RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

WEDNESDAY 25 NOVEMBER 2020

APPELLANT JOHANNES (HANK) VANDERBURG

RESPONDENT GREYHOUND RACING NSW

GREYHOUNDS AUSTRALASIA RULE 79A(4)

DECISIONS:

1. **Appeal against finding of steward dismissed**
2. **Appeal against severity of penalty dismissed; 12 months' disqualification imposed**
3. **Appeal deposit refunded**

1. The appellant appeals against the decision of a steward of GRNSW of 10 August 2020 to impose upon him a period of disqualification of 12 months to commence on 16 August 2020.

2. The charge itself had been set out in a document given to him on 16 August 2018 and was laid pursuant to rule 79A(4)which, summarised, stated:

> "that you Johannes Vanderburg were the registered trainer of the greyhound Miss Splendamiro on 21 May 2018 when a sample was taken from that greyhound that contained a permanently banned prohibited substance."

3. The charge was particularised in a number of subparagraphs, a key one was that the substance in question was Ipamorelin.

4. Rule 79A provides:

> "(1) In addition to the circumstances in Rules 79(1)(a) and (b) and pursuant to Rule 80, the Stewards may carry out, or cause to be carried out such tests as they shall deem necessary in relation to a greyhound at any time for the purposes of this rule."
>
> (4) When a sample taken from a greyhound being trained by a licensed trainer or in the care of a registered person has been found to contain a Permanently Banned Prohibited Substance specified in sub-rule (2),
>
> (i) the trainer and any other person who was in charge of such greyhound at the relevant time shall be guilty of an offence."

5. The Tribunal notes that sub rule (2) sets out a number of permanently banned prohibited substances.

6. The additional rules that need to be considered are contained in Rule 80:

> "(2) Where the Stewards require samples of urine" etc "to be taken from a greyhound, a Steward or other authorised person is equally authorised to take such sample from a greyhound pursuant to any established procedures for the collection of samples."
>
> (3) Where a sample is taken from a greyhound for testing pursuant to this Rule, Rule 78(1) or 79A, pursuant to any established procedures, the sample shall be placed in a sealed container having attached to it a number and such information as may be deemed necessary by the Stewards, and be delivered to an accredited laboratory. A report

signed by a person who purports to have taken the sample shall be, without proof of the signature thereon, prima facie evidence of the matters contained therein for the purpose of any proceedings pursuant to these Rules."

7. The matter has had an unfortunate history. The dates just outlined indicate the age of the matter. The sample was taken, the appellant interviewed, an inquiry commenced by two then stewards, they adjourned their inquiry, nothing happened. Then the steward who made the decision took over the matter and made his decision on 10 August 2020.

8. The initial inquiry related to the charge sheet of 16 August 2018. The replacement steward made a determination in 2020 that he would conduct the hearing involving the appellant on the papers and did so. The appellant was not given an opportunity to make submissions on penalty. The steward had received various statements, which were provided to the appellant, and they were the statements of the two stewards in question, Mr Beekman and Mr Forster, and was not given an opportunity to cross-examine them.

9. Those procedural defects led to a stay being granted by the Tribunal on this appeal. Those procedural defects are curable on this appeal.

10. The appellant denied the matter in his written submission to the steward and by his appeal has maintained he did not breach the rule. A number of issues have been identified to establish why the rule has not been breached.

11. Just setting the scene for the submissions that have been made, it is important to focus in Rule 80 sub rule (3) on the words "pursuant to any established procedures".

12. GRNSW, the then regulatory body and the decision-maker in this matter, had published a number of documents which were binding upon its employees.

13. They included a Code of Conduct – as stated, obligatory – one of its terms required compliance with legislation and practices and procedures of Greyhound Racing NSW.

14. GRNSW on 25 July 2016 published document numbered REG01 entitled "Swabbing Policy". That policy applies to all swabs taken by employees. It deals with such things as random sampling, targeted sampling, elective sampling and race day sampling. It required samples to be taken in accordance with an accredited laboratory guideline. There are a number of other obligatory matters contained in it. That swabbing policy cross-references the code of conduct.

15. It is common ground in these proceedings that GRNSW had not published a swabbing policy directly referring to out of competition testing. Therefore, within Rule 80 sub rule (3) there is not “any established procedure” directly relating to out of competition testing.

