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## FINA Doping Panel 04/10

### FINA Doping Panel

comprised of

F.D. (Erik) van Heijningen	(NED)	Chairman
William Bock III	(USA)	Member
Farid Ben Belkacem	(ALG)	Member

In the proceedings against

the swimmer **Sergio Garcia Ortiz**  
affiliated to the Spanish Swimming Association

represented by: Mr. Juan de Dios Crespo Perez  
Mr. Marcos de Robles,  
lawyers.

## I THE PARTIES

1.1 The FEDERATION INTERNATIONALE de NATATION (FINA) is the International Federation governing disciplines related to swimming. FINA has established and is carrying out, inter alia, a doping control program, both for in-competition as well as out-of-competition testing.

1.2. The SPANISH SWIMMING ASSOCIATION (SSA) is a member of FINA. SSA is required to recognize and comply with FINA's anti-doping rules which are set out in the FINA Doping Code ("FINA DC"). The FINA DC is directly applicable to and must be followed by Competitors, Competitor Support Personnel, coaches, physicians, team leaders, and club and representatives under the jurisdiction of the Spanish Swimming Association.



1.3 Mr. Sergio Garcia Ortiz is a 20 year old male Spanish swimmer. He is selected for the Spanish high performance centre in Madrid and part of the national swimming team.

## **II PROCEEDINGS**

2.1 By letter dated 4 May 2010, the FINA Executive Director asked the Chairman of the FINA Doping Panel to examine the case of Mr Garcia Ortiz in relation to three filing failures.

2.2 Meanwhile, the FINA Executive Director informed Mr. Garcia Ortiz about the decision to forward his case to the Doping Panel for consideration.

2.3 The FINA Doping Panel was formed pursuant to FINA Rule C 21.6.

2.4 By letter dated 19 July 2010, the chairman of the FINA Doping Panel informed Mr. Garcia Ortiz of his right to a fair hearing as per FINA DC 8.1 and confirmed the date of 20 August 2010 for the hearing.

2.5 The FINA Doping Panel hearing was held on 20 August 2010 at 10.30 hrs in FINA Headquarters, Lausanne (SUI).

2.6 Mr. Garcia Ortiz was present in person. He was represented by his lawyers Mr Juan Crespo Perez and Mr Marco de Robles.

## **III JURISDICTION AND APPLICABLE RULES**

3.1 The jurisdiction of the FINA Doping Panel arises out of the provisions of the FINA Rules C 21.5., C 21.6 and FINA DC 8.1.

3.2 The applicable Rules in this case are the FINA Doping Control Rules in effect since January 1, 2009 (amended on the occasion of the FINA General Congress on 24 July 2009).

## **IV LEGAL DISCUSSION**

### **THE FACTS**

4.1 Mr. Garcia Ortiz belongs to the FINA Registered Testing Pool (FINA RTP). He has not or has not timely sent FINA his whereabouts information for the fourth quarter of 2009 (Q4 2009), and for the first and second quarters of 2010 (Q1 and Q2 2010).

FINA never received Mr. Ortiz's whereabouts information for Q4 2009. On 1 March 2010, more than two months after the deadline, the athlete sent FINA whereabouts information for Q1 2010. On 12 May 2010, more than a month after the March 31, 2010, deadline the athlete sent whereabouts information for Q2 2010. On 6 July 2010, six days after the deadline, the athlete sent whereabouts information for Q3 2010.<sup>1</sup>

4.2 Mr. Garcia Ortiz was informed of his three (3) filing failures by letters of FINA dated respectively 23 November 2009 (Q4), 25 February 2010 (Q1) and 3 May 2010 (Q2).

4.3 Mr. Garcia Ortiz has been a swimmer for 11 years, lately being part of the Spanish national team. He represented Spain in the Olympics in Beijing in 2008, in the European Championships Swimming

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<sup>1</sup> Mr. Ortiz's most recent filing failure was not a part of FINA's allegations of an anti-doping rule violation against this athlete but evidence of the failure came up in the hearing and it is mentioned for the sake of completeness.

longcourse 2008 (Eindhoven) and shortcourse 2009 (Istanbul), competing in the 200m breaststroke.

