



COMMISSION HEARING

TORONTO, ONTARIO – APRIL 16, 2012

**IN THE MATTER OF THE RACING COMMISSION ACT S.O. 2000, c.20;
AND IN THE MATTER OF THE APPEAL AND REQUEST FOR HEARING BY
STANDARD BREED LICENSEE SEBASTIEN GIROUX**

Sebastien Giroux (“GIROUX”), licence #W98324, appealed against Standardbred Official Rulings SB 44343 and SB 44344 wherein GIROUX was fined \$5,000 and subject to a one-year suspension and a two-year probation for violating Rules 9.09(b), 26.02.01, and 26.02.02 of the Rules of Standardbred Racing, as a consequence of a positive test for the Class II drug, O-Desmethylvenlafaxine, the synthetic form of the major active metabolite of VENLAFAXINE, sold under the brand name EFFEXOR.

On January 18, 2012, counsel on behalf of GIROUX submitted a Notice of Appeal, including a request for a stay.

On February 1, 2012, the Deputy Director of the Ontario Racing Commission (“ORC”) issued Ruling Number SB 10/2012 wherein GIROUX’S request for a stay was denied.

On February 7, 2012, a Notice of Hearing was issued to notify the parties that the matter would be heard on April 16, 2012.

On April 16, 2012, a Panel of the ORC consisting of Chair Rod Seiling, and Commissioners Dan Nixon and Brenda Walker was convened to hear this matter.

Gerry White appeared as counsel on behalf of GIROUX. Jennifer Friedman appeared as counsel for the Administration of the ORC.

Upon reviewing the agreed statement of facts, hearing the testimony of ORC Investigator Pamela Bray, Claude Boivin, and GIROUX, considering the exhibits filed, and upon hearing the submissions of counsel, the Panel denied the appeal and confirmed the same penalty as per Standardbred Official Rulings SB 44343 and SB 44344:

- i) \$5,000 fine;
- ii) One-year suspension (to conclude on January 15, 2013);
- iii) Two-year probation (January 16, 2013 to January 15, 2015 inclusive).

The Panel’s Reasons for Decision is attached to this Ruling.

DATED at Toronto this 26th day of April 2012.

BY ORDER OF THE COMMISSION


John L. Blakney
Executive Director



REASONS FOR DECISION

Overview

1. Standardbred licensee, Sebastien Giroux, appealed SB Rulings 44343 and 44344 wherein he was suspended one year, fined \$5,000 and put on probation for two years following the expiration of his suspension for a Class II positive test for O-Desmethylvenlafaxine in the horse Mustang Mirabel at Rideau Carlton in the ninth race on October 6, 2011.

Background

2. Legal counsel for the appellant, Gerry White, informed the Panel that the hearing was only to deal with the penalty. Legal counsel for the Ontario Racing Commission (ORC), Jennifer Friedman, in conjunction with Mr. White put forth an Agreed Statement of Facts. Following a reading into the record of those facts, Mr. Giroux confirmed through the provided French interpretation service that he understood the agreed facts.

3. With the launch of his appeal, the appellant first put forward that a possible cause for the positive test was environmental, the contamination of the water at the stable where he and the 25 horses he trained were located. That supposition was abandoned given the admission that none of the other horses housed at the farm that drank the same water received a positive test for the same drug.

4. As per the Agreed Statement of Facts, Mr. Giroux did not accept fault for the positive test and put forth a defense of tampering by another trainer, John MacMillan. The appellant claimed Mustang Mirabel from MacMillan on August 18, 2011, and raced the horse on August 21, September 1, and September 8 before it was claimed by Thomas Dalborg. In those three races, the horse recorded a win, a fourth and sixth place finish. Mr. Giroux claimed the horse back from Dalborg on September 25 and raced him back on October 6.

5. The appellant submitted that he had been told by a Bernard Levine that MacMillan would get him in trouble for claiming Mustang Mirabel from him. ORC Investigator, Pamela Bray, confirmed Giroux made the allegation when she met with him as part of her investigation into the positive test but found nothing to support it. No specifics were forthcoming from Levine according to Giroux as to what kind of trouble. This information was not reported to the ORC Judges, according to Giroux, as Levine did not want to get involved because of his past relationship with MacMillan. Furthermore, he could not be called as a witness because of costs and when told there were alternatives, Giroux testified that Levine had moved to Calgary. Those other alternatives were outlined by Ms. Friedman that with the appellant being represented by legal counsel, Levine's information could have been brought forward via an anonymous tip and his evidence made available via a witness statement of which Mr. White would be quite familiar.

6. Claude Boivin, the major owner for Giroux and the owner of Mustang Mirabel supported the appellant's submission that MacMillan had tampered with the horse. On cross examination he admitted that he had no proof of his belief.



7. In the race on October 6, Mustang Mirabel drew the number two position. Mr. MacMillan was in that same race with the number three horse, Good Friend, meaning they were standing beside each other in the paddock. According to the appellant, it was likely there in the paddock that someone from MacMillan's stable fed Mustang Mirabel the drug by secreting it into an apple which was fed to the horse. The track does not have video surveillance in the paddock to confirm the allegation, however, the Panel notes that it is a practice in racing that anyone associated with another horse does not and should not feed another horse for obvious reasons.

