APPEAL PANEL OF RACING NEW SOUTH WALES

IN THE MATTER OF THE APPEAL OF TRAINER DEAN MCHARDIE

Heard at Racing NSW Offices

Appeal Panel:	**Mr L. Vellis - Convenor**; **Mr T. O'Callaghan**; **Mr J. Murphy**
Representatives:	**Racing NSW – Mr T.P. Moxon, Deputy Chairman of Stewards**
	Appellant – Mr J. Bryant, Solicitor
Date of Hearing:	**5 August 2024**
Date of Reasons and Orders:	**19 August 2024**

REASONS FOR DECISION

1. At a Stewards' Inquiry conducted on 21 June 2024, Licensed Trainer Mr Dean McHardie (**Appellant**) pleaded not guilty to a breach of **AR 240(2)** of the Australian Rules of Racing (**Rules**) relating to the detection of the prohibited substance cobalt, present in a urine sample taken from *Gorgias* following it competing and subsequently winning Race 3, the Class 1 Handicap over 1,200 metres at Mudgee Racecourse on 25 February 2024.

2. AR 240(2) is in the following terms:

   "… *if a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on Prohibited List A and/or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the trainer and any other person who is in charge of the horse at any relevant time breaches these Australian Rules.*"

3. The levels of cobalt detected were analysed to be 181 ug/L (the National Measurement Institute) and 188 ug/L (Racing Analytical Services Limited) by the respective labs. Accordingly, the levels were in excess of 100 ug/L, the threshold excepted under Schedule 1, Part 2, Division 3 - Prohibited List B thresholds, part 11 of the Rules of Racing.

4. Cobalt is a prohibited substance as it:

   a. either directly or indirectly has an action and / or effect on the nervous system, the musculo-skeletal system, the endocrine system and the blood system. Such substances are prohibited under Schedule 1, Part 2, Division 1 - Prohibited List B, parts 1(a), 1(e), 1(f), and 1(i) of the Rules; and

   b. is categorised as a haematopoietic agent. Such substances prohibited under Schedule 1, Part 2, Division 1 - Prohibited List B, part 2(pp) of the Rules.

5. Evidence was given at the Stewards' Inquiry by the Appellant (both trainer and owner of *Gorgias*), Racing NSW Chief Veterinary Officer, Dr C. Garling, and the General Manager of the Australian Racing Forensic Laboratory, Mr J. Keledjian.

6. Mr McHardie pleaded not guilty to the charge of a breach of AR 240(2) but was found guilty by the Stewards.

7. The penalties imposed by the Stewards were as follows:

   a. a period of 14 months disqualification, however having regard to certain penalty considerations, this was reduced to a period of disqualification of 12 months; and

   b. in accordance with AR 240(1), *Gorgias* was disqualified from its 1st placing in the Race 3, Class 1 Handicap run over 1,200 metres at Mudgee Racecourse on 25 February 2024 and the placings were amended.

8. The Appellant is subject to a stay of proceedings and has not commenced serving any part of his penalty.

9. The Appellant initially appealed against guilt and the severity of penalty imposed upon him. During the hearing the Appellant's legal counsel informed the Panel that the Appellant had changed tack and the appeal would be confined to an appeal against severity of penalty imposed upon him. The Appellant was represented at the appeal by Mr J. Bryant, instructed Solicitor. The Stewards were represented by Mr T.P. Moxon, Deputy Chairman of Stewards.

10. The appeal book, containing transcript of the Stewards' Inquiry, was admitted into evidence as Exhibit A.

Submissions of Mr Moxon

11. Mr Moxon supported the penalties imposed by the Stewards after the Inquiry. He noted that a breach of AR 240(2) is a strict liability offence, that cobalt is a notorious performance enhancing prohibited substance at levels in excess of 100 ug/L, and Mr Moxon also referred to the principles of general and specific deterrence that are necessary to protect the thoroughbred industry in cases such as this where there are prohibited substances detected.

12. It was also submitted by Mr Moxon that in presentation cases such as that of Mr McHardie, while the reason for the positive result is not relevant to whether or not the offence is breached, it remains possible for the relevant person to establish that they are blameless, such that the penalty should be reduced as a result. However, the burden is on the person to establish the reasons for the positive result on the balance of probabilities.

13. Mr Moxon further submitted that the principles applicable in these circumstances were established in *McDonough v Harness Racing Victoria* [2002] VRAT 6 per Judge Williams and *Kavanagh v Racing Victoria Limited* [2018] VCAT 291 per Garde J, and were summarised by

the Racing Appeals Tribunal in *Turnbull v Harness Racing NSW*, 30 September 2022, as follows:

"*In very broad summary, McDonough has provided three categories for consideration on penalty.*

The first of those is where a positive culpability on the part of the person responsible is established, for example, by administration of the drug, or at the direction or otherwise instrumental, and possibly involving deliberate wrongdoing, or through ignorance or carelessness. This was assessed as the worst category and high penalties were appropriate.

