RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

RESERVED DECISION

1 DECEMBER 2022

APPELLANT ANDREW BELL

RESPONDENT GWIC

GAR 83(2)(a)

BREACH DECISION

DECISION:

1. **Appeal against finding of breach dismissed**
2. **Stood over for penalty submissions**

INTRODUCTION

1. The appellant, licensed trainer Mr Andrew Bell, appeals against the decision of the Greyhound Welfare and Integrity Commission ("GWIC") of 18 May 2022 to impose upon him a period of disqualification of 16 months for a breach of Rule 83(2)(a).

2. Rule 83(2)(a) relevantly provides that:

> "83(2) The … trainer … of a greyhound -
>
> > (a) nominated to compete in an event;
>
> shall present the greyhound free of any prohibited substance."
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> GWIC particularised the breach as follows:
>
> "That you, Mr Andrew Bell, as a registered public trainer whilst in charge of the greyhound King Reed, presented the greyhound for the purpose of competing in race 10 at the Dapto meeting on 16 December 2021 in circumstances where the greyhound was not free of any permanently banned substance.
>
> The permanently banned substances detected in the sample of urine taken from the greyhound after the event were amphetamine, hydroxyamphetamine and methamphetamine, and amphetamine, hydroxyamphetamine and methamphetamine are permanently banned substances under Rule 79A(2)(vi) of the rules."

3. The appellant pleaded not guilty to the charge before GWIC and has maintained a denial of the breach of the rule on appeal.

4. By agreement of the parties, the Tribunal first makes a decision on whether the rule has been breached. And whilst it has taken submissions on penalty, on the basis that it would be more practical if the breach was established to do so, but subject to the right in the parties to make further submissions on penalty after viewing this decision.

5. The appeal proceeded on the tender of evidence and submissions with no witnesses called. No witnesses were called before the hearing panel.

6. The evidence bundle has comprised the respondent's brief of 319 pages, which contains the usual sampling and laboratory certification material, correspondence, CCTV footage from the Dapto kennelling area on 16 December 2021, transcript of the hearing on 1 April 2022, 13 May 2022 and 18 May 2022, report of Dr Major 13 May 2022, statement of the appellant of 13 May 2022, the subject decision.

7. At the hearing, the respondent tendered a report of Dr Karamatic of 30 August 2022. The appellant tendered the respondent's Race Day Hydration and Hot Weather Policy, greyhound attendant handbook, GWIC pilot study entitled "A pilot observational study to assess drinking water consumption by racing greyhounds while kennelled during NSW race meetings" and an updated statement of the appellant of 17 November 2022.

8. The appellant's grounds of appeal, in addition to taking issue on the penalty being manifestly excessive, set out the following two grounds of appeal:

> "1. GWIC erred in finding that the procedures for taking the samples from the greyhound King Reed at Dapto on 16 December 2021 (the event) were complied with. GWIC ought to have found that the procedures relating to the collection of samples were not adhered to, such that the samples could not be relied upon to support the charge brought against Mr Bell.
>
> 2. GWIC erred in law in not drawing the correct inference from the uncontested and unchallenged evidence of Dr Major, that the levels of the metabolite detected in King Reed following the event indicate that the animal, or the sample taken from the animal, was contaminated post-race, and could not be relied upon to support the charge brought against Mr Bell."

9. In addition to the subject rule 83(2)(a), the parties have brought to attention the following rules:

> "Rule 80
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> (1) Where the Stewards have requested or instructed a veterinary surgeon to take a sample for the purposes of testing a greyhound pursuant to Rule 78(1) or 79(1), the veterinary surgeon shall be entitled to take from the greyhound such samples of its excreta, urine, blood, saliva, hair or other substance pursuant to any established procedures for the collection of samples.
>
> (2) Where the Stewards require samples of urine, excreta, saliva, hair or other substance to be taken from a greyhound, a Steward or other authorised person is equally authorised to take such sample from a greyhound pursuant to any established procedures for the collection of samples.
>
> (3) Where a sample is taken from a greyhound for testing pursuant to this Rule, Rule 78(1) or 79A, pursuant to any established

procedures, the sample shall be placed in a sealed container having attached to it a number and such information as may be deemed necessary by the Stewards, and be delivered to an accredited laboratory. A report signed by a person who purports to have taken the sample shall be, without proof of the signature thereon, prima facie evidence of the matters contained therein for the purpose of any proceedings pursuant to these Rules.

Rule 81

(1) Where a sample taken from a greyhound has been analysed by an accredited laboratory pursuant to Rule 80 (3), a certificate signed by an accredited laboratory officer shall be, without proof of the signature thereon, prima facie evidence of the matters contained therein for the purpose of any proceedings pursuant to these Rules.

(2) Where in any proceedings pursuant to these Rules it is necessary to prove that a substance is a prohibited substance or a permanently banned prohibited substance as defined in these Rules, a certificate signed by a veterinary surgeon, chemist or laboratory officer approved by the Controlling Body, shall be, without the proof of signature, prima facie evidence of the matters contained therein for the purpose of any proceedings pursuant to these Rules.