## **MOTIONS AND CONTENTIONS**

4.4 The defence has raised the issue of whether Mr. Garcia Ortiz belonged to the FINA RTP in 2010. Mr. Garcia Ortiz suffered a serious injury in his right shoulder during the last quarter of 2009 and though he has swum in some events since that time has not been able to compete at a high level since his injury. Mr. Garcia Ortiz contends that due to his diminished competitive results because of this injury he must have fallen out of the FINA RTP.

4.5 According to Mr. Garcia Ortiz, the first filing failure (Q4 2009) can be explained by the poor psychological state of the athlete. The diagnosis of the doctors that he should be operated upon, without a guarantee of returning to the same level of swimming, as well as his fear that he would lose his privileged position as a professional athlete and student in Madrid, preoccupied him during this period. He represents that he could not concentrate on his obligations such as sending whereabouts information to FINA. According to Mr. Garcia Ortiz these circumstances justify the conclusion that the first filing failure is excusable.

4.6 Mr. Garcia Ortiz also submits that he tried to make up for his filing failures by sending the whereabouts information as soon as possible after being warned by FINA. He admits having missed the deadlines, but points out that with respect to his filing failures during the first two quarters of 2010 his whereabouts information was sent to FINA shortly after the required date.

4.7 Referring to these circumstances the defence has plead for a mild sanction, and emphasized his lack of intention to cheat, his young age and the lack of aid and guidance from the Spanish Swimming Federation in relation to doping control procedures.

## **THE LAW**

4.8 FINA DC 2.4 reads:

*“Violation of applicable requirements regarding Competitor availability for Out-of-Competition Testing, including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the Competitor shall constitute an anti-doping rule violation.”*

FINA DC 5.4.3:

*“FINA shall establish a FINA Registered Testing Pool of Competitors. The criteria for the inclusion in the Registered Testing Pool shall be revised yearly by FINA and be known to the Member Federations. Four (4) times a year the FINA Registered Testing Pool of Competitors shall be updated. All competitors included or removed from the Registered Testing Pool and the Member Federations to which they belong shall receive written information about the inclusion or exclusion of a Competitor in the FINA Registered Testing Pool no later than the first day of the months of March, June, September and December.”*

FINA DC 5.4.4:

*“It shall be the obligation of each Competitor in the Registered Testing Pool as well as that Competitor’s Member Federation, to keep FINA informed about where the Competitor can be met for unannounced*

*Testing. It is the responsibility of each Competitor in the Registered Testing Pool to report the required whereabouts information to the FINA office no later than the first Monday of the months January, April, July and October. (...)*

FINA DC 10.3.3:

*"For violations of DC 2.4 (Whereabouts Filing Failures and/or Missed Tests), the period of Ineligibility shall be at a minimum one (1) year and at a maximum two (2) years based on the Competitor's degree of fault."*

## **DOPING RULE VIOLATION**

4.9 FINA has yearly, pursuant to DC 5.4.3, issued a document entitled "Criteria to determine the FINA Registered Testing Pool as per the International Standards for Testing (IST)." Until 31 March 2010 the criteria for swimming were: *"Swimmers ranked in the Top 50 of each event (Long Course and Short Course)."* Since 31 March 2010 the criteria have read: *"Swimmers ranked in the Top 25 of each event (Long Course and Short Course). FINA might request additional whereabouts for swimmer ranked over #25 if necessary."*

Taking into account the results of the athlete in the years 2009 and 2010 the FINA Doping Panel has determined that there is no doubt that he belonged in the FINA RTP during the last quarter of 2009 and the first three quarters of 2010. His ranking has consistently been within the Top 50 and Top 25 during the time periods in question, specifically in the combination of events of 200 m breaststroke and 400 m individual medley, shortcourse and longcourse.