8. Mr. Giroux, despite his submission of tampering by MacMillan, and being warned in advance and being housed next door to MacMillan on October 6, admitted that he did not take any precautions to protect his horse. SB Rule No. 26.02.02 clearly puts the onus on the trainer to protect the horse from a positive test, a rule which Giroux admitted he was aware of.

9. Investigator Bray reported that, based on the veterinary records provided by the appellant for both his veterinarians, Drs. Garth Henry and Yves Bouvier, the horse had not been examined by a veterinarian during the material times in question. She confirmed that the drug is only available in pill form and is a time release medication meant only for human use. Sold under the brand name, Effexor, its purpose is to control mood swings in humans and while there has been no research on its effects on horses, it was speculated it could have similar effects on them.

10. Ms. Bray discovered at Giroux's stable, a container with powder in it with a label on the outside indicating the contents had been prescribed by Dr. Henry on October 6, 2011, the same day as the positive test occurred. The compound is used to help horses with respiratory problems. Giroux admitted that he had used the medication on Mustang Mirabel, claiming that he had prior approval to use the "stable medication". Dr. Henry's records did not support the appellant's claim thereby putting him in violation of the ORC rules requiring a veterinary doctor to examine a horse before prescribing any medication for that horse.

11. Herbal supplements were also found at the Giroux stable. In Investigator Bray's opinion, those supplements had no commonality or similarity to the drug. Herbal supplements can be a problem for trainers as the manufacturers do not always publish all the ingredients contained in the product. Notwithstanding, trainers remain responsible under the Rules of Racing. Mr. Giroux did not advance the herbal supplements as a possible cause.

12. The appellant was co-operative, according to Ms. Bray. In her view, the penalty assessed to Mr. Giroux was low.

Issue

13. Is the penalty assessed to the appellant reasonable given the mitigating and aggravating factors?

Decision

14. After carefully listening to the testimony and reviewing the evidence and documents filed, the Panel denies the appeal and confirms the penalty remains the same, one year full suspension, a fine of \$5,000 and probation for two years following the expiration of his suspension.

**Reasons for Decision**

15. The assessed penalty falls within the guidelines as per Policy Directive No. 1-2008. His penalty of a one-year suspension and a fine of \$5,000 is the minimum.

16. When comparing the mitigating factors versus the aggravating factors, the latter far outweighs the former. The only mitigating factor for the appellant is that he was co-operative and the Panel concurs that the Judges, in assessing their penalty decision, took that fact into consideration. Mr. Boivin's evidence carries little weight given his prejudice as owner and his admittance of no proof to the alleged tampering.

17. Aggravating factors include the following:

- he would not accept responsibility;
- no credible evidence to support his claim of tampering thereby giving credence to the old “phantom” rationale for the positive test;
- he failed to take any precautions to protect his horse, in violation of the rules of which he was aware, after claiming a person he knew was out to cause him trouble, and being housed side by side in the paddock on October 6 with that same person;
- his past record which includes two violations for injectables and two positive tests albeit one was for failure to submit a procaine slip to the officials;
- his violation of the Rules in using the respiratory powder on Mustang Mirabel and claiming he had veterinary approval when the records clearly show he did not, which goes to the heart of credibility.

18. Some licensees need and/or require general deterrence to ensure they follow the Rules of Racing. The precedent of such action, given the seriousness of a Class II positive test for a drug that has no therapeutic value, would cause future violators to reasonably expect similar treatment. This Panel would not be fulfilling its mandate to protect the health of the horse and the public interest to vary Mr. Giroux's penalty downward.

19. Precedent cases cited clearly demonstrate the requirement for cogent, compelling mitigating factors before a Panel varies a penalty to the benefit of the appellant. In Beback [2011] O.R.C.D. No. 50, Ruling Number COM SB 051/2011, the penalty was varied because there clearly was diminished responsibility given the role of the veterinarian involved. In Vrablic [2008] O.R.C.D. No. 16, Ruling Number COM SB 025/2008, the appellant was able to demonstrate compelling evidence related to the various forms of polysporin, some containing lidocaine including the child version and others not, in combination with a previously good record warranted a variance in the penalty to the favour of the appellant.

20. Penalties can and have been varied when the Panel receives a joint submission as was the case in both Belhumer [2010] O.R.C.D. No. 39, Ruling Number COM TB 011/2010 and Huarte [2010] O.R.C.D. No. 54, Ruling Number COM TB 016/2010. In the former, the Panel wrote at para 25, “All licensees



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deserve to see and understand that similar penalties are assessed for similar rule violation when it comes to punishment.” This Panel concurs. In the latter, where a variance was approved at para 14, the Panel wrote, “Had this matter come before the Panel to be adjudicated, and had the decision been to deny the appeal, the Panel is of the view that the penalty imposed by the Stewards was appropriate given the ranges available for such a rule violation.”

DATED this 26th day of April 2012.

A handwritten signature in cursive script that reads "Rod Seiling".

Rod Seiling
Chair