

APPEAL PANEL OF RACING NEW SOUTH WALES

APPEAL OF LICENSED TRAINER GARY WHITE AND THE APPEAL OF LICENSED STABLEHAND ASHLEIGH BORG

Appeal Panel:	Mr R. Beasley SC, Principal Member; Mr J. Murphy; Mr J. Nicholson
Appearances:	Mr M. Van Gestel, Chairman of Stewards for Racing New South Wales Mr P. Glissan of Counsel for the Appellants, instructed by Mr R. Storie of Roderick Storie Solicitors
Date of Hearing:	Written Submissions
Date of Reasons:	6 April 2022
Rules involved:	AR254(1)(a)(ii) – Race day administration AR252(1) – Possession of substance not properly dispensed or prescribed

REASONS FOR DECISION ON PENALTY

Mr R Beasley SC, for the Panel

Introduction

1. As set out in the Panel's Reasons for Decision in these appeals dated 14 March 2022, following an investigation that commenced in late September 2021, on 18 November 2021 the Stewards charged the Appellants with various breaches of the Australian Rules of Racing (**the Rules**). The Appellants pleaded guilty to some of the charges. The charges, the relevant pleas, and where relevant the determination of the Stewards were as follows:

Mr White

Charge 1 – AR254(1)(a)(ii) Injecting horses during one clear day

On the morning of Saturday 9 October 2021, as the trainer of the following horses he did, without the permission of the Stewards inject such horses which were engaged to run in the following races at the Hawkesbury race meeting on Sunday 10 October 2021.

- a. Race 2 – Hot Dancing

- b. Race 5 – Fine Impact
- c. Race 6 – Dreamline
- d. Race 8 – Timely Shadow

Mr White agreed that he had intravenously injected the medication Halo, which contains the active ingredient hyaluronic acid.

Plea: Guilty

Charge 2 – AR254(1)(a)(ii) Injecting horse during one clear day

On the afternoon of Wednesday 22 September 2021, as the trainer of the racehorse Alvin the Bold he did, without the permission of the Stewards inject Alvin the Bold which was engaged to run in race 1 at the Hawkesbury race meeting on Thursday 23 September 2021.

Plea: Not Guilty **Finding:** Guilty

Charge 3 – AR254(1)(a)(ii) Injecting horse during one clear day

On the afternoon of Saturday 25 September 2021, as the trainer of the racehorse Shadow Girl he did, without the permission of the Stewards inject Shadow Girl which was engaged to run in race 7 at the Bathurst race meeting on Sunday 26 September 2021.

Plea: Not Guilty **Finding:** Guilty

Charge 4 – AR252(1) Possession of substance not properly dispensed or prescribed

During an inspection conducted by Racing NSW Investigators at his registered training premises on 9 October 2021 he did have in his possession the following medication and/or substance and/or preparation that had not been labelled, prescribed, dispensed or obtained in accordance with the applicable State legislation, namely *Poisons and Therapeutic Goods Act 1966* and *Poisons and Therapeutic Goods Regulation 2008*.

- a. 3 x Ilium Dexapent
- b. 1 x Ilium Frusemide
- c. 1 x box of Halo (6 x 6ml)
- d. 1 x Austrazole
- e. 1 x Airways TMPS
- f. 1 x Platinum Bute IV
- g. 2 x Flunixin
- h. 1 x Apex PMP Ear Suspension

Plea: Guilty

Charge 5 – LR82(1) Employment of unregistered stablehand

On 9 October 2021 and for approximately 12 months leading up to 9 October 2021, he did have in his employ Mr Dylan Borg, when Mr Borg was not duly registered as a licensed stablehand.

Plea: Guilty

Charge 6 – LR51(2) – Failure to report to Racing NSW criminal Charge

Mr White failed to notify Racing NSW within 14 days that he had been charged with a criminal offence by NSW Police.

Plea: Guilty

Ms Borg

Charge 1 – AR254(1)(d)(ii) Party to injecting horses during one clear day

On the morning of Saturday 9 October 2021, she was a party to Mr White, without the permission of the Stewards, injecting the following horses within one clear day, when such horses were engaged to run in the following races at the Hawkesbury race meeting on Sunday 10 October 2021.

- a. Race 2 – Hot Dancing
- b. Race 5 – Fine Impact
- c. Race 6 – Dreamline
- d. Race 8 – Timely Shadow

Plea: Guilty

Charge 2 – AR254(1)(d)(ii) Party to injecting horse during one clear day

On the afternoon of Wednesday 22 September 2021, she was a party to Mr White, without the permission of the Stewards, injecting the racehorse Alvin the Bold within one clear day, when such horse was engaged to run in race 1 at the Hawkesbury race meeting on Thursday 23 September 2021.

