APPEAL 433

DETERMINATION AND REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**TERRENCE JAMES ERENSHAW**
APPLICATION NO:	**A30/08/433**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)** **MR J HEALY (MEMBER)** **MR A MONISSE (MEMBER)**
DATE OF HEARING:	**15 OCTOBER 1998**
DATE OF DETERMINATION:	**15 OCTOBER 1998**

IN THE MATTER OF an appeal by Mr T J Erenshaw against the determination made by the Western Australian Greyhound Racing Authority Stewards on 23 September 1998 imposing six months disqualification for breach of Rule 234(7) of the Rules Governing Greyhound Racing in Western Australia.

Mr T Kavenagh, instructed by Corser & Corser, represented the appellant.

Mr J Woodhouse, instructed by Watts & Woodhouse, represented the Western Australian Greyhound Racing Authority Stewards.

Preliminary

At the conclusion of the hearing, the Tribunal allowed the appeal and substituted a penalty of three months disqualification in lieu of six months disqualification. In so doing I stated the following:

> *"This is an appeal against penalty.*
>
> *The appellant was the trainer of CRYSTAL CURRENCY. That greyhound won Race 7 over 410 metres at Mandurah Greyhounds on Tuesday, 25 August 1998. A post race urine sample taken from CRYSTAL CURRENCY revealed the presence of the drug Methylprednisolone.*
>
> *On 23 September 1998 the Stewards opened an inquiry into the presence of the drug found in CRYSTAL CURRENCY. At the conclusion of the inquiry the appellant was charged in the following terms:*
>
> *'Mr Erenshaw, the Stewards after some considerable deliberation have decided to lay a charge against you under Rule 234 Section 7.'*

As to the particulars, the Stewards said:

'Now the particulars of the charge are that you, Mr Erenshaw, as the trainer had control of the greyhound CRYSTAL CURRENCY when it was brought to compete in Race 7 run over 410 metres at Mandurah Greyhounds on the 25th of August 1998 and upon analysis the greyhound was found by the Stewards to contain the drug Methylprednisolone, having been administered to it for an improper purpose.'

The appellant pleaded guilty.

After deliberating, the Stewards determined that the appropriate penalty was one of disqualification for a period of six months.

The appellant now appeals against that penalty.

It is the unanimous decision of the Tribunal that the appeal against penalty be allowed. Therefore the determination is that the appeal be allowed. The penalty of six months disqualification is set aside. In substitution, a penalty of three months disqualification is imposed.

Written reasons for the decision will be delivered at a later date."

REASONS FOR DECISION

The Facts

The appellant is a public trainer under the Rules. At the time of commission of the offence, he had been involved in the greyhound racing industry for 22 years. He had four greyhounds in work, and his practice was to have only that number at any given time. The appellant also derived income from treating other persons' greyhounds for injuries. The appellant had expertise in that area, as was recognised by the six persons who provided references on his behalf.

The appellant purchased CRYSTAL CURRENCY from a Mr Anthony Lord who resides in Bungendore, New South Wales. Mr Lord is in the business of selling greyhounds. The greyhound cost $4,000. In a letter, which the appellant tendered to the Stewards, Mr Lord said that CRYSTAL CURRENCY had been treated with Depo-Medrol in late July. At the time of treatment, it was not intended that the greyhound be sold. The relevant injury being treated was to a wrist. It was intended that the healing would take place over time.

Unexpected events occurred which meant that CRYSTAL CURRENCY was in fact transferred to the appellant. It arrived at his kennels on 25 July 1998. Mr Lord did not tell the appellant of the treatment with Depo-Medrol.

At the inquiry, the appellant told the Stewards that it was his practice to not start his greyhounds racing within four weeks of receiving them from interstate. He would use that period to settle the greyhound in, and make sure it was not carrying injuries (T18). It is apparent then that the appellant had some precautions in place, which would have allowed for excretion should a greyhound have been treated with a prohibited substance.

CRYSTAL CURRENCY raced on 25 August 1998, approximately four weeks after arriving at the appellant's kennels. A veterinarian, Dr Thomas, gave evidence to the inquiry. His evidence was that Methylprednisolone is a long acting anti-inflammatory steroid (T33). One of the common products

is Depo-Medrol (T33). The drug can be detected up to two to three weeks when used in a wrist. If injected intra muscular, it can be detected after longer periods (T32).

The Stewards, in their reasons for decision, did not accept that the administration described by Mr Lord resulted in the detection of 25 August 1998 (T45). Equally however, there was no suggestion that the appellant had anything to do with the administration. He was convicted of the offence of "presenting" the greyhound for racing, rather than administering the drug. By his plea of guilty, the appellant acknowledged the offence. The Stewards noted that he conducted himself in a professional manner at the inquiry, and cooperated fully (T45).

In their reasons for imposing the penalty of six months disqualification, the Stewards made reference to the above factors and to all other relevant factors. The letters of reference from the other trainers were very complimentary of the appellant. He had 22 years in the industry with no previous convictions of any relevance.

What the appellant did not do in this case was to ensure that CRYSTAL CURRENCY was drug free when he presented it for racing on 25 August 1998. The Western Australian Greyhound Racing Authority had gone to some lengths to provide the industry with the facility of pre race elective testing, and the appellant did not take advantage of that. The Stewards noted that fact as well when giving their reasons for penalty.

The Law

There is a need for consistency in penalty. Mason J in LOWE v R (1984) ALR 408, at 410, stated:

> *"Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and in the community."*

The imposition of a penalty is an exercise of discretion. A penalty will not be overturned on appeal unless it can be shown that there was some error of principle or of fact, or that the penalty itself was so far outside the range of penalties commonly imposed as to demonstrate an error. R v TAIT (1979) 46 FLR 386 at 387.

The requirement to apply consistency has led to the identification of a range of penalties. In this case, despite the Stewards' attempt to identify the range of penalties, we are of the opinion that the exercise miscarried. The upper level was identified as being 12 months. However, this was imposed for the more serious offence of administration. (MILLER). In the case of POTGIN, 12 months was imposed for a negligence offence. However, that decision is of limited value because it was a decision prior to the establishment of this Tribunal, and it was for a different type of offence.

Another case referred to by the Stewards was SIMPSON (Appeal 345 – Heard 27 February 1997), where received 12 months disqualification, reduced to seven months on appeal. Simpson pleaded guilty to an offence under the same rule as is under consideration here.

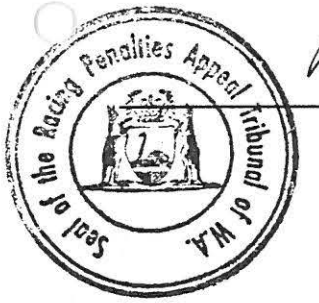
We have considered the case of SIMPSON and have noted that it was decided on its own special circumstances, and that there was no reference to the earlier cases of POLCZYNSKI (Appeal 301 – Heard 29 April 1996) and MOYLE (Appeal 304 - Heard 2 May 1996).

In both POLCZYNSKI and MOYLE, the disqualifications were imposed under the same rule. The drug in each case (being a metabolite of Phenylbutazone) was different than that under consideration here. However, little turns on that distinction in our view as both are anti-inflammatory drugs.

In our view, the range of penalties more accurately begins at the lower end at two or three months respectively as illustrated by MOYLE and POLCZYNSKI.

Given the range of penalties referred to herein, and factors personal to the appellant, we are of the opinion that the penalty of six months disqualification was so excessive as to manifest error in the exercise of the Stewards' discretion.

It is for these reasons that we allowed the appeal and substituted a period of disqualification of three months.



PATRICK HOGAN, PRESIDING MEMBER