Rule 86

A person (including an official) shall be guilty of an offence if the person-

(ag) fails to comply with a policy adopted by a Controlling Body.

Rule 28

(3) A person shall not enter the kennel area at a meeting without the permission of the Stewards.

(4) A person shall not handle a greyhound presented for an Event unless he is an owner, trainer, attendant or a registered person authorised by the Stewards to handle a greyhound for the Event.

Rule 41

(6) A handler shall not be permitted to remain in the kennel building once his greyhound is kennelled and shall not be permitted to re-enter the kennel building until permitted by the Stewards.

(7) A greyhound whilst kennelled shall at all times be kept so that only authorised persons shall have physical access to it."

10. During the hearing, discussion took place on the meaning of the word "present" in the charge and reliance placed upon the Rule 1 definition as follows:

> "'presentation' or 'presented' a greyhound is presented for an Event from the time commencing at the appointed scratching time of the Event for which the greyhound is nominated and continues to be presented until the time it is removed from the racecourse after the completion of that Event with the permission of the Stewards pursuant to Rule 42(2) or it is scratched with the permission of the Stewards."

11. The Tribunal notes that it is necessary to determine on the submissions of the respondent whether a prohibited substance was present, and the Tribunal notes the definition in Rule 1 but does not set it out. In addition, the Tribunal notes, Local Rule 1A on prohibited substances, which it again notes but does not set out.

12. The parts of the Race Day Hydration and Hot Weather Policy ("hydration policy") relied upon were the purpose, which relevantly provides:

> "The purpose of this policy is to protect the health, comfort, safety and welfare of greyhounds with respect to their race day hydration and muzzling, and during hot weather, while ensuring the integrity of greyhound racing."

13. It is noted that a breach of the hydration policy may lead to disciplinary action.

14. Critically, under paragraph 1, race day hydration, it provides as follows:

> "…
>
> The procedure for providing water during race day kennelling is as follows (subject to any direction from an Authorised person):
>
> …

> Any greyhound not undergoing swabbing must be returned to its kennel after racing. The water bowl that remains in the kennel from before the race may be refilled by the handler using a bottle of water.
>
> Any greyhound undergoing swabbing must be placed in the swab kennel (the handler of the greyhound must retrieve the water bowl from the original racing kennel, and must move the water bowl to the swab kennel)."

15. The parts of the greyhound attendant handbook relied upon by the respondent are found on page 10. The Tribunal notes that the balance of the document deals with how a handler is to act when greyhounds race or trial and how they are to be handled, etc.

16. In respect of page 10, the parts relied upon are to the effect that the kennelling procedure is very regimented and every step is to be done in particular according to the rules. Rules 26 to 42 are called in aid. It is said that the purpose of this is to ensure that the integrity of racing is protected.

17. The respondent relied upon the GWIC pilot study report as entitled above.

18. The respondent submitted that the policy as originally worded required a greyhound for a pre-race swab to be removed from the trial but this was subsequently updated to permit it. However, the requirement to remove a greyhound from the trial if it was marked for post-race swabbing remained intact.

19. This was set out in the policy to be effected to avoid the risk of potential contamination, real or perceived. These steps were taken to maintain the integrity of the sampling process. That is, there should be limited handling to avoid contamination.

FACTS

20. Few facts are contested. In the grounds of appeal, the appellant set out the basis for which the GWIC decision should be set aside as follows:

> "Procedures relevant to the swabbing (testing) process which led to detection of the prohibited substances in King Reed were not followed, and accordingly the test results could not be relied upon to establish breach of Rule 83.
>
> Particulars:

> An unknown and apparently authorised person apparently made physical contact with King Reed in the swab kennelling area prior to the impugned sample being collected.
>
> King Reed was provided with water in its swab kennel prior to being sampled, in breach of the GWIC race day hydration policy.
>
> An expert witness, Dr Major, gave uncontested and unchallenged evidence that metabolites invariably outnumber active ingredients once the active ingredients begin to be metabolised in an animal's system. Dr Major has observed that because the metabolite for hydroxyamphetamine was at a level much lower than the active ingredients methamphetamine and amphetamine, it was more likely than not that the animal or the sample was contaminated post-race."

21. From the grounds of appeal and the submissions why the appeal should be upheld, the facts can be canvassed in less detail than would otherwise be the case.

22. The appellant does not contest that on 16 December 2021 he was the licensed trainer of King Reed and the greyhound was nominated to participate in the named race.

23. The handler of the greyhound at the race was Mr Xuereb.

24. A urine sample was taken post-race and laboratory certification established the presence of the permanently banned prohibited substances amphetamine, 4-hydroxyamphetamine and methamphetamine.

25. The evidence establishes that when Mr Xuereb brought the greyhound back to the kennelling area and was leading the greyhound on a lead, that a female person had been observed, prior to his appearance in the CCTV images, to have walked through the kennelling area and then as Mr Xuereb proceeded forward, that same person appears back in the images in the kennelling area and walks past the greyhound on its right-hand side and raises her hand in the air and lowers it down towards the greyhound's head.

