

Decision

by

the FIBA Disciplinary Panel established in accordance with
Article 8.1 of the
FIBA Internal Regulations governing Anti-Doping
in the matter

Luis Alejandro Julio Torres
(born 6 December 1980)

hereafter:
(**“the Player”**)

(Nationality: Venezuelan)

Whereas, the Player underwent in-competition doping tests in Cali, Colombia on 5 November 2011 and in Bucaramanga, Colombia on 26 November 2011;

Whereas, the analysis of the Player's samples (Nos: 2639130 and 2639045) was conducted at the WADA-accredited Laboratory in Bogota, Colombia (“Laboratory”). On 25 November 2011 and on 20 December 2011 the Laboratory entered into the Anti-Doping Administration and Management System (“ADAMS”) the respective analysis result records, according to which the analysis of the Player's A samples showed the presence of the prohibited substance methylhexaneamine (dimethylpentylamine), which is included in the 2011 WADA Prohibited List;

Whereas, some time in early December 2011 the Player travelled to Bogota together with Mr. Carlos Parra, President of the club Bucaros de Bucaramanga, and attended the opening of the B sample from the test conducted on 5 November 2011. At the moment of opening the sample the bottle broke and it was not possible to perform the analysis. The analysis of the B sample was eventually abandoned;

Whereas, the Player's contract with the club Bucaros de Bucaramanga ended in December 2011 and he returned to Venezuela for the Christmas holidays. He started playing in Venezuela in February 2012 and he continued competing in the league of his federation of origin until July 2012;

Whereas, notifications to the Player regarding the adverse analytical finding (including a notification of 17 January 2012) arising from the test conducted on 26 November 2011 were sent to a wrong address by the Colombian authorities and the Player did not receive them;

Whereas, on 11 April 2012 the Disciplinary Committee of the Colombian Basketball Federation ("CBF") decided "*in accordance with the request of the National Anti-Doping Group*" ("de acuerdo con la solicitud del Grupo Nacional Antidopaje") to archive the case without imposing any disciplinary sanction on the Player ("the CBF Decision"). The CBF Decision referred to the accident during the B sample analysis of the sample collected on 5 November 2011 (No. 2639130), but does not contain any mention of the adverse analytical finding resulting from the analysis of the sample collected on 26 November 2011 (No. 2639045);

Whereas, upon FIBA's requests in May and June 2012, the CBF produced a copy of the case file. After review of the documentation, on 11 July 2012 FIBA wrote to the Player as follows:

"Dear Mr Torres,

FIBA has been informed that you underwent a doping test on 26.11.2011 in Bucaramanga, Colombia. The report issued by the laboratory revealed the presence of methylhexaneamine which pertains to the WADA prohibited list.

We invite you to submit, at your earliest convenience, your position in writing regarding this positive result. [...]"

Whereas, on 19 July 2012 the Player submitted to FIBA a letter dated 17 July 2012 explaining his position;

Whereas, in August 2012, while the Player and his agent initiated contacts with Colombian clubs in order to ensure a new contract for the 2012/13 season, they were informed by various club representatives that the Player was sanctioned in Colombia and could not participate in competitions there. As a result, the Player started playing again in the Venezuelan league during the 2012/13 season, where he competes until today;

Whereas, by letter dated 12 October 2012, FIBA informed the Player that, in relation to his positive doping control on 26 November 2011, the FIBA Disciplinary Panel would decide whether and to what extent a sanction should be imposed upon him for the purposes of FIBA competitions. In the same letter, the Player was informed about his right to be heard either in person (for which a hearing in FIBA's headquarters in Geneva would have to be organised) or via telephone conference on 30 October 2012;

Whereas, by letter dated 23 October 2012, the Player referred to the contents of his letter dated 17 July 2012, submitted a copy of the CBF Decision and requested that FIBA follow such precedent and similarly decide to close the matter without sanctioning the Player;

Whereas, on 29 October 2012, the Player's agent confirmed that he would participate in the telephone conference and that the Player was unable to do so as he was residing far from Caracas, where international telephone calls were "not easy";

Whereas, on 30 October 2012, the Player – represented by his agent Mr. Daniel Maes (FIBA license No. 2010023459) – was heard via telephone conference by a FIBA Disciplinary Panel composed of Dr. Wolfgang Hilgert, member of FIBA’s Legal Commission and of Dr. Peter Harcourt, Chairman of FIBA's Medical Commission (“the Panel”). Ms. Virginie Alberto, FIBA Anti-Doping Officer as well as Mr. Andreas Zagklis, FIBA Legal Advisor, were also in attendance;

Whereas, at the hearing and in his written statement the Player submitted the following:

