

# PENALTY DECISION



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**INQUIRY NUMBER:** 18S070  
**PARTICIPANTS:** Johannes Vanderburg (**Participant**)

**PANEL MEMBER(S):** Mr Paul Marks (**Steward**)

**DATE OF DECISION:** 10 August 2020

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## Charge

1. This Inquiry is chaired by myself as a steward appointed under the GRNSW Greyhound Racing Rules (**Rules**).
2. On 16 August 2018, a GRNSW Inquiry Panel, comprised of Ms Tammy Cootes and Mr Grant Carroll, issued one charge to the Participant under rule 79A (4) of the Rules:

That, Johannes Vanderburg, was the registered trainer of the greyhound 'Miss Splendamiro' (**Greyhound**) on 21 May 2018 when a sample was taken from the Greyhound that contained a permanently banned prohibited substance.
3. The permanently banned substance in relation to the charge was ipamorelin. This is identified as a category 2 substance under the GRNSW Penalty System.
4. The Participant denied the charge, entering a plea of Not Guilty on 1 June 2020.

## Conduct of the Inquiry

5. On 31 August 2018, the original Inquiry Panel held a hearing in relation to this Inquiry.
6. At the end of the Inquiry hearing on 31 August 2018, the original Inquiry Panel indicated that the hearing would be adjourned for a short period to allow for further evidence to be obtained from the investigators who collected the sample from Miss Splendamiro on 21 May 2018.
7. Since 31 August 2018, the original Inquiry Panel has ceased their employment with GRNSW and unfortunately, this Inquiry remained stagnant for a significant period of time.
8. On 14 May 2020, I took over carriage of this Inquiry in my capacity as Steward appointed by GRNSW under the Rules.
9. On 25 May 2020, after a review of all material obtained by GRNSW including a statement from Mr. Andrew Forster, former Senior investigator and the previous inquiry hearing, I wrote to the Participant and indicated that no further inquiry hearing would be conducted and instead, the Participant was offered an opportunity to enter a plea to the charge against him and make written submissions addressing the charge and possible penalty.
10. No further inquiry hearing was necessary as I was of the opinion that there was sufficient material available to this Inquiry as well as additional written statement from the GRNSW investigator which could be relied upon for a final determination to be made.

11. Following an application from Mr. Vanderburg on 6 July 2020, a further statement was obtained from Mr. William Beekman a former Senior investigator with GRNSW.
12. On 1 June 2020, the Participant provided this Inquiry with a completed plea notice in which he entered a plea of Not Guilty to the charge against him.
13. On 2 June 2020, Mr Michael Phillips, who is a part owner of the Greyhound, emailed this Inquiry with a signed request from the Participant seeking that Mr Phillips be allowed to act as his support person for the remainder of this Inquiry. I agreed to this request.
14. On 17 July 2020, the Participant provided this Inquiry with comprehensive written submissions regarding the charge against him.

### **Submissions on the Charge**

15. The Participant's written submissions set out a number of issues for consideration, each identified below.
16. Firstly, the Participant raised an issue with respect to the process of the inquiry and in effect that there has been a failure by this Inquiry to afford him adequate due process.
17. The Participant submits that it is arguable that GRNSW were satisfied that the facts before them in 2018, did not warrant further investigation given that contact with Mr Vanderburg on the matter had ceased. Resuming the progression of the matter following a two-year delay prevents Mr Vanderburg from gathering contemporary evidence to defend the charge.
18. It is also submitted that it is reasonable to expect the delay of two years and four days contributes to a reduction in the overall quality of evidence, in particular, witness memories will be weakened over time, and there is the potential for collaboration given the witnesses have had opportunity to discuss their account of incidents over time.
19. Further it is submitted that the process of the inquiry, and time taken to progress the matter, is in direct conflict with GRNSW's own Code of Conduct policy and as a result, this matter should be abandoned.
20. The second issue raised by the Participant relates to the out of competition swabbing procedure undertaken by Mr William Beekman and Mr Andrew Forster, which is submitted as being inconsistent with known swabbing procedures. This issue has seemingly been broken up into at least four categories by the Participant which are as follows: (a) failure to adequately identify the participant and the greyhound; (b) failure to undertake the swabbing collection process accurately; (c) failure to undertake the swabbing collection process accurately; and (d) failure to have Mr Vanderburg's present during the collection process.
21. With respect to (a) above, the Participant relies upon GRNSW Swabbing policy number REG01, dated July 25, 2016, which relates to Race Day swabbing. The participant's submissions regarding the policy are as follows:
  - (a) At no stage was Mr Vanderburg offered the opportunity to have a witness present during the sample collection.
  - (b) The swabbing processes undertaken on the day of the out of competition swab by Mr William Beekman and Mr Andrew Forster were not undertaken in accordance with any formal guidelines or procedures therefore there is no authority under which charges can be laid.
  - (c) In all race day swabbing processes, identification of both the participant presenting the greyhound and identification of the greyhound must occur prior to the swabbing being undertaken. The failure to undertake accurate identification is a serious breach of process which lends itself to questioning the overall integrity of the swab itself as the identity (certificate of registration, earbrand and microchip) of the greyhound was not clearly established.

