APPEAL - 206

DETERMINATION AND REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT :	GINO PETER POLETTI
APPLICATION NO. :	A30/08/206
PANEL :	MR P HOGAN (ACTING CHAIRPERSON) MR J PRIOR (MEMBER) MR F ROBINS (MEMBER)
DATE OF HEARING :	20 JULY 1994

IN THE MATTER OF an appeal by Mr Gino Poletti against the determination of the Western Australian Turf Club Stewards on 27 June 1994 imposing a five month disqualification for breach of Australian Rule of Racing 175(h)(ii).

Rule 175 states:

> "The Committee of any Club or the Stewards may punish:
>
> (h) Any person who at the time administers, or causes to be administered, any prohibited substance as defined in AR1:
>
> (ii) which is detected in any pre- or post-race sample taken on the day of any race."

At the hearing before the Stewards' the appellant was charged as follows:

> ".... presenting the horse REIGNLINE to race in the Kit Kat Handicap, the post-race sample taken from the gelding having had detected in it the prohibited substance as defined in Australian Rule of Racing 1, flunixin and yourself having admitted that you administered flunixin to REIGNLINE."

The appellant was convicted of a charge under Australian Rule of Racing 175(h)(ii) with administering flunixin to REIGNLINE prior to racing in the Kit Kat Handicap at Belmont on 28 May 1994. He was disqualified for five months at a Stewards' hearing on 27 June 1994. He now appeals against conviction and penalty.

APPEAL AGAINST CONVICTION

This is the unanimous decision of the Tribunal.

As to the appeal against conviction, the ground of appeal is that "I took all proper precautions and to the best of my veterinarian and myself the horse REIGNLINE should be drug free for racing". We take that to be in legal terms an appeal on the basis that the Stewards erred in not finding that the appellant had an honest and reasonable but mistaken belief that the horse would be drug free on race day. Certainly that is the issue which the Stewards felt compelled to decide on the evidence presented to them.

When he started the horse on race day the appellant believed the horse did not have any detectable trace of a prohibited drug. In his evidence in the Stewards' inquiry the appellant said that he was "out of the world" when informed by Mr Goddard of the positive swab. The appellant was mistaken in that belief. A drug was detected. It was flunixin. The analyst, Dr Stenhouse, submitted his certificate in evidence. A copy is at page 3 of the Stewards' transcript, and it confirms the finding of flunixin.

The appellant was honest in his mistaken belief. The Chairman of Stewards at page 43 of the transcript said "... the Stewards note that you had a belief that this horse would not have a drug in its system ...". The issue which fell for determination for the Stewards was whether this honest and mistaken belief was reasonable. The Stewards decided that it was not.

The issue for this Tribunal is whether it has been shown that the Stewards erred in that determination. We are of the view that the Stewards were not in error. There was sufficient evidence on which the Stewards could have reached the conclusion. Most significantly Dr Symons gave evidence that the administration of both drugs, phenylbutazone and flunixin, could operate so as to slow down the excretion of each drug. Evidence to that effect appears at page 13 of the Stewards' transcript. Nothing in Dr Hilbert's evidence today persuades us that Dr Symons was wrong in his opinion. Significantly also, the appellant himself was aware of the slower excretion rate when both drugs were administered and he said as much at page 18 of the transcript.

The appellant's regime was to administer the two drugs two days apart, that is four and six days before race day. The reason for that appears to be so that both the drugs would not interact to slow the excretion rate. The appellant changed the regime and the drugs were given only one day apart, namely four and five days before racing. The treatment card which appears following page 28 of the Stewards' transcript shows this conclusively. There was no room for the appellant to argue that the record may be in error. The Stewards were entitled to treat that record on its face as correct. They found that the changing of the regime was not a reasonable thing to do. There was nothing put to us that persuades us that the Stewards were wrong.

For these reasons the appeal against conviction is dismissed.

APPEAL AGAINST PENALTY

This is the unanimous decision of the Tribunal. The appellant appeals against the severity of the sentence passed upon him following conviction for a breach of Australian Rule of racing 175(h)(ii). He was disqualified for five months.

The imposition of a penalty is a matter of discretion. Penalty will not be interfered with unless it can be shown that some error of fact was made some relevant consideration was not taken into account, an irrelevant consideration was taken into account, or the penalty itself may be so out of the range as to indicate error.

We are of the view that the Stewards discretion miscarried in this case. We reach that conclusion because the Stewards do not appear to have taken into account the following relevant factors.

The drug was not one of the performance enhancing drugs. It was a common anti-inflammatory drug. We are of the view that this type of prohibited substance is not at the highest end of the scale in terms of seriousness of prohibited substances.

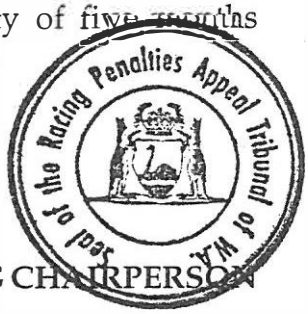
Another relevant factor is the accepted evidence of the appellant that despite the breaking of his regime in administering the oxphenbutazone one day later than normal, he took steps to safeguard his position by administering a lower therapeutic dose, namely 10 mls instead of 15.

Further the appellant was, despite breaking his regime, still operating within the guidelines for each drug taken individually. In that regard his actions could be viewed as an error of judgement. Again there is the factor of the appellant's unblemished record of 18 years, albiet 13 of those years spent part-time. It appears from the sentencing comments of the Chairman of Stewards that a starting point for penalty in this case was six months. He went on to say, and I paraphrase, because the appellant had some prospects with that horse in the Summer Carnival and because of the unblemished record the penalty would be lessened by one month.

We are of the view that the reduction in penalty in this case, by way of mitigation, was inadequate. The Tribunal will always scrutinise carefully any imposition of disqualification as a penalty. It is one of the most serious penalties available. It is a fundamental principle that all available options should be considered. In that regard the Chairman of Stewards did not say in his sentencing comments that a fine had been considered. In all of the circumstances, in this case, we are of the view that a fine should have been imposed by way of penalty in this case.

We allow the appeal against sentence. We set aside the penalty of five months disqualification and in lieu thereof we impose a penalty of $5,000.

Half the fee paid on lodgement is to be refunded.



PAT HOGAN, ACTING CHAIRPERSON