THE RACING PENALTIES APPEAL TRIBUNAL

DETERMINATION AND REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRMAN) AND MR J PRIOR (MEMBER)

APPELLANT:	ALEX JAMES LINDSAY
APPLICATION NO:	A30/08/349
PANEL:	MR D MOSSENSON (CHAIRPERSON) MR J PRIOR (MEMBER) MR S PYNT (MEMBER)
DATE OF HEARING:	22 MAY 1997
DATE OF DETERMINATION:	9 JULY 1997

IN THE MATTER OF an appeal by Mr A J Lindsay against the determinations made by Western Australian Greyhound Racing Association Stewards on 26 February 1997 imposing warning off periods of 2 years and 6 months for breach of Rule 231(1)(d) and of 18 months for breach of Rule 234(16)(i), both to be served concurrently.

Mr C Harrison was granted leave to represent Mr Lindsay.

Mr M Kemp appeared for the Western Australian Greyhound Racing Association Stewards.

This is an appeal by Mr A J Lindsay against convictions and penalties imposed by the Western Australian Greyhound Racing Association Stewards for breaches of Rules 231(1)(d) and 234(16)(i) of the Rules Governing Greyhound Racing in Western Australia. In respect of the first breach the penalty of warning off for a period of two years and six months was imposed. In respect of the second breach a penalty of warning off for a period of eighteen months was imposed. It was ordered that both penalties be served concurrently.

Rule 231(1)(d) specifies:

> '231 (1) *A person may be disqualified if he is found on inquiry -*
> ...
> *(d) to be guilty of any negligent, dishonest, corrupt, fraudulent or improper act or practice in connection with greyhound racing or the registration of a greyhound or any act detrimental to the proper control and regulation of greyhound racing or the registration of greyhounds; or ...'*

Rule 234(16)(i) specifies:

> '234. *A person may be found to be guilty of the breach of any provision of these Rules not specified in this rule, but without prejudice to the generality of that liability a person who -*
> ...
> *(16) uses improper or insulting words or behaviour towards -*
>
> *(i) a Steward;*
> ...
> *in relation to his or their official duties;*
> ...
> *commits a breach of these Rules.'*

Mr Lindsay attended before a Steward's inquiry after having been requested to do so by letter from one of the Stewards. In that letter Mr Lindsay was given copies of reports lodged by two Stewards. Further he was advised that he may bring witnesses to assist his cause and was told '*Should you not attend the Inquiry the Stewards may proceed in your absence in accordance with Rule 216*'.

At the time of the offences Mr Lindsay was unregistered. In April 1996 his public trainer's licence had been cancelled by the Committee of the Association. The Committee had also directed that his application for renewal be refused. Mr Lindsay had been involved in the industry for quite some time. His record of convictions revealed two convictions for drug offences, breach of Rule 231(1)(d) for an improper act, breach of Rule 234(15) for disobeying a lawful order of the Stewards and breach of Rule 42(2) refusing a kennel inspection by the Stewards. The last three of his offences had occurred within a 6 month period in July 1995.

The Charges Heard by the Stewards

During the course of the hearing which took place before the Stewards on 19 February 1997, the appellant of his own volition decided not to participate further and left the hearing. The Stewards subsequently wrote to Mr Lindsay advising him that the Stewards considered that every attempt had been made to afford him the opportunity to present his case and that he had chosen to leave without consent. Mr Lindsay was further advised that *'The Stewards ...continued with the inquiry in your absence'* and *'...after considering all the evidence decided to lay two charges against you'*. In addition, Mr Lindsay was informed that the Stewards would be resuming the inquiry on 26 February 1997. Mr Lindsay was requested to attend and was told he may bring witnesses and should he not attend the Stewards may proceed in his absence under Rule 216.

