APPEAL NO.831

DETERMINATION OF THE

RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: **COSI DAGOSTINO**

APPLICATION NO: **A30/08/831**

PANEL: **MS KAREN FARLEY (CHAIRPERSON)**
MS ZOE GILDERS
MS JOHANNA OVERMARS

DATE OF HEARING: **20 FEBRUARY 2020**

DATE OF DETERMINATION: **4 May 2020**

IN THE MATTER OF an appeal by COSI DAGOSTINO against a determination made by Racing and Wagering Western Australia Stewards of Greyhound Racing on 21 January 2020 to impose a disqualification of 9 months for breach of Rule 83(2)(a) and a 12 month disqualification for breach of Rule 86(d) of the RWWA Rules of Greyhound Racing, of which 5 months was to be served concurrently, resulting in a total disqualification of 16 months.

Mr C Dagostino self-represented.

Mr R Davies QC represented the Racing and Wagering Western Australia Stewards of Greyhound Racing.

Summary

1. In my opinion, for the reasons which follow, the Appellant's appeal against conviction and penalty for the breach of Rule 83(2)(a) of the RWWA Rules of Greyhound Racing ("Rules") should be dismissed.

2. The appeal against penalty for the breach of Rule 86(d) of the Rules should be dismissed.

Reasons

3. Cosi Dagostino ("Mr Dagostino" or "the Appellant") is a RWWA Licensed Trainer in the WA Greyhound Racing Industry.

4. Mr Dagostino has appealed against:

    a. the conviction and penalty imposed by the RWWA Stewards on 21 January 2020 in which they imposed a disqualification of his trainer's licence for 9 months, having found him guilty of breaching Rule 83(2)(a) of the Rules of Greyhound Racing for presenting AWESOME GRIT to compete in Race 2 at Greyhounds WA Cannington on 5 June 2019 not free of the prohibited substance Cobalt, evidenced by a concentration level in excess of 100 nanograms per millimetre in a pre-race urine sample taken from the greyhound ("Charge 1"); and

    b. the penalty imposed by the RWWA Stewards on 21 January 2020 in which they imposed a disqualification of his trainer's licence for a period of 12 months of which 5 months was to be served concurrently with Charge 1 for a breach of Rule 86(d) of the Rules of Greyhound Racing for giving misleading evidence at the inquiry on 2 September 2019 to the panel by stating that the Level 1 Greyhound Tonic seized from his premises had been in his possession for 14 months, when that was misleading ("Charge 3").

5. On 8 August 2019, the Stewards notified Mr Dagostino of the positive Cobalt test result and suspended his trainer's licence.

6. The disqualifications imposed on 21 January 2020 were backdated to run from the date he was suspended.

Background

7. Mr Dagostino has been a licensed trainer since 1997. He has owned dogs since 1993. Racing is his livelihood.

8. He was at all material times the trainer of the Greyhound AWESOME GRIT ("Greyhound").

9. On 5 June 2019, the Appellant presented AWESOME GRIT to race at Greyhounds WA Cannington. A pre-race urine swab ("sample") was taken.

10. AWESOME GRIT went on to race and came second.

11. On 25 July 2019, Perth ChemCentre ("ChemCentre") advised that an irregularity had been detected in the pre-race urine sample. The sample was also analysed by the umpire lab, Racing Analytical Services Ltd ("RASL") and it was confirmed on 5 August 2019 that the sample contained a Cobalt reading of in excess of 200 nanograms per millimetre.

12. Due to the positive test, on 29 July 2019 Senior investigator Mr Geoff Johnson, RWWA Industry Veterinarian Dr Judith Medd ("Dr Medd"), Stewards Compliance Officer Ms Freya Bennette and Senior Investigative Steward Paul Criddle (collectively to be known as "the investigation team") attended Mr Dagostino's property in Banjup.

13. During the inspection a half full unregistered 50ml bottle labelled “Level 1 Greyhound Tonic” was located in Mr Dagostino’s fridge.

14. Mr Dagostino advised he had obtained the bottle from a stock feed store and had not used it for approximately 12 months.

15. The bottle was originally a sterile bottle of water and had an injectable stopper on the top. There was a white label on the bottle which had been partially covered by a green and gold label which read *“Dosage 0.6ml Per 10kg given orally twice weekly no swabbing ingredients Mackay Training”.* The details of the white label underneath could be partially seen including a date “2/2019”.

16. The bottle was seized and packaged in a seal proof bag and sent to ChemCentre for analysis. The test result showed the Cobalt level in the product was 11mg/L.

17. Mr Dagostino’s medication journal with respect to his Greyhounds was inspected, photographed and confiscated. No entries in relation to AWESOME GRIT were found that contained Cobalt.

18. Mr Dagostino was unable to explain the presence of Cobalt in AWESOME GRIT’s urine sample.

RWWA Stewards Inquiry

19. At the inquiry on 2 September 2019 the Stewards attempted to get to the bottom of how the Cobalt came to be in AWESOME GRIT’s system at the level detected in the sample.

20. During the inquiry Mr Dagostino:

    a. Took issue with the fact that the urine sample was under 10ml and how it was divided between the two testing bottles. He argued that the low amount meant the Cobalt reading would be higher and create an incorrect reading;

    b. Took issue with the video footage from when the sample was taken not being made available to him; and

    c. Argued there were naturally occurring ways in which the Cobalt may have entered the Greyhound’s system including from soil, water and diet.

21. Mr Dagostino claimed to have evidence that there was 2ml in the A sample and 5ml in the B sample. His argument was that if the amount varied, then the concentration of Cobalt in the sample would also vary.

22. Evidence was given by K Wilson, the Representative from ChemCentre, where the A sample urine was tested. She says at page 46 of the transcript “*the A sample that we received, the bottles had approximately 6mls of urine it…And the B sample had approximately 3mls in it”*. When asked by Mr Dagostino what the minimum sample required was, she stated “*at least a ml to do a cobalt analysis”* (transcript page 16).

23. The Kennel Staff member, Mr B Fletcher, who took the swab from AWESOME GRIT also gave evidence about how much urine was collected. He stated that he divided the sample into two bottles.

24. In relation to the A sample at page 62 of the transcript he stated "*to be honest, it would have been over 5ml because we don't allow anything less than that but to be honest, I couldn't actually remember….There's little notches on the bottles that tell us how much is in there but it goes 5, 10 so it would have been somewhere in between 5 and 10."*

25. He went on at page 63 of the transcript

> *"Chairman: …when did you read the measurements?*
>
> *Fletcher: After we put the urine into the bottles. So, 3ml goes in the B Sample and there's supposed to be 10ml go into the main sample.*
>
> *Chairman: Alright, so you're saying the main sample had about 5ml. Is that what you said?*
>
> *Fletcher: Yes. It would have had to be around there for Carlos to be informed."*

26. Evidence was also given by RWWA Industry Veterinarian Dr J Medd that so long as Sample A was over 3.5ml and Sample B over 1.5ml the testing was able to be carried out accurately. At Page 25 of the transcript she stated:

> *"…using an argument around concentration ultimately doesn't really stand up when you've got levels that are high like this. The concentration of urine, what's been measured and what' been given in a value, is a value of ng/ml so it's measuring the total number of nanograms which is a unit measurement per ml of urine. So, whether you've got 2ml or 3mls or 5mls or 50mls you're not measuring the total amount of cobalt in that volume of urine, you're measuring the concentration. So, it's how much cobalt is in each ml of urine."*

27. Further at page 76 of the transcript she stated:

> *"By collecting a lower volume doesn't mean that the test results that come out of that lower volume are going to be erroneous or wrong…the Standard Operating Procedures…says "collect all urine – the Racing Chem laboratory would prefer each bottle half filled. Collect a minimum of 5ml. A bottle: 3.5ml B bottle 1.5mls. Now that's the bare minimum that the Chem Centre have advised us that they can work with."*

28. During the inquiry Mr Dagostino was unable to provide evidence to support his contention that the low amount of urine affected the quality of the testing.

