



Fédération Internationale
de Natation

FINA Doping Panel 02/12

FINA Doping Panel

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In the proceedings against

the swimmer **Isabell Donath**
affiliated to the German Swimming Federation (DSV)

not present at the hearing

Nature of the case

Ms. Donath is a professional open water swimmer from Germany who has missed three unannounced tests by not being present or available at the specified moment and place. She has not denied the doping rule violation but has asked to take into account her personal circumstances.

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 GERMAN SWIMMING FEDERATION "Deutsche Schwimmverband" (DSV) is a member of FINA. DSV 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 DSV.

1.3 Ms. Isabell Donath is a professional open water swimmer. She competed in the 2011 FINA World Championships swimming and several Marathon Swimming World Cups (2010, 2011).

II PROCEEDINGS

2.1 By letter dated 27 June 2012 the FINA Executive Director asked the Chairman of the FINA Doping Panel to examine the case of Ms. Isabell Donath in relation to three filing failures.

2.2 Meanwhile, the FINA Executive Director informed Ms. Donath about the decision to forward her 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 9 July 2012 the chairman of the FINA Doping Panel informed Ms. Donath of her right to a fair hearing as per FINA DC 8.1. Ms. Donath did not react on this letter.

2.5 By letter dated 30 July 2012 to Ms. Donath the chairman of the FINA Doping Panel reminded her of the letter of 9 July 2012 and of her right to a hearing.

2.6 Ms. Donath responded by email dated August 2012, providing a written defense and declining the opportunity to have an in person hearing.

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 Ms. Donath belongs to the FINA Registered Testing Pool (FINA RTP). She has missed three doping tests by not being available for testing within the required one (1) hour time slot as required by Sections 11.4.1 and 11.4.2 of the World Anti-Doping Agency International Standard for Testing ("IST").

4.2 Ms. Donath was informed of her three (3) missed tests by letters of FINA dated respectively 13 December 2011 and 19 May 2012, as well as the German Doping Authority NADA by letter of 25 April 2012.

4.3 As noted above (see section 1.3), Ms. Isabell Donath is a professional open water swimmer who has competed in a number of important international competitions and should be well acquainted with the applicable anti-doping rules.

MOTIONS AND CONTENTIONS

4.4 Through her written statement Ms. Donath described her personal circumstances at the moments the doping control officers tried

to find her at the places and times she had written in her whereabouts forms.

4.5 In her August email Ms. Donath stated:

“The army doctor saw no other solution but to suspend me from the Sport Promotion Group of the Federal Army. At that moment I was not able to attend my duties in general and hence to my duties regarding my whereabouts.

Leaving the Sport Promotion Group at the end of March I had lost the crucial basis of practicing my sport and I saw no possibility to pursue my sports career. This was a huge disappointment and I had to restructure my living conditions.

Therefore my attitude towards my duties even worsened. I was overburdened by this situation and I was primarily forced to find a new job and a new place to live.

During this period of time I wouldn't have been able to foresee my whereabouts.”

She said that the second failure was related to the request of her partner, living in another town in Germany, to help him and bring him to the hospital. She contends that at the time of the third missed test she was at the right location, but was not able to hear the doorbell or telephone. She stated that she had worked until 05.00 o'clock in the morning in a restaurant, sleeping in a building nearby.

4.6 She has asked the Doping Panel to take into account her personal circumstances.

THE LAW

4.7 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 5.4.1:

“(…). Every competitor affiliated to any member federation is obliged to undergo unannounced doping control as decided by FINA.”

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. (…)”

The International Standard for Testing (IST), 11.4.1 reads:

“An athlete in a RTP must be specifically be present and available for testing on any given day in the relevant quarter for the 60-minute time slot specified for that day in his/her whereabouts filing, at the location that the athlete has specified for that time slot in such filing.”

