Court of Arbitration for Sport

TAS 2011/A/2493 Antidoping Switzerland v/

arbitration award

handed down by the

COURT OF ARBITRATION FOR SPORT

in session in the following composition:

Sole arbitrator: Mr. André **Gossin,** lawyer, Moutier, Switzerland

in the arbitral appeal proceedings

between

Antidoping Suisse, Berne, Switzerland

- appellant -

and

**** Clarens, Switzerland

represented by **** Cheytres, Switzerland

- respondent -

I. THE PARTIES

1. Antidoping Suisse (hereinafter referred to as the appellant) is a foundation under Swiss law, which is one of the bodies for the prevention of doping, according to the Statute relating to doping 2009 of the Swiss Olympic Association (hereinafter referred to as the Statute).

2. ***** (hereinafter referred to as the respondent), born on 21 July 1995, is a boxer of Swiss nationality, also living in Switzerland, practising boxing as a member of the Noble art Boxing Club Montreux – Vevey Riviera, in the junior category – 75 kg.

II. SUMMARY OF THE FACTS

3. Following the final of the Swiss boxing championships which took place on 6 March 2011 in Blonay, **** who competed in the junior category, - 75 kg, was the subject of a doping test, after victory in the final.

4. Urine sample (A-3602095) was analysed by the Swiss Doping Analysis Laboratory , whose final report on 24 March 2011 (RII-01025) revealed the presence of Nikethamide, as well as one of its metabolites (N-Ethylnicotinamide).

5. According to the statement of 6 April 2011 by his parents, the respondent authorised Jean-Jacques **** to represent them and to deal with this case before the courts for the prevention of doping. He did not request a 2nd analysis from sample "B" and did not dispute the result of the analysis.

6. The case was referred to the Disciplinary Chamber for doping cases of Swiss Olympic (hereinafter referred to as the Disciplinary Chamber) and held a hearing on Wednesday 8 June 2011, during which both **** and Jean-Jacques **** and the appellant were heard.

7. **** declared he had explained to the doctor responsible for the official weigh-in on the day of the competition that he did not feel very well and that he was a little tired, having had to expend additional physical efforts in order to lose weight. On the morning of Sunday 6 March 2011, he had also explained to his trainer, Jean-Jacques ****, that he did not feel very well, the latter informing him to take dextrose[1] which he then offered to the former. He had been extremely shocked to hear the positive result of the anti-doping test.

8. For his part, Jean-Jacques ****, the trainer of ****, acknowledged having handed **** a Gly-Coramin tablet, explaining to him that it was dextrose. However, he had had previously found out from a doctor friend about the possible effects of this medication, to which the doctor had replied that there was "no doping risk".

[1] Translator's note: alternative translation grape sugar

9. Furthermore, he stated that if someone should be punished it was himself and not the accused sports professional who he described as an exemplary sportsperson, who did not cheat, showing a lot of respect for his sport and his adversaries in competition. He produced an unsigned report, drawn up by a pharmacy student, explaining in essence that nikethamide had a life span of 30 minutes, so that it was a molecule with a short active lifetime, but for which the elimination by urine is, on the contrary, longer lasting. According to this student, the pharmacological effect of Gly-Coramin, four hours after its ingestion is, non-existent.

10. The representative of Antidoping Suisse notably requested a 3 month ban, subject to deduction of the provisional suspension period, stating that the goal of the banned product had been to improve the state of health of the boxer, who, for his part, had no other intention than to take dextrose. Antidoping Suisse had also requested the removal of the title of Swiss Champion and the pronouncement of a fine of CHF 100.00.

11. In a decision of 8 June 2011, the Disciplinary Chamber, having heard both **** and Jean-Jacques ****, established that **** had not breached the anti-doping rules and had decided against handing down a punishment in the form of a ban or a fine against him, while withdrawing the title of Swiss Boxing Champion junior category, - 75 kg, and also the medal and any other prize obtained by **** on 6 March 2011 in Blonay.