29. The soil and water from Mr Dagostino's property was tested by Bioscience and a copy of the analytical report was presented. The possibility of the Cobalt reading arising from the Greyhound ingesting sand, water and its kibble were explored and ruled out.

30. The video footage of the collection of the swab was unavailable because it runs on a 6-8 weeks loop and is then deleted. Due to the timing of Mr. Dagostino's request it could not be provided, however, there was no requirement for this to occur.

31. When questioned about the bottle labelled "Level 1 Greyhound Tonic" Mr Dagostino told the Stewards he had not used the bottle for 14 months. He denied giving the product to AWESOME GRIT at any time.

32. After further questions he stated he had used it but *"not for approximately 18 months".*

33. Due to issues with the date which could be seen on the bottle and Mr Dagostino's evidence, it was directed that members from the investigation team attend the ChemCentre to inspect the bottle and the inquiry was adjourned. The purpose was to see what information could be gleaned from the bottle including whether the date was an expiration or manufacture date.

34. During the inquiry Mr Dagostino could offer no satisfactory reason for AWESOME GRIT having an elevated Cobalt level. At the same time, he had in his possession an unregistered bottle of medication which was possible of causing the reading.

35. On 16 September 2019 the inquiry resumed. Charges were then brought and Mr Dagostino plead:

    a. not guilty to a breach of Rule 83(2)(a) of the Rules of Greyhound Racing for presenting AWESOME GRIT to compete in Race 2 at Greyhounds WA Cannington on 5 June 2019 not free of the prohibited substance Cobalt, evidenced by a concentration level in excess of 100 nanograms per millimetre in a pre-race urine sample taken from the greyhound ("Charge 1"); and

    b. guilty to a breach of Local Rule 85 for having in his possession at his training premises a half-full bottle labelled "Level 1 Greyhound Tonic" which was not registered in compliance with the relevant legislation ("Charge 2").

36. Evidence was given by Dr Medd about the inspection of the bottle carried out at the ChemCentre by members of the investigation team. She explained how she had peeled back the green and gold label and the original white label underneath provided the bottle's manufacture date of February 2019.

37. Further questions were then put by the Chairman to Mr Dagostino about when the bottle came into his possession. It was obvious the evidence he had previously given was incorrect, given the manufacture date of the bottle was only 5 months prior to it being seized.

38. The Chairman asked if it was possible Mr Dagostino mistakenly gave the liquid to AWESOME GRIT. Mr Dagostino swore on his children's graves and his mother's life he had not given it to the Greyhound.

39. The Chairman went on to point out that Mr Dagostino had given evidence of obtaining the bottle at 3 different time frames being 12 months, 14 months and then 18 months. When asked again how long Mr Dagostino had had the bottle in his possession, he then said the time frame was longer, being maybe more, 2 years.

40. When it was put to Mr Dagostino that he wasn't being honest he stated he had been honest and that he didn't believe the manufacture date was correct.

41. The Stewards found Mr Dagostino had not been entirely honest about the bottle and charged him with a breach of Rule 86(d) of the Rules of Greyhound Racing for giving misleading evidence at the inquiry on 2 September 2019 to the panel by stating that the Level 1 Greyhound Tonic seized from his premises had been in his possession for 14 months, when that was misleading ("charge 3").

42. Mr Dagostino pleaded not guilty to charge 3. His defence was he believed the bottles had been tampered with. He stated he did not believe that the bottle in question was the one he thought was in the fridge. His reason for this was he believed he had a lot of enemies.

43. The Stewards raised that given Mr Dagostino denied giving the Level 1 Greyhound Tonic to AWESOME GRIT, replacing the bottles made no sense.

44. Mr Dagostino then said he was having a panic attack and asked to wrap things up. The inquiry was then concluded.

45. Due to the Appellant's health issues he was not able to appear before the Stewards to address matters of penalty. The Stewards facilitated appropriate support services to be provided under the RWWA Racing Assist program.

46. On 8 January 2020, the Stewards received a report from Clinical Psychologist Ms. S Ridley which confirmed that in her opinion the Appellant was of sound mind to complete the inquiry, but recommended submissions be received via correspondence.

47. On 21 January 2020, the Stewards completed their deliberations and published their written reasons. The Appellant received the following:

    a. in relation to Charge 1 - 9 months disqualification;

    b. in relation to Charge 2 - a fine of $500; and

    c. in relation to Charge 3 – 12 months disqualification with 5 months to run concurrently.

48. The total cumulative period of disqualification imposed was 16 months.

49. The Stewards backdated the commencement of the disqualification to 8 August 2019, the date that the Appellant was suspended pending outcome of the inquiry.

50. AWESOME GRIT was also disqualified from the race with the placings to be amended accordingly with the commensurate implications to all stake money and payments applied.

The Appeal

51. The Appellant filed a Notice of Appeal dated 22 January 2020 which provided his grounds of appeal as follows: "*manifestly excessive disqualification; false positive was created due to swabbing inadequacies; environmental proof of cobalt contamination; ignored previous precedents*". He was self-represented when filing the notice and the grounds were not particularised.

52. At the hearing of the appeal on 20 February 2020 ("the hearing") in oral submissions the Appellant sought the conviction for Charge 1 be set aside and, in the event it was not, then a reduced penalty, including the disqualification period be reduced.

53. In relation to Charge 3 he sought the penalty be set aside and instead a fine imposed.

54. There was no appeal in relation to Charge 2.

55. Senior Counsel for the Stewards sought that the appeal be dismissed on the grounds that the conviction and penalties imposed for both charges were appropriate. The Stewards relied on the cases of Appeal 821 G Elson (Harness), Appeal 816 K Prentice (harness) and Appeal 788 R Miller (Harness) which are all Western Australian cases where horses were presented not free of a prohibited substance, which was Cobalt.

56. Directions were made to allow the Appellant to file further written submissions, which included cases he wished to rely upon in relation to penalty relating to Charge 1. This was because during the hearing the Appellant referred to certain cases which he was unable to make available to the Tribunal, and because he was self-represented.

57. A direction was made that the Representative for the Stewards could file a response to the material filed by the Appellant.

58. The Appellant provided by way of email numerous cases he submitted were relevant to Charge 1. He did not file any general written submissions.

59. Senior Counsel for the Stewards filed written submissions in relation to Charge 3. None of those submissions related to the cases filed by the Appellant.

60. Given the submissions fall outside the parameters of what was directed I have not taken those submissions into account.

