

BEFORE THE AMERICAN ARBITRATION ASSOCIATION
North American Court of Arbitration for Sport Panel

United States Anti-Doping Agency, Claimant

v.

AAA No. 30 190 00789 05

Mark Hainline, Respondent

AWARD AND DECISION OF THE ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated by the above-named parties, and having been duly sworn and having duly heard the proofs and allegations of the parties, and, after a hearing held on November 20, 2005, do hereby render this full award pursuant to its undertaking to do so by December 7, 2005.

1. Introduction and Facts

- 1.1 The Claimant, USADA, is the independent anti-doping agency for Olympic Sports in the United States and is responsible for conducting drug testing and any adjudication of positive test results pursuant to the United States Anti-Doping Agency Protocol for Olympic Movement Testing ("USADA Protocol").
- 1.2 The Respondent, Mark Hainline ("Hainline"), is an athlete in the sport of archery.
- 1.3 On April 16, 2005, Hainline participated in the Arizona Cup and placed third.

- 1.4 As of August 13, 2004, the USADA protocol implemented the mandatory provisions from the World Anti-Doping Code (the "WADA Code") into the USADA Protocol, which include the WADA definitions of anti-doping rule violations, burden of proof, prohibited list and sanctions.
- 1.5 The parties entered into Stipulations of Uncontested Facts and Issues on August 11, 2005. In addition to the agreement regarding the applicability of the USADA Protocol and the WADA Code, the parties agreed that:
- a. Hainline did not stipulate that he agreed to the application of or had knowledge of the provisions of the USADA Protocol or WADA Code at the time.
 - b. Hainline refused to be tested when requested by USADA. ("Test Refusal")
 - c. Hainline did not contest that his Test Refusal is a first doping offense.
 - d. The period of ineligibility will be a maximum of two (2) years beginning on the date of the decision with credit being given for the time Hainline served a provisional suspension beginning on April 27, 2005, to a minimum of one (1) year.
 - e. Hainline was disqualified from the Arizona Cup and forfeits any and all competitive results received subsequent to the Arizona Cup and this hearing.
 - f. Hainline will testify that he used a prohibited substance immediately prior to competing at the Arizona Cup on April 16, 2005, and that he subsequently refused to allow the testing.

2. The Applicable Rules

2.1 The relevant WADA Code definition of doping is set forth in Article 2.3:

Refusing or failing without compelling justification, to submit to Sample collection after notification as authorized in applicable anti-doping rules or otherwise evading Sample collection.

See also Annex A to USADA Protocol, Article 2, Section 2.3.

2.2 The period of ineligibility for a refusal to test in accordance with Article 10.4 of the WADA Code is found in Article 10.2:

Imposition of Ineligibility for Prohibited Substances and Prohibited Methods

Except for the specified substances identified in Article 10.3, the period of Ineligibility imposed for a violation of Articles 2.1 (presence of Prohibited Substances or its Metabolites or Markers), 2.2 (Use of Attempted Use of Prohibited Substance or Prohibited method) and 2.6 (Possession of Prohibited Substances and Methods) shall be:

First violation: Two (2) years' Ineligibility.

Second violation: Lifetime Ineligibility

However, the Athlete or other Person shall have the opportunity in each case, before a period of ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article 10.5.

(Emphasis added.) See also Annex A to USADA Protocol, Article 10, Sections 10.2 and 10.4.

2.3 The WADA Code addresses the limited circumstances under which an athlete may eliminate or reduce the period of ineligibility based on exceptional circumstances:

10.5.2 No Significant Fault or Negligence

This Article 10.5.2 applies only to anti-doping rule violations under Article 2.1..., Article 2.2..., failing to submit to *Sample* collection under Article 2.3, ...If an

Athlete establishes in an individual case involving such violations that he or she bears *No Significant Fault or Negligence*, then the period of *Ineligibility* may be reduced, but the period of *Ineligibility* may be not less than one-half of the minimum period of *Ineligibility* otherwise applicable,...¹

See also Annex A to USADA Protocol, Article 10, Section 10.5.2.

2.4 The applicable WADA Code definition states:

No Significant Fault or Negligence. The *Athlete's* establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or Negligence*, was not significant in relationship to the anti-doping rule violation.

3. Issue to be decided

3.1 There is only one issue to be decided in this proceeding, namely, the length of suspension or ineligibility for Respondent's refusal to be tested at the Arizona Cup.

4. The Evidentiary Hearing

4.1 The Respondent testified on his own behalf and was represented by Michael S. Straubel, Valparaiso University, Sports Law Clinic. He was ably assisted by third year law students, Allen Blakeney and Tony Calandro. The Respondent presented the testimony of Rita Hainline, the Respondent's mother, Lloyd Brown, an archery coach, and Mark Kelegian, an attorney and archer. On rebuttal he also presented the testimony of Joe McGlynn, USOC athlete council representative for USA Archery.