Plea: Not Guilty **Finding:** Guilty

2. Having found Mr White guilty of all of the charges, the Stewards imposed the following penalties on him:

- (i) Charge 1 – AR254(1)(a)(ii): 9-month disqualification reduced from 12 months for guilty plea.
- (ii) Charge 2 – AR254(1)(a)(ii): 12-month disqualification.

- (iii) Charge 3 – AR254(1)(a)(ii): 12 months disqualification.
 - (iv) Charge 4 – AR252(1): \$5000 fine.
 - (v) Charge 5 – LR82(1): \$500 fine.
 - (vi) Charge 6 – LR51(2): 1 month suspension.
3. Applying principles analogous to those applicable to the concept of totality in sentencing, the Stewards determined that for the breaches of the Rules relating to charges 1, 2, 3 and 6, Mr White should be disqualified for a period of 2 years.
4. In respect of the findings of guilt made in relation to Ms Borg, the Stewards imposed the following penalties:
- (i) Charge 1 – AR254(1)(d)(ii): 4½ months disqualification reduced from 6 months for guilty plea.
 - (ii) Charge 2 – AR254(1)(d)(ii): 6 months disqualification.
5. The Stewards then determined that the total penalty that should be imposed on Ms Borg was an 8-month disqualification.
6. On 23 February 2022, the Panel heard Mr White’s appeal against the findings of breach of the Rules in relation to charges 2 and 3 and allowed him to change his plea from guilty to not guilty in relation to charge 4. On the same day the Panel also heard Ms Borg’s appeal in relation to the finding of breach concerning charge 2.
7. In its Reasons for Decision dated 14 March 2022, the Panel unanimously dismissed Mr White’s appeal in relation to the findings of guilt relating to charges 2 and 3, and also found him in breach of the relevant rule in respect to charge 4. Ms Borg’s appeal in relation to the finding of guilt in respect to charge 2 was also dismissed.

8. There remains to be determined the Appellants' appeals against the severity of the penalties imposed upon them. Mr White has appealed against the severity of penalty imposed upon him in respect to charges 2, 3 and 4. The Panel has treated his appeal as also being in respect to the total disqualification period imposed. Ms Borg has appealed against the severity of the penalty imposed upon her for the breach relating to charge 2, and against the total disqualification period imposed upon her.
9. To assist the Panel, the Stewards lodged written submissions on penalty dated 18 March 2022 (**Stewards' submissions**). On 28 March 2022, the Panel received written submissions on penalty on behalf of the Appellants (**Appellants' submissions**).

Proper approach to imposing penalties

10. There are now many decisions of this Panel that make it clear that the principal purpose of imposing penalties for breaches of the Rules is to protect the industry rather than to punish an offender. Disciplinary proceedings such as those involving breaches of the Rules are regarded as being "*entirely protective*" and "*notwithstanding that [they] may involve a great deprivation to the person disciplined, there is no element of punishment involved*": *NSW Bar Association v Evatt* (1968) 117 CLR 177 at 183-184; *In the matter of the Appeal of Noel Callow (RAP)* 3 April 2017 at [38]. Hence, where there is no minimum or prescribed penalty for a breach of the Rules (such as exists in these appeals), whilst the imposition of the penalty is at the discretion of the Panel, that discretion must be exercised while firmly keeping in mind the need to protect the sport. Other matters that are relevant in the exercise of discretion in determining a penalty include these:
 - (a) The importance of deterrence, which is related to the object of protecting the sport in the sense that penalties should deter a licensed person found to be in breach of the Rules from "*repeating the misconduct, and deterring others that might be tempted to fall short of the high standards required of them*": *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 per Giles AJA at [471].

- (b) Related to the above, the objective seriousness of the breach of the Rules is to be considered, as is the need for a penalty to be proportionate to that objective seriousness.
- (c) Any subjective circumstances concerning an offender under the Rules that may be relevant to the determination of penalty, including their disciplinary record.
- (d) Whether an offender has been cooperative with the Stewards in their inquiries, and whether a plea has been entered.