Swabbing inadequacies

61. In oral submissions the Appellant contended he *"wanted to disprove the swabbing"* because video of the sample being taken was not made available to him and the amount of urine was inadequate to provide an accurate test.

62. No new evidence was provided at the hearing in relation to these two issues.

63. The Appellant claimed there were discrepancies in the evidence at the inquiry as to how much urine was taken, being firstly 9 millimetres and then later 6 millimetres.

64. During the hearing the Appellant conceded there had been no break in the chain of custody when handling the sample.

65. The evidence of Mr Wilson, the Representative from ChemCentre and Kennel Staff member Mr Fletcher, who took the sample is set out above in paragraphs 21-24 of this judgment. The evidence of both witnesses confirmed the amounts in both samples exceeded the minimum threshold for a test to be carried out accurately.

66. There is no evidence before the Tribunal challenging the credibility of these two witnesses and it is not clear from where Mr Dagostino has obtained his measurements which he claims are inconsistent.

67. Whilst the evidence as to the exact amount in sample A differs slightly between Mr Wilson and Mr Fletcher, Mr Wilson was clear that he could not remember exactly the amount in sample A. He was, however, clear that it was above the minimum required.

68. The Cobalt levels were certified by both the ChemCentre and RASL. Accordingly, the two separate certifications of each sample constituted conclusive evidence that the Cobalt levels in each case exceeded the threshold level of 100 nanograms per millimetre of urine.

69. The ground of appeal of *"false positive due to swabbing inadequacies"* is not made out.

Environmental Proof of Cobalt Contamination

70. The Appellant made oral submissions in relation to Cobalt which included:

- That dogs are carnivores and therefore have a higher naturally occurring level of Vitamin K than horses;
- That the testing is inadequate at is does not differentiate between different types; and
- It was possible the sand in which the dogs were living contained Cobalt.

71. No new evidence was provided at the hearing to support the Appellant's oral submissions.

72. Rule 83(2)(a) of the Rules provides *'The owner, trainer or person in charge of a greyhound – nominated to complete in an Event shall present the greyhound free of any prohibited substance'.*

73. Rule 83(10) of the Rules provides *"Cobalt at or below a mass concentration of 100 nanograms per millimetre in a sample or urine taken from a greyhound will not breach the provisions of sub-rule (1A) or (2) of this Rule".*

74. The Appellant did not challenge the Stewards' finding that the Cobalt found in AWESOME GRIT's pre-race urine samples in the levels found, constituted a prohibited substance.

75. It is well known that there are different forms of Cobalt. The inorganic state is when it forms part of a Cobalt Sulphate (also spelled Cobalt Sulfate) or Cobalt Chloride molecule. The organic state is when it forms part of a cyanocobalamin molecule, better known as Vitamin B12.

76. Testing for Cobalt does not differentiate between the organic or inorganic state.

77. The industry recognises that Cobalt occurs naturally in Greyhound's systems as a result of their environment and diet. This is why the threshold has been set at 100 nanograms per millimetre.

78. Mr Wilson gave evidence that AWESOME GRIT's Cobalt reading was 300ng/ml. When asked if he considered this a low, a medium or high reading for this particular substance, he stated (page 13 transcript):

> "*Well I would consider that to be a high level. To give you an idea, since the beginning of January 2017, so over 2 ½ years, we have tested 1931 canine samples for cobalt and less than 1% of those have returned a positive value, so above 110ng/ml and over 90% of them were less than 10ng/ml".*

79. The industry view is that the threshold is a generous one to allow for usual environmental factors. Trainers are still required to ensure that their feeding and medication regimes which include products containing Cobalt are managed appropriately.

80. There is ongoing debate around the drawbacks of a testing system that does not differentiate between the types of Cobalt as the organic form is claimed by some not to be performance enhancing.

81. In their reasons for conviction the Stewards noted the rule in question is one of absolute and strict liability.

82. It is not necessary to prove an administration nor an intention on the part of the trainer to enhance a greyhound's performance. It is also not necessary to show that a performance advantage was actually obtained.

83. It is not a defence to show that there was an environmental source from which the Cobalt entered the Greyhound's system.

84. Explanations can serve as a mitigating factor when deciding penalty but do not provide any defence to a charge under Rule 83(2)(a) of the Rules.

85. On the basis of the above, the ground of environmental proof of Cobalt contamination as a reason for setting aside the conviction fails.

<u>Penalty</u>

86. The Stewards structured their reasons to provide considerations relevant to all charges ("general reasons") first and then further considerations as they applied to each charge.

87. In their general reasons, among other things, the Stewards had regard to the following factors when reaching their decision on penalty:

    a. The matter caused Mr Dagostino considerable anguish and impacted his mental health;

    b. They were sympathetic to the situation he was now in as a person who has a heavy reliance in greyhound racing;

    c. Charge 1 was a presentation offence;

d. Mr Dagostino had been involved in the industry for much of his life and demonstrated a high level of care and regard for the greyhounds he was responsible for;

e. Mr Dagostino had several dependents and financial commitments and greyhound racing was a strong contributor to his livelihood;

f. Whilst his record was not unblemished in regard to the detection of prohibited substances, it was a good record given the length and extent of his involvement, affording him mitigation for what they deemed as a good record; and

g. The impact as a result of the penalties.

Penalty for Charge 1

88. When deciding penalty for Charge 1, the Stewards:

a. Considered the nature of Cobalt and that it had a reputation as a performance enhancing substance;

b. Noted that whilst there continues to be ongoing scientific debate about its actual or potential effects it was a substance the industry was obliged to respond to;

c. Took into account the evidence of Dr Medd with respect to the establishment of the threshold level of 100ng/ml and given the average level of Cobalt in the racing population of greyhounds is considered 3.4ug/L the threshold is a generous one;

d. Noted that they could not afford Mr Dagostino added mitigation for an explanation for the reading when one was not made available;

e. Considered Mr Dagostino's submission for a penalty in the range of 3 months, and his reference to penalties for Cobalt which were applied in other states;

f. Noted that in Western Australia when dealing with similar charges of presentation the penalties ranged between 9-12 months, even in those cases of first offenders who pleaded guilty and trainers who relied on their licences for their livelihoods;

g. Considered a fine or suspension as a mode of penalty but to impose either would be inappropriate and unprecedented; and

h. Considered that while Mr Dagostino had a good record, he did not attract the same level of mitigation as applies to first offenders.

Mitigation Afforded for Explanation

89. How AWESOME GRIT came to have the elevated reading of Cobalt in his system is a consideration relevant to penalty, particularly when considering the 'blameworthiness' of the Appellant. For example, it is appropriate to differentiate between cases where a clear mistake can be shown as opposed to a deliberate act.

90. It is the Appellant's onus to show evidence of how the Cobalt came to be present, if he wishes to have the benefit of mitigation.

91. No finding was made by the Stewards in their judgment as to how the Cobalt came to be in AWESOME GRIT's urine sample.

92. As a result of no satisfactory explanation being given, the Appellant was not afforded any mitigation in sentencing for this factor.

93. The case of *Appeal No 816 Mr Kim Prentice (Harness)* 20 September 2018 discusses the applicable law in relation to mitigation where explanations are given. In that case, apart from the use of VAM, Mr Prentice could offer no other satisfactory reason for the horse having an elevated Cobalt level. The Stewards' non-satisfaction was a factor they considered relevant to the penalty and imposed a penalty different to that which they would have imposed had there been in their view a plausible explanation offered by Mr Prentice for the elevated Cobalt level.

