

**R u l i n g**

In the disciplinary proceedings

against

Dimitrij Ovtcharov (hereinafter "Athlete")

-Representative in litigation: Attorney-at-Law Dr. Michael Lehner, Heidelberg -

- DO 01/10 -

the "Anti-Doping" disciplinary organ of the DTTB (DOG) has resolved through the President Hans-Philipp Hübinger, the deputies Dr. Stefan Lieck and Markus Neeb and also the additional judge Dr. Herbert Zschau in written proceedings:

1. A ban is not imposed.
2. The costs are borne by the DTTB.

**Facts of the matter**

A training check was held on Athlete, who is a member of the RTP pool, on 23.08.2010, one day after his return from the China Open. The Institute of Biochemistry in Cologne notified the National Anti Doping Agency (NADA) on 16.09.2010 that the substance "Clenbuterol" had been detected in Athlete's sample. This is a question of a substance which has been classified as "S 1 Anabolic substance" in the 2010 prohibition list.

A value of 75 pg (picogram)/ml had been measured in Athlete's urine and thus assessed as positive in the doping test of the Institute of Biochemistry in Cologne. In this context, reference is made for reasons of completeness to the fact that there is no standardised limit figure valid all over the world for "Clenbuterol" for which a doping offence is to be presupposed if it is exceeded. Instead, the assessment whether a so-called "adverse analytical finding" and thus a positive doping test exists is a matter for the national examination laboratories accredited by the WADA, in which context the WADA merely states as a "minimum standard" that this is to be the case in the event of a quantity of 1

nanogram or 1,000 picograms of "Clenbuterol" per millilitre, i.e. with more than 13 times the quantity established with Athlete. The question of whether a doping offence exists or not in particular depends on which of the laboratories accredited by the WADA carries out the test in question, as they partly considerably differ with a view to the measurement sensitivity and thus also in the assumption of a "adverse analytical finding".

In correspondence of 17.09.2010, the NADA informed the DTTB, which is responsible for result management according to its Anti-Doping Ordinance (hereinafter: ADO), of this state of affairs. The formal notification within the framework of the ADO to Athlete was done with correspondence of 18.09.2010.

In correspondence of 21.09.2010, he was provisionally suspended by the DTTB according to Art. 7.5.1 of the ADO.

In correspondence of 22.09.2010, Athlete demanded the opening of the B sample, which was done on 29.09.2010. The outcome corresponded to the A sample.

Unannounced training checks were also done with four further athletes of the DTTB, who had also participated in the China Open, on 24.08.2010, one day after the control of Athlete. All the results were negative. By order of the NADA of 22.09.2010 and consent of the DTTB, the aforementioned samples were examined with a distinctly more sensitive measurement method not applied in practice within the framework of subsequent controls following notification of the positive finding with Athlete. In the samples analysed at the Institute for Biochemistry in Cologne, traces of "Clenbuterol" were found in an extremely low range of concentration not normally recorded (2.5, 5 and 10 pg/ml), as the letter from the Institute of Biochemistry to the NADA of 24.09.2010 manifests.

Three of the four samples (as previously that of Athlete) were analysed in the Institute for Biochemistry in Cologne by its head, Prof. Dr. Schänzer.

The 4<sup>th</sup> sample was subsequently analysed in the Institute of Doping Analysis and Sport Biochemistry in Dresden. Traces of the active substance "Clenbuterol" were also identified with the detection method optimised here. The concentration in the urine sample amounted to 7.1 pg/ml (letter from the Institute of Doping Analysis and Sport Biochemistry in Dresden of 29.09.2010).

According to the letter from the Institute for Biochemistry in Cologne of 24.09.2010 and the institute in Dresden of 29.09.2010, the aforementioned four samples do not fulfil the criteria of the so-called "adverse analytical finding", i.e. they do not lead to the finding being assessed as a positive doping case as a result of their minimum "Clenbuterol" quantities.

The NADA confirmed this in its correspondence of 27.09.2010 to the DTTB.

As early as the correspondence from Prof. Dr. Schänzer of 24.09.2010 and also in that from the NADA of 27.09.2010, there was reference to the fact that the possibility of a contamination via nutrition should be included in the assessment of the case in the evaluation of the aforementioned subsequent measurements.

Via his representative in litigation, Athlete applied for a provision hearing according to Art. 7.5.1 ADO in correspondence of 01.10.2010 and commented with a view to the content via his representative in correspondence of 08.10.2010 and 12.10.2010.