As to the first charge which was under Rule 231(1)(d), the Stewards' letter stated that:

> *'The specifics of the charge at (sic) that at Nambeelup Park at approximately 7.30am on 11 February 1997 you were holding six greyhounds at the one time and that these greyhounds were not muzzled in any way which is a breach of the Dog Act 1976, an act which is considered by the Stewards to be an improper act.'*

As to the second charge which was under rule 234(16)(i), the letter stated that:

> *'The specifics of the charge are that at Nambeelup Park at approximately 7.30a.m. on 11 February 1997, you used improper and insulting words towards Chief Steward Carlos Martins in relation to his official duties.'*

The Findings of the Stewards

As Mr Lindsay did not attend the hearing on 26 February 1997, the Stewards proceeded in his absence.

In respect to the charge under Rule 231(1)(d) the Stewards found as follows:

'WAGRA Stewards, Carlos Martins and Gary Dickenson, have presented to us statements made from eye witness accounts of events on the morning of 11 February, 1997 at Nambeelup Park where they detailed that Mr Lindsay was holding six greyhounds at one time and that these greyhounds were not muzzled in any way. Furthermore, we have been presented with photographs of the incident which clearly shows six greyhounds being held in the manner described by Mr Martins and Mr Dickenson. Mr Lindsay has not disputed the fact that Mr Martins and Mr Dickenson were at Nambeelup Park on the morning of 11 February, 1997 nor has he disputed that he was also there. It is also clear from the evidence presented that a conversation did take place between Mr Lindsay and Mr Martins at this time. Mr Lindsay also does not dispute that he was holding six greyhounds at the one time. It is also clear from the statements presented, i.e. Exhibits 2 and 3, that these greyhounds were unmuzzled at this time. Mr Lindsay did raise a number of points in regard to the statement presented, i.e. Exhibits 2 and 3, however, the points do not detract from the specifics of the Charge. There has been nothing presented to this Panel to support any of Mr Lindsay's allegations in respect to the honesty and integrity of the Stewards and the Stewards can see no reason why Mr Martins or Mr Dickenson would submit such statements if they were untruthful. It is also clear that such actions are a contravention of the Dog Act, which the Stewards feel is an improper act.

As the charge and specifics indicate, the Stewards are not considering this matter as a breach of Rule 246, but rather that Mr Lindsay's act of holding six unmuzzled greyhounds at the one time, which is clearly a breach of the Dog Act, is seen to be an act which is improper. The Stewards are therefore in no doubt that the specifics of the charge have been made out and therefore find Mr Lindsay guilty as charged'.

In respect to the charge under Rule 234(16)(i), the Stewards found as follows:

'... there is ample evidence that a conversation did take place between Mr Martins and Mr Lindsay on the morning of 11 February, 1997 at Nambeelup Park and that at this time Mr Lindsay used improper and insulting language towards Chief Steward, Mr Martins. The Stewards are therefore in no doubt that the specifics of the Charge have been made out and therefore find Mr Lindsay guilty as charged.'

The following general facts are not in dispute:

1. The Stewards Martins and Dickenson came across the appellant on the morning of 11 February 1997 at a location being an extension of Gull Road, Nambeelup Park.

2. When the Stewards first met the appellant, he was walking six greyhounds at once by holding them on leashes from the motor vehicle he was driving at the time.

3. The six greyhounds were not muzzled at the time. One of the dogs, SEA LURE was earbranded and is owned and trained by Mrs Costello. Mrs Costello is a registered trainer. The other animals belonged to the appellant.

4. During the course of conversation between the appellant and Chief Steward Mr Martins, the appellant swore at Mr Martins.

5. The appellant was an unregistered person at the time.

The Grounds of Appeal

The grounds of appeal as set out in the notice of appeal filed by the appellant dated 6 March 1997, are brief in their terms and state the following:

> *'I think the Stewards have erred in both the above Rules and I also disagree with the penalty (severity) of same.'*

At the hearing of the appeal the representative of the appellant, Mr Harrison, expanded on the grounds of the appeals against conviction for the two breaches of the Rules in question. The following propositions or particulars are relied on by the appellant:

1. The Stewards had no jurisdiction or authority to act against an unregistered person.

2. When considering the breach of Rule 231(1)(d) the Stewards had no jurisdiction to rely on provisions of the *Dog Act* 1976 which is administered by the relevant Local Government Authorities.