94. On appeal, the Tribunal set aside the original sentence of a 12 months disqualification and replaced it with a 9 months disqualification, as the members considered the penalty manifestly excessive. In his reasons at paragraph 52 Member Nash stated:

> *"It is understandable that the Stewards may consider frank admissions made by a trainer about making administration prior to a race, and thus providing a plausible explanation for an elevated cobalt level, are mitigatory. However, the mere fact that a trainer has been unable to provide what the Stewards consider to be a satisfactory explanation ought not as a matter of course result in less mitigation being afforded. Such an approach has the potential to create perverse outcomes where someone who deliberately administers a substance such as cobalt immediately before a race…is better off than someone who genuinely cannot explain how their horse came to have an elevated level. I cannot see how being frank about the former case justifies a better penalty outcome than for someone who simply cannot explain an elevated level*, *provided the Stewards have no basis to consider the person in the latter case is not genuine. For example, if someone is a repeat offender or is found to be an unsatisfactory witness during the inquiry, then that may provide a basis for not accepting their genuineness."*

95. In that case, the Stewards did not make a finding that Mr Prentice had not been honest or forthcoming in his evidence and praised Mr Prentice for his co-operation and professional dealing with respect to every aspect of the inquiry and the investigation.

96. The same cannot be said for Mr Dagostino. Not only was he found by the Stewards to provide vague and unconvincing evidence, he was also charged with misleading the inquiry members.

97. After considering a number of WA cases relating to excess Cobalt presentation offences across thoroughbred, harness and greyhound racing the Stewards considered that 9 months disqualification was consistent with those decisions.

98. It is Mr Dagostino's submission that when formulating the penalty the Stewards ignored relevant precedents. It is his argument that the average disqualification for this type of offence across other States is only 3 months, and therefore a disqualification of 9 months is manifestly excessive.

99. By email on 21 February 2020, Mr Dagostino provided numerous Victorian and NSW cases where there had been convictions for administration and presentation of Greyhounds with Cobalt readings exceeding the industry's limit.

100. In the Victorian cases the suspension (or disqualification) period was usually set at a period of 12 months, with the majority (usually around 9-10 months) of that period being suspended so long as there was no further offending of the same type for a further period, usually again of around 12 months. The result was a suspension (or disqualification) of 2-3 months.

101. It is not necessary to set out a synopsis of every case which Mr Dagostino provided, as the Stewards in his case did not fail to take into account the relevant precedents.

102. It is recognised that each State has its own rules of racing, and therefore penalties vary between jurisdictions.

103. Whilst it is desirable to have uniformity within States/Territories it is not a requirement that the Stewards apply the sample penalties that Stewards in Victoria or NSW have.

104. In their reasons the Stewards cited the case of *S Beard Appeal 536* and noted the comments of member Mr P Hogan that "*whilst I accept that consistency in penalty Australia wide might be a desirable object, I am not persuaded that it is necessarily so. Further, even if it were, I am on the opinion that nothing has been demonstrated to indicate that the Western Australia approach is not the one to be followed*."

105. The approach the Stewards took was to follow penalty precedents set in WA cases where circumstances were similar.

106. I am not convinced the Stewards approach in doing this was incorrect.

107. In fact, should the Stewards had decided to base their decision as to penalty on Victorian and NSW cases this would cause a lack of uniformity in regard to sentencing within WA. This is particularly so, when there is already a considerable WA precent "bank" to which they can refer.

108. For these reasons I do not consider that there was any error by the Stewards in determining penalty for Charge 1.

<u>Penalty for Charge 3</u>

109. It is Mr Dagostino's case that the penalty imposed for Charge 3 was manifestly excessive. From his submissions it appears this is on the basis that the Stewards failed to take into account previous cases and because he relies on racing for his income. Mr Dagostino gave evidence that he has no other skills and the only other type of job he could obtain would be labouring, which at his age would be difficult.

110. Among other matters, in their reasons for the penalty applied for Charge 3 the Stewards noted:

a. Such an offence struck at the heart of proper control of the industry and the Stewards ability to properly conduct investigations and inquiries;

b. The misleading evidence related to an unregistered medication, which had the potential to cause the detection of a prohibited substance in a Greyhound the Stewards were inquiring to;

c. There was no place for dishonesty and Mr Dagostino maintained his deception throughout the inquiry;

d. The truth was revealed by the Stewards;

e. Misleading the Stewards was not incidental to the matter at hand but central to it;

f. It was not a spur of the moment decision to mislead;

g. It was a deliberate course of conduct and maintained throughout the inquiry;

h. The motive was self-serving;

i. There must be a clear and strong deterrence to all that to appear before Stewards at an inquiry and give misleading evidence; and

j. Misleading evidence at an inquiry has the potential to pervert the course of justice.

111. The Stewards noted difficulty with aligning past matters with the present case but considered the following cases:

i. *Trainer M. Green (1998) ("Green").* In this case Mr Green, when asked by the Stewards whether he had seen Mr Evans walking greyhounds on the morning in question, answered no. The investigation related to whether another party, Ms Wheeler, obtained a licence on the basis that Mr Evans was not involved in training her greyhounds. On appeal the sentence of a 6 months disqualification imposed by the Stewards was reduced by the Tribunal to 3 months.

ii. *Trainer M. Julien (2002) ("Julien").* In this case Mr Julien submitted a false Statutory Declaration concerning arrival dates for greyhounds to enable them to meet eligibility criteria. The Stewards imposed an 18 months disqualification. The Tribunal dismissed his appeal against sentence.

iii. *Trainer B Cook (2012).* In this case Mr Cook made a misleading statement to Stewards by stating that he had made a payment to an owner which in fact he had not. He was disqualified for 12 months. On appeal, it was dismissed. The misleading evidence in this case was protracted and Mr Cook's motive for the misleading evidence was financial gain.

iv. *Trainer S. Shinners (2016).* In this case Mr Shinners made a misleading statement to RWWA Stewards during an official interview by stating that greyhounds had only been at the residential property since 2 August 2016 when they had been there longer. He

received a fine of $1500. This is quite a different case. Mr Shinners was charged with failing to advise the RWWA Stewards of the greyhound kennelling operations being conducted out of his residential address. The misleading evidence related to this charge, for which he was convicted and given a fine. He plead guilty.

112. In my view the case of *Green* can be distinguished by a number of important factors. Firstly, an explanation for providing the misleading evidence was given. That was, the Appellant was confused and felt under pressure by his loyalty to Ms Wheeler. Secondly, the Appellant had quickly recanted his evidence. Thirdly, the Appellant had nothing to gain by providing the misleading evidence. Fourthly, the Appellant had pleaded guilty.

113. Whilst there are some distinguishing features between the case of *Julien* and Mr Dagostino's circumstances, including the anteceeds of the Appellant, and that Mr Julien was at the time of the offence serving a disqualification for an unrelated offence, what is similar is that Mr Julien's dishonesty was persistent. Further, like Mr Dagostino his motivation was personal gain.

114. While the cases referred to by the Stewards may be helpful guides, they cannot fetter the scope of the considerations that are to be applied in setting penalties for breaches of Rule 86(d) and the need to have regard to all the circumstances of the individual case.

