

JUDICIAL AWARD DELIVERED BY THE FISA DOPING HEARING PANEL

sitting in the following composition

Members: **Tricia Smith**
 Mike Williams
 John Boulton

In the cases of
Gregory Flood and Frank Petrucci

THE FACTS

USADA conducted in-competition testing at the USA Senior World Championship National Trials on 7 August 2013. A urine sample was collected from Gregory Flood and another urine sample was collected from Frank Petrucci (“the Athletes”).

The sample collected from the Athlete Gregory Flood had the sample number 1560078 and it was properly recorded on the Doping Control Form. He signed the form and was given a copy. Mr. Flood declared on the form that he had taken a total of three products during the seven days before the test; multivitamins, fish oil and a substance containing electrolytes which is unreadable. He made no comments about the procedure on the doping control form. The WADA accredited laboratory in Los Angeles, UCLA, received the “A and B” samples on 8 August 2013.

The sample collected from the Athlete Frank Petrucci had the sample number 1560082 and it was properly recorded on the doping control form. He signed the form and was given a copy. Mr. Petrucci declared on the form that he had taken a total of two products; Vitamin D 400mg, and Vitamin B12. The WADA accredited laboratory in Los Angeles, UCLA, received the “A and B” samples on 8 August 2013.

The Certificates of Analysis from the UCLA Laboratory, dated 19 August 2012, indicate that both samples showed the presence of Glycerol at concentrations of 21.6mg/mL for sample 1560078 and 19.6mg/mL for sample 1560082 which are both greater than the threshold limit of 1.3mg/mL. Glycerol is included in the 2013 Prohibited Substances/Methods List of the World Anti-Doping Code. Glycerol is classified in class S5, Diuretics and Other Masking Agents.

It is assumed that USADA determined that Mr. Flood and Mr. Petrucci did not have valid Therapeutic Use Exemptions (TUE) for Glycerol and that no departures from the International Standard for Testing (ISL) have been established.

As USADA was the Testing Authority in these two cases, they were responsible for results management and conducted an expedited hearing in view of the impending FISA World Rowing Championships in Chungju, Korea due to begin on 25 August 2013, (the "Competition"). On 20 August 2013, USADA issued a news release stating that both Athletes accepted a sanction of a public warning and the loss of their results obtained on 7 August 2013. On 21 August, the FISA Executive Director immediately requested that USADA forward the doping control forms and the reasoned decision of the USADA Panel.

On 26 August, the FISA Executive Director appointed a Hearing Panel (the "Panel") to hold a Preliminary Hearing and to advise him if the two Athletes should be provisionally suspended from the Competition. The Executive Director requested the Panel make recommendations in this regard because the athletes in question are U.S. citizens and the Executive Director, also being a U.S. citizen, did not want there to be any perceived conflict of interest.

The Panel met and decided they could not make a recommendation to the Executive Director without the Reasoned Decision of USADA and doping control forms. Accordingly the Executive Director informed the athletes and their representatives that these documents must be provided before a decision could be made and must be provided before their next race in the Competition.

On 27 August, following the receipt overnight of these USADA documents, the Panel decided to reopen the cases. An expedited hearing at the FISA Rowing World Championships in Korea took place with the two Athletes, their legal counsel, Howard Jacobs (by phone) and two team officials, Matt Imes and Curtis Jordan, in order to carefully examine all circumstances of the cases. The Panel's role was to decide if it should confirm or reject the USADA decision, and to do so before future races in the Competition by the two Athletes so that no other rowers participating in the Competition would be prejudiced.

HEARING

Jurisdiction

The Athletes' legal counsel (by phone) raised the issue that the FISA Hearing Panel did not have jurisdiction to re-open the cases and that the appropriate course of action would be for FISA to appeal to CAS. He argued that Articles 8.4.7 and 13.2.3 of the FISA Anti-Doping Bye-Laws are in conflict and accordingly should be interpreted as noted above.