- (d) The sealed bottle of water referred to by Mr Forster was from an unknown source and was not identified as part of the swabbing kit or sterile water. It is concerning that the ladle was washed with a random bottle of water, rather than just utilising the zip hot water service and cold running water that was clearly available adjacent to the bench that was used to carry out the swabbing process.
  - (e) It is further noted that as part of the collection procedure, neither Mr Forster or Mr Beekman washed their hands prior to carrying out the collection sample potentially causing cross contamination of the sample.
  - (f) The evidence provides different accounts of Mr Vanderburg's presence during the process. There is serious concern raised regarding the Stewards requesting to see the greyhound's documentation whilst the swabbing process was being carried out, resulting in Mr Vanderburg not being present for part of the process.
22. The final issue submitted by the Participant relates to the custody of Miss Splendamiro prior to the positive swab being collected and also the availability of Ipamorelin as a cream rather than an injectable substance. With respect to these issues, the following submissions have been made:
- (a) As outlined in the GRNSW transcript of interview on August 14, 2018 with Mr Neil Parsons, Senior Investigator and Mr Wayne Watkins, Senior Investigator, Mr Vanderburg provided detail that Miss Splendamiro had travelled to Victoria with two other licenced greyhound trainers just prior to the out of competition swab being taken.
  - (b) Mr Vanderburg sought help and assistance due to his elderly age to race in a feature race in Victoria. The greyhound Miss Splendamiro was out of his direct control both travelling with others by road as well as via aeroplane to and from Victoria.
  - (c) It has already been established that the positive swab to the product Ipamorelin could have made contact to the greyhound as a cream and not only as an injectable, yet no evaluation of an administrative study has been undertaken.
  - (d) It is submitted that the mitigating circumstances, including the availability of creams, and the fact that Mr Vanderburg did not have custody of the greyhound at all times prior to the competition swab provide doubt as to how the greyhound returned a positive swab.

### **Findings in relation to the Charge**

- 23. The primary issues in contention for determination by me are as follows: (a) The Participant's submission that the process of the Inquiry has caused a loss in due process and outside of the principles of procedural fairness and natural justice; and (b) that the out of competition swabbing procedures, were undertaken in a manner that was inconsistent with known swabbing procedures.
- 24. With respect to the first issue raised by the Participant, I again note that the original Inquiry Panel which carried this Inquiry, no longer is in the employment of GRNSW.
- 25. I am of the opinion that a final determination of this Inquiry can be reached taking into account the evidence available to the Inquiry from 31 August 2018. Further, I am comfortably satisfied that the further evidence obtained from Mr Beekman and Mr Forster adequately addresses the concerns raised by Mr Vanderburg with respect to the sample collection procedure.
- 26. With respect to the second issue in contention identified above, I find that Rule 79A(1) provides a broad discretion to the Stewards to conduct out of competition testing under Rule 79A(1), which states that: [T]he Stewards may carry out, or cause to be carried out such tests as they shall deem necessary in relation to a greyhound at any time for the purposes of this rule.
- 27. The GRNSW Swabbing Policy also authorises Stewards to conduct targeted swabbing.
- 28. I note that the out of competition testing was conducted at the same time that a kennel inspection was conducted by GRNSW Senior Investigators, Mr Beekman and Mr Forster.