26. CCTV images from behind Mr Xuereb and from in front of Mr Xuereb are not such as to establish as to whether there was actual contact by the woman's hand with the greyhound's head.

27. It is an agreed fact in the proceedings that the woman in question has not been identified. The respondent's evidence is that it does not know who she was, and it is the evidence of the appellant that he does not know who she was.

28. Mr Xuereb was not called to give evidence to indicate if he knew who the person was or whether in fact there was contact, to his knowledge, with the greyhound's head.

29. Accordingly, so far as Rule 28(3) is concerned, it is not possible to determine if that person was in the kennelling area with or without the permission of the stewards. No evidence has been called by the respondent to indicate that no such consent for that unidentified person was forthcoming.

30. Likewise, it is not possible to determine under Rule 28(4) that the person actually handled the greyhound. Likewise, it is not possible to determine whether that person was a registered person who was authorised by the stewards to handle a greyhound for the event. It is more probable than not, as she has not been identified, that no such authorisation had been given.

31. Also, under Rule 41(6), it not being known whether the person was a handler, as to whether she had been permitted to enter or re-enter the kennel building. As she has not been identified by the respondent, it is more probable than not that no such permission was given.

32. Under Rule 41(7), it is not possible to determine whether the woman was an authorised person entitled to have physical access to the greyhound whilst kennelled. It being assumed that as the greyhound was in the kennelling area, it falls within the words "whilst kennelled". It is probable that as the respondent is not able to identify the woman that she was not such an authorised person.

33. The Tribunal notes in passing that the CCTV images at this point do show attendants present. The CCTV image does not appear to show any interaction between attendants and the unidentified female.

34. The second factual scenario identified by the appellant relates to the handing by an official to Mr Xuereb of what is apparently undisputed to be a water bottle. There is no agreement on the facts of what actual kennel Mr Xuereb and the greyhound were in when that official handed the water bottle to Mr Xuereb.

35. There is no doubt that the person who handed the water bottle to Mr Xuereb was an official by reason of the balance of the CCTV images and the outfit worn by that person.

36. The respondent is of the belief that the subject kennelling area where that handing over of the water bottle took place was the swab kennel area. The respondent makes no such concession, but does not lead any evidence to indicate what it otherwise was. The respondent's position appears to be it was a post-race area, whatever that is.

37. The Tribunal notes that there is no evidence to deal with how that water bottle came to be in that kennel, that is, who put it there and when, and any identification of that person and any likelihood of that person being exposed to amphetamine or methamphetamine. It is not therefore known whether that bottle was contaminated in any fashion with amphetamine or methamphetamine.

38. There is no evidence to indicate whether the official who handed the bottle across had been questioned as to whether she was an amphetamine or methamphetamine user or whether she had been in contact with anyone or anything that might have those substances on them or it.

39. The CCTV image does not continue to show what Mr Xuereb did with the water bottle so far as its presence near the greyhound was concerned. There is no evidence from Mr Xuereb to indicate, for example, that having handled the bottle, he used that hand, or if he held the bottle in both hands, both hands, to touch the greyhound about its mouth area. There is no evidence Mr Zuereb gave the greyhound a drink directly from the bottle or poured in in to a vessel and the greyhound drank from that vessel.There is no evidence of the time lapse between that handing over of the bottle and the actual swab taking place because it is a not disputed fact that the CCTV images show a timeframe which could not be correct.

40. That timeframe could not be correct because it appears to be the case that the race was concluded at 10:13 and the sample was taken at 10:50.

41. As can be seen from the unclear facts, there are a substantial number of facts that are not known.

42. The appellant has called in aid the report of Dr Major of 13 May 2022. Dr Major did not give evidence to the hearing panel, nor to the Tribunal.

43. The report of Dr Major sets out the background and his viewing of the CCTV images. He made certain preliminary remarks which have not been the subject of any contest and do not need to be examined. He set out research that had been undertaken on excretion levels and the like.

44. He noted that the qualitative levels reported here were amphetamine at 20 ng/ml, 4-hydroxyamphetamine at 1 ng/ml and methamphetamine at 5 ng/ml.

45. He stated:

> “After administration of a drug, initially, only the parent substance will be found in the blood or urine. Within hours or minutes, the level of metabolites of a drug invariably exceeds the level of the parent

substance. Frequently, no parent drug is found, but rather its metabolites.

In the case of King Reed, the principal metabolite 4-hydroxyamphetamine has been found at a significantly lower level (approximately 1 ng/ml) than the active substances – 25 and 5 ng/ml respectively."

46. He therefore concluded:

"1. The dog has been exposed, by some route, to a very small quantity of amphetamine or methamphetamine, very close to (within one hour) sample collection.

Or

2. A small quantity of a body fluid, such as sweat or urine, from a person or animal exposed to a high level of amphetamine, has contaminated the collection vessel directly or from the environment."