IST 11.4.2:

“It is the athlete’s responsibility to ensure (including by updates, where necessary) that the whereabouts information provided in his/her whereabouts filing is sufficient to enable any ADO to locate him/her for testing on any given day in the quarter, including but not limited to during the 60-minute time slot specified for that day in his/her whereabouts filing. (...)”

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.”

FINA DC 5.5.1:

“A competitor who has been identified by FINA for inclusion in FINA’s Registered Testing Pool shall continue to be subject to these Anti-Doping Rules, including the obligation to be available for unannounced Testing, unless and until the Competitor gives written notice to FINA that he or she has retired. A Competitor is accountable for any violation of these Anti-Doping Rules occurring prior to FINA’s receipt of his or her notice of retirement.”

DOPING RULE VIOLATION

4.8 The FINA Doping Panel finds that it has been established that the swimmer was not available for unannounced testing during her designated one hour time slot on three different occasions (13

December 2011, 22 March 2012 and 19 May 2012). These facts constitute an anti-doping rule violation pursuant to FINA DC 2.4.

4.9 The FINA Doping Panel has thoroughly studied Ms. Donath's written defense. It appears that the difficulties in her sports career and changes in life have seriously troubled her, possibly causing a kind of indifference or carelessness towards her duties as an athlete.

4.10 On the other hand, there are no sufficient grounds for the conclusion that during this period she was not able at all physically and psychologically to comply with her ongoing responsibilities as an athlete and be available for unannounced testing. Her behavior from 13 December 2011, the date of the first missed test, shows she continuously neglected her duties during a period of half a year, although she was repeatedly warned of the consequences of her conduct through letters from FINA in conformity with the notice requirements of Section 11.6.3 of the IST.

4.11 The explanations Ms. Donath has given for the missed tests in a period of half a year do not convince the FINA Doping Panel of her serious intention to be available for unannounced testing. On the contrary, her behavior has shown a degree of negligence and a lack of interest, which are underscored by her remark in the written defense "*But even now I can not completely make sure that every knock on the door or phone will be heard*". The FINA Doping Panel is of the opinion that such an approach to the requirements of the IST is unacceptable because an athlete must be specifically present and available for testing, as stated in the IST.

4.12 Accordingly, the FINA Doping Panel finds that Ms. Donath has committed an anti-doping rule violation through violation of FINA DC 2.4.

V THE SANCTION

5.1 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 and the IST. The rules exist to deter doping, help ensure a level playing field and promote confidence in the integrity of swimming competitions. Withholding whereabouts information and failing to be at the location specified on the swimmer's whereabouts filing has to be regarded as a serious obstruction of the necessary control of the use of prohibited substances and/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. FINA DC 10.3.3 provides that the determination of the length of sanction is to be based upon the swimmer's degree of fault. The comment to this rule provides that the sanction "shall be two years where all three missed tests are inexcusable. Otherwise, the sanction shall be assessed in the range of two years to one year, based on the circumstances of the case." FINA DC 10.3.3, Comment. In this case, Ms. Donath has not provided a compelling excuse for any of her three missed tests.

Therefore, weighing the degree of fault of the athlete and taking into account all of the relevant circumstances, the FINA Doping Panel is of the opinion she deserves a period of ineligibility of two (2) years, starting

1 September 2012, to be regarded as the date of the decision of the FINA Doping Panel.

5.2 All results achieved by Ms. Donath from the date of the third filing failure, i.e. 19 May 2012, 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

6.1 Ms. Donath receives a two year period of ineligibility commencing on 1 September 2012, and ending at the conclusion of 31 August 2014, for her first anti-doping rule violation.

6.2 All results obtained by Ms. Donath after 19 May 2012 and through the date of this decision are disqualified. Any medals, points and prizes achieved during that period shall be forfeited.

6.3 All costs of this case shall be borne by the DSV in accordance with FINA DC 12.2.

6.4 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 judgment (FINA Rule C 12.9.3).

F.D. van Heijningen
Chairman

Peter Kerr
Member

William Bock, III
Member

Signed on behalf of all three Panel Members



F.D. van Heijningen