16. It becomes an issue in these proceedings as to the extent to which, therefore, the two stewards who collected the out of competition sample were obliged to comply with other procedures. The other procedure sought to be relied upon by the appellant relates to race day sampling. It is titled “Track Staff,Policy & Procedure Guidelines”. If it is found that the guideline relating to race day sampling applies, was they complied with? If it does not apply, was the sample otherwise collected in a process which is credible and which removes from consideration issues of contamination or contamination possibility?

17. Some facts need to be established. The evidence in these proceedings has comprised a bundle of some 285 pages on behalf of the respondent and that bundle contains a number of documents which critically involve the usual certificates and the like from sample collections and analysis, a transcript of the inquiry conducted by the two stewards on 31 August 2018, matters relating to the collection of items from the appellant’s property, none of which are relevant, statements of the two inspectors, the interview with the appellant carried out by investigators, and the detailed submissions made to the inquiry steward as well as the subject decision.

18. The appellant has put in a bundle of evidence which contains various documents, the key ones being the Code of Conduct, the Swabbing Policy, the race day Staff Track sample collection policy, a Greyhound Racing Victoria swabbing sampling policy and procedures document of 2017, a statutory declaration of the appellant’s wife, Mrs Vanderburg, and some references. No oral evidence was called.

19. Those documents establish, relevant to the matters to be proved on a certificate case, some key facts.

20. The appellant was the trainer of the subject greyhound when the sample was taken. The sample was taken as an out of competition sample on 21 May 2018. The urine was subsequently analysed by accredited laboratories, each of which found Ipamorelin.

21. The evidence of Dr Karamatic, regulatory veterinary surgeon for GRV, retained by GRNSW, establishes that Ipamorelin is a prohibited substance, and it is a permanently banned prohibited substance. His evidence – and this will be relevant on other issues – is that under the GRNSW penalty system, as it was then written, this would be a Category 2 of the five categories of prohibited and/or permanently banned prohibited substances.

22. On the face of it, that disposes of this case. Because it is the argument for the respondent that that is all that needs to be established, namely, under the subject rule, that the appellant was the registered trainer when the sample was taken and present in that sample was a permanently banned prohibited substance.

23. The rules provide in Rule 81(1) the following:

> "Where a sample taken from a greyhound has been analysed by an accredited laboratory pursuant to Rule 80(3), a certificate signed by an accredited laboratory officer shall be, without proof of the signature thereon, prima facie evidence of the matters contained therein for the purpose of any proceedings pursuant to these Rules."

24. There is therefore prima facie evidence. Prima facie evidence can be rebutted. But is the rebuttal as to the accredited laboratory officer's certification, or is it to some other issue? There has been nothing adduced in relation to the analysis itself of the sample to indicate that that prima facie evidence has been rebutted.

25. But the Tribunal is not of the opinion that, in the absence of any specific rule exculpating a trainer from liability where there is a case of contamination, the trainer must be found to have breached the rule. That would require an absolute liability offence. This is not that. Other codes contain some absolute liability offences, particularly the prohibited substance presentation rule in the harness racing code. But that is not the way these rules are written.

26. If, therefore, the Tribunal finds contamination or that the respondent cannot eliminate contamination, then it is the Tribunal's opinion that the trainer cannot be found to have been in breach of the rule. It is necessary to examine that part of the case. As stated, it is not necessary to examine the sample testing processes. The issues go to failures by the two stewards on various matters as alleged against them for complying with best practice procedures, as they might otherwise be described, on the processes they undertook.

27. In addition, there is an issue about the way in which the prohibited substance can come to be present.

28. It might be noted as a formality that the Tribunal is not required to determine the correctness or otherwise of the decision of the steward and, as expressed, whether there was procedural fairness extended to the appellant, because this is a de novo hearing and all such matters require that procedural fairness be extended – here there is no submission to the contrary – and that the Tribunal make its own determination.

29. Some other key facts. This was the appellant's best greyhound, as he described it, and he sent it off to a $100,000 heat in Victoria. A friend, Mr Sultana, took the greyhound to Victoria and was accompanied by another person, Mr Magri. They had the care and control of the greyhound from the time they picked it up to the time they dropped it off to the appellant's property at or about 11 o'clock on 18 May.

30. There is no evidence that Mr Sultana or Mr Magri had any access to any cream which might contain the subject peptide. It is the evidence of Mr Sultana and Mr Magri in their interviews by inspectors that the greyhound was in their care and control, it was only fed food provided by the appellant. The greyhound was subsequently taken to Victoria after the out of competition testing and that evidence does not have to be examined.

