOND REQUEST FOR STAY**

On December 16, 2016, Indiana Horse Racing Commission (“IHRC”) Chairman Tom Weatherwax assigned ALJ Bernard Pylitt to hear the disciplinary action related to Administrative Complaint 216005. Pursuant to 71 IAC 10-3-20(d), Indiana Horse Racing Commission Staff (“Staff”) filed a Motion for Default Judgment on the basis that the appropriate pleading was not timely filed and therefore, default judgment was appropriate. Staff’s Motion for Default Judgment was granted by ALJ Pylitt and was affirmed by the IHRC at its March 7, 2017, meeting. Brower timely filed a Petition for Judicial Review in the Madison Circuit Court. In response, Commission Staff filed a Motion to Dismiss, which was denied. In its denial, the Madison Circuit Court judge found that a responsive pleading had been timely filed.

Staff and Brower then entered into a settlement agreement, the terms of which were memorialized in an Agreed Entry, approved by the Madison Circuit Court on October 17, 2017. Relevant portions of that Agreed Entry provide that:

- “[T]he parties agree to the entry of a Judgment in Favor of Brower remanding the matter to the Commission for further proceedings relating to Administrative Complaint No. 216005 issued by the Commission’s Executive Director on Nov. 14, 2016, consistent and in compliance with the Indiana Administrative Orders and Procedures Act and Commission regulations.”
- “[E]ach party reserves all rights with respect to the previous appointment of Administrative Law Judge, Bernard Pylitt, to preside over this matter.”

On January 4, 2018, Respondent Brower filed a Motion to Disqualify Administrative Law Judge Pylitt (“Motion to Disqualify”) along with a Motion to Stay Administrative Proceedings (“First Motion to Stay”) pending a resolution of his Motion to Disqualify. Brower’s First Motion to Stay argued that ALJ Pylitt was not properly assigned and/or should be disqualified. On January 8, 2018, ALJ Pylitt issued an order denying Respondent’s First Motion to Stay on the basis that the First Motion for Stay “ignores the clear requirements of the (relevant) regulation.”

On February 23, 2018, Respondent Brower filed his Second Motion for Stay of Proceedings (“Second Motion for Stay”). In his Second Motion for Stay, Brower argues that he will be “subject to further prejudice” absent a stay of proceedings insofar as “ALJ Pylitt may continue to make rulings that will adversely affect Respondent and his right to a fair and impartial hearing...”. Brower does not believe ALJ Pylitt has been or will be fair or impartial. Brower’s sole evidence for this belief is the procedural posture of the case; Brower has produced no new evidence in support of his request since his First Motion for Stay was denied. In fact, Brower’s Second Motion to Stay appears to be not much more than a third attempt at arguing that ALJ Pylitt

should be disqualified. Because Brower has not presented any legitimate support for his motions, those motions must be denied.

## ARGUMENT

### *Motion to Disqualify*

“The law presumes that a judge is unbiased and unprejudiced in the matters which come before the judge.” *Smith v. State*, 477 N.E.2d 857, 864 (Ind. 1985). Brower’s Motion to Disqualify does nothing to rebut this presumption. He simply argues that Judge Pylitt cannot preside fairly over his case because in a prior Recommended Order, he concluded that Brower was in default for failing to timely file an answer. ALJ Pylitt interpreted the rules according precedent at the time of the Recommended Order. Brower alleges that this interpretation based upon precedent evidences bias and prejudice. However, Brower fails to state *why* or *how* ALJ Pylitt showed bias or prejudice. Brower only claims that bias and prejudice are shown by the outcome, and not by the process or method used to reach the outcome. An unfavorable outcome to ones case is not evidence of bias or prejudice. There must be more, of which Brower has failed to demonstrate.