It was agreed that the Hearing would continue and the Panel, in its reasons would decide the jurisdictional issue.

Athletes' Evidence

The Athletes' legal counsel sent several documents to the FISA Hearing Panel shortly before the start of the Hearing:

- Pre-Hearing Brief of Respondents Gregory Flood and Frank Petrucci
- Declaration of Gregory Flood
- Declaration of Frank Petrucci
- FINA v. Cielo (CAS 2011/A/2495)
- UCI v. Kolobnev & Russian Cycling Federation (CAS 2011/A/2644)

The FISA Hearing Panel also received on August 27 from USADA the detailed reasons for their decision in this case (the "Reasons") which included a summary of the Athletes' evidence.

The Panel asked the Athletes if they agreed that their evidence as presented in the Reasons was their evidence and was accurate. They both agreed it was.

The evidence outlined in the USADA Reasons referred to the purchase of a bottle of store brand "Pure Glycerin USP", and in some detail, the research the Athletes conducted on glycerin, glycerine and glycerol. Set out below are the relevant facts from the Reasons which USADA found to be established. The USADA Reasons had attached to them the relevant documents supporting the findings of fact. Those attachments were reviewed by the Panel but are not attached here:

1. "On August 6, 2013, the Athletes purchased a six ounce bottle of store brand "Pure Glycerin USP" from a CVS drugstore in Princeton, New Jersey. The active ingredients for the product as listed on the label are Glycerin 99.5% and Anhydrous."
2. "After making the purchase, the Athletes conducted a search for "Glycerin" (using the "Ctrl + F" function) on the World Anti-Doping Agency (WADA) Prohibited List to ensure that it was not prohibited for use in sport. No matches were found for Glycerin on the WADA Prohibited List."
3. "After the search for "Glycerin" returned no results on the WADA Prohibited List, the Athletes accessed USADA's GlobalDro website (www.globaldro.com) in order to conduct further research to determine whether the use of the substance was prohibited in sport."
4. "The Athletes' search for "Glycerin" on GlobalDro returned approximately 15 results for various brands of Nitroglycerin, all of which were correctly identified as non-prohibited substances."
5. "The Athletes then conducted a search for "Glycerin" on Wikipedia, a user edited online encyclopedia. Through the Wikipedia search, the Athletes learned that Glycerine and Glycerol were synonyms for the substance they were considering using. The Athletes then conducted searches for "Glycerine" and "Glycerol" to determine whether either of terms was identified as a prohibited substance."

6. "The search for "Glycerine" on GlobalDro returned no direct matches but two alternative substances, Glycine and Glyburide, were suggested as possible matches. Both Glycine and Glyburide were correctly identified on GlobalDro as non-prohibited substances. The Athletes did not conduct an additional search for "Glycerine" on the WADA Prohibited List."
7. "The search for "Glycerol" on GlobalDro returned no direct matches but Glycine, Glycopyramide, Glycopyrrolate, Glyceryl trinitrate and Glycerophosphate were suggested as possible matches. As before, all of the suggested matches were correctly identified on GlobalDro as non-prohibited substances. The Athletes did not conduct a separate search for "Glycerol" on the WADA Prohibited List."
8. "After conducting a search for "Glycerin" on the WADA Prohibited List and searches for "Glycerin," "Glycerine" and "Glycerol" on the GlobalDro website, the Athletes concluded that their anticipated use of CVS brand "Pure Glycerin USP" was not prohibited for use in sport under the Code."
9. "On the morning of August 7, 2013, the Athletes prepared the Glycerin for ingestion by pouring the substance into two one-litre bottles of Pedialyte. Following their weigh-in for the race, the athletes drank the Pedialyte mixed with Glycerin. The athletes estimate that their use of the Glycerin occurred approximately two hours prior to the start of their race."
10. "Following their first place finish in the finals, the Athletes were notified that they had been selected for doping control. Both athletes provided a urine sample, as requested by the USADA doping control personnel on site."
11. "After providing his urine sample, Mr. Flood picked up a copy of the "Examples of Prohibited Substances & Methods" wallet card that is annually produced by USADA."
12. "While looking through the wallet card after leaving the race venue, Mr. Flood noticed that "Glycerol" was listed as an example of a prohibited substance in the category of "Diuretics and Other Masking Agents" on the WADA Prohibited List."
13. "Mr. Flood immediately notified Mr. Petrucci of his discovery. The Athletes proceeded to conduct some additional research in order to determine whether their use of the Glycerin product prior to their race had indeed been a violation of the Code. As part of their research, the Athletes contacted USADA and left a voice message inquiring as to whether Glycerin and Glycerol were considered different substances under the WADA Prohibited List."
14. "On the afternoon of August 8, 2013, the Athletes informed their coach, Mike Zimmer, that they were concerned about the possibility that they had ingested a prohibited substance the prior day. US Rowing was made aware of the Athletes' situation later that same day and John Ruger, the United States Olympic Committee Athlete Ombudsman, was advised of the situation on August 11, 2013."