31. The relevance of those timings is this: that the sample was taken at or about 7 am, or slightly afterwards, on 21 May. The greyhound was returned on 18 May at 11 pm. The time between the appellant taking possession and the sample being taken is some 56 hours.

32. The appellant is unable to explain why the subject prohibited peptide became present in the greyhound. The Tribunal set out earlier the appellant's thoughts of two possible sources. There was nothing about his feeding or treatment regime, which was examined by the two stewards in 2018, which is able to cause the presence of a synthetic peptide.

33. The evidence of Dr Karamatic in his report dated 29 July 2018, which deals with formalities, is as follows. The key facts are, having established that the subject drug is a prohibited substance and a permanently banned prohibited substance, neither of which are in issue in these proceedings and need not be further examined, are that there are no Australian Pesticide and Veterinary Medicines Authority registered products that contain Ipamorelin and there are no Therapeutic Goods Administration human registered products that contain Ipamorelin. He stated that Internet searches showed that there are numerous unregistered products presented as small injectable vials containing a powder to be reconstituted with sterile water and subsequently injected.

34. He gave evidence about the peptide being capable of affecting a performance in a positive way and reasons why it is administered and they do not need to be examined on the issues here.

35. Essentially, he says there is no reason to administer ipamorelin to a greyhound other than to improve its condition or performance.

36. Critically, he referred to an administration study by Racing Analytical Services Ltd where there was an administration to three greyhounds by intramuscular injection at a particular dose rate, which does not need to be

examined here, the effect of which was there was detection dated 29 July 2018 up to 23 hours. Another drug was examined, it does not need to be analysed here.

37. Here he opined that given the low concentration detected in urine after injection it is difficult to see the detection in these urine samples of GHRPs, which is a generic term, from any cause other than administration via injection in a recent timeframe likely to be within 24 hours.

38. He stated and confirmed in his oral evidence to the inquiry.

> "Summary. In my opinion, the permanently banned prohibited substance Ipamorelin detected in urine sample V500682 is capable of affecting the condition or performance of a greyhound and its detection in this sample indicates the recent administration of Ipamorelin. Based on previous administration studies in the greyhound, administration appears likely to have been less than 24 hours prior to the collection of the sample."

39. He was given the timeframe, just outlined, of the dog's return to the care of the appellant and opined "as is always the case, not knowing the amount administered or when, it was not possible to deal with certain scenarios as to why there might have been a low reading".

40. And Dr Steel, who gave evidence in the proceedings as the Manager of Biological Research Unit at Racing Analytical Services Ltd, stated that on a qualitative assessment from the readings he had available, this would be a low level.

41. The next facts are what happened on the sample day.

42. The two stewards arrived about 7am, Mrs Vanderburg greeted them. They indicated they were present to see Mr Vanderburg. They indicated to him, when he became available a few minutes later, that they wished to take a sample from the subject greyhound. Mr Vanderburg took them to the kennel and produced the greyhound they had named. They then sampled the urine of that greyhound following a procedure they set out in their two reports.

43. It is noted that their reports were prepared almost two years after the event, they do not contain any reference as to how they refreshed their memory from the particular procedure, they were both former experienced police officers, there was an element of consistency between their statements but they have not been cross-examined on that issue. What they have set out indicates, in the Tribunal's opinion and from its experience, and consistent with the race day sampling procedures, is that virtually all of the

steps they were required to take were undertaken in accordance with the required steps.

44. There are some challenges to some of those steps. The other steps need not be examined. It is to be borne in mind that the Tribunal is looking at possible failures with the view to finding some stage at which contamination might have occurred.

45. Contamination becomes relevant because it is the case for the appellant that there are creams on the market – and it might be noted that the Internet searches by Dr Karamatic did not find these, he only found injectable products – on internet searches undertaken by Mr Phillips, who is assisting the appellant with his appeal, is that there are products available through a particular website which contain a cream and which itself contains Ipamorelin.

46. That website has not been examined. The respondent's examination indicates that no author appears to be there. As to what precisely is demonstrated by that website is not in evidence. As to what therefore might be the concentration of Ipamorelin in the cream and which, when applied to a greyhound, might produce some subsequent reading, has not been put in evidence, and nor has any expert been called which would support that the application of whatever that cream was, with whatever it contained, might have produced at some stage, by absorption, the presence of the peptide in the urine of the greyhound. There is no evidence that it is likely to or might have been licked from the coat of the greyhound if applied to it. If of course it was applied to the tongue or mouth of the greyhound, there is no evidence that it might then have been absorbed. There is no evidence of rates of absorption through the skin or coat of a greyhound. There is no evidence of how that cream could otherwise have come to have been on the greyhound.