47. He then opined that:

"The fact that both the active drugs and the metabolites were in such trace levels, and the fact that the metabolite was present at between 1/20th and 1/5th the level of the parent drug indicate exposure to a very small dose. I consider it highly unlikely that the performance of this dog was in any way affected by the drug.

This assumes that the substances were in fact in the dog at the time of racing. I believe the real possibility exists that drugs in the collection vessel came from environmental contamination and were never in the dog at all."

48. He then repeated his conclusions, as just stated, based on the combination of the drugs found and their estimated levels.

49. Dr Karamatic in his report of 30 August 2022 set out why the particular three drugs are permanently banned prohibited substances and this being not an issue need not be examined. He noted their absence as registered products. He noted their stimulant and euphoric effect. He noted that in humans it is capable of reducing fatigue and enhancing athletic performance. He noted amphetamine can be a metabolite of methamphetamine.

50. He noted amphetamine has a relatively short half-life of around 4.5 hours in the dog.

51. He then noted that the exposure of a greyhound to methamphetamine or methamphetamine and amphetamine could result in the detection of amphetamine, 4-hydroxyamphetamine and methamphetamine in the subject sample.

52. He then noted various human studies on detection and times of detection.

53. Having noted the qualitative levels detected in this case, he said they are typical compared to the majority of the previous positive swab cases with which he has been involved, which typically involved detections of amphetamine at between 1-50 ng/ml.

54. As is invariably stated, he then said:

> "… It is not possible to distinguish whether the concentration measured in that sample is as a result of a recent exposure to a small amount of the substance (e.g. contamination), or an earlier exposure to a large amount of the substance (e.g. therapeutic dose several days prior), or even a very recent administration (e.g. doped immediately prior to racing)."

55. He then expressed an opinion on the scenarios identified by Dr Major.

56. As to theory one as to exposure within one hour of sample collection, he said, "this could be one of many possible scenarios."

57. He continued that the exposure could have been at any stage over the preceding several days. He then noted that the substance, amounts and route of exposure and other factors will all impact on the likelihood of any approximate concentration being detected. He said, however, that the scenario identified here because of security arrangements did not seem likely.

58. In respect of Dr Major's theory two about the contamination of the collection vessel, he described the normal sample collection process. He referred to the use of the control solution. He therefore concluded:

> "… It does not seem likely that accidental contamination from bodily fluids such as sweat or urine could occur even if another nearby person or animal had a high level of amphetamine in their system."

SUBMISSIONS

Respondent's Submissions

59. The respondent opened by referring to the necessary ingredients to be proved in the charge and that on the facts of this case each of those ingredients have been established.

60. The respondent then replied to its understanding that the issue is one of contamination of the sample or the greyhound but says that on the facts of this case that is mere surmise or conjecture and does not enable the appellant to avoid an adverse finding.

61. The respondent concedes that contamination could be relevant on the issue of penalty under the McDonough principles and that this would be a category 2 under those principles.

62. The respondent then submitted on the factual matters involving the unknown female in the kennelling area and the fact that the person was unknown and a hand at best was only near the greyhound's head and the facts did not show a definite contact. It was therefore said it was mere speculation that that potential contact could have caused the contamination in the greyhound's system.

63. The failure of the appellant to call the handler Mr Xuereb was identified on the basis that he could have given evidence about whether there was contact or not.

64. The submission continued that even if there was contact, this would not assist the appellant because there is no evidence that that would give a positive in the urine sample.

65. It was submitted that if there was sub-dermal absorption through the greyhound, there would be time needed for that to appear in the urine.

66. In respect of the water in the swabbing kennel and being contrary to any policy, the respondent submitted that it did not accept there was any breach of the subject policy.

67. But even if there was, it is said, "so what?" Because the fact that that would lead to any positive would be an unreliable finding and more was needed. It was submitted that the appellant had failed to give any evidence of what was given, by whom and how that would lead to a contamination. Therefore, it was mere hypothesis.

68. It was submitted again that the failure to call the handler Mr Xuereb was fatal because he could have given relevant evidence on the facts.

69. It was submitted that Dr Major's evidence did not go so far as to say if water had been given, then half an hour later there would be a positive.

70. The respondent submitted on Dr Major's scenarios about contamination post-race of the sample.

71. The respondent submitted on Dr Karamatic's evidence to the effect that the theories set out above about contamination, therapeutic dose several days prior or doped immediately prior to racing and the reasons for those conclusions aid the respondent.

72. It was noted that Dr Karamatic did say that exposure within one hour of sample collection could be one of many possible scenarios and the respondent then relied upon Dr Karamatic's responses that that could be at any stage over the preceding several days.

73. Reliance was also placed upon Dr Karamatic's evidence that it did not seem likely that the accidental contamination in the collection vessel from body fluid could occur even if another nearby person or animal had a high level of amphetamine in their system.

74. Therefore, it was submitted there was no evidence to support conjecture advanced by Dr Major and that more was needed to address those possibilities.