15. "After consulting with their coach, the US Rowing leadership, the USOC Athlete Ombudsman and an outside attorney, the Athletes made the decision to come forward to USADA and admit their use of a prohibited substance even though the Laboratory had yet to report either of their samples as adverse."

The Panel noted the Reasons contained some aspects that were slightly different from the statements of the Athletes at the Preliminary Hearing and that clarification of certain responses was required.

During the Preliminary Hearing, the Athletes stated that the first time they realised that the substance Glycerol that they ingested may have been prohibited was at the time that the USADA testing was completed by USADA and when the Athlete Gregory Flood picked up a wallet card produced by USADA which mentioned that Glycerol was a prohibited substance. Their evidence set out in the USADA Reasons stated that following a negative search for Glycerin using the function "Ctrl+F" on the WADA Prohibited list, they continued with USADA's GlobalDRO website to search for Glycerin. They then commenced a search on Wikipedia and learned that Glycerin, Glycerine and Glycerol were synonyms. The athletes confirmed that they were aware Glycerin and Glycerol were synonyms prior to seeing the wallet card but as presented in their evidence at the Preliminary Hearing, did not realize it was prohibited until seeing the wallet card. They stated this was consistent with the evidence in their Preliminary Hearing and in the evidence they confirmed which is set out in the Reasons.

The Athletes stated that with the Wikipedia information they then entered Glycerol and Glycerine into the GlobalDRO website. The website, erroneously, did not show that the substance is prohibited. Evidence was provided that since these cases, the GlobalDRO website has been updated to show the correct information, namely that Glycerol / Glycerin is prohibited. It is the Athletes' evidence, that the GlobalDRO website, which is the website to which USADA directs all US athletes, was not up to date and did not show Glycerin and Glycerol as prohibited substances. The Athletes at the Preliminary Hearing and at the Hearing testified that U.S. Athletes are directed to refer all anti-doping questions to USADA and evidence was produced from the USADA website which showed that the website refers athletes to the GlobalDRO website to check all substances.

The Athletes' evidence is that after the Wikipedia search, they were still not totally clear that it was the same substance with different names. They conducted one search for Glycerol on GlobalDRO. They stated they had no reason to believe that GlobalDRO would not provide correct information.

Significantly there was evidence before USADA from the GlobalDRO search records which confirms the Athletes conducted the searches on GlobalDRO which they claim to have conducted.

The Panel asked why the Athletes did not check the safety of the substance with a team doctor. The Athletes replied that they were not members of the team at this stage and, as the substance did not show up on any of the searches, they did not judge the substance as requiring further checking. They also stated that they knew it was a substance in general use in various household and food products and is often used in “baking”. Given the time line, as they had bought the product and were checking the substance the evening before the race, they believed they were going through normal preparation and could not have spoken to medical staff anyway.