47. The grounds of appeal identified cream as a possible source. The respondent has not produced evidence from the two inspectors to eliminate cream as a possible source. The appellant has not produced evidence that anyone else who was likely to have had contact with the greyhound might have had that cream and either inadvertently or intentionally administered it to the greyhound, it being remembered that there is no evidence from the appellant that he would have any reason for the administration of that cream to his greyhounds.

48. The issue then becomes what would flow from that possible presence of the cream. It will be seen from the above analysis, which is not sought to be complete on absorption and the like, there being no expert evidence in this case, that it is not established by the appellant that it might have come from anyone else handling the greyhound or, indeed, that it might come from the two handlers, because it simply is an unknown factor.

49. Mr Phillips in his detailed submission points out that there is no evidence of any administration studies of greyhounds who have been subjected to the application or other absorption of the subject cream. That is correct. Therefore, there can be no excretion rates in urine identified and therefore no assessment of the dissipation of the subject drug in the dog's urine with any timeframe where it might have occurred from people other than the two inspectors or, indeed, by the inspectors.

50. There was also, it might be noted, criticism of the administration study identified by Mr Phillips that it was a very limited study and Dr Karamatic agrees that a proper study should have involved more greyhounds in a wider population, etc. At the end of the day, nothing turns on that particular criticism of the actual administration study.

51. Could therefore the inspectors have been responsible for some contamination? Two identified sources. One is somehow it was on their hands from an injectable form or two from a cream. There is no evidence whatsoever to link either of the two inspectors with the injectable form of the substance. And it must be borne in mind that anyone who had the substance would be breaching various rules, particularly anyone associated with a greyhound would be in breach of the rules, because it is a permanently banned prohibited substance. Indeed, the use of the cream itself would likewise give rise to the possession and use of a permanently banned prohibited substance. There is no evidence whatsoever to link either of the two inspectors with the cream form of the substance.

52. The challenges are these.

53. Firstly, there were no established out of competition testing or swabbing guidelines or procedures. Therefore, it is sought to draw from other swabbing practices and procedures a set of standards of best practice. The submission in the grounds of appeal is this: in the absence of an approved out of competition swabbing collection procedure or guidelines, the appellant argues that no charges can be laid. The Tribunal rejects that submission. The rules when read as a whole permit an out of competition sampling, that the rules only mandate compliance with a policy if published, and it is common ground there is no such policy published. Therefore, the laying of the charge in the absence of an out of competition swabbing collection procedure is permitted by the rules.

54. The next is what swabbing policy principle should be applied? It has been noted there is not one for out of competition sampling. It is suggested that it is mandatory that policies be followed. There being no policy that is applicable, there can of course be no mandatory requirement to follow a published policy. So that ground of appeal falls away.

55. Drawing down on a swabbing policy that adopts a Track Staff Policy and Procedure Guidelines Accreditation Level 2 Version 1 October 2012 document, which, by reason of its very title, is a race day swabbing guideline, can only be used for determining what might have been a best practice. The failure to comply with any precise matter in that track staff policy and procedure does not mandate a failure which requires a rejection outright of the sampling processes. It can only go to best practice.

56. What then are failures of best practice?

57. Firstly, the swabbing policy states “ensure that the industry participant is afforded an opportunity to have a witness present during the sample collection”. Neither inspector refers to it. Mr Vanderburg in his interview and before the stewards set out various things that took place. He is corroborated by the statutory declaration of Mrs Vanderburg in evidence, and no such offer was made. Mrs Vanderburg was available. It was not complied with. The Tribunal digresses from the facts here to note from the many cases with which it has dealt that in this code it has not a recollection of any occasion on which that particular policy wording was complied with. It might well be, but it has never been raised before to the Tribunal.

58. That policy was not one limited to the track policy or race day policy. It is applicable. But what follows if it was not complied with? The Tribunal will return to that.

59. Next is the issue of the failure to correctly identify the participant and the greyhound. There is no mandatory requirement to do so. Was it necessary?