4.2 The Claimant, USADA, was represented by Travis T. Tygart, General Counsel. Witnesses for USADA were Sherri Rhodes, former Olympic Team Coach;

¹ The Comment to 10.5.2 explains that "Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases."

Jeannie Rollo, Lead Doping Control Officer for USADA; Tom Parrish, High Performance Director for USA Archery; Tom Green, USA Archery Official; and Kate Mittelstadt, Director of Doping Control, USADA.

4.3 The hearing was governed by the Commercial Rules of the AAA, as amended and modified by the AAA Supplementary Procedures, referred to in the USADA Protocol as Annex E. Because of scheduling problems Respondent waived the requirement of Supplementary Rule R-24 that the hearing be held within three months of the date of appointment of the arbitrators and agreed that the hearing be held in San Diego on November 20, 2005.

4.4 The parties filed pre-hearing briefs and numerous exhibits, all of which were deemed admitted in evidence in accordance with the Panel's procedural orders. The parties made opening statements and closing arguments, and the record was closed on November 28, 2005. All witnesses were sworn in at the hearing.

5. Legal Analysis and Reasoning

5.1 The Respondent testified and contends that his test refusal was based on lack of significant fault and "exceptional circumstances" within the meaning of the WADA Code. (See USADA Protocol, Annex A, and WADA Code, 10.5.2 and Comment thereto). "Exceptional circumstances" are recited only in the "Comment" and not in the body of the WADA Code or USADA Protocol, but are included, for instance, in the Canadian Anti-Doping Program ("CADP").

5.2 Respondent propounds essentially three arguments to support "exceptional circumstances" or lack of significant fault or negligence: that he relied on misinformation from responsible officials, that the maximum two-year

ineligibility period is disproportionate to his offense and sanctions imposed in other cases, and that he should not be penalized for relying on such misinformation.

5.3 Based on the testimony received at the evidentiary hearing, the Panel concludes that the material information on which the Respondent claimed to rely was firmly denied by the witnesses to whom such information was attributed and could, therefore, not be characterized as misinformation. Moreover, his reliance was unjustified, and the cases cited to support exceptional circumstances were inapposite.

5.4 Respondent in essence claimed to have justified his Test Refusal on information by several persons that both a Test Refusal and a positive result (which he conceded would have occurred had he provided a test sample) would have incurred a one-year ineligibility period. Accordingly, he reasoned, for his own good and to preserve the good name of USA Archery, he would refuse the test.

5.5 Respondent, who had been tested in 1995 following a U.S. Olympic Festival Team Competition, testified that he was surprised to hear over the public address system in the middle of the Arizona Cup competition that there would be drug testing, that he sought out Sherri Rhodes, a former Olympic Team Coach, for advice knowing that he would test positive, and that she assured him that he would not be tested since he was not part of the registered testing pool. He proceeded to participate in the competition and was awarded third place, whereupon he was informed that USADA had selected him for a drug test. Sherri Rhodes, called to testify by USADA, vigorously denied that she advised

Respondent that he would not be tested. To the contrary, she said USADA often is on site for testing at some tournaments and practice sessions, and its presence is never publicly announced beforehand.

5.6 Respondent testified he questioned Jeannie Rollo, the lead Doping Control Officer for USADA assigned to him for testing, who said that while she was unsure of the sanction for a test refusal, an athlete in another sport received a one-year penalty for a positive test result. Ms. Rollo testified that she was unaware of the length of sanction for a test refusal or that it was an issue for Respondent. Had she known it was an issue for Respondent or been requested by him to do so, she said she would certainly have called USADA for an answer.

5.7 Respondent claims he then sought out Tom Green, National Team manager, USA Archery, and Tom Parrish, High performance Director for the National Archery Association (both of whom testified for USADA), and that they both concluded, and advised Respondent, that both a refusal to test or a positive test result would carry a one-year suspension. Both officials denied reciting a one-year suspension; to the contrary, they said suspension for a refusal to test was likely to be two years, although they were not completely sure.

5.8 Mark Kelegian, a fellow competitor of Respondent and an attorney, while testifying that he was unfamiliar with WADA or testing procedures, said Respondent called him and said Messrs. Green and Parrish told him that a one-year suspension would be the sanction for a test refusal or a positive test result.

On that basis, Mr. Kelegian said he agreed with Respondent's decision to refuse the test.²

5.9 Besides Sherri Rhodes, Jeannie Rollo, Tom Parrish, and Tom Green, USADA called Kate Mittelstadt, Director of Doping Control, USADA. She testified to the effect that, had she been asked, she would not have given an answer on the length of suspension for a test refusal because it depends on a myriad of circumstances and could not be answered in a vacuum given the number of variables.