115. The strongest factor in the above cases affecting the range of penalty available in my view appears to be the charge or circumstances to which the misleading evidence relates, and whether there is protracted behaviour in maintaining the misleading evidence.

116. The circumstances in Mr Dagostino's case were very serious. They related to an unregistered medication, which contained Cobalt in a circumstance where Mr Dagostino was being investigated for presenting a Greyhound with a positive result for Cobalt. That Cobalt reading was particularly high.

117. Mr Dagostino was given numerous opportunities by the Stewards to clear up any doubt around the length of time the medication had been in his possession but instead he persisted with providing misleading evidence and continued to change his answers.

118. Mr Dagostino's misleading evidence must be seen in the context of what was occurring at the time, which was that he was trying to build a case that there were other possible sources of Cobalt which could have caused the reading, such as his soil and water, and calling into question the testing procedures whilst trying to distance himself from a product in his Kennels which was capable of providing the elevated reading in his Greyhound.

119. The Stewards have acknowledged in their reasons that it was difficult to align past matters with his case as each is unique and turns on its own circumstances. They were clear that as the nature of the misleading evidence was about a product which was capable of providing the reported result it placed it in the higher ranges of penalty. I agree with those reasons.

120. It is clear throughout their reasons that the Stewards took into account that Mr Dagostino relies on racing for his income. I am of the view that the Stewards properly took into account Mr Dagostino's antecedents and personal circumstances and that he received sufficient mitigation for those factors.

121. Whilst I am of the view that a slightly shorter disqualification could have been imposed, 12 months is still within the range of the appropriate penalty. I cannot substitute my own view for that of the Stewards.

122. As recently stated in Prentice, supra [at para 59]:

> *'The Tribunal will not substitute its own opinion for that of the Stewards simply because it may disagree with the Stewards' opinion as to what the appropriate penalty ought to be. The Stewards' deep understanding of the industry and how actions of its participants impact the industry and perceptions of the industry, are matters which are accorded considerable weight by this Tribunal. However, if it is demonstrated that a penalty imposed by the Stewards is manifestly excessive, or if the Stewards have misdirected themselves in some material way, or their decision has been the product of taking into account an irrelevant consideration or of a failure to take into account relevant consideration, then it is open for this Tribunal to reconsider the Stewards' determination of the penalty imposed. That is consistent with the approach that appeal courts take in reviewing criminal sentences on appeals: Dinsdale v R [2000] HCA 54 at 57 to 58, and reflects what has been said in numerous previous decisions of this Tribunal.'*

Period of concurrency

123. Having regard to the principle of totality, the Stewards determined that 5 months of the disqualification for Charge 3 should be served concurrently and 7 months cumulatively.

124. Their reason was that a wholly concurrent sentence would mean that no penalty would have been suffered for misleading the Stewards. In their view, this would be inappropriate as it would do little to discourage others.

125. The Stewards then turned their minds as to whether the aggregate penalty could be considered inappropriately long, even though in their view it could not be described as crushing.

126. It is important that the sentence for Charge 3 is not seen in isolation, and all the circumstances of the total penalty are taken into account.

127. The fact that the Stewards made almost half of the sentence concurrent is important as this formula acted to ensure that the overall penalty was not manifestly excessive.

128. The entirety of the sentence was also backdated to the date of the suspension, even though the Stewards are not required to do so. In my view this was completely appropriate. This factor also assisted in ensuring the result was not manifestly excessive.

129. On the basis of the above, I do not consider the penalty imposed in this case was manifestly excessive in the context of that determination. The appeal is dismissed.

JOHANNA OVERMARS, MEMBER

APPEAL NO. 831

RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MS K FARLEY SC (CHAIRPERSON)

APPELLANT: **COSI DAGOSTINO**

APPLICATION NO: **A30/08/831**

PANEL: **MS K FARLEY SC (CHAIRPERSON)**
MS Z GILDERS (MEMBER)
MS J OVERMARS (MEMBER)

DATE OF HEARING: **20 FEBRUARY 2020**

DATE OF DETERMINATION: **4 May 2020**

IN THE MATTER OF an appeal by COSI DAGOSTINO against a determination made by Racing and Wagering Western Australia Stewards of Greyhound Racing on 21 January 2020 to impose a disqualification of 9 months for breach of Rule 83(2)(a) and a 12 month disqualification for breach of Rule 86(d) of the RWWA Rules of Greyhound Racing, of which 5 months was to be served concurrently, resulting in a total disqualification of 16 months.

Mr C Dagostino represented himself.

Mr R Davies QC represented the Racing and Wagering Western Australia Stewards of Greyhound Racing.

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1. I have read the draft reasons of Ms Johanna Overmars in this matter and I agree that, for these reasons, the appeal should be dismissed.

2. I would add only the following by way of comment.

3. Mr Dagostino was found by the Stewards to have breached three of the Rules of Greyhound Racing:

   i. Rule 83(2)(a) – *"The owner, trainer or person in charge of a greyhound…nominated to compete in an Event…shall present the greyhound free of any prohibited substance."*

   ii. Local Rule 85(1) – *"Any person commits and offence, if in the exercise of the powers afforded by Rule 18 and Local Rule 18, the Stewards find them to be in possession of or have on their premises any substance or preparation that has not been registered…in compliance with the relevant…legislation."*

   Mr Dagostino pleaded guilty to this charge, which resulted from him having been found in possession of a half full bottle labelled "Level 1 Greyhound Tonic" which was unregistered. The contents of this bottle were later tested and found to contain a Cobalt level of 11mg/L.

   Whilst neither the finding against Mr Dagostino on this charge or the penalty imposed of a $500 fine were challenged, and therefore did not form part of this appeal, the facts giving rise to Charge 2 were relevant to the Stewards findings on Charge 3.

   iii. Rule 86(d) – *"A person…shall be guilty of an offence if the person…being an owner, trainer, attendant or a person having official duties in relation to greyhound racing makes a false or misleading statement in relation to an investigation, test or inquiry…"*

<u>Rule 83(2)(a)</u>

4. Rule 83(2)(a) ("The presentation Rule") is one of strict liability. It does not contemplate an administration. That is a different charge, pursuant to Rule 83 (1A).

5. The substance Cobalt is a prohibited substance above a certain concentration. Rule 83(10) states that Cobalt at or below a mass concentration of 1000 nanograms per millilitre in a sample of urine taken from a greyhound will not breach Rule 83(1A).

6. Mr Dagostino's dog tested at 300ng/mL, three times the allowable level.

7. Whilst Mr Dagostino attempted to challenge the test, there was no basis upon which to do so in all the circumstances of the case. Likewise, the fact that various environmental factors may impact upon a Cobalt reading would not explain a reading as high as that found in AWESOME GRIT. Of 1931 canine samples for Cobalt since January 2017, 90% have been less than 10ng/mL (evidence Wilson, p.13 of the transcript).

8. Penalties imposed on Western Australia for presentation offences have generally ranged between 9-12 months and have almost always involved disqualification. Whilst each case must be looked at on its merits and that range may not reflect the "bottom" or "top" of the range, it would be inappropriate for the Tribunal to substitute its own discretion for that of the Stewards in fixing an appropriate penalty, where that of the Stewards is one within range. Given the fairly settled range in Western Australia, the Victorian and New South Wales decisions relied on by Mr Dagostino were of little assistance, or relevance, to the Tribunal.