60. Two stewards with a particular function to attend a nominated trainer’s registered premises attended on the premises upon which the appellant was present. It was his registered premises. He was the registered trainer for those premises. He had at those premises the registered subject greyhound.

61. Can it seriously be suggested that because he was not required to produce his identification – and there was no obligation mandatorily upon the inspectors to require that – that any of these processes did not involve Mr Vanderburg. To the extent it might be necessary on a race day, that is understandable because a number of people may be in charge of a greyhound and able to present it to the swabbing attendant. A trainer is entitled to nominate people to do that and therefore the swabbing attendant should know with whom they are dealing, particularly as that person is required to sign the swabbing collection certificate. No such obligation applied here. No failure of any type occurred because it was patently Mr Vanderburg.

62. The next issue is the question whether there was an obligation to use multiple means to identify the greyhound. The track staff policy document does require reliance on more than just the brand or microchip. There is an obvious reason for that. What greyhound is being presented by whom to the swabbing attendant? Or indeed, to race? A number of documents can be mandated. They include the greyhound's registration document.

63. But here, again, as just expressed, Mr Vanderburg, the licensed trainer, was at his registered premises. So it is reasonable to expect that the registered greyhound which he was asked to produce and then he went with the inspectors to the kennel and there produced a greyhound would be the greyhound in question. Can it seriously be suggested it was not the subject greyhound? The appellant has never suggested otherwise, just taken this identification procedural point. It would be nonsense to make a finding otherwise. There was no mandatory requirement under any procedure or guideline to do otherwise. And in addition, the inspectors carried out a microchip examination of the greyhound. It can be implied, although they did not express it exactly, that that microchip identified the subject greyhound as being the greyhound from which they would take the sample. Further examination of those facts is really unnecessary.

64. The next is a failure to undertake the swabbing collection process correctly.

65. The race day swabbing procedures require this:

> "swab official to rinse the ladle under running water (hot water where possible) and excess disposed in sink" etc.

66. There is another document upon which the appellant relies which is the GRNSW Greyhound Attendant Handbook. That is not a book upon which there is mandatory obligations upon an inspector to comply. That is a handbook. It is a handbook for an attendant. It is not a handbook for a sampler. It certainly sets out certain matters which the author of that handbook thought should be important to be in the knowledge of a handler or attendant, and that is you watch the collection procedure from start to finish. That is not a mandatory obligation on an inspector in an out of competition testing matter.

67. Then it goes on to say:

> "The track vet" – and note that refers to a vet – "will first wash his or her hands and then rinse the collection pot with running water."

68. Here there is no evidence that either inspector washed his hands. It is submitted, therefore, that prior to them doing that, by whatever they might have done, they may have contaminated the subject ladle with either the

product of some syringe, about which there is no evidence whatsoever, or by reason of a cream, and about which there is no evidence whatsoever as to its presence or non-presence.

69. What is the requirement then in respect of best practice? Each of them put gloves on. From that point on, whatever contamination might have been on their hands becomes irrelevant. It is submitted for the appellant that what is relevant is that when they put their gloves on, any contamination on their hands might have passed to the glove. That is a reasonable proposition, unsupported by evidence in this case. But again it then becomes an issue of the presence or absence of such a substance. Is it at all possible that that cream, uncertain as to its nature and its relevance to the subject drug, its absorption rates etc, all of which were examined earlier, can remain a critical point?

70. Issue was taken with the failure to use a nearby Zip hot water unit and cold water tap to otherwise rinse the ladle and what was used was a sealed bottle of water produced by one of the inspectors. As to what the source of that water was is not in evidence. The Tribunal focuses upon the word “sealed”. The pouring out of water from a bottle onto a ladle, in the Tribunal’s opinion, otherwise meets the unbinding obligation to rinse the ladle under running water.

71. It might be noted that the water in the Zip container and in the cold water tap might just as well have been contaminated, as might have been the sealed bottle of water. There is no evidence that goes to the prospects of sealed bottles of water containing contaminants of a peptide. There is simply no evidence at all. The Tribunal considers that it is far-fetched to suggest that the subject peptide somehow came from the sealed bottled of water into the ladle or that by rinsing it that it did not become sterile. There is no evidence adduced to say that rinsing with cold water from a sealed bottle will not remove a peptide from a ladle. The Tribunal is not prepared to find that it was a possibility.