75. It was submitted that a mere possibility is not enough.

76. Detailed submissions were made on case law, in particular Kavanagh v Racing Victoria, Kempshall 2019, Staines 2019 and Fenwick-Benjes 2020 and Whelan 2020.

77. In Kavanagh it was pointed out that these matters are strict liability offences without the need for establishing mens rea.

78. Kempshall v GWIC, RAT NSW, 4 December 2019, was a case dealing with a presentation for arsenic. A number of principles were identified from that case. Reference was made to the establishment of breaches by the presentation of certificates and the breadth of the presentation rule. This was a case involving examination of a belief of the appellant that the greyhound had been nobbled but was not a contamination case.

79. In that case, reference was again made to the fact that the regulator did not have to prove how, when, why or by what route a prohibited substance came to be present.

80. It was noted that it was up to the appellant to establish the nobbling. It was noted that in that case the issues raised by the appellant were speculative. It was noted the burden is on the regulator, the respondent, to disprove by rebuttal.

81. The next matter referred to was Staines v GWIC, RAT NSW, decision undated but issued 29 April 2019.

82. That case, being a severity appeal in respect of prohibited substances, repeated the mantra that it is not necessary to prove the how, when, why etc. Matters where there is no evidence of administration or how the substance came to be present generally raise issues for consideration under penalty.

83. The next matter was Fenwick-Benjes v GWIC, RAT NSW, 6 March 2020.

84. This was an amphetamine presentation case. Again, there was no explanation of how the substance came to be present. The mantra was repeated. The fact that matters identified were relevant to penalty only was again referred to. The fact that only conjecture could be advanced was referred to. The necessity for integrity and welfare was referred to.

85. The next matter referred to was Whelan v GWIC, RAT NSW, 11 August 2020.

86. The prohibited substance was atenolol. This was a drug given to humans for blood pressure. Various scenarios were advanced to explain the possibility of the presence of the prohibited substance. It was said that the various theories advanced were not elevated to a level of comfortable satisfaction. The issues were speculative. The respondent eliminated that speculation.

87. In particular, the Tribunal found that there was no evidence that the type of bottled water provided by the respondent at the races and used by trainers contained the subject drug at all, let alone at any level which would subsequently be detected.

88. Again, this was a case where at the end of the day the respondent was able to establish each of the necessary ingredients of the charge, speculation was overcome and the breach established.

89. The respondent identified that the burden of proof to establish this issue of contamination is, as set out in McDonough, and as accepted since, upon the trainer. It was conceded that whilst there could be contamination, it needs to be proved to a level of probability, not possibility.

Appellant’s Submissions

90. The appellant opened by stating that there was not a mere breach of the water policy here and that the procedures provided for in the rules and in

policies had not been complied with. Therefore, the prima facie certificate had been rebutted.

91. Emphasis was placed upon the fact that Rule 80 mandates with sampling and testing that it be done “pursuant to any established procedures for the collection of samples.”

92. The Tribunal notes in considering the submissions that the appellant has referred to Rule 80(1), which deals with samples by veterinarians. The evidence does not establish that a veterinarian took the sample here and, accordingly, it appears that Ms Bartle, who was the sampling officer, was an authorised person and accordingly Rule 80(2) applies. However, nothing turns upon that because that also requires compliance with established procedures for the collection of samples.

93. It was then submitted that Rule 81(1) requires that prima facie evidence flows where a certificate is signed by an accredited laboratory officer. And that is for the purpose of any proceedings pursuant to these rules.

94. Therefore, it was submitted that there must be compliance with established procedures, otherwise the prima facie evidence is rebutted.

95. Reliance was placed upon Rule 86(ag) to the effect that an officer commits an offence if they fail to comply with a policy. The appellant does not submit there was such an offence here, however. The submission is that it is important to comply with procedures and that 86(ag) confirms that.

96. In this respect, Rules 28(3) and (4) and 41(6) and (7) were relied upon as having been breached. That is, a person entering the kennel area, handling the greyhound, a handler not remaining outside the kennelling area and not to re-enter, and only authorised persons are allowed access to the kennelling area.

97. Page 10 of the handbook for attendants, set out above, was called in aid.

98. The evidence was then summarised showing the unknown female entering and then walking through with the concession that it cannot be conclusively established that that person actually touched the greyhound. It was, however, submitted that her presence was contrary to Rule 41(7). Therefore, it was said the swab area was not secure. Therefore, there was non-compliance with established procedures. Therefore, the sampling process was compromised.

99. Again, it was submitted that non-compliance with Rule 80 means that the certificates are no longer prima facie evidence under Rule 81.

100. It is said that the breaches were not trifling but extremely serious.

101. The purpose of the hydration rule, set out above, was called in aid. The aspects of integrity of the greyhound racing industry and the strictness of the regime that relates to these procedures was referred to.

102. The breach of that policy as to having water in the swabbing kennel rather than simply moving the bowl from the first kennel to the swabbing kennel was identified. That is, the policy was there would not be a refill of water in the bowl if a greyhound was to be swabbed.