The second category is where the decision-maker cannot determine where the prohibited substance came from or the decision-maker does not accept the explanation given by the trainer. This was said to attract a penalty similar to the first category.

The third category is where the person is not responsible for the administration of the drug or for administration by others, and whilst technically guilty of the offence because it is absolute, has no true moral culpabilities. The case establishes that it is necessary for the trainer to demonstrate, because the onus is on the trainer, that culpability does not exist. That is, the blameless test. If this explanation is accepted and there is no culpability, then it may not be appropriate to impose deterrence and it may be possible to impose no penalty at all."

14. Mr Moxon submitted that in this case the second category in the *McDonough* decision was applicable the Stewards cannot determine where the prohibited substance came from or the do not accept the explanation given by the Appellant. In circumstances where the second category from *McDonough* applies, the when issuing a penalty, a matter should be treated as falling within the first McDonough category and therefore attract a higher penalty than with respect to a matter falling within the third category.

15. In the present case Mr Bryant made a submission that the Panel could find that this case fell within the third category as here the Appellant had offered some explanation for the presence of the cobalt arising from certain feed, and it could not be positively ruled out by the stewards.

16. The factual basis for that submission, was that the horse was fed on the day of the race (some eight hours prior to the urine sample being provided) and the day before the race with:

    a. "Digestive VM", which had returned levels of cobalt when tested by the stewards following the inspection of the Appellant's stables. Mr Bryant submitted that this was surprising to the Appellant as the label for Digestive VM did not specifically refer to cobalt; and

b. "Grenfell Commodities Sweetblend 3", which had returned elevated levels of cobalt when tested by the stewards following the inspection of the Appellant's stables.

17. The results of the testing of the Digestive VM and the Grenfell Commodities Sweetblend 3 were in evidence before the Panel. According to the Report of the National Measurement Institute Report No RN1475268, dated 7 May 2024:

a. the Digestive VM contained cobalt in levels of 2.2 mg/kg; and

b. the Grenfell Commodities Sweetblend 3 contained cobalt in levels of 0.32 mg/kg, despite the label suggesting it would present at a level of 0.00953 mg/kg.

18. Mr Moxon noted that while Mr Bryant was seeking to rely upon the possibility that the digestive and feed caused the elevated levels of cobalt to be present in *Gorgias*' urine, there was insufficient evidence to conclude that this was the cause of the elevated cobalt levels. In particular, Mr Moxon referred to Dr Garling's comment at 15-650 of the appeal book in which Dr Garling said it was "*unlikely that the amount of feed would cause an increase in the threshold*" and again at 15-652 where Dr Garling considered the impact of the Digestive VM and the Grenfell Commodities Sweetblend 3 in the feed and said that it was "*highly unlikely*" that the elevated levels of cobalt were caused by the feed.

19. With respect to penalty, Mr Moxon submitted that a period of disqualification was the only appropriate penalty in this case and submitted that the penalty of a 12 months disqualification initially ordered by the Stewards was appropriate.

20. Mr Moxon discussed other cases involving cobalt and compared the penalties from those cases to Mr McHardie's case, concluding that the penalty imposed by the Stewards was consistent and reasonable. Some of the other cases (among others) mentioned by Mr Moxon were as follows, each of which are presentation case in which elevated levels of cobalt were detected:

a. *In the matter of Cassandra Schmidt, 8 November 2023*, where the Racing NSW Appeal Panel determined that a disqualification period of 10 months was appropriate for a race day presentation of a horse with cobalt above the threshold (at levels of 164 ug/L and 150 ug/L), in circumstances where it was unknown how the prohibited substance came to be in the horse's system;

b. *In the matter of Michael Rinkin, 2023*, where Racing NSW Stewards determined that a disqualification period of 10 months was appropriate for a race day presentation of a horse with cobalt above the threshold;

c. *In the matter of Terry McCarthy, 2020*, where Racing NSW Stewards determined that a disqualification period of 14 months was appropriate for a race day presentation of a horse with cobalt above the threshold;

d. *In the matter of Michael Freedman, 2022*, where Racing NSW Stewards determined that a fine of $6,000 was appropriate for a race day presentation of a horse with cobalt above the threshold. Mr Moxon noted that in this matter the feed company providing the feed to Mr Freedman has made an error in producing the feed that caused the presence of cobalt above the threshold. In circumstances where Mr Freedman was blameless the Stewards did not impose a period of disqualification; and

e. *In the matter of Russell Osborne 2022*, where Racing NSW Stewards determined that a suspension of licence of three months was appropriate for a race day presentation of a horse with cobalt above the threshold. Mr Moxon noted that in this matter that Mr Osborne had undertaken a costly investigation to determine the cause and determined that the corn being used to feed the horses was at fault. Having identified the issue and corrected it, the Stewards determined that a suspension was the more appropriate penalty rather than a period of disqualification.