Summary of Stewards' Submissions

11. In his submissions, Mr Van Gestel has noted that Mr White has not appealed in relation to the penalty imposed for charge 1 (a 12-month disqualification reduced to 9 months as a result of plea). Given this, Mr Van Gestel submitted that Mr White should be seen as accepting that a 12-month disqualification is the appropriate penalty for the findings of guilt in relation to charges 2 and 3 concerning the same rule and similar conduct. If the penalties for the breaches relating to charges 1, 2 and 3 were served cumulatively rather than concurrently, the period of disqualification would be 2 years and 9 months, whereas the penalty that was imposed was a 2-year disqualification. The Stewards submit that this is a "lenient" approach.
12. As for the breach of AR252(1) (charge 4), Mr Van Gestel has noted that Mr White was previously found guilty of a breach of this rule in December 2019 and fined the sum of \$1,000. Having been warned by Stewards to cease conduct that constitutes a breach of AR252(1), the Stewards submit that the penalty they imposed of a fine of \$5,000 is appropriate. Given that there is no longer any discount for plea, the Stewards now submit that the appropriate penalty is a fine in the sum of \$6,250.
13. In relation to Ms Borg, the Stewards have referred to a series of prior decisions of this Panel and the Racing Appeals Tribunal (which are also relevant to the penalty imposed on Mr White) in relation to similar breaches of the Rules. In those matters, the various appellants were all disqualified for periods ranging from 6 months to 18 months. The Stewards submit that the total period of disqualification imposed on Ms Borg of 8 months is also "lenient".

Summary of Appellants' Submissions

14. The Appellant rejects the notion that a 12-month disqualification is appropriate in respect to the findings of guilt to charges 2 and 3 because he has not challenged the penalty imposed in respect to charge 1. It appears as though the submission is made that the offending in relation to charge 1 is more serious than that in respect to charges 2 and 3 because more than one horse was involved in the pre-race administrations concerning charge 1 (4 horses, as distinct to one horse in relation to charges 2 and 3 respectively). The submission is made that a total disqualification of 9 months is an appropriate penalty for the breaches of AR254(1)(a)(ii) relating to charges 1, 2 and 3. In particular, the Appellant highlights his early guilty plea in relation to charge 1 (as well as 5 and 6) and the fact that he has a good disciplinary record that arises from a long contribution (45 years) to racing. Reliance is also placed on the character evidence tendered on Mr White's behalf to which the Panel has had regard.
15. In relation to charge 4, the submission is made that the penalty should be reduced from \$5,000 to nil. It is submitted that there was no intent to breach AR252(1), and that the finding of a breach of the rule is based on an "extreme technicality": Appellants' submissions at [12].
16. For Ms Borg the submission is made that each of the prior decisions of the Panel and the Tribunal relied upon by Mr Van Gestel involve more serious offending than Ms Borg's. The submission is also made that she was in effect acting under the direction of Mr White, who as a licensed trainer was obviously the more senior person involved, and to her was "like my dad". Reference is also made to her otherwise good disciplinary record, the evidence of her good character, and (as with Mr White) the severe financial and other hardship that will be caused by a disqualification. It is submitted on behalf of Ms Borg that a total concurrent period of disqualification of 3 months should be imposed in lieu of 8 months.

RESOLUTION

Mr White

17. Mr White's breaches of AR254(1)(a)(ii) relating to charges 1, 2 and 3 are extremely serious breaches of the Rules. While the substance injected (Halo) is a "disease modifying osteoarthritis drug" (T28.1277) and may be administered to horses, it is

known to all industry participants that without the Stewards' permission, a horse cannot be injected with any substance at any time during the one clear day prior to 12.00am on the day of a scheduled race. The only explanations offered by Mr White for what can clearly be seen to be a deliberate course of conduct in relation to the horses particularised in charges 1 to 3 is that he either "forgot" (Exhibit 3, L57) or that he "made a poor call and did something stupid that I regret": T22.982-983. The conduct is more than stupid or a poor call. That is underplaying it. The conduct particularised in charges 1 to 3 concerns serious, deliberate breaches of the Rules involving injecting horses with substances when that is prohibited. That kind of conduct puts Racing in a bad light.

18. While the conduct involved serious offending, and the sport needs penalties to be imposed that demonstrate that Racing will not tolerate such conduct and that thereby offers an element of protection to the sport's image and integrity, we also must take into account Mr White's good record over 45 years in the industry. There is evidence which we accept that he has otherwise been a person of good character. It is also acknowledged, as with almost every case involving a disqualification, that such a penalty will cause Mr White financial and possibly other hardships.
19. The Appellant's contention that a 9-month disqualification in total for charges 1 to 3 is rejected. An unchallenged 9-month disqualification was imposed for charge 1. The submission therefore is that there should be no additional penalty for the conduct the subject of charges 2 and 3. Such an approach would not reflect the gravity of the breaches of the Rules involved here.
20. The total concurrent penalty imposed by the Stewards of a 2-year disqualification for the breaches of charges 1 to 3 is within a range that we consider to be reasonable and rational. However, considering Mr White's very long association in the racing industry, we are of the view that while we agree with the Stewards that the starting point for the breaches of each of charges 1, 2 and 3 is a 12-month disqualification, the total penalty that should be imposed upon Mr White is an 18-month disqualification in lieu of a 2-year disqualification. We have reached this view given that it is arguable that the conduct particularised in each of charges 1, 2 and 3 can be seen as closer to one course of conduct over a relatively confined period of time, rather than as individual breaches that better fit entirely cumulative penalties.