The Hearing Panel asked the two Athletes why they did not write the name of the product on the doping control form. The Athletes claim that because they did not believe it was a substance to worry about, being in general use, and not being listed on GlobalDRO, therefore they did not list it on the doping control form. They however wrote other items, such as fish oil and vitamins, as they thought that these substances would be mentioned if searched for on GlobalDRO and might show up on test results.

Other evidence from the Athletes before the Panel was that they first found out about Glycerin and its ability to aid hydration from an article in the New York Times about its being used by well-known marathon runners, and that it was “an effective and legal” means of doing so. That article, however, was written at a time before Glycerol was added to the WADA Prohibited List.

The Panel also asked the US Rowing officials present at the hearing why the Athletes were selected for the US National Team if, under the USADA decision, their results at the National Trials were annulled. US Rowing responded that because the trial results were annulled they did not take the race in question into account, and the selection was based on other results, and other factors. It was not the role of the Panel to enquire further into the grounds of selection of the Athletes that being a matter within US Rowing’s remit alone.

Argument

Legal counsel for the athletes argued that the sanction imposed on the athletes by USADA is appropriate under Article 10.4 of the FISA Anti-Doping Bye-laws. The athletes were found by USADA to be at fault as contemplated by Article 10.4 but found the level of their fault was low.

He argued it was unfair to claim that fault was demonstrated because the Athletes did not contact someone from US Rowing, because that was not what athletes are directed to do. The Athletes went through the process of checking the substance as they were told to do, and had showed a high level of diligence. There is evidence which confirms they conducted the searches on the website to which USADA refers athletes. He argued it was not their fault that the information received from this USADA endorsed website was not accurate. Any one of the three GlobalDRO searches conducted should have demonstrated that the substance was prohibited. He submitted that the GlobalDRO search was the appropriate action for them to undertake, but that they went further than that in their searches in any case. The fact that they did not conduct a Ctrl + F search on the WADA website for Glycerol (as opposed to Glycerin) did indicate a level of fault, but a low level.

Athletes’ legal counsel emphasized that the fact that the Athletes also contacted USADA in advance of receiving their urine sample results demonstrated that they did not wish to hide anything once they became aware of the potential problem.

He argued that the specified substance in question was not intended to enhance performance, in that the product Glycerin was taken to aid rehydration after weigh in. He

states it should be seen as a health issue, not a performance issue. He also stated that the test results showed that this was not an attempt to mask the taking of any other substances.

He stated USADA did not apply the article of no fault (Article 10.5 in the FISA Anti-Doping Bye-Laws), but applied Article 10.4 which provides that even if there is a degree of fault, sanctions range from a reprimand to up to two years of ineligibility. He recognised that there was a small degree of fault shown by the Athletes and that this was consistent with the WADA Code and the FISA Bye-Laws. A public warning (or reprimand) is the lowest sanction under Article 10.4 taking into account the level of fault. However, significantly, the violation does count as a “first offence” on the Athletes’ records. If ever the Athletes were to have a second, even unintentional, offence, then the sanction would be more severe. Their result from the competition in question was also annulled.

He submitted that the level of fault shown by these Athletes is consistent with other athletes from other sports who have received a reprimand. Examples such as the FINA v. Cielo (CAS 2011/A/2495) and the UCI v. Kolobnev & Russian Cycling Federation (CAS 2011/A/2644) were raised by legal counsel.

He further claimed that USADA have recognised that they have some degree of fault. The GlobalDRO website provided inaccurate information which has led to the situation where the Athletes are facing an anti-doping rule violation. According to Article 10.4, and decided cases on that Article, proportionality in the sanction should relate to the level of fault.

APPLICABLE LAW

The applicable rules

The applicable rules are the FISA Anti-Doping Rules in force at the time of the test (7 August 2013). These rules are consistent with the World Anti-Doping Code.