29. As a result, I am satisfied that the Stewards had the authority to conduct the out of competition testing of the Greyhound.
30. I do not agree with the submission by the Participant that the swabbing procedure undertaken on the relevant day by Mr William Beekman and Mr Andrew Forster were not done in accordance with any formal guidelines or procedures.
31. The procedure undertaken by Mr Beekman and Mr Forster as set out in their statements and implied by other material available in the brief of evidence, including the signed Sample Identification Card does not persuade me that the manner in which the sample was collected had any impact on the result of its testing. I therefore also disagree that there is no authority under which charges can be laid against the Participant.
32. Mr Beekman and Mr Forster have provided statements to this Inquiry that provide consistent versions of events which importantly indicate that: a) There was nothing unusual in the procedure undertaken to collect the samples and there would be no reason to believe that the integrity of those samples is questionable; b) Mr Vanderburg did not raise any concerns with the collection procedure undertaken at the time; and c) Mr Vanderburg was present for the entirety of that collection process.
33. With regard to b) above, this is supported by the fact that *at the time of the out of competition testing on 21 May 2018, Mr Vanderburg signed a Sample Identification Card, stating the following: "I Johannes Vanderburg, ...did witness the collection , packaging and sealing of the sample collected from this animal...I am satisfied with the procedure I have witnessed and have signed the document in the designated area below..."*.
34. With regard to c) above, Mr Vanderburg submits that at the time of his initial interview with investigators on 14 August 2018 and at the Inquiry hearing itself on 31 August 2018 he indicated that he was not present during the entirety of the sample collection. It is acknowledged that this matter was raised by the Participant on at least two occasions, however the Participant has provided no positive evidence to this Inquiry which supports any suggestion by him that the collection procedure undertaken by Mr Beekman and Mr Forster impacted the integrity of the samples taken.
35. It is accepted that the statements from Mr Forster and Mr Beekman dated 20 May 2020 and 7 July 2020 respectively, were provided some two years after the positive sample was collected by them on 21 May 2018. However, this in itself does not mean that the information contained therein is inaccurate and further, this submission is not supported by any other material contained in the brief of evidence for this Inquiry or any positive evidence provided by Mr Vanderburg.
36. I find that there is no evidence to support the Participant's submission that the detection of the permanently banned prohibited substance was a result of the actions of GRNSW or its investigators.
37. Turning to the analysis conducted of the samples taken, I find that: (a) The analysis of the Samples by the Laboratory was conducted in accordance with the Laboratory's NATA accreditation; and (b) Ipamorelin is a permanently banned prohibited substance under the Rules. As such, there is no requirement within the Rules that stipulates that a level must be provided for a permanently banned prohibited substance for a declaration of a positive swab.
38. As a result, I am satisfied that the certificates from the Laboratory and Confirmatory Laboratory can be relied on.
39. I accept the expert evidence of Dr Rohan Steel, Racing Analytical Services Ltd including that: (a) Ipamorelin is a synthetic peptide which has been developed to stimulate the natural production of growth hormone; and (b) The peptide was detected at a middle range level, indicating an administration was definitely made within 48 hours of the sample being taken, but most likely within 24 hours of the sample being taken.
40. The Inquiry Panel also accepts the expert evidence of Dr Steven Karamatic, Chief Veterinarian of Greyhound Racing Victoria including that: (a) Ipamorelin is a Growth hormone Releasing Peptide; (b) Ipamorelin meets the criteria for a permanently banned prohibited substance; (c)

Ipamorelin is capable of affecting a greyhound's condition or performance with any effect to most likely be positive; (d) Racing Analytical Services Ltd has performed an administration study involving the administration of the peptides. This study concluded that the peptides could only be detected in a urine sample from a greyhound for a short period after administration; and (e) It is difficult to see the detection in the relevant samples from any cause other than administration via injection, in a recent timeframe, likely to be within 24 hours.