72. Next is Mr Vanderburg’s presence during the entire collection process. What is the contest?

73. Each inspector, in their statements two years later, say they were present. The appellant has been quite clear throughout this case, whenever interviewed or required to make submissions, that he was not present. He is supported by the statutory declaration of Mrs Vanderburg, who was not cross-examined. If nothing else, the Tribunal accepts her sworn evidence. In any event, the Tribunal accepts the appellant’s evidence.

74. The Tribunal rejects the recall of the two inspectors. It is quite clear that they asked him for the dog’s registration papers – and it might be noted that that, in any event, after the commencement of the sampling procedures,

deal further with the issue of the identification of the greyhound – he left, he went to his residence, it was at least 50 metres away – photographs are produced to confirm the distance – and he was absent for some minutes while Mrs Vanderburg retrieved the registration papers from in the house, gave them to him and he went back.

75. In the meantime the sampling process was completed. Nevertheless, up until the point he left he had witnessed what was happening. He clearly recalls at the inquiry by the stewards each of the necessary best practice steps which the stewards undertook in accordance with, it now appears, the race day swabbing policy in any event. It is not necessary to list all of those matters. They had taken every step except the actual sealing of the bottles.

76. Can it seriously be the case that there is to be found a possibility of contamination by this particular peptide in the mere process of sealing the two bottles? Sealing is an essential fact. It might also be noted that the control sample was negative. The Tribunal therefore does not find that there is any fact that is established, or which is not able to be discounted by the respondent, as to any prospects of contamination by a syringe-based peptide or cream-based peptide in those few minutes when the appellant was absent.

77. Is there a case established by the consideration of the failure to have a witness present and the absence of the appellant during the sampling?

78. That question is answered by consideration of all the facts and circumstances. Neither alone leaves open contamination . Together the possibility of a wrong step taking place arises but the unlikelihood of the peptide going in to the sample by improper conduct of the inspectors or by environmental contamination is eliminated by the respondent as the appellant has not established the factual basis to support it. neither inspector was cross examined to establish the facts.

79. The next matter argued is delay.

80. It is submitted that he has been denied procedural fairness and natural justice because there was this two-year delay. Not one skerrick of evidence is advanced to actually indicate what prejudice has been occasioned to the appellant. What witnesses have been lost? What opportunity was there that was lost to him to go and do something which no longer existed because of delay? He has given no evidence about that whatsoever. There is nothing factually against which the issue of delay, which might in other places be known as abuse of process, arises for consideration. No loss of documentary evidence. No loss of physical evidence. No loss of witnesses because they cannot be found. No evidence of witness loss of memory. Indeed, to the contrary, Mrs Vanderburg sometime later was able to quite

clearly recall the facts. There is just nothing. That becomes an issue about which there is no factual matter that the respondent should fail upon.

81. The last issue agued has already been touched upon and that was the possibility of the cream being the source. That is an important fact. But the Tribunal indicates that the gap in the evidence that the appellant would need to adduce – it is not for the respondent to discount an unknown factual case – is the capacity of a cream, should it in fact exist, should it in fact contain the subject peptide, and should it in fact be capable of being somehow present in the urine of a greyhound to have any weight or character to it that it is to be assessed, or, indeed, as stated earlier, any expert evidence which would give support to that theory about a cream. The cream factor is not found.

82. Therefore, the issue of contamination, so carefully researched and put forward, is not found for the reasons expressed. There is therefore nothing that remains against which the Tribunal, unaided by the wording of the rules, could find that the prima facie case established by the facts earlier determined should not remain the case in fact at the conclusion of evidence. Failures there might have been. Failures have been established. Best practice in some areas not adopted. But generally the whole of the process was conducted in a way which leaves the Tribunal, on the balance of probabilities, with that comfortable level of satisfaction on each of the facts that the case against the appellant should be found proven.

83. The appeal against the adverse finding is dismissed.

SUBMISSIONS MADE IN RELATION TO PENALTY

84. The issue for determination is the question of penalty.

85. Penalty, under the rules, can be disqualification, suspension, fine, no action and the like. There is the Greyhound Racing NSW Penalty Table. The Tribunal has indicated on many prior occasions, both in this code and the others, that it will look to that table as providing very strong guidance to determine an aspect of penalty, to provide a measure of certainty to this individual trainer, to trainers generally, to stewards and the industry at large.

86. Focusing on that Penalty Table to start with, it is the evidence of Dr Karamatic, which is not challenged by any adverse evidence but submissions, that he assessed this as a Category 2 drug. It is to be noted there are five categories. Category 1 is the worst category.