12. In essence, if the Disciplinary Chamber had accepted the presence of nikethamide and one of its metabolites in the urine sample of ****, which objectively constitutes a breach of the anti-doping provisions, according to article 2.1 of the Statute, on the other hand, it considered that **** had not committed any fault or any negligence by swallowing a Gly-Coramin tablet, with his trainer, Jean-Jacques ****, having indicated that it was dextrose. Supported by these considerations, the Disciplinary Chamber decided against handing down a punishment in the form of a ban or fine pursuant to article 10.2 of the Statute. On the other hand, pursuant to article 10.1 of the Statute, it withdrew the title of Swiss Champion obtained by **** as well as the medal or any other prize.

13. Antidoping Suisse appealed against this decision on 1 July 2011, submitting that the decision of the Disciplinary Chamber be annuled, that **** be punished with at most a 3 month ban, but at the least by a reprimand, and that the title of Swiss boxing champion and the associated prizes are withdrawn from him. It requests that the costs of analysis are paid by ****, and also the cost of proceedings before the Disciplinary Chamber and the TAS, while ordering the respondent to pay to Antidoping Suisse an indemnity of CHF 400.00.

III. PRIMARY ARGUMENTS PUT FORTH BY THE APPELLANT

14. Antidoping Suisse alleges, in essence, that annulment of the punishment, pursuant to article 10.5 of the Statute, is ruled out in the case of ****, specifying that according to the final provisions of the Statute, the comments appearing in appendix 2 of this Statute forms and integral part thereof and is used for interpretation thereof.

15. However, with reference to the commentary of article 10.5.1, the example given allowing the annulment of a punishment would be a solid example of unforeseeable sabotage by a competitor, whereas, on the contrary, a trainer administering a banned substance, without the sportsperson being informed thereof, according to the commentary of the Statute would specifically be a case which does not allow the annulment of any punishment, a persistent fault.

16. Consequently, the appellant submits that absence of fault and negligence cannot be evoked, in the absence of actual exceptional circumstances. Furthermore, with regard to the young age of the sportsperson, the appellant admits that it may be taken into account as grounds for a reduction in punishment, in the sense of article 10.4 of the Statute.

17. The appellant considers that the fault of **** may be considered to be insubstantial, given that he believed he was taking dextrose and in light of the trust he placed in his trainer, Jean-Jacques ****. Furthermore, the appellant recalls that the concealed nikethamide is one of the substances specified in the sense of art. 4.2.2 of the Statute, to which art. 10.4 of this Statute is applicable.

18. Consequently, the appellant claims a reduced ban of 3 months, or even a reprimand.

19. Furthermore, it finds that the result must be annulled automatically, in the sense of article 9 of the Statute, and that the Disciplinary Chamber may not exempt **** from any costs associated with these proceedings. Furthermore, it highlights that article 17 of the Rules of Procedure before the Disciplinary Chamber (hereinafter referred to as the Rules of Procedure) do not provide for Antidoping Suisse being made responsible for the payment procedural fees. Only Swiss Olympic and not Antidoping Suisse may, where applicable, have to pay legal costs, as the appellant specifies that, in this case, the costs of analysis, amounting to CHF 320.00, must be paid by **** who must be found guilty of breach of the anti-doping rules, in the sense of articles 2.1 and 10.4 of the Statute.

IV. PRIMARY ARGUMENTS PUT FORTH BY THE RESPONDENT

20. In its pleadings in response, the respondent, through the intermediary of his trainer Jean-Jacques ****, submits in substance that the appeal lodged by Antidoping Suisse be dismissed, while requesting that the costs of the proceedings before the Disciplinary Chamber and before the TAS be payable by Antidoping Suisse.