21. As to the breach of AR252(1), we disagree with the Appellants' submissions that this is some form of technical breach of the Rules. The rule has been breached - period. We do not consider this to be heinous offending in the sense that there was no intent to cheat or be dishonest, but the Appellant has been warned about (and found guilty of) breaches of AR252(1) in the past. The rule is there to be followed. Imposing no penalty at all for this breach of the Rules would not be appropriate. However, given the breach is more akin to administrative error than deliberate deceit, we are of the view that the monetary penalty should be reduced from \$5,000 to \$2,500 (even bearing in mind the change of plea).

Ms Borg

22. As to the seriousness of the breaches of the Rules, what is said in relation to Mr White's offending can be repeated in relation to Ms Borg's. However, she is a licensed stablehand and jockey, while Mr White is the licensed trainer. The decision to breach the Rules in relation to the pre-race injections was Mr White's. Ms Borg should therefore be seen as a participant in the breach, but not as a principal decision-maker – which reflects how she has been charged. Of course, it is clear that she voluntarily made a decision to go along with Mr White in conduct that involved serious breaches of the Rules. We accept, however, that they have a close relationship that may be akin to father and daughter, which also warrants the imposition of a lesser penalty for Ms Borg. We also take into account the evidence before the Panel of her otherwise good character, and of course the financial and perhaps other hardships she will suffer as a result of a disqualification.
23. Again, we are of the view that the total concurrent penalty of an 8-month disqualification imposed by the Stewards for Ms Borg's breaches of the Rules relating to charges 1 and 2 is well within the range of what is reasonable. The 3-month disqualification submitted by the Appellant simply does not reflect the gravity of the offending here. However, taking all matters into account, whilst we again agree with the Stewards that the appropriate penalty for charge 1 is a four-and-a-half-month disqualification, and the appropriate penalty for charge 2 is a 6-month disqualification, we consider that the total period of disqualification should be a 6-month disqualification in lieu of 8 months.

Mr Murphy and Mr Nicholson

24. We agree with the above reasons, and with the orders set out below.

Orders

25. The orders of the Panel are therefore as follows:

Mr White

- (1) Appeal against the finding of breach of AR254(1)(a)(ii) (identified as charge 2) is dismissed.
- (2) Finding of breach of AR254(1)(a)(ii) in relation to charge 2 is confirmed.
- (3) Appeal in relation to finding of breach of AR254(1)(a)(ii) (identified as charge 3) is dismissed.
- (4) Finding of breach of AR254(1)(a)(ii) in relation to charge 3 is confirmed.
- (5) Appeal in relation to finding of breach of AR252(1) identified as charge 4 is dismissed.
- (6) Finding of breach of AR252(1) is confirmed.
- (7) Appeal in relation to total penalty imposed in respect to charges 1, 2 and 3 is allowed. In lieu of a disqualification of 2 years, the total period of disqualification to be imposed on the Appellant is 18 months (which includes the penalty imposed for charge 6, which was not subject to appeal). That penalty commenced on 13 October 2021, and expires on 13 April 2023, on which day the Appellant may reapply for his licence.
- (8) Appeal in relation to severity of penalty in respect of charge 4 (AR252(1)) allowed.

- (9) In lieu of a fine of \$5,000, the Appellant is fined the sum of \$2,500 (the Panel notes a further fine has been imposed by the Stewards for Charge 5, which was not subject of this appeal).
- (10) Appeal deposit forfeited.

Ms Borg

- (1) Appeal in relation to finding of breach of AR254(1)(d)(ii) identified as charge 2 is dismissed.
- (2) Finding of breach of AR254(1)(d)(ii) relating to charge 2 is confirmed.
- (3) Appeal in respect to total penalty imposed for the breaches relating to charges 1 and 2 is allowed.
- (4) In lieu of an 8-month disqualification, the Appellant is disqualified for 6 months. That penalty commenced on 18 November 2021, and will expire on 18 May 2022, on which day the Appellant may reapply for her licence.
- (5) Appeal deposit forfeited.