87. A Category 2 drug is one described as “all prohibited substances that are listed under GAR 79A. This would also include such substances listed as illegal substances under the Standard for the Uniform Scheduling of

Drugs and Poisons Commonwealth, as amended from time to time, inclusive of NSW legislation regarding these substances".

88. The substance itself is a peptide. It is one which has been known world over to be taken for the purposes of a belief in performance enhancement by reason of increasing muscle mass, which may increase speed and endurance. This is a synthetic peptide. In other words, there is nothing natural about it in the greyhound. There is nothing natural about it in the world. It is a manufactured drug. Its use in certain circumstances appears to be illegal in this state because it contravenes the Therapeutic Goods Administration rules and also, in relation to greyhounds, it is not a registered product.

89. Peptides have been assessed as capable of positively affecting performance. The Tribunal acknowledges Dr Karamatic's evidence that no research has been undertaken – an impossible situation, it must be noted – to actually ascertain the impact upon a greyhound of the presence of a peptide, particularly this peptide. The fact, therefore, that it was present is one which is of grave concern. The respondent satisfies the Tribunal, on Dr Karamatic's evidence, that it is a permanently banned prohibited substance.

90. The Penalty Table provides a starting point of a disqualification of 156 weeks. It is not submitted there are any aggravating factors in this matter which would warrant a movement of that "not less than" period. There are mitigating factors for consideration on that table which will be taken into account.

91. It is the case for the respondent that the decision of the steward was correct. The steward determined a starting point, consistent with the table, of 156 weeks' disqualification and then reduced that to a period of disqualification of 52 weeks for the subjective factors.

92. It is necessary to determine objective seriousness.

93. The Tribunal is not able to determine the source of the subject drug in the greyhound. It is, therefore, that the Tribunal cannot determine that the appellant is blameless because the Tribunal does not know how it got there. There is no explanation advanced by the appellant at the end of the day which the Tribunal rejects, it simply remains unexplained. There is no evidence that the appellant was engaged in the administration of the substance.

94. Applying, therefore, the principles adopted in McDonough v Harness Racing Victoria [2008], the Tribunal looks to the relevant three categories: Level 1, the most serious, establishing blame. Level 2, unexplained. Level 3, blameless. This is Level 2. What Level 2 means is that the penalty appropriate to the particular facts and circumstances is to be applied.

95. The presence of a synthetic peptide in a greyhound that is engaged in a trial relatively a short time before and in a final to which it had qualified, found in an out of competition testing after a heat, is serious. It was sufficiently long after the heat to be not capable of being determined as performance-enhancing on the date of the test by reason of the 23-hour elimination time,

96. There is nothing about the facts and circumstances that would cause the Tribunal to adopt a different starting point.

97. It is necessary then to look at the subjective facts.

98. There has been no plea of guilty against which a discount can be applied. The starting point remains at 156 weeks.

99. The respondent submits that the two-year discount given by the steward should be applied by the Tribunal. That is a very powerful submission. For the Tribunal to do otherwise would require procedural fairness and the extending to the appellant of an opportunity to either withdraw the appeal under the equivalent of the criminal law Parker principles, or to otherwise reconsider his position so that he does not incur a heavier penalty than that the steward considered appropriate.

100. It is necessary to continue to examine the subjectives because it is the case for the appellant that at the worst a fine should be applied.

101. The Tribunal, in assessing those subjectives, must do so on the basis that a two-year discount on a three-year penalty for subjectives is a very, very substantial discount. The discount, from what is considered by the regulator to be a starting point of disqualification to a fine – that is, movement right through the aspect of suspension itself to a fine – is a very, very substantial discount.

102. What then of the appellant? He has been associated with the industry some 40 years. He has no priors, a very strong subjective factor. He has a swab history in which he might have had priors with this greyhound on some 25 or 26 occasions, others all clear, and with many others of his greyhounds over these years all clear. A very strong factor, because he presents greyhounds to race, that he is compliant with the rules.

103. The level itself was low, which was an objective feature but also relevant subjectively.

104. He has suffered substantial hardship. At the outset it must be noted that hardship is often an inevitable consequence of wrong conduct. But here it has been substantial. He voluntarily stood down. He disposed of his greyhounds. He disposed, it must be is accepted, with perhaps the greatest

disappointment, of the best greyhound he had ever had, the subject greyhound. He had the benefit of a stay and has undertaken some interim training. So his hardship is somewhat reduced.