103. The pilot study identifying potentials for the risk of contamination, either real or perceived, was called in aid.

104. It was said that this policy and the other policies establish the importance of avoiding contamination by improper presence or handling.

105. The facts involving the officer handing the bottle of water to the handler Mr Xuereb were identified.

106. Dr Major's recognition of a possibility of contamination was called in aid. In particular, it was emphasised that the metabolites should have been more prominent having regard to the length of time that the animal might have been kennelled, up to three hours, as compared to a half-life for amphetamine of 4.5 hours.

107. Therefore, it was a series of qualitative levels as identified by Dr Major as being consistent with a very small dose being given immediately prior to sampling.

108. Therefore, it was submitted that the greyhound had not been exposed to amphetamines before the race.

109. The extended definition of present, as set out above, it was submitted, should be read on the basis that it did not apply to a contamination of a sample post-race. That is, the focus needs to be at the time the greyhound was presented to actually race.

110. It was conceded that if that submission was not accepted, the appellant would fail.

111. It was emphasised that the case for the appellant, to be rebutted by the respondent, it was said, is a post-race contamination.

112. The factual contest as to whether the bottled water was given in the swab kennel or in the post-race kennel was noted to have arisen for the first time during submissions. The appellant fairly complained that the

respondent had not indicated to the appellant that its misconception advanced at the hearing panel was incorrect, or possibly incorrect.

113. The Tribunal reflects that it is unfortunate that such a critical factor was only identified in closing submissions. This was so, as it was open to the respondent, not the appellant, to know what area of the kennelling complex was identified in the evidence when the water bottle was handed over. It did not do so.

114. It is said that Kempshall can be distinguished because it is not conjecture here. That is said to arise because it is said the prima facie certificate is rebutted.

Respondent in Reply

115. The respondent submits that the appellant's reliance upon the hydration policy is misplaced and does nothing to indicate the policy was relevant to any time up to the sample being taken.

116. In respect of the access by the unknown female, it says there is no evidence that she was present whilst the greyhound was kennelled for the subject purposes but was merely being taken to a kennel.

117. Again, it was submitted that the failure to call the handler Mr Xuereb was such that there could be no satisfaction.

118. In respect of the presence of the woman, it was said there was simply no evidence and it is not known if that person could have been legitimately there.

119. The respondent submitted that it could not be accepted that a bottle was handed across by the official in the kennelling area.

120. In any event, even if that fact was established, it is said there is no evidence what was in it and the onus is on the appellant, not the respondent, on this point.

121. In relation to Dr Major's evidence about the issues of metabolites in primary drugs and their levels, it is said that this does not matter. It is said that the certificate is prima facie evidence and that is what is to be focused upon. It is said that Dr Major's opinions and a general lack of evidence does not undermine that certificate.

122. In relation to the definition of presentation, it is said that the appellant's desire for a narrow construction is wrong and the definition has a clear capture of the greyhound at sampling time.

DISCUSSION

123. One of the points raised by the appellant deals with the meaning of the word “present” in the subject rule.

124. The Tribunal has set out the definition of presentation or presented and is satisfied that that is intended to apply to the word “present”.

125. The appellant briefly submits that the focus upon present in the rules is to actually present at the race.

126. The respondent submits that the proper consideration of the definition and its application in fact applies throughout the period specified in the definition. That is, a greyhound is presented to race from the nominated scratching time until it leaves the course.

127. The Tribunal is satisfied that the respondent’s submission is correct and is consistent with numerous prior determinations by the respondent and the Tribunal.

128. The focus in this case has been upon the possible contamination of the greyhound after it had completed the race. The Tribunal indicates that that will not exculpate the appellant from liability even if the greyhound was prohibited substance-free at the time it completed the race.

129. A further discussion point is the use to be made of the appellant’s submissions that because there has been a breach of protocols, or procedures, that the respondent’s case must fail.

130. The Tribunal has determined in a number of harness racing appeals where a defence exists under those rules if a trainer is able to establish a material flaw in the “certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of the certificate”. That has been determined by the Tribunal to mean everything undertaken at or around the taking of a sample up until the certificate of analysis issues.
131. This has enabled a focus under those rules to be made upon contamination at any time in that process.

132. The Tribunal is satisfied that under the greyhound rules the fact that there has been a failure in a step in the sampling or analysis and certification process does not necessarily mean that the results can be disregarded. That is, that a prima facie certificate status is set aside.

133. Something more is needed. That is, that the actual failure itself must be examined to see whether it indicates that anything has been done, or not done, which casts doubt upon the validity of the sample result. This could

apply at any time in the whole of the sampling process. It could apply during the whole of the analysis and certification process.

134. Here, therefore, the fact that a rule, such as those to be found here in rules 28 and 41, has not been complied with does not mean that the results must be disregarded.

135. Accordingly, the words “any established procedures for the collection of samples” (Rule 80) or “… signed certificate … prima facie evidence of the matters contained therein for the purpose of any proceedings pursuant to these rules” (Rule 81) do not mean that any failure to follow an established procedure is fatal to the regulator.