The relevant rules

The relevant rules in this case are the FISA Anti-Doping Bye Laws including but not limited to:

- Article 2.1.1 which states it is each Rower’s personal duty to ensure no Prohibited Substance enters his body;
- Article 10.2 which sets a period of two years’ ineligibility for a first violation for prohibited substances, and which provides that the athlete shall have the opportunity to establish the basis for eliminating or reducing this sanction as provided in Articles 10.4 and 10.5;
- Article 10.4 which relates to the elimination or reduction of the period of ineligibility for Specified Substances under specific circumstances. Article 10.4 specifically states:
- *“Where a Rower or Other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Rower’s sport performance or mask the use of a performance-enhancing substance, the period of ineligibility found in Article 10.2 shall be replaced with the following:*

First violation: At a minimum, a reprimand and no period of ineligibility from future Events, at a maximum, two (2) years of ineligibility.

To justify any elimination or reduction, the Rower or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The Rower or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of ineligibility."

- Article 8.4.7 which provides for the review by the FISA Doping Hearing Panel of all National cases.

MERITS

Jurisdictional Issue

In relation to the issue of jurisdiction, the Panel finds that the review process under Article 8.4.7 is not inconsistent with the appeal process under Article 13.2.3. Both processes exist side by side, and the one does not supersede the other. The review under Article 8.4.7 is appropriate in that it enables the FISA Doping Panel to ensure that the sanction applied is adequate and to ensure that all Rowers in the world are treated consistently and in an equal manner. However, it goes without saying that each case must be decided on its own facts and merits in the circumstances, and the Panel is not entitled to do other than to apply the World Anti-Doping Code and the FISA Anti-Doping Bye-Laws to the facts of the case at hand. As indicated in the Cielo case cited above, it is not the role of the Panel to seek to do justice as it perceives by giving the Anti-Doping Bye-Laws an interpretation or application inconsistent with those Bye-Laws, with the object and purpose of those Bye-Laws or with the body of CAS jurisprudence which has developed in respect of those Bye-Laws, or their equivalents in the World Anti-Doping Code or other sports' Anti-Doping Rules.

Determination of Doping Offence

It is clear that Glycerol appears on the WADA 2013 Prohibited List as a Specified Substance under S5 - Diuretics and other Masking Agents. Article 10.4 of the FISA Anti-Doping Bye-Laws (and the WADA Code) provides a specific legal regime for anti-doping rule violations involving Specified Substances. The CAS Panel in the Kolobnov case noted from the footnotes to Article 10.4 in the WADA Code that Specified Substances are particularly susceptible to unintentional Anti-Doping Rule Violations or susceptible to have a credible non-doping explanation. Once it is identified as a Specified Substance, and additional conditions are met, the period of ineligibility under Article 10.2 is replaced by a sanction ranging from a reprimand to a two year period of ineligibility. (See the Kolobnov case mentioned above). Therefore, the Panel has to consider if those additional conditions are met.

The Panel is satisfied that a positive test was established by the evidence of the laboratory analysis and as admitted by the Athletes. The Athletes approached USADA admitting the possibility of positive test results before learning of the results of laboratory analysis.

For the conditions under Article 10.4 to be met, the Athletes must first give evidence as to how the Prohibited Substance entered their bodies, and then establish to the comfortable satisfaction of the Panel that it was not intended to enhance the Rower's performance or mask the use of a performance-enhancing substance.

USADA has stated that it “concluded that the Athletes adequately established how the Specified Substance came into their possession and entered their bodies through the use of the product “Pure Glycerin USP”. The Panel agrees that the documentation of the investigation and purchase of the Product by the Athlete Gregory Flood and the Athletes’ mutually corroborating evidence of their ingestion of the Product has adequately demonstrated how the Athletes ingested the prohibited substance.

The Panel also agrees with USADA that, from the evidence provided, the Panel is comfortably satisfied that the Athletes did not intend to use the Product for performance enhancement or as a masking agent. In particular, given that the substance is included in the WADA list as a masking agent, there was no evidence to suggest that there was any other substance present in the Athletes’ bodies which would be masked by Glycerol. The laboratory results also did not indicate that the urine concentrations were outside of normal range, which could be an indication of use of a masking agent.