Rule 86(d)

9. This is a serious charge. Misleading statements made to Stewards strike at the heart of industry control and regulation and frustrate the ability of the Stewards to carry out their duties. Further, the behaviour has a tendency to lower the level of trust and confidence that others in the industry, and the general public, may have in the industry.

10. Mr Dagostino gave several conflicting explanations as to how a bottle of "Tonic" found in his kennels had come into his possession, for how long he had it, and whether and when last he had used it. He denied giving the tonic to AWESOME GRIT either intentionally or by accident. He then claimed that the bottle had been tampered with.

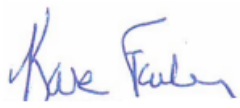
11. His answers at times were contradictory and most certainly misleading. They were maintained by Mr Dagostino. This was a serious example of misleading conduct.

12. It is important that any breach of the Presentation Rule (or Administration Rule) be investigated thoroughly. The presence of prohibited substances in the racing industry (or any sport) is viewed extremely seriously, for obvious reasons, now widely known and accepted. Twelve months disqualification for this breach was within range.

The Total Penalty of 16 Months Disqualification

13. The Stewards correctly considered backdating cumulatively and concurrently of the various periods of disqualification.

14. There is no question that the total penalty was severe, particularly given that Mr Dagostino had been a successful trainer for many years, did not have a substantial record of previous breaches of the Rules, and relied upon greyhound racing for his income. Notwithstanding some mitigation and generally positive antecedents, the serious nature of Charges 1-3 indicate that the penalty, in its totality, whilst severe, could not be described as being manifestly excessive.



_____ **KAREN FARLEY SC, CHAIRPERSON**

APPEAL NO. 831

RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MS Z GILDERS (MEMBER)

APPELLANT: **COSI DAGOSTINO**

APPLICATION NO: **A30/08/831**

PANEL: **MS K FARLEY SC (CHAIRPERSON)**
MS Z GILDERS (MEMBER)
MS J OVERMARS (MEMBER)

DATE OF HEARING: **20 FEBRUARY 2020**

DATE OF DETERMINATION: **4 May 2020**

IN THE MATTER OF an appeal by COSI DAGOSTINO against a determination made by Racing and Wagering Western Australia Stewards of Greyhound Racing on 21 January 2020 to impose a disqualification of 9 months for breach of Rule 83(2)(a) and a 12 month disqualification for breach of Rule 86(d) of the RWWA Rules of Greyhound Racing, of which 5 months was to be served concurrently, resulting in a total disqualification of 16 months.

Mr C Dagostino represented himself.

Mr R Davies QC represented the Racing and Wagering Western Australia Stewards of Greyhound Racing.

Summary

1. I agree that the Appellant's appeal against conviction and penalty for the breach of Greyhound Rule of Racing 83(2)(a) of the RWWA Rules of Greyhound Racing ("Rules") should be dismissed.

2. For the reasons that follow, I would allow the appeal against penalty for the breach of Greyhound Rule of Racing 86(d) of the Rules. In my opinion, the penalty of 12 months

disqualification should be set aside and a penalty of 8 months disqualification imposed upon the Appellant. I would order 7 months of this term to be served concurrently with the disqualification period imposed in respect of Charge 1, resulting in a total effective disqualification 10 months disqualification.

Penalty for Charge 3

3. The only ground of appeal in relation to the penalty imposed in relation to Charge 3 alleges that the disqualification period of 12 months, 5 of which to be served concurrently with the period imposed in relation to Charge 1, was manifestly excessive.

4. The Appellant, in short, submits the following in support of this:

   a. Racing is the Appellant's only source of income.

   b. The Appellant has been involved in racing since 1993 and has a limited alternative skillset.

   c. The Stewards failed to give consideration to similar cases.

5. The Appellant gave evidence that he could possibly obtain work in labouring, however the state of his mental health at the time of the Tribunal hearing would be restrictive in this regard.

6. He further gave evidence that he has a child at university who requires ongoing medical treatment, and that he is reliant on extended family members to meet these financial obligations in the absence of any income of his own.

7. The Appellant did not provide further details or any medical evidence in support of this position, however, I accept in the circumstances where the Appellant has a long history of involvement in racing, and his primary income has been derived from racing for this period, that the disqualification would undoubtedly cause him financial hardship.

8. The Stewards considered the following matters in imposing the penalty for Charge 3:

   a. Offences of this nature strike at the heart of the proper control of the industry;

   b. The misleading evidence related to an unregistered medication, which had the potential to cause the detection of a prohibited substance in a Greyhound the Stewards were inquiring to;

   c. Licence holders are expected to respond to Stewards honestly and to the best of their ability;

   d. The investigation of matters such as the offence in Charge 1, is a difficult task and the associated fact-finding exercise is further complicated in circumstances where people decide to mislead the Stewards;

   e. The deception was central to the investigation of Charge 1;

   f. The vague and ultimately misleading information provided restricted the Stewards from pursuing other lines of enquiry as to the origin of the substance;

g. There must be a clear and strong deterrence to all that to appear before Stewards at an inquiry and give misleading evidence; and

h. Misleading evidence at an inquiry has the potential to pervert the course of justice.

9. In their assessment of the conduct the subject of Charge 3, the Stewards were guided by the following determinations:

a. Trainer M. Green (1998) ("Green")
Made a misleading statement to Stewards during an investigation into the handling of greyhounds.

The Stewards investigation related to Ms Wheeler and Mr Green.

Ms Wheeler had obtained her (conditional) licence on the basis that Mr Evans was not to be involved in training her greyhounds.

Mr Green was asked whether he had seen Mr Evans 'walking greyhounds' on the morning in question, to which he answered "No".

The evidence of Mr Green was vital in the investigation as he was a direct witness to a matter which would otherwise be difficult to detect. His explanation for the answer referred to the interpretation of word "greyhounds" to refer explicitly to race dogs, as opposed to the breed of dog as a whole.

Mr Green's conduct was motivated by misguided loyalties and was quickly rectified.

Mr Green had a poor history, albeit involving offences of a different category, and had held an unconditional licence for a period of 12 months. At the material time, he only had one dog but was looking to expand his training operation.

Penalty: 6 months disqualification reduced on appeal by the Tribunal to 3 months.

b. Trainer M. Julien (2002) ("Julien")
Submitted a false Statutory Declaration.

Mr Julien sought to nominate two dogs in the National Sprint Championships. Greyhounds must have been domiciled at a Western Australian kennel address for 90 of the past 150 days to meet the eligibility criteria.

Mr Julien was questioned by the Stewards regarding the eligibility of the nominations and it was requested that he provide a Statutory Declaration confirming the respective dates on which the dogs arrived in Western Australia.

Mr Julien submitted a Statutory Declaration containing false information as to the dates on which the dogs were purchased and arrived in Western Australia, for the purpose of meeting the nomination preconditions for the race which the dogs would otherwise have been ineligible.

The request for the Statutory Declaration was made as Stewards were suspicious that the dogs did not meet the nomination criteria. The conduct of Mr Julien implicated others.