136. The determination whether the procedures have been followed is a matter of fact in each case. The extent to which there might be a failure is a matter of fact to be analysed to determine whether it can be concluded that the established procedures have not been followed, such that consequences will flow, not that it automatically means that an adverse consequence to the regulator will flow. It is not necessary to set out examples of failures which might not be fatal as compared to examples of those which would be, because it is a question of fact in each case.

137. The focus upon deciding whether a failure to follow an established procedure is fatal or not is governed by the necessity to ensure the integrity of greyhound racing and the sampling analysing and certification process. As the appellant has pointed out, there are a number of policies that strongly endorse those principles, such as the hydration policy and the pilot study. The attendance handbook is a further example of the emphasis placed upon the importance of process and the avoidance of contamination.

138. The discussion here needs to focus upon ground of appeal 1 on procedures in relation to the unidentified woman’s actions and then on the official’s actions in handing to the attendant a bottle of water. It is then necessary to have regard to the veterinary evidence of Drs Major and Karamatic as to contamination post-race.

139. Again, it is stated that in respect of the first of those issues on the procedures, it is necessary to focus upon what consequences will flow from a failure to comply with a procedure, if established.

140. The first issue is the suggestion of contact with the greyhound’s head by an unknown person.

141. The Tribunal has earlier analysed the facts that go to that issue. The first issue of relevance is whether the Tribunal can be satisfied there was contact by the female with the greyhound’s head.

142. The evidence does not establish that fact. The appellant concedes in submissions that there is no such conclusive evidence.

143. The failure to call the handler, Mr Xuereb, does not assist the appellant because he was in a position to see whether a contact took place and there is no evidence as to why he was not called to so state.

144. Assuming, therefore, that the unknown female's hand was in some proximity to the greyhound's head, what follows from that? The veterinarian evidence in this case is not sufficient to establish that such a proximity could in the circumstances at the time have led to a transmission of amphetamine or methamphetamine from that person's hand, or, indeed, any other part of their body, or from their bodily systems to the greyhound.

145. There is no evidence of the temperature on the day and therefore the possibility that the unknown woman, or, indeed, anyone else, was sweating, such that sweat droplets could possibly have flown through the air and landed on the greyhound. Again, Mr Xuereb, the handler, was not called and he may have been able to have cast light on this issue.

146. There is no evidence in these proceedings that anyone urinated anywhere where this greyhound was likely to have come in contact with that urine, for example, licking, or otherwise, and certainly no evidence that the unknown female could have transmitted through her urine the amphetamine and methamphetamine to the greyhound.

147. It would be entirely speculative, therefore, to find that in the absence of any contact the unknown female has any relevance to the possibility of transmission of amphetamine or methamphetamine to the greyhound.

148. It is then necessary to assess if it had been possible to conclude there had been contact what would flow from that.

149. Again, the same issues of a factual nature as to the possibility of transmission by that contact, and assuming that the unknown female had amphetamine or methamphetamine on her hand, or on her body or elsewhere, such that the contact itself could have caused a transmission of those drugs to the greyhound.

150. Such a transmission is entirely speculative.

151. In any event, the evidence of Dr Major is not sufficient to establish that by that mere contact by hand to head or otherwise there would be transmission through the greyhound's head, presumably sub-dermally, into presumably the greyhound's blood and then, presumably, through the greyhound's bodily systems to its kidneys and then from its kidneys to its urine in the time that transpired between that contact and the greyhound

giving a urine sample. Such a transmission has not been covered by the evidence as possible and is entirely speculative.

152. Accordingly, Dr Major's opinion, where he concluded that "by some route" the dog became exposed, is not able to be established on the facts.

153. Dr Karamatic only opined on a very recent administration, for example, doping immediately prior to racing, and did not give evidence of this particular possibility. He did, however, concede exposure within one hour of sample collection was a possible scenario. However, the evidence does not enable that scenario to be found.

154. Therefore, that route of contamination is not found, but the emphasis in the appellant's case has been upon the procedural issues.

155. The Tribunal identified the problems with the evidence relating to the appellant's reliance upon Rules 28 and 41.

156. In respect of Rule 28, the fact that a person was in the kennel area, apparently without permission, appears on the facts as established and discussed above to go no further than that simple fact. That is, a person was present but nothing flows from it.

157. Further in respect of Rule 28, the evidence does not establish that someone has breached that rule by handling the greyhound and not being a person authorised to do so.

158. The same conclusions are reached in respect of Rule 41. In other words, the fact that the person was merely present in the kennelling area does not take the issues here any further.

159. Accordingly, in relation to this issue of the unknown female's actions, the fact that Rules 28 and 41 may have been breached does not lead to any conclusion that the established procedures have been so compromised that the respondent cannot rely upon the certificates of analysis. To the extent that that may deal with an issue of a prima facie certificate from the laboratory, and the Tribunal is not persuaded it does, the respondent overcomes that issue.