21. Mr Moxon also submitted that the Appellant should not be given any discount for the guilty plea made during the hearing on the basis that no guilty plea was made during the Stewards' inquiry. Given that the plea of guilty was made several minutes after commencement of the Appeal hearing, the Panel agrees with the position put forward by Mr Moxon. In the current circumstances the Panel has determined that the Appellant will not be afforded any discount for his belated guilty plea.

Submissions of Mr Bryant

22. Mr Bryant recognised that the provisions of AR 240(2) impose strict liability on the trainer of the horse so presented to race, but Mr Bryant submitted that Mr McHardie did not inject, or cause the injection of, any product likely to have caused the presentation of *Gorgias* with cobalt at a level above the threshold. It was noted by Mr Bryant that no injectables were found at Mr McHardie's stables during a stable visit undertaken by Stewards.

23. Mr Bryant submitted that it was more likely that the level of cobalt above the threshold that was found in *Gorgias*' urine sample was caused by the feed used by the Appellant, which included the Digestive VM (which contained cobalt in levels of 2.2 mg/kg, which was not made clear on the label) and Grenfell Commodities Sweetblend 3 (which contained cobalt in levels of 0.32 mg/kg, despite the label suggesting it would present at a level of 0.00953 mg/kg).

24. Mr Bryant noted that *Gorgias* was fed the night before racing and again between 6:00 am – 7:00 am on the race day, with the urine sample being taken at 2:49 pm on the same day. Mr Bryant then referred to a report of Dr Garling in the appeals book, in particular at 65-14 where Dr Garling notes that "urinary cobalt levels return to single-digit baseline figures within 24 hours". The implication here appears to be that the feed was contaminated through no fault of the Appellant and given the short timeframe from feeding *Gorgias* to taking the sample, this may have exacerbated the results produced.

25. Mr Bryant then submitted that the Appellant naturally falls within category three of *McDonough,* in that he was not responsible for the presence of cobalt above the threshold as he merely relied upon the feed to be uncontaminated, which it was not. The Panel does not find this to be a compelling argument, particularly Dr Garling's comment at 15-650 of the appeal book in which Dr Garling said it was "*unlikely that the amount of feed would cause an increase in the threshold*" and again at 15-652 where Dr Garling considered the impact of the Digestive VM and the Grenfell Commodities Sweetblend 3 in the feed and said that it was "*highly unlikely*" that the elevated levels of cobalt were caused by the feed.

26. Mr Bryant also attempted to draw a connection between *Gorgias* and another horse owned and trained by the Appellant, named *Wellerman*. A pre-race urine sample was taken from *Wellerman* on 30 April and the level of cobalt detected was 66 ug/L. While this finding was under the threshold, Mr Bryant suggested that this higher level along with the levels found in *Gorgias'* sample, were indicative of feed contamination. Given that it was only *Gorgias* that had levels of cobalt above the threshold and that there was three weeks between the samples taken from *Gorgias* and *Wellerman* (with *Wellerman* having another sample taken in the intervening period that produced a finding of 2.5 ug/L) , the Panel is not convinced that there is a connection that can be drawn between the feed and the results of the urine samples of *Gorgias* and Wellerman that benefits the Appellant.

27. It was submitted by Mr Bryant that the appropriate penalty is a fine rather than a disqualification or a suspension. Mr Bryant mentioned the *Freedman* and *Osborn*e matters described above as matters in which a disqualification was not issued. The Panel consider the Freedman and Osborne matters to be distinguished from the current matter, in that in those matters the decision maker's appear to have accepted that Mr Freedman and Mr Osborne were in each case blameless and / or not morally culpable. In Mr Osborne's matter the Panel understand that Mr Osborne undertook a costly investigation to ascertain the cause of the finding of the cobalt above the threshold and was able to satisfy the Stewards that the cause had been identified and addressed.

28. Mr Bryant also referred to several other matters involving breaches of AR 240(2), albeit with respect to different prohibited substances to cobalt, these matters being *Neasham, Carroll, Baker, Cleary* and *Stitt.* These were all matters in which fines were issued for a breach of AR 240(2). Given the abundance of precedent penalties and matters involving cobalt and AR 240(2), the Panel is of the view that limited utility is to be gleaned from refers to these matters involving prohibited substances that are not cobalt.

29. It was also submitted by Mr Bryant that the Appellant had already suffered significant loss in this matter, in that in accordance with AR 240(1), *Gorgias* was disqualified from its 1st placing in the Race 3, Class 1 Handicap run over 1,200 metres at Mudgee Racecourse on 25 February 2024 and the placings were amended. This disqualification has cost the Appellant approximately $14,000 in prizemoney and the winning trainer’s percentage, in addition to reputational damage.