105. The other aspects are a number of references.

106. There is a reference of the vet, Dr Robert Zammit, 2 September 2020. A regular attender to the appellant. A person who has never seen anything untoward. he says the appellant displays confidence in the industry. And is a person who is – that is the appellant – so conscious of the prohibited substance rules that he would not breach them. He says he would not have been responsible for this matter.

107. The next is by Stephen Archer, 3 September 2020. He first met him in 2019 when he wanted to have an interest in a greyhound. Been associated with the appellant on that basis since. He says the appellant is a willing helper to new participants. And the referee assesses his care for greyhounds as being extremely close and thorough, with all appropriate hygiene, nutrition and so on. He has demonstrated to Mr Archer a good knowledge of the rules.

108. The next is by Jeff Collerson, undated. He has been a journalist associated with this industry. Known the appellant for some 35 years professionally and personally and interviewed him dozens of times, and always found the appellant to be forthright and sincere in a sport which the appellant loves.

109. The next is dated 7 September 2020 by Ross Gerard. He has known him for a number of years and considers him to be a gentleman. He has known him about the racing industry, particularly at Richmond, and been able to assist him on race days. He is meticulous, methodical and motivated, and a person who gives a hundred percent undivided attention to everyone. He assesses him as a humble man who has built a reputation of being a straight shooter and his family is well regarded. He has seen him operate about the premises and cannot believe this incident took place.

110. The next is by Ron Arnold, 5 September 2020. He has known him for 30 years. He has always found him to be dedicated to his greyhounds and that the greyhounds are his life. His greyhounds are always in the best condition and he provides incentives to owners because of that. He has contributed to the industry.

111. A medical report is presented by Dr Crampton of 16 July 2020. As is so often the case, the Tribunal will maintain the appellant's confidences of medical conditions. This doctor has been treating him for 20 years. Simply put, it is that the impact of these proceedings upon him has been profound

and as a result he has suffered from some new conditions which require certain help and medication.

112. It is quite apparent, therefore, that the appellant is very well regarded by people who are associated with the industry. That there is a disbelief amongst his referees that such a matter could happen. It has had that substantial impact on a man of good standing, to which the doctor makes reference. It comes as a surprise to a person such as a vet that such things would happen. They are strong subjective factors.

113. A discount of 66 percent for subjective factors is, simply put, far greater than the standard 20 percent. Absent are any substantial matters of an favourable nature to others, which would cause this Tribunal to form an opinion that more than 66-odd percent discount is warranted.

114. That, therefore, leads to this conclusion. That the Tribunal, finding itself coloured by the submissions that the steward's finding is appropriate, declining to increase the discount cannot find its way to determine a suspension is appropriate and therefore it could not possibly in those circumstances reduce the appropriate penalty to a fine. Consistent with cases of this nature in this state for a long time, this Tribunal has expressed the opinion that the presence of prohibited substances, particularly permanently banned prohibited substances, and in particular peptides, must mean a disqualification is appropriate. The Tribunals declines to vary that.

115. Having regard to the submissions made, the appeal against severity of penalty is dismissed.

116. The Tribunal imposes a period of disqualification of 12 months.

117. The Tribunal notes the starting point that was adopted by the steward but also notes that a stay has been in operation for a considerable period of time. It is a matter for the regulator to determine the termination date of that period of disqualification.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

118. The appellant makes application for refund of the appeal deposit.

119. This appeal was based on a denial of breach of the rule and on severity. On both matters the appellant has lost. Ordinarily, therefore, the Tribunal would order the appeal deposit forfeited.

120. No submission is made by the respondent on this issue. It is, not unfairly, left to the Tribunal to determine.

121. The Tribunal notes – and it is not unusual – there has been financial loss. The Tribunal has taken into account in recent times the increased impact in the community in relation to COVID issues. That, of course, has a converse impact upon the regulator and its finances as well. It is not a great sum of money. But in the circumstances, with the totality of the facts and circumstances, the Tribunal will order it refunded.

122. The appeal deposit is to be refunded.

POST DECISION COMMENT ON THE TIMING OF THE DISQUALIFICATION.

The Tribunal notes its opinion to the parties, conveyed by the Secretary to the Tribunal, on 26 November 2020, that the disqualification commenced at the moment of that order by the Tribunal and not when it is entered in the respondent's computer system.