5.10 Respondent has failed to establish that the two-year ineligibility period for his refusal to test should be reduced by reason of "truly" exceptional circumstances (mandated by WADA Code Article 10.5.2) rather than those that exist in the vast majority of cases.³ Respondent's test refusal constitutes a presumptive WADA Code violation requiring that Respondent, in order to overcome the presumption, demonstrate by a preponderance of the evidence truly exceptional or compelling circumstances justifying less than the maximum two-year sanction. To do so he invokes information he alleges that he received from the lead Doping Control officer and archery officials, all of whom vigorously and credibly denied providing such information. Moreover, an athlete's duty of care to be informed of the rules and not rely on information or advice of third parties has been

² It was the Panel's understanding that Respondent called Mr. Kelegian out of friendship rather than for his professional legal advice.

³ See Comment to WADA Code Article 10.5.2 and Hipperdinger v. ATP Tour (CAS 2004/A/690).

enunciated in several CAS cases⁴ and most notably in the recent Zardo case involving a refusal to test.⁵

- 5.11 Respondent cites certain pre-WADA cases involving non-harmonized rules and sanctions for the proposition that the ineligibility period should be reduced under a proportionality principle since he had no intention to cheat.

The fact is that he intentionally refused to be tested. All the cases cited to support his “proportionality” argument in seeking a reduced sanction involved circumstances surrounding positive test results. There is no evidence to corroborate Respondent’s own testimony as to what substance(s) he would have tested positive for had he submitted to testing. By contrast, Claimant has cited thirteen USADA refusal to test cases from 2001 to 2005 in which a two-year sanction was imposed and a 2001 case in which a four-year suspension was given.

- 5.12 Respondent’s argument that he had no intention to cheat, and thus there was no showing of significant fault or negligence thereby allowing him a sanction reduction under WADA Article 10.5, is misplaced. Only had he not intentionally refused testing would he be in a position to argue exceptional circumstances or no significant fault. He chose to refuse testing, and we cannot find exceptional circumstances based on a putative, unproven test result.

⁴ See e.g. Fazekas v. IOC (CAS/A/714) § 64 and Hipperdinger, *supra* n.2.

⁵ CCES v. Zardo, No. SDRCC DT-05-20023.

6. Decision and Award

The Panel decides as follows:

- 6.1 A doping violation occurred on the part of the Respondent.
- 6.2 The minimum suspension for a first offender of two (2) years, to take place effective from April 16, 2005, is imposed on the Respondent pursuant to WADA Code Article 10.2.
- 6.3 The Respondent will receive credit for the provisional suspension that he began serving on April 27, 2005.
- 6.4 The Respondent had already been disqualified from the Arizona Cup and had forfeited any and all competitive results received subsequent to the Arizona Cup.
- 6.5 During the same two-year period of ineligibility, the Respondent shall not have access to the training facilities of the USOC Training Centers or other programs and activities of the USOC, including grants, awards or employment.
- 6.6 The administrative fees and expenses of the American Arbitration Association totaling \$750.00 shall be borne entirely by the United States Olympic Committee and the compensation and expenses of the arbitrators totaling \$18,196.92 shall be borne by United States Olympic Committee.
- 6.7 The parties shall bear their own costs and attorneys' fees.
- 6.8 This Decision and Award is in full settlement of all claims submitted to this arbitration.

Signed this 7th day of December, 2005.

Walter G. Gans

Walter G. Gans, Esq. (Chair)

Patrice M. Brunet, Esq.

Carolyn B. Witherspoon

Carolyn B. Witherspoon, Esq.

**AMERICAN ARBITRATION ASSOCIATION
Arbitration Tribunal**

In the Matter of the Arbitration between:

Re: 30 190 00789 05
United States Anti-Doping Agency, Claimant
and
Mark Hainline, Respondent

DISPOSITION FOR APPLICATION OF MODIFICATION OF AWARD

WE, THE UNDERSIGNED ARBITRATORS, having been designated by the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, and having previously rendered an Award dated December 7, 2005, and Claimant having filed an uncontested application for Modification of the Award dated December 9, 2005, do hereby, DECIDE, as follows:

The following correction.

Section 6.2 is hereby modified to read as follows: Section 6.2 The minimum suspension for a first offender of two (2) years, to take place effective from December 7, 2005, the date of this Award and decision of the Arbitrators, is imposed on the Respondent pursuant to WADA Code Article 10.2.

In all other respects the Award dated December 7, 2005, is reaffirmed and remains in full force and effect.

Walter G. Gans, Chairman

DATE: _____

Patrice M. Brunet, Esq.

DATE: _____

Carolyn B. Witherspoon, Esq.

DATE: _____

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