The athlete has been aware of his obligations as competitor belonging to the RTP due to information he received from FINA and the Spanish Swimming Federation. Since 2008 at least he has sent whereabouts

information to FINA. Moreover, at the hearing he clearly admitted his awareness of his obligations in this regard.

4.10 The FINA Doping Panel finds that it has been established that the athlete has not sent or has not timely sent his whereabouts information FINA for Q4 2009, Q1 2010 and Q2 2010. These facts constitute an anti-doping rule violation pursuant to FINA DC 2.4.

## **V THE SANCTION**

4.11 Unannounced testing is an essential part of the anti-doping policy of FINA. Competitors belonging to the RTP have the obligation and responsibility to strictly follow the procedures as described in DC 5.4.3 and 5.4.4. The rules exist to deter doping, help ensure a level playing field and promote confidence in the integrity of swimming competitions. Withholding the whereabouts information has to be regarded as a serious obstruction of the necessary control on the use of prohibited substances or methods.

The mandatory sanction range of one (1) to two (2) years set forth in FINA DC 10.3.3 for violation of athlete whereabouts requirements reflects the important duty of athletes and national federations to ensure that all swimmers under the purview of FINA's rules be available for out-of-competition drug testing. The FINA Doping Panel is of the opinion that in principal a sanction of two years ineligibility has to be applied to athletes committing a doping rule violation through three filing failures as mentioned in DC 2.4.

The explanation of the athlete, by written submissions but also during the hearing, that he was in a "poor psychological state" because of his serious shoulder injury, the apparent need of an operation and his fear to lose his position as a professional swimmer, has not lead the Doping

Panel to the conclusion that his first filing failure was excusable. Certainly his injury has caused him serious problems, physically and psychologically, but these did not prevent him from fulfilling his obligations as a professional swimmer belonging to the RTP.

On the other hand, the athlete and his defence have convinced the FINA Doping Panel that he had a serious intention to correct his mistakes as soon as he realized the nature and consequences of his behavior. From 1 March 2010 he has started to send whereabouts information regularly again. It is also a fact the athlete had shoulder surgery on 2 July 2010, with a recovery period of around six months, assuming the lack of complications. Accordingly, the evidence before the Panel indicates that the athlete has not intended to cheat or evade doping control. Also taking into account a negative out-of-competition doping control on 18 March 2010 the FINA Doping Panel accepts the conclusion that this young athlete, who has otherwise had a clean record, had no intention to cheat.

Thus, weighing the degree of fault of the athlete the FINA Doping Panel is of the opinion he deserves a period of ineligibility of one (1) year, starting 20 August 2010, being the date of the hearing decision. Regarding the facts and circumstances the FINA Doping Panel has not found sufficient grounds to apply DC 10.9.2.

4.12 All results achieved by Mr. Garcia Ortiz from the date of the third filing failure, i.e., 5 April 2010, are disqualified and any medals, points and prizes achieved during that period shall be forfeited pursuant to FINA DC 10.1 and 10.8.



## VI. CONCLUSION

5.1 Mr. Garcia Ortiz receives a one year period of ineligibility commencing on 20 August 2010, and ending at the conclusion of 19 August 2011, for his first anti-doping rule violation.

5.2 All results obtained by Mr. Garcia Ortiz after 5 April 2010 and through the date of this decision are disqualified. Any medals, points and prizes achieved during that period shall be forfeited.

5.3 All costs of this case shall be borne by the Spanish Swimming Federation in accordance with FINA DC 12.2.


5.4 Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland not later than twenty one (21) days after receipt of this judgement (FINA Rule C 12.9.3).

F.D. van Heijningen  
Chairman

William Bock III  
Member

Farid Ben Belkacem  
Member

Signed on behalf of all three Panel Members



F.D. van Heijningen