At the time, Mr Julien was serving a disqualification for an unrelated matter. The conduct was persistent and dishonest and motivated by personal gain; seeking eligibility in a high stakes race, for which the dogs would otherwise be ineligible.

Penalty: 18 months disqualification. Appeal dismissed by the Tribunal.

c. Trainer B Cook (2012)
Made a misleading statement to Stewards by stating that he had made a payment to an owner which in fact he had not.

Mr Cook was only registered as an owner trainer, not a public trainer. Mr Cook had entered into a training agreement contrary to the licence he held, with the owner of the greyhound.

The owner alleged, through a written complaint to RWWA, that Mr Cook had not paid him $2,137.50 in stake money.

In an interview with the Stewards, Mr Cook claimed had paid the sum to the owner (in the form of two $1,000.00 bank deposits) but refused to produce bank statements. He was afforded a further 7 days to do so but still declined; alleging that the request was beyond the powers of Stewards and a breach of Commonwealth laws. He further alleged that the owner was not a person of integrity and should not be believed. The owner provided Stewards with bank statements supporting the position that no funds had been forthcoming.

Mr Cook had been involved in racing for 6-7 years, and his previous history of offences was considered to be an aggravating factor. Mr Green's offending was solely motivated by financial benefit, and had the potential to lead to diminished confidence in the trainers, and the racing industry at large.

Penalty: 12 months disqualification. Appeal dismissed by the Tribunal.

d. Trainer S. Shinners (2016)
Made a misleading statement to Stewards relating to the time he had resided at his property.

Mr Shinners mislead Stewards during an interview by stating that he had only been residing at his residential property since 2 August 2016 which was untrue. He had in fact been residing there for a longer time.

Penalty: Fine of $1,500.00.

10. The above cases are in no way binding and simply provide guidance in assessing the objective seriousness of the conduct of the Appellant in the present matter.

11. In my view, the matter of Green is distinguishable from the present matter on the following basis:

    a. The Appellant pleaded guilty.

    b. An explanation was provided for the Appellant's conduct.

    c. The Appellant did not stand to obtain a benefit from the conduct.

    d. The Appellant's conduct was quickly rectified.

12. However, it remains that the Appellant's evidence was crucial in the Stewards' investigation as Mr Green was an eyewitness to conduct which would otherwise have gone undetected. The conduct of Mr Green *"seriously compromised the conduct of his (Martin - Steward) investigation".*

13. The Appellant's personal circumstances were significantly different to the present matter. He had only one dog at the time, with a view to expand his training operation.

14. I find the matter of Julien only of assistance insofar as it represents an example of a breach of the Rules, which is in my opinion, towards the highest end of the scale of seriousness.

15. I do not find the Appellant's conduct in the present matter to be at all proximate to that of Julien. I make the following observations in relation to this matter:

    a. The preconditions for nomination in high stakes races, such as the National Sprints, exist to ensure transparency and fairness for participants across the States and Racing Industry as a whole. Compliance with the criteria for such nominations is paramount to the integrity of these events.

    b. Mr Julien's conduct arose from the existing, and duly expressed, suspicions of the Stewards that the dogs he sought to nominate did not meet the requisite criteria. These suspicions lead the Stewards to request he provide a legal document in support of the nominations. It followed that he engaged in persistent, and potentially criminal, conduct in providing them with a Statutory Declaration, the contents of which were false. This conduct implicated others (Farquarson and Mackey) who were subjected to cross examination in the course of the hearing of the matter.

    c. Mr Julien sought his dogs be eligible for a race, which attracts significant stake monies, in circumstances which they would otherwise be ineligible. This conduct had the potential to exclude genuine participants from the National Sprint Championships and undermine the integrity of the Racing Industry as a whole.

    d. Further, at the material time, Mr Julien was already serving a period of disqualification for an unrelated matter.

16. It is of course the case that in considering the case of the Appellant in the present matter, Charge 3 cannot be viewed in a vacuum. The case must be assessed having regard to the totality of the conduct, the circumstances of the misleading statement, and the investigation as a whole.

17. In assessing the seriousness of the offending, I have regard to the following matters:

    a. the nature and seriousness of the consequences sought to be avoided;

    b. the period of time over which the deception occurred and whether it was merely allowed to continue or was repeated or persisted in and what else was done to maintain it;

    c. whether the deception involved some other person, either as an accomplice or a victim;

    d. whether the deception caused diversion of investigative resources;

    e. whether the offence was a spur of the moment response or was premeditated, and if so, the degree of premeditation, planning and persistence; and

    f. the degree to which any deception extended - whether a hearing or Tribunal was deceived, or it resulted in the creation of false public records, and if so, the extent and consequences of that.

18. Mr Dagostino was charged contrary to GAR 83(2)(a) in that he failed to present AWESOME GRIT to compete at Race 2 at Cannington on 5 June 2019, free of a prohibited substance, namely Cobalt, evidenced by a concentration level in excess of 100 nanograms per millilitre in a pre-race urine sample taken from the greyhound.

19. To this charge he pleaded not guilty, but was found guilty following the Stewards inquiry.

20. I do not propose to go into the details of the defence advanced in respect of this charge in further detail, save to say Mr Dagostino proffered alternative explanations for the reading.

21. I also note that he is charged with presenting the greyhound contrary to GAR 83(2)(a), rather than an offence of administering the substance contrary to GAR 83(1). As I have said, I would dismiss the conviction and penalty appeal in relation to this charge.

22. Charge 2 was an offence contrary to Local Rule 85; having in possession, at his premises, a half full bottle of “Level 1 Greyhound Tonic” which had not been registered in compliance with relevant State or Commonwealth legislation. To this charge, Mr Dagostino pleaded guilty. He takes no issue with the fine imposed being one of $500.00.

23. In light of the plea of guilty to Charge 3, I cannot be satisfied that the conduct the subject of Charge 2 was embarked upon to avoid detection, or punishment in relation to this conduct. It would seem inexplicable to admit possession of the “Level 1 Greyhound Tonic” by way of a plea of guilty, but to then mislead the Stewards to avoid the consequences of such a plea.

24. The Stewards, appropriately in my opinion, conclude that that there is no evidence available on Mr Dagostino’s possession of this substance, which can give rise to an inference that he had sought out the substance to deliberately gain an unfair advantage or to cheat.

25. In assessing these matters, I also find the chronology of events to be relevant and summarise them as follows:

    a. 5 June 2019 – AWESOME GRIT pre-race swab conducted.

    b. 26 July 2019 – hand delivered letter from investigators to Mr Dagostino advising of the ChemCentre report regarding Cobalt reading detected in the pre-race sample obtained from AWESOME GRIT on 5 June 2019 (exhibit 3).

    c. 29 July 2019 - "Level 1 Greyhound Tonic" located in Mr Dagostino's kennels.

    d. 8 August 2019 – Confirmation letter and notification of requirement to attend the Stewards inquiry to Mr Dagostino (exhibit 4).

    e. 12 August 2019 – Mr Dagostino email to Mr Borovica requesting further information.

    f. 19 August 2019 – ChemCentre report of the unknown liquid in bottle labelled "Level 1 Greyhound Tonic" (exhibit 7).

26. I find it to be relevant that the "Level 1 Greyhound Tonic" was located in Mr Dagostino's kennels on 30 July 2019, in circumstances where he had already been notified of the Cobalt reading of AWESOME GRIT by way of a hand delivered letter and annexed report some three days earlier.