30. Mr McHardie's personal situation was also discussed by Mr Bryant, noting that:

    a. Mr McHardie has been a licensed thoroughbred trainer in New South Wales and for approximately 31 years and during this time he had an excellent disciplinary record with no material breaches of the Rules.

    b. Mr McHardie typically owns the horses he trains and derives an income from his training. While he could be described as a hobby trainer should Mr McHardie be

disqualified he would be required to find alternative work to meet his financial obligations.

c. Mr McHardie is 59 years of age and has mortgage on his 30 acre property, that includes a 600 metre track on which Mr McHardie trains his horses. Mr McHardie also makes regular car repayments.

31. Mr Bryant submitted that based on the evidence the Mr McHardie had a very low level of culpability for the infringements. Mr Bryant also mentioned for consideration that Mr McHardie had fully cooperated with Racing NSW during the investigation and made himself available for interview by Racing NSW Stewards whenever required.

32. Mr Bryant reiterated that the penalty should be structured in the nature of a fine only.

Resolution

33. Appeals in relation to AR 240(2) are difficult when there is no definitive evidence as to how a prohibited substance has come to be in a horse's system.

34. Based on the evidence presented, the Panel is unable with any confidence or probability accept that the explanations provided by Mr Bryant were the cause of the prohibited substance above the accepted threshold finding its way into *Gorgias*.

35. The Panel reiterates the principles elucidated in *McDonough v Harness Racing Victoria* [2002] and the three categories espoused in *McDonough* reflect the absolute liability attaching to a breach of AR 240(2).

36. The Panel is not satisfied that the Appellant has established on the balance of probabilities what the cause was of the breach of AR 240(2) relating to the detection of the prohibited substance cobalt at levels above the threshold that were present in the urine sample taken from *Gorgias.* Based on the evidence presented, the Panel does not know one way or the other what the cause was and in this case, the decision falls within category 2 of *McDonagh* such that it is treated as a category 1 matter.

37. A breach of AR 240(2) is an objectively serious breach of the Rules. It is always a bad look for racing when any horse races and is subsequently found to have had a prohibited substance in its system.

38. Penalties imposed are not for the purpose of punishment, but are a means of protecting the industry, and to demonstrate to the public that racing officials will take steps to ensure that the reputation of the industry, and its integrity, are protected. Deterrence is another important matter, itself related to both the protection of the sport, and the racing public. Both the racing industry, and the racing and betting public, need to be protected from circumstances where a prohibited

substance is detected in a horse's system. The question to be asked is what kind of penalty is required to deter the conduct involved in a particular breach of the rules.

39. The Panel has borne these matters in mind in assessing what penalty is appropriate in this matter, together with the subjective circumstances of the appellant. Additional factors that the Panel has considered in assessing penalty are as follows:

    a. Mr McHardie fully cooperated with Racing NSW during the investigation and made himself available for interview by Racing NSW Stewards whenever required;

    b. The Stewards being unable to establish a definitive explanation for the analysts' findings;

    c. The loss already suffered by the Appellant with *Gorgias being* disqualified from its 1st placing in the Race 3, Class 1 Handicap run over 1,200 metres at Mudgee Racecourse on 25 February 2024, which cost the Appellant approximately $14,000 in prizemoney and the winning trainer's percentage, in addition to reputational damage; and

    d. The Appellant's excellent disciplinary record during his 31 years as a trainer.

40. We do not agree with the submission by Mr Bryant that an appropriate penalty here is closer to a fine, or that the penalty imposed is excessive. The performance enhancing nature of the prohibited substance in this case is also relevant.

41. It may appear that a penalty like a lengthy disqualification is harsh where no dishonest conduct is involved. The conduct here has resulted in the presence of cobalt at a level above the threshold. Detection of such substance at elevated levels in racehorses is very damaging to the image of racing, maybe even more so when such racehorse wins. It is just not as simple as saying that if no-one tried to cheat then it should be a lenient penalty. That is not a proper approach to the Rules of Racing.

42. Taking all relevant factors into consideration, we agree with the Stewards that the nature of the penalty to be imposed here for charge must be a disqualification.

43. Where the Panel disagrees is with the Stewards, is as to the period of disqualification. Taking into account all of the factors described above, the Panel is of the unanimous view that the appropriate penalty is a period of disqualification of Mr McHardie's licence to train for a period of 6 months for each charges.

44. Accordingly, the Panel makes the following orders:

    a. Appeal against severity of penalty allowed.

b. The period of 12 months disqualification imposed by the Stewards is set aside, and in lieu thereof, the Appellant is disqualified for a period of 6 months.

c. The period of disqualification commences on 20 August 2024 and expires on 20 February 2025, on which day the Appellant may reapply for his licence.

d. Appeal deposit to be refunded.