In addition, the Panel is also comfortably satisfied that the Athletes did not intend to enhance their performance with a Prohibited Substance. Their evidence is that after their research they considered it to be a substance which was not prohibited and which would help them with effective hydration by using what they thought was a legal substance with water, just like another energy drink would do. The Panel (and it would appear, the USADA panel) accepted that the Athletes gave evidence honestly and candidly, and accepts that evidence which is largely corroborated by the documentary evidence.

However, because of the presence of the substance in their bodies, and following the review of all the facts and of other similar cases decided by the Court of Arbitration for Sport (cited above), the Panel has concluded that the two athletes are guilty of a doping offence.

Sanction

Turning to the question of the sanction for the offence, the Panel understands that in undertaking a review of the National case under Article 8.4.7, the Panel must consider whether an adequate sanction has been given by the National body; in this case USADA. The CAS cases referred to above establish that where a sanction is subject to appeal or review, the sanction should be reviewed if it is grossly disproportionate. The review panel should not interfere with a well-reasoned sanction.

The Panel therefore considered the level of fault of the Athletes in the case, as being the only criterion to be considered under Article 10.4 in relation to the setting of a sanction within the range of sanctions stipulated by that Article for cases involving Specified Substances. The Athletes took a substance without seeking advice from a medical professional. The Athletes neglected to put the substance on their doping control forms. The Panel finds that there is some degree of fault on the part of the Athletes. On the other hand, the evidence is clear that the Athletes did check the GlobalDRO website as directed by USADA and, through no fault of their own, the information provided to them was incorrect.

The Panel noted the GlobalDRO website is produced by a partnership of UK Anti-Doping, the Canadian Centre for Ethics in Sport, USADA and is also used by the Japan Anti-Doping Agency as a licensee. It claims that it provides “easily accessible and accurate information on the status of specific substances or specific pharmaceutical products for the use by UK, Canada and USA athletes” and that it “reflects the WADA prohibited list”.

In the view of the Panel, there is fault to be attributed to the inaccurate GlobalDRO website, which did not “reflect the WADA prohibited list” which the Athletes were entitled to expect it to do, given that it is the official website of a number of reputable National Anti-Doping Authorities, and the website to which they are directed to check on substances they might use. Reliance on this website does not completely absolve the Athletes of their responsibility for the doping offence; however, the Panel considers the Athletes fault is mitigated by their reliance on the site and then using a substance which, as far as they knew after searches on the site, was not prohibited by WADA.

CONCLUSION

The Panel concludes:

1. the level of fault of the Athletes is consistent with their receiving a first offence on their anti-doping records, the loss of their results at the relevant event and a reprimand as provided for under Article 10.4;
2. the USADA sanction to this effect was not “grossly disproportionate” in the circumstances, and it is not appropriate for the Panel to interfere with the sanction, other than to note that the correct reference in accordance with Article 10.4 is to a “reprimand” not a “public warning”; and
3. the Panel notes that this decision is specific to the facts. The probative evidence showing there was incorrect information on the GlobalDRO website and the documentary evidence of the search records confirming the Athletes’ searches on the website were critical to this finding. If this had not been the case, the finding of this Panel could well have been different.

FOR THESE REASONS

The FISA Doping Hearing Panel finds:

1. According to Article 8.4.7 of the FISA Anti-Doping Bye-Laws, the FISA Hearing Panel has the right to review all National cases when they are final at National level to ensure that all Rowers in the world are treated consistently and thus has the jurisdiction to hear the subject case.
2. Gregory Flood and Frank Petrucci have committed an anti-doping rule violation and the violation will be on their record as a first offence.
3. The USADA decision dated 26 August is confirmed, except the portion of the sanction which refers to a “public warning” is noted to be a “reprimand”.
4. This award is rendered without costs.

Chungju, 30 August 2013

For the FISA Doping Hearing Panel:

Tricia Smith

Mike Williams

John Boulton