41. The final submission made by the Participant relates to the custody of Miss Splendamiro leading up to the time in which the positive sample was collected by investigators on 21 May 2018.
42. During the Inquiry hearing, Mr Vanderburg indicated that Mr Darren Sultana attended his property on 14 May 2018 in order to collect Miss Splendamiro and drove the Greyhound to Melbourne, Victoria for a race on 17 May 2018. The evidence available to me also suggests that Mr Jason Magri had access to Miss Splendamiro during this time when Mr Sultana seemingly had custody of Miss Splendamiro.
43. The evidence available to me indicates that Miss Splendamiro was returned to Mr Vanderburg by Mr Sultana at about 11:00pm on Friday, 18 May 2018.
44. I do not agree with the suggestion by Mr Vanderburg that the permanently banned substance could have been administered by someone else who had custody of Miss Splendamiro prior to the positive sample being collected.
45. The expert evidence obtained by this Inquiry suggests that the administration would have likely occurred some time between about 7:00am on 19 May 2018 and 7:00am on 21 May 2018. Again, I accept this evidence over the submissions made by the Participant.
46. Similarly the suggestion by the participant that the permanently banned substance may have been administered by way of a cream is not accepted and I again rely on the expert evidence obtained by this Inquiry, for instance that contained in the report of Dr Karamatic dated 29 July 2018, which indicates that: *"Given the low concentrations detected in urine after injection, it is difficult to see the detection in these urine samples of GHRPs from any cause other than administration via injection, in a recent timeframe, likely to be within 24 hours."*
47. Mr Vanderburg was afforded the opportunity to cross-examine both Dr Steele and Dr Karamatic at the hearing of this Inquiry on 31 August 2018, however he declined to do so.
48. As a result, the Inquiry Panel is satisfied that the issues raised by the Participant do not materially affect the charge or inquiry.
49. On the totality of facts before the Inquiry Panel, I am comfortably satisfied that:
  - (a) On 21 May 2018, Johannes Vanderburg, was the registered trainer of the greyhound 'Miss Splendamiro'.
  - (b) On 21 May 2018, an out of competition urine sample was taken from the Greyhound and allocated the number V500682 (**Sample**).
  - (c) The Sample was analysed by Racing Analytical Services (**Laboratory**), an accredited laboratory under the *GRNSW Greyhound Racing Rules*.
  - (d) The Laboratory provided a certificate signed by David Batty, accredited laboratory officer, confirming the presence of ipamorelin in the Sample.
  - (e) The Sample was analysed by New Zealand Racing Laboratory Services (**Confirmatory Laboratory**), an accredited laboratory under the *GRNSW Greyhound Racing Rules*.
  - (f) The Confirmatory Laboratory provided a certificate signed by David Palmer, an accredited laboratory officer, confirming the presence of ipamorelin in the Sample.
  - (g) Ipamorelin is a permanently banned prohibited substances under the Rules and a category 2 prohibited substance under the GRNSW Penalty System (**Penalty System**).

50. Regardless of the submissions made by the Participant, the wording of the charge pursuant to R79A (4) of the Rules, suggests that this particular offence is one of strict liability and this Inquiry could find Mr Vanderburg guilty of the breach purely on the basis that he:
- (a) On 21 May 2018, Johannes Vanderburg, was the registered trainer of the greyhound 'Miss Splendamiro'.
  - (b) On 21 May 2018, an out of competition urine sample was taken from the Greyhound and allocated the number V500682 (**Sample**).
  - (c) The Confirmatory Laboratory provided a certificate signed by David Palmer, an accredited laboratory officer, confirming the presence of ipamorelin in the Sample.
  - (d) Ipamorelin is a permanently banned prohibited substances under the Rules and a category 2 prohibited substance under the GRNSW Penalty System (Penalty System).
51. The above position has not been the deciding factor for the Inquiry, however it is simply noted.
52. Following consideration of all the evidence before the Inquiry Panel, the Inquiry Panel finds that the Participant has breached the Rules as detailed in the Charge against him. I therefore find Mr. Johannes Vanderburg guilty of the charge.

### **Submissions on Penalty**

53. As noted above, the Inquiry hearing was held on 31 August 2018. No submissions on penalty were made at this time.
54. In the Participant's written submissions dated 17 July 2020, Mr Vanderburg has not made any direct submissions regarding penalty, however a number of considerations are still to be taken into account when determining an appropriate penalty.

### **Penalty**

55. The starting point for the determination of penalty for a category 2 substance under the Penalty System is 156 weeks disqualification.
56. By Rule 92(4), I am required to have regard to the following matters in reaching a decision as to penalty:
- (a) the character and antecedents of the person charged;
  - (b) the nature of the breach and the circumstances in which it was committed, in particular, the seriousness of the breach and any negligence, recklessness or indifference of the person charged;
  - (c) whether the person has denied or admitted to charge.
57. Mr Vanderburg has pleaded not guilty, and shall receive no discount for an early plea of guilty.
58. Mr Vanderburg has no prior findings of being in breach of the Rules. I take his clear record into account.
59. I consider that there are no aggravating factors present with respect to this matter.
60. The significant delay in determining this Inquiry has been a clear consideration in determining penalty, and I am of the opinion that a significant discount in penalty is appropriate in the circumstances.
61. Having regard to the above considerations, the Inquiry Panel considers that a period of a disqualification of 1 year is the appropriate penalty in the circumstances. This period is to commence from midnight on 16 August 2020.

62. As the Greyhound Miss Splendamiro was nominated at the time the sample was taken for a Race at Sandown in Victoria ("**Race**") on 24 May 2018, The Sapphire Crown Final, contrary to Rule 79A(4) I have also determined to disqualify the Greyhound from the Race pursuant to Rule 79A(4).



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**Mr Paul Marks**

Steward