21. He alleges that the young boxer ****, in fact, suffered a ban of more than 6 months, while specifying that the medal won was returned to "Swiss Boxing", as well as his boxer's licence. He mainly refers to the judgement pronounced by the Disciplinary Chamber and claims that the effects of the Gly-Coramin tablet taken by **** only lasted for half an hour, whereas three hours after it had been swallowed, it no longer had any doping effect or would be likely to lead to any improved sporting performance. He alleges that the use of Gly-Coramin is authorised for training, but not in competition and that more than 5 hours passed between taking the medicine and the beginning of the boxing match in question. He produces an unsigned report by a person called Justine Erard, reporting on the pharmacokinetics of Gly-Coramin of which the active ingredients, which is nikethamide, no longer has pharmacological effects 4 hours after its arrival in the blood. On the other hand, its elimination by urine persists after 24 hours, without nikethamide still having clinical effect.

22. In a letter of 21 September 2011, the TAS requested the publishing of the Disciplinary Chamber file, and the parties had been invited to make up their minds one last time, after being able to read the documents appearing in the file in question.

23. In a letter of 6 October 2011Antidoping Suisse confirmed its conclusions, arguing in essence that the challenged decision corresponded to a full acquittal, contrary to the Statute.

24. The respondent, as far as he is concerned, also maintained its position by letter of 7 October 2011, recalling in particular that the medicine had not in any way improved or changed the performance of ****.

V. JURISDICTION OF THE TAS

25. The jurisdiction of the TAS results both from article R. 47 of the arbitration code in sporting matters (hereinafter referred to as the Code) and also art. 16 of the Rules of Procedure and of art. 13.2 of the Statute, and also the statement of submission of **** signed on 9 September 2010, to the anti-doping standards of Swiss Olympic in particular, which meets the formal conditions of article 358 of the Code of Civil Procedure (hereinafter referred to as "CPC".)

26. As all the parties respectively have their registered office and residence in Switzerland, this is an internal arbitration, in the sense of art. 353 para. 1 CPC.

27. Furthermore, the jurisdiction of the TAS is not disputed by any of the parties, so that there are no grounds for examining this matter in further depth, taking into consideration article 359 CPC.

28. As the appeal was lodged within a period of 21 days from notification of the decision by the Disciplinary Chamber, which occurred on 24 June 2011, which is not disputed by the respondent, it must be established that the appeal was consequently filed in due course, so that it is admissible in form. Furthermore, the appellant has only filed one document within the given time limit, his appeal declaration being equivalent to a statement of appeal.

VI. APPLICABLE LAW

29. Article R58 of the Code sets out, in essence, that the bench gives a ruling in accordance with the applicable rules and according to the legal norms chosen by the parties or, if there is no choice, according to the law of the country in which the association or sporting body which delivered the challenged decision has its place of residence.

30. As all parties respectively have their office and the residence in Switzerland, there is no doubt that only Swiss law is applicable, this being for that matter an internal arbitration, the parties not having expressly chosen to submit this dispute to a specific law other than Swiss law.

VII. POINTS OF LAW

31. In its decision of 8 June 2011, the Disciplinary Chamber accepted that ****, born on 21 July 1995, had been practising boxing since the age of 11 in the junior category – 75 kg. On 6 March 2011 in Blonay, **** won the final of the Swiss boxing championship for his category, after which an anti-doping test had been conducted.

32. The urine sample (A-3602095) taken after the competition was analysed by the Swiss doping analysis laboratory, which detected the presence of nikethamide and one of its metabolites N-Ethylnicotinamide, a specified stimulant forming part of the 2011 List of banned substances and methods in competition.

33. The result of the analyses is accepted by both parties.

34. It should be noted that, in accordance with article 2 of the Statute, the presence of nikethamide and one of its metabolites N-Ethylnicotinamide in the body of **** constitutes a breach of the anti-doping rules, according to article 2.1 of the Statute.

35. Pursuant to article 8 of the Statute, the consequences of a breach of the anti-doping rules are those set forth under articles9 through 11 of the present Statute.