Canon 2.11 of the Indiana Code of Judicial Conduct provides:

[A] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including...the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding[, or]... (5) The judge...has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(Emphasis added). *See also* Ind. Code § 4-21.5-3-10 (setting forth grounds for disqualification of an ALJ, which include “bias [or] prejudice,” or “any cause for which a judge of a court may be

disqualified.”). As the Canon expressly contemplates, the fact that a judge makes a statement in a court proceeding or judicial decision does not compel the judge’s disqualification, even if the statement appears to commit the judge to reach a particular result.

Interpreting Indiana case law has repeatedly reinforced this principle. As a general proposition, “[a]dverse rulings and findings do not, in and of themselves, establish a judge’s bias or prejudice.” *Brown v. State*, 684 N.E.2d 529, 534 (Ind. Ct. App. 1997). Nor does it “require a trial judge to disqualify himself although he or she presided over a co-defendant’s bench trial,” even where the prior bench trial resulted in a conviction. *Green v. State*, 676 N.E.2d 755. (citing *Jones v. State*, 416 N.E.2d 880 (Ind. Ct. App. 1981)). *See also* Ind. Code § 4-21.5-3-13(c), (d) (providing that disqualification of an ALJ is not required on the grounds that the individual made a determination of probable cause or other preliminary determination in a proceeding and authorizing an ALJ to preside at successive stages of the same proceeding).

Following Brower’s logic that a previous ruling against Brower is evidence sufficient to disqualify ALJ Pylitt from hearing the matter, the Commission itself, which held a hearing to evaluate, and subsequently adopt, ALJ Pylitt’s Recommended Order granting default judgment against Brower would also be disqualified from hearing the matter.

Every perceived evidence of bias referenced by Respondent has fallen squarely within Canon 2.11 of the Indiana Code of Judicial Conduct, which again, specifically carves out an exception for statements made by judges in court proceedings, judicial decisions, or opinions.

In short, Brower has not only failed to provide any evidence to support his spurious allegations of bias against Judge Pylitt, he has failed to acknowledge any legal authority in support of his arguments.

### ***Second Request for Stay***

Pursuant to 71 IAC 10-2-10, a person who has been disciplined by a ruling of the judges may apply to the commission for a stay of the ruling, pending an action on an appeal by the commission. The commission may grant the stay on a finding of “good cause.” Brower fails to meet the minimum requirements necessary for a stay. Brower is not suspended and will not be suspended until the conclusion of the disciplinary process related to Administrative Complaint No. 216005.

Even if Brower were suspended or disciplined, he has failed to show good cause that a stay should be granted. “Good cause” is not defined by the commission’s administrative rules or by the Horse Racing Act; however, Black’s Legal Dictionary defines good cause as “a substantial reason amounting in law to a legal excuse”, or a “legally sufficient ground or reason.” Citing the procedural history of the case, Brower has identified the basis of his request for a stay as the *possibility* that ALJ Pylitt *may* make rulings that, in Brower’s estimation, will adversely affect him. Not only does Brower not identify a substantial reason or sufficient grounds for his request, he fails to identify any new information supporting his request for a stay since filing his First Motion for Stay, which was denied by the ALJ.

### **CONCLUSION**

Administrative law judges are “assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.” *U.S. v. Morgan*, 313 U.S. 409, 421 (1941). Judge Pylitt is entitled to the benefit of that presumption, and Brower has done nothing to establish that it should be reversed in this case. Furthermore, Respondent has provided no evidence supporting his second request for a stay.

Accordingly, ALJ Pylitt's Recommended Orders Denying Brower's Motion to Disqualify Administrative Law Judge Pylitt and Denying Respondent's Second Request for Stay should be adopted.

Respectfully submitted,



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Lea Ellingwood (Atty. No. 22346-49)  
INDIANA HORSE RACING  
COMMISSION  
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Indianapolis, IN 46202

*Counsel for Indiana Horse Racing  
Commission Staff*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has been served via e-mail on the 16th day of April, 2018, addressed to:

Peter J. Sacopulos  
Sacopulos, Johnson & Sacopulos  
676 Ohio Street  
Terre Haute, IN 47807  
amodesitt@sacopulos.com



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Lea Ellingwood