3. In relation to the conviction for breaching Rule 234(16)(i), the Stewards erred in finding that the Stewards in question were acting in the course of their official duties.

4. The Stewards in effect breached the rules of natural justice by failing to give in advance warning of the particular breaches for consideration.

Authority of Stewards to Act Against Unregistered Persons

There is no dispute between the parties that on 11 February 1997 when the alleged breaches of the Rules were committed that the appellant was an unregistered person. In relation to the question whether the Stewards have jurisdiction to deal with unregistered persons for breaches of Rules 231(1)(d) and Rule 234(16)(i), we are satisfied that such jurisdiction is clear.

Rule 231 applies to *'a person'*. A person is defined in Rule 2, (the Interpretation Rule), as *'any person whether or not registered by the Board or by an Approved Registration Authority'*. It is clear on the evidence before the Stewards that the appellant met the definition of *'a person'* under Rule 2.

It was further argued, in support of this ground of appeal in relation to this Rule, that it did not apply to the appellant as the penalty imposed for breach of the Rule could only be disqualification which could only apply to a registered person.

We are satisfied that Rule 231 does not limit the powers of the Stewards to penalties of disqualification only and therefore imply that it is only available to persons who are registered persons. The Rule itself does not make disqualification mandatory, as it is couched in the terms *'may be disqualified'* at the beginning of the Rule.

Rule 76(1) gives the Stewards an additional power in any matter to warn people off after an inquiry *'... for any term or at their pleasure, any person who, in the opinion of the Stewards, is liable to disqualification, under these Rules or is guilty of improper conduct at a meeting or trial'*.

We are satisfied on the evidence that the Stewards in imposing the penalty of warning off for breach of this rule, were clearly exercising their powers pursuant to Rule 76(1).

In relation to Rule 234(16)(i), for the same reasons as set out above in relation to the conviction on Rule 231(1)(d), we are satisfied that the Stewards had jurisdiction to deal with Mr Lindsay in relation to breach of this Rule and to deal with him in such a way as by applying a penalty of warning off.

Mr Lindsay was not simply a member of the general public with no connection or relationship with the greyhound racing industry. He had previously been registered as a public trainer. Further the evidence established that one dog he was leading was a registered animal.

No Authority to Rely on the Provisions of the *Dog Act*

This argument relates specifically to the conviction of the appellant for breach of Rule 231(1)(d) and the use of the Stewards of the provisions of the *Dog Act* 1976. We agree with the appellant's representative that the jurisdiction to prosecute in relation to the *Dog Act* is vested only in the relevant Local Government Authority defined under the *Dog Act* and Regulations. The real question this raises is whether the Stewards had jurisdiction to consider the *Dog Act* when considering whether the acts of the appellant constituted a breach of Rule 231(1)(d) by being an improper act.

The Stewards when considering this matter, referred specifically the following two sections of the *Dog Act* which state as follows:

> Section 33(1)
>
> *'A greyhound shall accept while it is on its premises occupied by its owner be muzzled in such a manner as will prevent it from biting a person or animal.'*

Section 33(2)(c)

'For the purpose of Section (1)(a) of that Section, a person shall be conclusively deemed to be incapable of controlling a greyhound if it is one of more than two greyhounds held by him at one time.'