- he complained about the sample taking process, because his doctor was not present and also because the process was conducted in a “common bathroom” and not a proper doping control facility;
- he described the incident at the Laboratory, where the B sample from the test conducted on 5 November 2011 (according to the Player, the first test took place on the 23rd and not the 5th of November 2011) was broken and the analysis was abandoned;
- a CBF notification of 17 January 2012 never reached him because the city of his residence (Guarenas) was misspelled (Guareros). It should therefore be deemed invalid;
- he was informed about the contents of the Laboratory report only on 11 July 2012, through FIBA’s letter;
- his right for a proper defence had been violated, because he had never been given the chance to request the analysis of the B sample;
- he had been tested various times in the past, both in club competitions and while playing for the Venezuelan national team, and he had never tested positive before;
- the positive result in November 2011 cannot be explained since he played in Venezuela during 2012 “without incident”;
- he had never been sanctioned for any disciplinary infraction throughout his career;

Whereas, following the hearing, on 2 November 2012 the Panel wrote to the Player as follows:

"The FIBA Disciplinary Panel has considered your argument that you were not informed by the Colombian authorities regarding the adverse analytical finding and therefore you had not, until today, been given the right to request the analysis of the B bottle.

In view of the above and in accordance with Article 7.1.3 of the 2012 FIBA Internal Regulations governing Anti-Doping, you shall have the right to request in writing and within ten (10) days of the receipt of this communication the analysis of bottle B at your own cost.

This analysis shall be carried out at the same laboratory (in Bogota, Colombia) by different people from those who carried out the analysis of bottle A. The cost of this analysis will be 700 US dollars.

You have the right, as well as a representative of your team, to be present and witness the opening of bottle B and its identification.

In case you decide to make use of such right, the laboratory will perform the B sample analysis on 26 November 2012. After receipt of the result, the FIBA Disciplinary Panel will invite you to make further comments prior to issuing its decision on your case.

If you have not requested the analysis of the B bottle within the 10-day deadline mentioned above, you will be deemed to have waived your right in this respect. In such case, the FIBA Disciplinary Panel will proceed with issuing its decision on your case."

Whereas, on 9 November 2012, the Player requested that the B sample analysis be performed and informed FIBA that he was willing to cover the related costs;

Whereas, on 30 November 2012, the Scientific Director of the Laboratory Dr Gloria Gallo Isaza ("Dr Gallo") wrote to FIBA as follows:

"I would like to inform you that sample B was not opened in the established date because the athlete did not come to the lab. Yesterday, someone called us from Venezuela and told me that in these days they were going to request a

new date to open the sample. I am going to inform you when this occur.”

Whereas, on 5 December 2012, the Player’s agent informed FIBA that the Player had difficulties paying the laboratory costs due to currency restrictions in Venezuela which did not allow him access to US Dollars. The payment of USD 700 to the Laboratory was effected in early January 2013;

Whereas, on 24 January 2013, Dr Gallo wrote to FIBA as follows:

“I would like to inform you that the athlete just requested the sample B analysis (few days ago). The dates for the analysis are February 5 or 12, because before it is impossible for the lab.”

Whereas, on 6 February 2013, the Laboratory entered into ADAMS the analysis result record, according to which the analysis of the Player's B sample (No. 2639045) confirmed the presence of the prohibited substance methylhexaneamine (dimethylpentylamine);

Whereas, upon the Panel’s invitation, the Player – represented by Mr Maes – was heard again by telephone conference on 26 February 2013;

Whereas, at the second hearing the Player – through his agent – submitted the following:

- he was in a location 10 hours away from Caracas and could not join the telephone conference;
- he complained that it took more than one month to learn the result of the B sample analysis, but he nevertheless accepted the result;
- while playing in Colombia in the autumn of 2011, he went together with the rest of the teammates and the physiotherapist of the team to a well known supplement store named GNC where he bought the supplement "Hemorage";

- he bought the supplement because he was feeling strong pain at the lower back at that time and thought that he needed some help in order to cope with the training schedule;
- he did not think this was a prohibited substance because other teammates bought it also the same day from the same well-reputed store and the physiotherapist of the team did not advise him of any possible dangers. The team did not have a doctor following its activities on a daily basis;
- he used the supplement over a period of 1-2 weeks in November 2011, preparing a “milk-shake” in the morning of training days. He did not take it on game days because he did not like the taste and it was upsetting his stomach. He stopped using it after two weeks because he felt better during the training sessions already;
- at that time, FIBA’s circular regarding methylhexanamine had not been released yet and he had no idea about the various names of this prohibited substance. He realised this supplement was the source of the substance only after his agent received the FIBA circular in January 2012;
- he has suffered a big financial loss as a result of the positive results because clubs in Colombia, which can offer him a salary much higher than in Venezuela, believe he is sanctioned and refused to sign a contract with him;

Now, therefore, the Panel takes the following:

DECISION

A period of nine (9) months' ineligibility, i.e. from 5 April 2013 until 4 January 2014 is imposed on Mr. Luis Alejandro Julio Torres.