27. The medical journal located at Mr Dagostino's kennels contained no entries for AWESOME GRIT. I reiterate that he is charged with presenting the greyhound contrary to GAR 83(2)(a), rather than an offence of administering the substance contrary to GAR 83(1), and it is in this context that the facts must be viewed. The use of a pet food or a B12 injection containing Cobalt is not, in itself, an offence. I disagree with the finding of my fellow learned Tribunal members that Mr Dagostino's misleading evidence should be viewed in the context of an attempt to bolster a case for alternative sources of Cobalt. Mr Dagostino embarked upon his own independent enquiries in this respect and presented the relevant evidence to the Inquiry.

28. As has been discussed, the current testing regime does not distinguish the 'type' of Cobalt detected. The offence with which he is charged (Charge 1) is a strict liability offence.

29. In my view, in circumstances where there can be no determination to the source of the source, no adverse inference can be drawn from the absence of any medical journal notations in respect of AWESOME GRIT.

30. At the time Mr Dagostino gave evidence, the Stewards had already conducted enquiries as to the date of production marked on the bottle of "Level 1 Greyhound Tonic". These were not in depth or extensive enquiries – the label is clear on the photograph of the exhibit.

31. It cannot, in my view, sensibly be advanced that there was any diversion of investigative resources on account of Mr Dagostino's evidence in this respect.

32. I further note the bottle was labelled “Mackay Training” – a label placed over what appeared to be the original sterile water label. Based on this, the Stewards were well equipped to make their own enquiries as to the origins of the “Level 1 Greyhound Tonic”, without the assistance of Mr Dagostino.

33. This is not to diminish the requirement that licensed trainers should honestly assist, to the best of the ability, the Stewards. However, in my opinion this is not an example of a situation where the evidence of the Appellant derailed an investigation in respect of another charge (Charge 1), nor where valuable resources were unnecessarily misdirected on account of the conduct of the Appellant.

34. Having regard to the transcript of the Inquiry, the chronology of events and the Tribunal hearing, I am not persuaded that Mr Dagostino’s misleading evidence was allowed to continue over time, diverted valuable investigative resources, or that it encompassed a high degree of pre-meditation.

35. Further, in my opinion, Mr Dagostino’s answers to the line of questioning surrounding the dates of the “Level 1 Greyhound Tonic” must be viewed in the context which can be sensibly extrapolated from the transcript of the Stewards Inquiry.

36. Whilst the numbering of the pages contains no timestamps, it is evident from the language used by Mr Dagostino when questioning commences in this regard (ts99 onwards), and the manner in which the hearing progresses up until the Inquiry is adjourned (ts108) for the Stewards to consider the evidence provided, and again upon resumption (ts109) that Mr Dagostino is experiencing some difficulties, which may be attributed to anxiety.

37. In support of this, I am drawn to the following exchanges:

TS102-103:

> *“CHAIRMAN: You told us at the start when this bottle first appeared in the video that we watched when the investigators found it, you thought it was untraceable, it was herbal, didn’t have anything in it.*
>
> *DAGOSTINO: it says that on the bottle.*
>
> *CHAIRMAN: Yes it did say that on the bottle. You didn’t know it had cobalt in it. I don’t think any of us knew that.*
>
> *DAGOSTINO: no*
>
> *CHAIRMAN: Until we did the testing*
>
> *DAGOSTINO: That’s true*

CHAIRMAN: Given that you've got this, what you think is to be an innocuous substance, a herbal substance, is it possible that you might have thought "well, this is ok to use", not realising that it had cobalt in it and then accidentally used too much, too close, whatever, and its caused you this problem? Is that possible

DAGOSTINO: No

CHAIRMAN: Because you're thinking it's untraceable, it's harmless why wouldn't you use it?

DAGOSTINO: That's correct but, it didn't happen, so."

And at TS104:

"O'DEA: and you can't explain why that's got the date of manufacture on it as of February this year?

DAGOSTINO: I can't. It's like I've been set up to be honest.

O'DEA: By who?

DAGOSTINO: I don't know. The label's been ripped, I don't know if that's, I just can't explain it."

At TS105:

"CHAIRMAN: And the label partly removed. So, just for the record Dr Medd, I'll let you answer to this, you were the person who removed the label from the bottle and that's

DAGOSTINO: I can see the date there before that anyway

CHAIRMAN: Yes

DR MEDD: Yes, that's correct. So

CHAIRMAN: Before you go on. So, Mr Dagostino you accept then that this bottle hasn't been tampered with?

DAGOSTINO: Yes, yes, yes.

CHAIRMAN: or labels replaced?

DAGOSTINO: Yes"

38. It follows there is an exchange between Dr Medd and the Chariman about the process associated with the removal of the "Green and yellow" label:

At TS106-107

> *"CHAIRMAN: ….So, Mr Dagostino, you did say last time you were here, in one of your, when you were talking to the panel, you said to us, words of the effect of "that if any of us thought you'd deliberately this dog cobalt, we would be badly mistaken"*
>
> *DAGOSTINO: Yes.*
>
> *CHAIRMAN: I think the actual words were "I don't understand, I don't really, I don't know really if anyone if this room actually believes that I would deliberately use cobalt to enhance a dog's performance with a withholding period or within or deliberately, honestly do it. I don't think anybody truly believes it" And on reflection, I though the use of the word "deliberately" was a bit of a curious qualification to that statement. Was there a suggestion there that you might have accidentally done it?*
>
> *DAGOSTINO: Yes, I see what you mean now, I just, yes, just thrown me. I'm in a bit of a shock to be honest.*
>
> *CHAIRMAN: What has?*
>
> *DAGOSTINO: No, just the date, I. No, no, I haven't deliberately done it. No. I plead not guilty."*

39. It follows that the Chairman and the Appellant engage in an exchange surrounding accidental, or inadvertent use of a substance containing Cobalt.

40. Upon the resumption of proceedings, on the transcript some 5-10 minutes later, the Chairman indicates to Mr Dagostino that a further charge, Charge 3, an offence contrary to GR 86(d) will be preferred.

41. Mr Dagostino indicates a plea of not guilty.

42. The basis for the charge is the earlier exchanges (TS103-107) which are clearly already refuted by the enquiries which have already been conducted by Dr Medd and the Stewards.

43. In my view, the exchanges from TS110-113 exhibit a heightened state of anxiety and confusion on the part of Mr Dagostino, and in any event, this evidence does not form the basis upon which Charge 3 was preferred.

44. The Stewards have acknowledged in their reasons that it was difficult to align past matters with this case, as each case is unique and turns on its own facts. I do not accept there is evidence to support a direct link between the conduct encompassed in Charge 3 and the offence proved in Charge 1.

45. I disagree with the finding that the misleading evidence was "about a product" capable of providing the reported result (Cobalt reading). I disagree that this conduct is towards the higher end of the scale of seriousness. In my view, there was no forensic or investigative disadvantage incurred as a result of the evidence of the Appellant.

46. In my opinion, the Stewards failed to objectively assess the serious of the conduct against the matters to which they relied upon for guidance, and did not have due regard to the totality of the circumstances and matters personal to Appellant.

ZOE GILDERS, MEMBER