The Rules do not specifically define what is an *'improper act'*. We are satisfied after hearing submissions from the representatives of both parties at this appeal, that historically a broad range of factual circumstances has been considered by the Stewards as improper acts. It is clear from the Stewards' reasoning in the transcript of proceedings that the Stewards considered the acts of both having unmuzzled greyhounds and more than two greyhounds being held by the appellant at one time, were both acts potentially liable to be construed as an improper act. It must be remembered also that with respect to a prosecution under the *Dog Act*, the relevant Court dealing with the matter would need to be satisfied beyond reasonable doubt in order to convict, whilst a Stewards' inquiry, when considering whether such acts constitute an improper act, are only required to be satisfied on the balance of probabilities.

The Stewards were entitled to refer to the *Dog Act*. But in any event it is the factual circumstances, which are not in dispute, which the Stewards considered constituted an improper act. We can see no error in the Stewards' reasoning in finding that these facts do constitute an improper act.

It was further argued that the fact that the greyhounds were unmuzzled is a matter which should have been dealt with by Rule 246 and not Rule 231(1)(d). Rule 246 only applies to a category of persons. The appellant at the time did not meet the description of being a person convicted by a court for the relevant offence of leading a greyhound in a place other than on land of which the owner of the greyhound is occupier without a muzzle. A logical extension of this submission would be that unless a person was prosecuted and convicted in a court of law for such an offence, that person could never be convicted of an improper act for such activity. Such a submission fails to recognise the different standards of proof that apply to a Stewards' Inquiry and a criminal court of law.

In any event, as previously stated, the Stewards have not only relied on the fact that the greyhounds were unmuzzled, but also that there were six greyhounds being led by the appellant at the one time.

Acting in the Course of Official Duties

This aspect of the argument raises the interesting question as to when the Stewards cease to be Stewards for the purpose of performing their official functions and duties. For the appellant it is argued that the Stewards were acting outside their powers in dealing with this unregistered person who was handling greyhounds at a location in the public domain. It is necessary to consider the powers of the Stewards under the Rules.

The Stewards have duties imposed on them by the Rules to control meetings and qualifying trials and to adjudicate on issues that arise. The Stewards can make, alter or vary all arrangements for the conduct of a meeting or trial. They have the responsibility to inspect race tracks, kennels, starting boxes and equipment and to check particulars of the dog. There is a duty on Stewards to give effect to directions given by the Board. The Board has the power to appoint and regulate the functions of the Stewards. The Board can inquire into, deal with, hear and determine any matter relating to greyhound racing. Any matter can be referred to the Stewards for investigation and report. This includes an inquiry into the nomination, training, handling and running of any greyhound be it the subject of a report or decision or not.

The conferral of power by the Board ensures that the Stewards can exercise their powers and duties at and outside of the racetrack.

In H.H.B. Gill v The King (1948) Indian Law Reports 542; 35 AIR (1948) PC 128, the term *'acting or purporting to act in the discharge of his official duty'* was considered. It is immediately apparent that the inclusion of the words *'purporting to act'* considerably extends the coverage of the term. However Lord Simonds' discussion of acts in the discharge of official duty (at 133) is of some relevance. The observations are of equal force in relation to each alternative.

> *'A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act: nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office.'*

In other words the act of receiving a bribe is not itself an act done by virtue of the office, and the appellant was therefore not entitled to the usual procedural protection (a sanction issued by the Governor General before prosecution) in favour of acts done in the discharge of official duty. Their Lordships drew the distinction between receipt of the benefit and the acts which the official might do to earn it. With respect to these latter acts, their Lordships suggested the appropriate test to be whether the acts lie within the scope of his official duty or whether they are acts that he could reasonably claim to be doing by virtue of his office. This approach certainly rejects the need for positive duty to act in a certain way before an act may qualify as one *'in the discharge of his official duty'*.

The word *'duty'* has been construed in the context of a statute prohibiting an officer from divulging or communicating information obtained in the course of his employment with the Taxation Commissioner *'except in the performance of any duty as an officer'*. Dixon CJ said:

> *'I think that the words `except in the performance of any duty as an officer' ought to receive a very wide interpretation. The word `duty' there is not, I think, used in a sense that is confined to a legal obligation, but really would be better represented by the word `function'. The exception governs all that is incidental to the carrying out of what is commonly called `the duties of an officer's employment'; that is to say, the functions and proper actions which his employment authorizes.'* (Canadian Pacific Tobacco Co Ltd v Stapleton (1952) 86 CLR 1, 6).