Reasons:

1. Article 2.1 of the FIBA Anti-Doping Regulations ("FIBA ADR") reads as follows:

“ARTICLE 2 ANTI-DOPING RULE VIOLATIONS

Players and other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.

The following constitute anti-doping rule violations:

2.1 The presence of a Prohibited Substance or its Metabolites or Markers in a Player’s Sample.

2.1.1 It is each Player’s personal duty to ensure that no Prohibited Substance enters his or her body. Players are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Player’s part be demonstrated in order to establish an anti-doping violation under Article 2.1. [...]”

2. The Player's complaint that he was never informed of his right to request the opening and analysis of the B sample was addressed during the proceedings before this Panel: after FIBA's communication with the Laboratory, the Player was given the opportunity to request such analysis and indeed the Laboratory performed it and confirmed the initial adverse analytical finding.
3. Further, despite the delay in such procedure – caused by the Player's leaving Colombia a few weeks after he was submitted to the doping control in question and by the inability of CBF to communicate with him – at no stage in these proceedings did the Player show that a departure from the International Standards for Laboratories and Testing respectively took place. In that relation the Panel refers to Articles 3.2.1 and 3.2.2 of the FIBA ADR which provide as follows:

“3.2.1 WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Player or other Person may rebut this

presumption by establishing that a departure from the International Standard occurred which could reasonably have caused the Adverse Analytical Finding. [...]

3.2.2 Departures from any other International Standard or other anti-doping rule or policy which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such results. If the Player or other Person establishes that a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused the Adverse Analytical Finding or other anti-doping rule violation occurred, then FIBA shall have the burden to establish that such a departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation.”

4. The Panel notes firstly that the Laboratory is WADA-accredited. Moreover, the above-mentioned Articles clearly provide that, even if the Player’s allegations regarding a faulty sample taking process were substantiated – *quod non* –, he would be required to prove that such procedural defects could reasonably have caused the adverse analytical finding. The Panel notes that no such allegation has been put forward by the Player in his letter of 17 July 2012 or in any other submission in these proceedings.
5. For the sake of completeness, the Panel underscores that the present proceedings before FIBA, as evidenced by the correspondence of the Secretary General and of this Panel addressed to the Player, were related to the sample taken on 26 November 2011 and not to the one taken on 5 November 2011, where the B sample was apparently broken.
6. It follows that the Player has committed an anti-doping-rule violation pursuant to Article 2.1 of the FIBA ADR since methylhexanamine (demethylpentylamine), a prohibited substance listed in WADA’s 2011 Prohibited List under letter S.6.b (Specified Stimulants) was found in his urine sample. This fact remained uncontested.
7. According to Article 10.2 of the FIBA ADR

“The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), [...] shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:

First violation: Two (2) years' Ineligibility.”

8. According to Article 10.4 of the FIBA ADR:

“Where a Player 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 Player’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, and at a maximum, two (2) years of Ineligibility.

To justify any elimination or reduction, the Player 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 Player’s or other Person’s degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.”

9. The Panel initially notes that the CBF Decision, issued in April 2012, contains no explanation why the Player’s case was closed in Colombia without the imposition of any sanction despite the second adverse analytical finding resulting from the doping control of 26 November 2011. Therefore, the CBF Decision can be of no assistance in these proceedings. In addition, the fact that the Player was not notified of the adverse analytical finding before FIBA’s letter in July 2012, i.e. 9 months after the positive finding, and that a B sample analysis procedure had to take place since CBF had not completed the management of the results, has caused significant delays in the process. This has had an impact on the evidence presented before this Panel.

10. The Panel has carefully examined the arguments presented by the Player's agent. The Panel notes that the Player had declared the use of the supplement Hemorage on the Doping Control Form, since he was using it to enhance his training schedule during the week before the game. In addition, publicly available sources confirm that, in 2011, Hemorage still contained DMAA¹, which is another name for the prohibited substance methylhexanamine. The Player also noted on the Doping Control Form that he was using "Mega Men Sport", which is a product sold in GNC Stores² also as a supplement that assists the daily training schedule but does not stimulate the performance in a game. This information, coupled with the fact that GNC indeed operates a store in Colombia³ leads the Panel to the conclusion that a) the source of the prohibited substance in his body was the supplement Hemorage, bought by the Player in a GNC store, b) he had no intention to enhance his performance.
11. The Panel now turns to the circumstances under which the Player decided to buy the supplement, *why* and for *how long* he used it, as presented by the agent.
12. According to Article 10.4 of the FIBA ADR, when determining the applicable sanction the Player's degree of fault "*shall be the criterion considered*". The Player bears the burden of proving the circumstances which justify "any elimination or reduction".