36. The first of the consequences of a breach of the anti-doping rules is the one set out in art. 9 of the Statute which sets out that in individual sports, a breach of the anti-doping rules automatically leads to the annulment of the results obtained during the competition affected by the anti-doping test, with all the associated consequences, in particular the withdrawal of the medals and prizes.

37. According to the comments interpreting the Statute appearing in its appendix 2, when a sportsman obtains a medal, if a banned substance has been found in his or her body, it is an unfair situation for the other "clean" sportsperson, so that the withdrawal of medals must occur irrespective of the fault of the tested sportsperson. Art. 10.1, contrary to what its wording may lead one to understand, does not relate to the specific competition at which the test occurred, but the whole event, so that the discretionary standard may not related to ****, since a single competition took place on 6 March 2011, i.e. specifically the one for which the test was carried out, which leads to the obligation of withdrawing his medal, annulling his result and withdrawing any prizes won.

38. In this respect, it must be noted that the Disciplinary Chamber, in its decision of 8 June 2011, on one hand, had established that **** had not breached the anti-doping rules, whereas, on the other hand, it had decided on the withdrawal of the title of Swiss boxing champion obtained on 6 March 2011, as well as the withdrawal of the medal and any prizes won at that time by ****. However, according to article 9 of the Statute, the condition set for such medal withdrawal is specifically a breach of the anti-doping rules. Consequently, and as highlighted by the appellant, the optional annulment of results in the sense of article 10.1 of the Statute does not relate to the penalisation of the result obtained during the competition in which a breach of the anti-doping rules has been established, but actually the invalidation of other results obtained at the same time during an event, a hypothesis not fulfilled in this case.

39. Consequently, the title of Swiss boxing champion, junior category – 75 kg, obtained on 6 March 2011 by **** must be withdrawn, as well as all the prizes associated therewith, pursuant to art. 9 of the Statute.

40. The Disciplinary Chamber considered that according to article 10.5.1 of the Statute, **** had not committed any fault or negligence in relation to the presence of nikethamide and one of its metabolites in his urine, so that, consequently, it arrived at the conclusion that the sportsperson had not breached the anti-doping rules, consequently, deciding against pronouncing a punishment in the form of a suspension or fine.

41. Pursuant to art. 10.5.1 and 10.5.2 of the Statute, the commentary in appendix 2 clearly stipulates, by way of an example, that the total annulment of the punishment in the absence of fault may correspond to the sportsperson who, despite all the precautions taken, was the victim of an act of sabotage by a competitor. This same commentary specifies that on the contrary, a banned substance administered by the trainer or the doctor, without the sportsperson having been informed, cannot lead to the annulment of any punishment, as a result of the liability incumbent on sportspersons regarding the choice of their entourage.

42. In this case, it emerges from the file that the trainer is a friend of the family, so that it could be expected even more so that he would protect the sportsperson from any ingestion of banned substances. In any event, it clearly emerges from the comments of the Statute that exoneration from any fault or negligence may not result from the fact that the banned substance is found in the body of the athlete by the acts of his trainer alone or his doctor, given the responsibility of the sportsperson, and respectively of his parents, with regard to minors, in the choice of their sporting and medical entourage.

43. Consequently, articles 10.5.1 and 10.5.2 of the Statute, applicable only in the event of the absence of fault or negligence, respectively in the absence of significant fault or negligence, is not applicable here.

44. Under the terms of article 10.2 of the Statute, in the event of the presence in a body of a banned substance, the period of suspension imposed is 2 years, in the case of a first offence. However, pursuant to article 10.4 of the Statute, the suspension period may be annulled or reduced, if a sportsperson or another person can establish the facts underlining how the substance came to be found in his body and that it was not intended to improve the performance of the sportsperson, nor mask the use of a substance aiming to improve performance. In this case and in the event of a first offence, the punishment must correspond at least to a reprimand and at the most to a suspension of 2 years.

45. According to the commentary of appendix 2 of the Statute, art. 10.5.1 and 10.5.2 are only applicable in the event that the circumstances are really exceptional, specifying that article 10.5.2 should not apply in the event that article 10.4 is applicable, because this latter provision already takes into consideration the seriousness of the fault of the sportsperson.