The High Court of Australia considered the term *'duties of his office'* in Herscu v The Queen (1991) 173 CLR 276. There it was held that the phrase *'duties of his office: in s87 (Queensland Criminal Code) was not confined to specific statutory duties, but should be read in the sense of 'functions of his office'*. It included

the performance of a function which it was for the public official to perform, whether or not he was legally obliged to perform it in a particular way or at all.

In a joint judgment in the above mentioned case Mason, Dawson, Toohey and Gaudron JJ referred to Nesbitt Fruit Products Inc v Wallace (1936) 17 FSupp 141, at p 143 where it was stated:

> *'The duties of a public office include those lying directly within the scope of the office, those essential to the accomplishment of the main purpose for which the office was created and those which, although only incidental and collateral, serve to promote the accomplishment of the principal purpose.'*

Also referred was a judgement by Dixon CJ in Canadian Pacific Tobacco Co Ltd v Stapleton [1974] 2 NZLR 713, where he stated:

> *'... I think that the words 'except in the performance of any duty as an officer' ought to receive a very wide interpretation. The word 'duty' there is not, I think, used in a sense that is confined to a legal obligation, but really would be better represented by the word 'function'. The exception governs all that is incidental to the carrying out of what is commonly called 'the duties of an officers employment'; that is to say, the functions and proper actions which his employment authorises.'*

Their Honours went on to find that:

> *'... an act of a public official, or at all events a Minister, can constitute an act 'in the discharge of the duties of his office' when he performs a function which it is his to perform, whether or not it can be said that he is legally obliged to perform that function in a particular way or at all. Sometimes the same act may be performed by a private individual as well as by an office holder. In that event, it is for the jury to decide whether the act, if done by the office holder, was done in the discharge of the duties of his office. That was what the jury decided in this case.'*

It is clear that in supervising the sport and ensuring the Rules are complied with the Stewards have a wide range of express powers. In keeping with the authorities the Stewards are entitled to exercise a range of incidental and collateral powers. We are satisfied that the Stewards are under obligation and have the power to take the action which they did in this case. Had they refrained from doing so they would have been in dereliction of their duties.

As previously stated Mr Lindsay was not simply a member of the general public with no connection in relation to the greyhound racing industry. He had previously been registered. Mr Martins was known to Mr Lindsay at the time he was spoken to by Mr Martins. It is also relevant that at the time the improper and insulting words were uttered by Mr Lindsay he was leading a registered animal.

Breach of the Rules of Natural Justice

There is no merit in this ground of appeal. Mr Lindsay not only attended the initial Stewards' inquiry on 19 February 1997 before the two charges for breach of the relevant Rules were laid against him, but was given the additional benefit of the following:

1. written copies of the statements of the two principal witnesses before the inquiry commenced,

2. written notice of the intended charges for breach of the two Rules in question which were being brought against him by the Stewards following the initial inquiry, and

3. the opportunity to attend a further inquiry to make submissions in relation to the two charges and whether he could be convicted of the relevant Rules.

In many ways this appellant was better armed prior to being charged for breaches of the Rules in the relevant industry than most appellants who come before this Tribunal.

The appellant of his own volition elected not to attend the subsequent Stewards' hearing on 26 February 1997 when the Stewards convicted him of the breaches of the two relevant Rules. As previously stated, pursuant to Rule 216, the Stewards have the power to proceed in the absence of a party.

The appellant was under no misapprehension whatsoever of the relevant charges the Stewards were considering. Neither of the Stewards' inquiries offended any of the basic principles of natural justice.