¹ See the official website of the company Nutrex which markets this product (http://underground.nutrex.com/products/hemo-rageUC.asp#prPaContainerhemo_rage_uc), where a post by a "Staff Expert" dated 31 January 2013 reads: "*The new formulation of HemoRage Ultra Concentrate which does not contain DMAA was released around 6 months ago.*"

² See <http://www.gnc.com/product/index.jsp?productId=4033435>.

³ See <http://www.gnc.com/storeLocatorIntl/index.jsp>.

13. The Panel is aware of the standing FIBA jurisprudence regarding the measurement of sanction for methylhexanamine cases resulting from supplement consumption under similar circumstances; the present composition of the FIBA Disciplinary Panel has also contributed to such jurisprudence.
14. In addition, there are objective elements here, such as the Player's declaration of the supplement Hemorage on the Doping Control Form, which is a clear indication of his state of mind: he was not aware that the supplement contained a prohibited substance.
15. However, the Panel finds that the case of the Player is not identical to the rest of the cases involving the same substance and shall be distinguished from them.
16. The Player was the first one who failed to make submissions personally (or to submit witness testimonies) regarding the circumstances of the anti-doping rule violation. Indeed, this is one of the few cases where a player was allowed two hearing sessions and, despite the high stakes for his career, decided not to show up in either. Communication from Venezuela may be complicated or expensive, but the Player could have travelled to Caracas and attended the hearing(s) from the office of his agent, who had no connection problems.
17. Hearings by telephone conference have been introduced by FIBA in order to facilitate the participation of players from around the world and reduce their costs. The Panel had unfortunately not been given the chance to listen to the Player's own testimony so as to form – to the extent possible – a more complete view of his behaviour in relation to the anti-doping rule violation. In addition, the documentation on record signed by or on behalf of the Player is focused on alleged procedural irregularities which, as mentioned above, cannot set aside the Laboratory results.

18. Such absence is of course not to be held against a player in all cases, since he has the right to be represented by counsel. In the present matter, though, the agent was not able to remember more than the information that the Player had shared with him at the time of the violation and was often pausing to “refer to his notes”. The information provided by the agent was in part corroborating the version of the facts as established above through a careful reading of the documents on file, and in part contradicting it: for example, it is not possible that the Player used the supplement for "one, maximum two weeks" (before or around 26 November 2011), given that he declared "Hemorage" also on the Doping Control Form of the test conducted three weeks earlier, on 5 November 2011. Also, there is no document on file proving the Player's injury, which allegedly led him to visit a supplement store and buy a product that would help him train. Similarly, there is no explanation in the way the Player vehemently insisted in rendering the Laboratory results invalid, when he had already admitted on the Doping Control Forms the use of a supplement which, as he later discovered, contained the prohibited substance. It is unfortunate that the only direct evidence received from the Player in this proceeding, even in written form, was related to the validity of the sample collection and analysis.

19. In a nutshell, the Panel finds that the Player, a 31-year old (at the time of the violation) professional who has played professional basketball for more than a decade, with international exposure also through the Venezuelan national team, was negligent in (a) purchasing, and (b) failing to research the ingredients of the supplement before using it. The contention that the Player received information by the physiotherapist of the team and erroneously trusted him in buying the supplement has not been proven. It has been proven, however, that the Player was playing abroad and selected an internationally well-known supplement store (from the GNC company), which should in principle provide some quality guarantees.

20. Lastly, the fact that the Player committed the violation at a time (late 2011) when public awareness regarding methylhexanamine and its various names was rather low – e.g. FIBA had not yet issued its circular, which helped the agent and the Player to find out the source of the prohibited substance – needs to be taken into account by the Panel; however, such argument is not capable of absolving the Player from any responsibility.
21. Therefore, in view of the particular circumstances of this case, the Panel finds that the Player's degree of negligence for the committed violation indeed deserves a reduction of the period of eligibility, but such reduction shall be lesser than that of players who tested positive for the same substance but were straightforward in their submissions to the Panel and fully substantiated the circumstances of the violation. As a result, and without intending to give any direction whatsoever for future cases, the Panel decides that it is appropriate to impose a sanction of nine (9) months on the Player.
22. With respect to the start date of the sanction, both publicly available records and the agent's testimony show that the Player still competes in Venezuela. The Player's contention that he was not allowed to play in Colombia is not documented (on the contrary, the CBF Decision was clear that no sanction were to be imposed on him) and in any event he was allowed to continue playing in Venezuela or another country abroad, since FIBA had not imposed a provisional suspension on him either. Therefore, pursuant to Article 10.9 of the FIBA ADR the period of ineligibility is to start on the date of this decision.
23. This decision is subject to an Appeal according to the FIBA Internal Regulations governing Appeals as per the attached "Notice about Appeals Procedure".

Mies, 5 April 2013

On behalf of the FIBA Disciplinary Panel

Dr. Wolfgang Hilgert
President of the Disciplinary Panel