46. Furthermore, and still according to this commentary of appendix 2, youth and lack of experience of the athlete form part of the relevant factors to be taken into consideration in order to establish fault, within the context in particular of articles 10.4 and 10.5.1 of the Statute.

47. As accepted also by the appellant, **** did not know what was handed to him, when he received what he thought was dextrose, trusting his trainer even more so as he was still of school-going age, a reason why the fault of **** can be considered to be very insubstantial.

48. As the manner in which the banned substance was found in the body of **** has been sufficiently documented, and also the absence in the improvement in the performance of the sportsperson, and respectively the fact that the specific substance found did not serve to conceal the use of a performance enhancing substance, article 10.4 of the Statute is clearly applicable.

49. As the athlete was still of compulsory school age at the time of the anti-doping test, he was not only a minor, but still sufficiently young to have a submissive relationship with the adult, in this case with his trainer, in whom his own parents had all confidence (which they confirmed by their statement of power of representation which they still granted him on 6 April 2011). Given also that he was not yet old enough to commence professional training with all that this entails in an apprenticeship in the adult world, there are grounds for taking this circumstance into consideration, in this case, in order to reduce the punishment, in the sense of article 10.4 of the Statute.

50. Therefore, given the very insubstantial fault there are grounds for keeping to the minimum set out by the Statute in order to fix the applicable punishment. Consequently, instead of a suspension, there are grounds for imposing a reprimand on ****.

VIII. COSTS AND EXPENSES

51. Establishing that a breach of the anti-doping rules has occurred, according to article 17 of the Rules of Procedure, in the event of sentencing, the costs are in principle made payable by the person charged. However, the Disciplinary Chamber may also, if the circumstances justify it, carry out a proportional distribution of the costs.

52. Pursuant to article 20 of the Statute, Antidoping Suisse bears the costs of all analyses, and also the costs of organising and carrying out tests, except in the case of positive results, under which circumstance these costs must be attributable to the sportsperson at fault.

53. In this case, the costs in question, which amount to CHF 320.00 must actually be payable by ****, pursuant to article 20.2 of the Statute.

54. With regard to the cost of proceedings before the Disciplinary Chamber, they must be the responsibility of Antidoping Suisse, which the latter disputes, arguing that pursuant to article 10.7 of the Rules of Procedure, only Swiss Olympic or the sporting federation in question, in addition to the person charged, may be ordered to pay the costs.

55. The appellant, therefore, concludes that the costs of proceedings before the Disciplinary Chamber and before the TAS are payable by ****.

56. In this specific case, the costs of the proceedings before the Disciplinary Chamber amount to CHF 1,000.00 and were payable by Antidoping Suisse, which actually appears to be contrary to article 17 of the Rules of Procedure which entered into force on 1 November 2010, i.e. at a time when Antidoping Suisse already existed, which is proved by reference to it as part of article 2 of the Rules of Procedure. Consequently, it must be accepted that Antidoping Suisse cannot be ordered to pay costs before the Disciplinary Chamber, since only Swiss Olympic (although it was not considered to be party to the proceedings, according to art. 1 of the Rules of Procedure), the sporting federation in question or the person charged may be allocated the costs, according to the rules of Swiss Olympic.

57. For his part, **** submitted that all the costs should be payable by Antidoping Suisse.

58. In this case, there are grounds for establishing that the fault of **** is extremely insubstantial, whereas he is not only a minor, but also, at the time of the testing, in a period of compulsory schooling. Furthermore, his parents have modest incomes, according to what Jean-Jacques **** stated and not called into question by the appellant. It should be noted that they did not call on a lawyer to defend their interests, as stated by Jean-Jacques **** in his statement of opinion on 7 August 2011, this was also for financial reasons.