Penalty

In general terms, the appellant has appealed against the severity of both of the penalties of warning off which were imposed for breach of each rule. It was agreed by the parties that the only penalties available in view of the status of this appellant at the time, for breach of the Rules was a warning off and/or a fine. Pursuant to Rule 76(2), the maximum fine which the Stewards may impose for a breach of the Rules, is *'a fine not exceeding $100.00'*.

We are satisfied, after considering the factual circumstances of these offences, the appellant's previous record and the appellant's personal antecedents, that upon breach of the relevant Rules, a fine by itself with a maximum sum of $100.00, would have been a manifestly inadequate penalty. The question then remains as to whether the Stewards have erred in imposing the length of warning off of two years six months in respect to the breach of Rule 231(1)(d) and eighteen months in respect of Rule 234(16)(i).

We are satisfied that in the circumstances of the facts of this case, the relevant matters for consideration of the Stewards were as follows:

1. the appellant's previous record for breaches of the Rules,

2. the appellant's lack of remorse in breaching the two Rules, as indicated by his failure to plead guilty and his lack of participation at the two Stewards' inquiries,

3. the specific factual circumstances relating to the breach of each of the relevant Rules,

4. the effect a warning off penalty on an unregistered person, as opposed to the effect other penalties have on a registered person, and

5. whether there is any tariff of similar penalties for breaches of these Rules.

The appellant has referred us to Rule 246 as a guideline as to the time periods that could have been imposed for warning off. We are satisfied that this Rule is not of assistance, as it only relates to disqualification. The effect of a disqualification on a registered person must be much greater than the effect of warning off on an unregistered person. In those circumstances, we are not satisfied that a direct comparison can be made between the time lengths of disqualification penalties and warning off penalties.

It is incumbent on the appellant to succeed in his appeals against penalty to satisfy us that the Stewards were in error in imposing the length of time of the warning off period by failing to give sufficient weight to relevant considerations, or giving too much or any weight to irrelevant considerations so that the penalty imposed must be in error.

Having heard the submissions by the appellant, we are not satisfied that the Stewards were in error in imposing the time limits they did with respect to the two warning off penalties.

It is clear, by virtue of Rule 76(1), that the Stewards are given an unfettered discretion as to the length of time they may impose for warning off penalties. There is nothing we have heard from the appellant which suggests that the two time periods imposed were excessive in the circumstances. Had Mr Lindsay's record been different and had he not offended on previous occasions in not complying with the authority of the Stewards the circumstances may well have been different.

Decision

For these reasons, we would dismiss the appeals against convictions and penalties.

The fee paid on lodgment of the appeal is forfeited.

DAN MOSSENSON, CHAIRMAN

JOHN PRIOR, MEMBER

APPEAL 349

THE RACING PENALTIES APPEAL TRIBUNAL

DETERMINATION AND REASONS FOR DETERMINATION OF MR S PYNT (MEMBER)

APPELLANT:	**ALEX JAMES LINDSAY**
APPLICATION NO:	**A30/08/349**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR J PRIOR (MEMBER)** **MR S PYNT (MEMBER)**
DATE OF HEARING:	**22 MAY 1997**
DATE OF DETERMINATION:	**9 JULY 1997**

IN THE MATTER OF an appeal by Mr A J Lindsay against the determinations made by Western Australian Greyhound Racing Association Stewards on 26 February 1997 imposing warning off periods of 2 years and 6 months for breach of Rule 231(1)(d) and of 18 months for breach of Rule 234(16)(i), both to be served concurrently.

Mr C Harrison was granted leave to represent Mr Lindsay.

Mr M Kemp appeared for the Western Australian Greyhound Racing Association Stewards.

I have read the draft of the joint reasons of Mr D Mossenson, Chairperson and Mr J Prior, Member. I agree with the reasons and the conclusion and I have nothing to add.

Seal of the Racing Penalties Appeal Tribunal of WA

STEVEN PYNT, MEMBER