

APPEAL PANEL OF RACING NEW SOUTH WALES

APPEAL OF KAYLA McEWEN

Appeal Panel:	Mr R. Beasley SC, Presiding Member; Mr P. Santucci; Mrs J. Foley
Appearances:	Racing New South Wales Stewards: Mr O. Jones of Counsel Appellant: Ms M Tilbrook, Solicitor, Tilbrook & Associates
Date of Hearing:	Written submissions for penalty
Date of Reasons:	22 February 2024
Rules involved:	AR 228(b)

REASONS FOR DECISION ON PENALTY

The Panel

Introduction

1. On 7 June 2023, licensed Foreperson Rider Ms Kayla McEwen (the Appellant) was found by Stewards to have breached AR 228(b) of the Australian Rules of Racing in that she was found to have engaged in “improper conduct”.
2. The particulars of the charge brought against the Appellant were as follows:

“... she did engage in improper conduct at approximately 8:00 am on Saturday, 25 March 2023, in the vicinity of the tie up stall area at Moruya racecourse when she did, whilst mounted on the registered racehorse “Fifteen Black”:

 - (i) Turn her mount in the direction of licensed stable hand Mr Andrew Petith, who was on foot, and ride her mount in an aggressive manner attempting to make contact with Mr Petith in an attempt to frighten/intimidate Mr Petith.
 - (ii) Attempt to strike Mr Petith with her whip in a frustrated and aggressive manner.”
3. The Appellant pleaded not guilty to breach of the rule but was found guilty by the Stewards. They imposed a penalty of a suspension in full of the Appellant’s licence for

a period of two months. The Appellant lodged an appeal to the Panel on 7 June 2023 challenging both the finding of breach of the rule, and the severity of the penalty imposed upon her. Following a hearing which took place on 11 September 2023, and the subsequent provision of written submissions from the parties, on 15 January 2024 the Panel delivered reasons dismissing the Appeal in relation to breach (**Breach Reasons**).

4. In our Breach Reasons, the Panel found both particulars of the charge to have been made out. More specifically (and noting for these penalty reasons that we rely on our full findings of fact set out at [44] to [56] of our Breach Reasons), we found that the Appellant:
 - (a) rode the horse towards Mr Petith in a manner that was consistent with intending to intimidate him and at a pace that was a fast walk or trot;
 - (b) was motivated to do this by anger at Mr Petith;
 - (c) (by her own admission) attempted to strike Mr Petith with the whip on his head in an aggressive manner, and not in “self-defence”; but
 - (d) did not drive Mr Petith twenty or thirty metres backwards.

Penalty Submissions

5. The appeal in relation to penalty has been assisted by written submissions lodged by the Stewards dated 5 February 2024, and from the Appellant lodged on 19 February 2024.
6. Unsurprisingly, the Stewards contend in their submissions that the 2-month suspension imposed by them is the appropriate penalty. In doing so they **first** point to the findings of fact made by the Panel, and the objectively serious nature of the offending under the Rules. **Secondly**, they rely on prior determinations involving other licenced persons (Heywood and Costin) where penalties for relatively analogous offending resulted in the imposition of suspensions consistent with the penalty imposed here. **Thirdly**, they point to the Appellant’s record, which is not unblemished, and includes a suspension for breach of AR175(q) (now AR 228(b)) back in 2014. **Fourthly**, they submit there is evidence that the conduct of the Appellant has had an adverse impact on Mr Petith.

7. For the Appellant, a proper concession of the serious nature of the offending is made. She otherwise contends that it would be appropriate to suspend the penalty imposed on her for these reasons (which we set out in summary form only, and in no order of importance):
- (a) while not offering it as an excuse for her conduct, her motivation was the result of what she contends are historic reasons (that the Panel makes no findings on) for antagonism towards Mr Petith;
 - (b) a two-month suspension would be financially catastrophic for her;
 - (c) her conduct carries less culpability than that of Heywood and Costin relied upon by the Stewards;
 - (d) her prior breach of AR 228(b) back in May 2014 arose out of a personal situation of traumatic circumstances with an ex-partner (the details of which have been considered by the Panel but do not need to be stated in these reasons); and
 - (e) the Appellant should be considered to be a person who loves horses, and has made a positive contribution to racing (a matter supported by the character references supplied with her submissions).

Resolution

8. Most incidents involving similar type facts to those in this appeal would result in the appeal against severity of penalty being dismissed. There are two main reasons for that. **First**, the offending is objectively serious. It involved aggression, and risk of injury to licenced persons and a horse. That is unacceptable, and similar conduct could lead to a long suspension or even a disqualification. **Secondly**, while we have taken all the personal circumstances of the Appellant into account, including the financial consequences of a suspension, the paramount matter we must consider in an appeal such as this is the protection of the sport. This has been said in many Reasons for Decision, and need not be elaborated on here. It is why we are of the view that the penalty of a two-month suspension imposed by the Stewards is well within the range of reasonable penalties that could have been imposed on the Appellant for her breach of AR228(b) here.
9. Despite this, we have ultimately taken the view that there is proper scope here to suspend a significant part of the proper penalty to be imposed on the Appellant, while

agreeing with the Stewards' that a two-month suspension (which we have rounded to 8-weeks) is the appropriate base penalty. We have reached this view for these reasons:

- (a) the incident was precipitated by a level of personal animosity between the Appellant and Mr Petith of long standing. It was not a random burst of anger without any background. This is no defence to breach, but offers some explanation at least for the conduct;
 - (b) we accept that the offending in May 2014 arose from unique and traumatic circumstances;
 - (c) while we have not unduly taken into account the financial hardship of a suspension per se, we have taken into account how it might affect the charity work the Appellant undertakes that we have been informed about;
 - (d) we accept that the Appellant is a person generally of good standing, who makes a significant contribution to horse welfare, a matter we think it is proper to take into account when considering penalty.
10. The offending is too serious to warrant a full suspension of the penalty imposed, but we are of the view that it is appropriate that there should be a suspension of penalty for 5 weeks of the total 8-week penalty, on the condition of good behaviour.
11. Our complete orders for this appeal then are as follows:
- (1) Appeal against finding of breach of AR 228(b) dismissed.
 - (2) Finding of breach of AR 228(b) confirmed.
 - (3) Appeal against severity of penalty allowed in part.
 - (4) Eight-week suspension of the Appellant's licence confirmed. However, five weeks of that penalty is to be suspended under AR 283(5), for a period of 18 months, on the condition that the Appellant not breach any of the "Misconduct" rules in Part 9 of the Australian Rules of Racing.
 - (5) The Panel grants a deferment of the three-week non-suspended part of the penalty for up to 7 days from the date of these reasons pursuant to LR107(1)(e), but the suspension may start earlier upon request of the Appellant to the Stewards.
 - (6) Appeal deposit forfeited.