59. There are grounds for taking into account the fact that **** must bear the costs of the testing and analysis amounting to CHF 320.00. On the contrary, if, on principle, the costs of the proceedings before the Disciplinary Chamber must be payable by the person charged, it must be accepted that the Rules of Procedure set out that if circumstances justify it, a proportional distribution of the costs may be carried out.

60. Consequently, in this case, given the lack of financial resources of ****, a school boy at the time of the acts and the modest situation of his parents, there are grounds for only making him payable for the amount of CHF 100.00 for the costs of the proceedings before the Disciplinary Chamber, the balance of CHF 900.00 being made payable not by Antidoping Suisse, since the Rules of Procedure doe not provide for this, but by Swiss Olympic, pursuant to article 17 of this Rule of Procedure.

61. With regard to the costs before the TAS, in accordance with article R. 64.1 of the Code, the registry fee of the TAS remains its responsibility, but it is taken into account in the final account.

62. Pursuant to article R. 65.4 of the Code, the registry of the TAS shall decide on the final amount of the arbitration costs in their final account which shall be communicated separately to the parties.

63. Pursuant to article 64.5 of the Code, the bench shall determine which party shall bear the costs of the arbitration or in what proportion the parties shall share the cost. Furthermore, the bench may freely order the losing party to pay a contribution to the legal fees of the other party, as ordering to pay arbitration costs and legal fees must take account of the result of the proceedings, as well as the behaviour and the resources of the parties.

64. In this particular case, it must be established that Antidoping Suisse intervened itself, without the representation of a lawyer, through the intermediary of its own bodies. Consequently, there are no grounds for granting indemnity for the legal fees to Antidoping Suisse, whether before the Disciplinary Chamber or before the TAS.

65. With regard to the costs of the proceedings before the TAS, it must be established that the appellant mainly won the case, while emphasising that figure 4 of its conclusions had already been accepted in the first instance. Furthermore, it had already borne the registry fee of CHF 1,000.00.

66. However, we are in the presence of two parties with incomparable financial resources, so that there are grounds, given the fact that we are faced with a minor sportsperson (still at compulsory school at the time of the acts) and must without significant income, make the costs of the proceedings at the rate of 10% payable by ***** and the balance payable by Antidoping Suisse, the only party to the proceedings, article 17 of the Rules of Procedure consequently not being applicable before the TAS.

ON THESE GROUNDS

The sole Arbitrator taking a decision in private:

1. Declares the appeal admissible brought by Antidoping Suisse against the decision of 8 June 2011 of the Disciplinary Chamber of Swiss Olympic in the **** case.

2. Partially accepts the appeal, in the sense that figures I, II, IV and VII of the decision of 8 June 2011 of the Disciplinary Chamber of Swiss Olympic must be annuled;

3. Establishes the breach of the anti-doping rules, in the sense of art. 2.1 of the Statute relating to 2009 doping of Swiss Olympic, committed by **** on 6 March 2011, by the presence in his body of a banned substance;

4. Pronounces a reprimand against ****.

5. Confirms the withdrawal of the title of Swiss boxing champion, junior category – 75 kg, obtained by **** on 6 March 2011 in Blonay;

6. Confirms the withdrawal of the medal and also any other prize won by **** at the Swiss boxing championships on 6 March 2011 in Blonay;

7. Orders **** to pay the analysis costs for the anti-doping test up to a limit of CHF 320.00;

8. Makes the costs for proceedings before the Disciplinary Chamber of Swiss Olympic payable by **** up to a limit of CHF 100.00 and the balance of the costs of the proceedings before the Disciplinary Chamber of Swiss Olympic by CHF 900.00 payable by Swiss Olympic;

9. Makes the cots of proceedings before the TAS, according to a separate final account which must be communicated subsequently by the registry of the TAS to the parties, at the rate of 10% payable by ****, the balance remaining payable by Antidoping Suisse;

10. Dismisses all other or fuller submissions of the parties.

Lausanne, 29 November 2011

COURT OF ARBITRATION FOR SPORT

André COSSIN

Arbitrator