160. The second issue identified on these procedural failures is in relation to the water bottle.

161. Again, the Tribunal has analysed its factual findings earlier.

162. The Tribunal notes the absence of evidence which would go to show that the actual fact of a handing of a bottle of water to Mr Xuereb in the location in which it was given can be found in any way to have compromised

the processes or procedures so far as the respondent is concerned. The facts do not need to be set out again here.

163. The evidence that the water bottle could have had any relevance to the subsequent contamination was sufficiently analysed earlier under the facts to reach a level where it is mere speculation that it could have any relevance.

164. In particular, the failure to call Mr Xuereb on this point is a substantial failure. He could have explained what happened with that water bottle and its contents and he has not.

165. The evidence does not establish that the water bottle has any relevance to the failure to follow procedures.

166. Assuming that the hydration policy was not followed, and it appears that is the case, that is not, for the reasons expressed earlier, fatal to the respondent's case.

167. In any event, the failure to have all the evidence relating to the water bottle and what subsequently happened, for example, with the water bowl, and even assuming Mr Xuereb opened the water bottle in any way, and there being no evidence of the greyhound having consumed any of the water, there is simply nothing to make a possible breach, which the respondent does not accept of the hydration policy relevant to any failure on procedures.

168. Accordingly, the respondent overcomes the appellant's case in relation to the water bottle in respect of a failure to follow procedures such that, if indeed this was a correct analysis of the rules, there was a procedural failure contrary to the requirements of Rule 80.

169. The prima facie certificate issued under Rule 81 remains intact.

170. The third issue for determination is the evidence of Dr Major.

171. The Tribunal accepts his opinion that within hours or minutes the level of metabolites of a drug invariably exceed the level of the parent substance. The Tribunal accepts his assessment of the evidence that the metabolite hydroxyamphetamine was at a significant lower level than the amphetamine and methamphetamine.

172. The Tribunal accepts that his two theories about exposure by some route or contamination of the collection vessel are possible theories.

173. The Tribunal accepts that the totality of the evidence here establishes that because of the levels of metabolite detected, the drug was not present

in the greyhound when it was originally kennelled some three hours before the sampling.

174. Noting that Dr Karamatic conceded that there was a possible scenario of exposure within one hour of sample collection, it becomes necessary to focus upon whether that could have occurred.

175. As set out, Dr Karamatic's theory that exposure could have occurred at any stage over the preceding seven days, the Tribunal determines that that does not arise on these facts.

176. As set out factually in dealing with the first two issues of the unknown female and the water bottle, the Tribunal having determined that factually that could not have led to the transmission of amphetamine or methamphetamine, means that Dr Major's opinion that exposure by some route to a very small quantity cannot be a remaining scenario. That is, a scenario relevant to the arguments of the appellant because they were based upon procedural matters and not some other type of exposure for which the appellant would escape an adverse finding.

177. The Tribunal has dealt at length with the second possible scenario identified by the appellant of contamination by sweat or urine.

178. That is the Tribunal simply does not accept that there is any evidence that could be elevated beyond a guess that someone near the collection pan, after the control solution test was done, sweated such that droplets, contaminated droplets, floated through the air and unfortunately landed in the collection pan. There is no evidence that anyone was contaminated with the two parent drugs near the collection pan. It is beyond fanciful to suggest that urine somehow came in contact with the collection pan. The Tribunal readily concedes that the appellant has not raised these possibilities.

179. As analysed above, there is simply no evidence and only surmise or conjecture that sweat or urine could have had anything to do with this positive and the evidence simply cannot go to the fact that by such means the collection vessel became contaminated.

180. The surmise and conjecture is just too great.

CONCLUSION

181. The case that the appellant invited the Tribunal to consider has not been established.

182. The respondent establishes that all of the processes and procedures it was required to undertake have been appropriately complied with, or should there have been adverse determinations made, such failures have had no

part to play in respect of the adequacy of the procedures in their entirety, such that there can be any conclusion that the weight to be given to the prima facie finding in the certificate is to be disregarded.

183. Setting aside any procedural failure issues, the respondent overcomes the remaining case for the appellant based upon the evidence of Dr Major to the effect that there may have been some exposure of the greyhound in the sample collection process or some contamination of the collection vessel, such that the case for the respondent is not established.

184. Accordingly, the Tribunal finds that the respondent has established that the appellant breached the rule as particularised.

185. The facts pleaded to support grounds of appeal 1 and 2 are not found established and grounds of appeal 1 and 2 are dismissed.

186. The appeal against the finding of the breach of the rule is dismissed.

DIRECTIONS

187. At the hearing on 18 November 2022, the Tribunal took preliminary submissions from the parties on penalty and then determined a timetable for submissions on penalty, if necessary.

188. The Tribunal notes that the timetable agreed by the parties at the hearing was that the appellant would make any submissions on penalty in writing within five days and the respondent reply within two days of receipt of the appellant's submission. Each party was given liberty to apply on that timetable.

189. Accordingly, the parties are invited to make such further submissions on penalty as they see fit.