It must expressly be stated that Athlete - by recommendation of Prof. Dr. Schänzer - had commissioned an analysis of his hair in Dresden on 24.09.2010 with the approval of the DTTB. The outcome was notified in correspondence of 08.10.2010. In this analysis report of 08.10.2010, it is stated:

" ... on the basis of the negative analysis findings in the aforementioned hair sample, a low dosage of "Clenbuterol" cannot be indubitably ruled out. However, repeated or lasting use of "Clenbuterol" in a therapeutic dosage can be ruled out."

In the hearing applied for by him and held on 11.10.2010, and also in the correspondence of 08.10.2010, Athlete stated that he had presumably absorbed "Clenbuterol" into his body without culpability via meat contaminated with animal feed. For this purpose, he also presented documents and articles from various media, which prove that there are very often cases of meat contaminated with "Clenbuterol" and absorption of "Clenbuterol" by humans through nutrition in China.

The hearing was attended by the representatives of the presidium Thomas Weikert, Hans Wilhelm Gäb and Matthias Vatheuer and also the anti-doping representative of the DTTB, Rainer Kruschel, the spokeswoman for result management with the NADA, Claudia Wildmann, as well as Prof. Dr. Wilhelm Schänzer.

In detail, reference is made to the minutes of the hearing of 11.10.2010, in particular to the extensive questioning of Prof. Dr. Schänzer, which is available to all the parties.

Following the hearing, there was a summary assessment of the available analysis results by Prof. Dr. Schänzer by agreement with Dr. Thieme, the director of the institute in Dresden.

Alongside further establishments, the assessment of 13.10.2010 states:

"As a result of the fact that numerous reports on the illegal use of "Clenbuterol" in animal feed in China have become known and made the subject of discussions in recent years, the assumption that there has been absorption of "Clenbuterol" in small amounts via contaminated food by all athletes is the most probable explanation of the findings from my point of view."

Further clarification of the facts of the matter is not possible, in particular further examinations in China in order to determine the origin of the food, in particular the meat, not being feasible, as none of the parties involved in these proceedings possesses the sovereign rights necessary there in order to achieve really reliable and credible information.

This also applies to the WADA, as has been seen in the past.

To start with, the DTTB had discontinued the proceedings against Athlete with a ruling of 15.10.2010 and cancelled his suspension with immediate effect, as there had been no culpable breach. After a repeated examination, the DTTB decided for formal reasons to

initiate proceedings against Athlete before the DOG, albeit without refuting the contents of the establishments which it had already made.

For the sake of completeness, it is mentioned that the WADA made an appeal against the discontinuation decision by the DTTB of 15.10.2010 with the CAS "to comply with the period" and simultaneously applied for discontinuation of the proceedings.

Athlete's representative in litigation expressed doubts concerning the admissibility of the application following knowledge of the initiation of the proceedings in correspondence of 15.12.2010, as no right to a unilateral revision of its decision of 15.10.2010 accrued to the DTTB. Over and above this, Athlete had declared agreement to a decision in written proceedings.

Athlete has applied:

1. that the application of the Presidium of the DTTB for a decision capable of a remedy by the "Anti-Doping" disciplinary organ of the DTTB be rejected as inadmissible,

alternatively

Athlete is acquitted of the charge of a breach against the anti-doping directives of the DTTB.

2. The DTTB bears Athlete's costs in the proceedings of result management and in the present proceedings before the "Anti-Doping" disciplinary organ of the DTTB.

### **Reasoning of the decision**

The application by the DTTB to the DOG for initiation of disciplinary proceedings is admissible.

But as Athlete was able to prove that he is not to blame for the (objectively existent) doping offence, a ban is not to be imposed pursuant to Art. 10.5.1, ADO.

The application by the DTTB of 08.12.2010 is admissible. The discontinuation decision by the DTTB was based on the fact that the panel called to make the decision had come to the conclusion that Athlete had consumed the substance without any culpability, with the result that sanctions were not to be imposed. In this context, the DTTB based its decision on Art. 10.5.1, without explicitly mentioning this in its decision. According to the ADO and also according to other directives, the decision to discontinue the proceedings and not to initiate proceedings before the DOG does not attain "legal effectivity". It can be examined by the deciding panel at any time and made again if the assessment deviates. Also the fact that the NADA has the possibility according to Art. 12.1.2, ADO, of initiating proceedings before the DOG itself if the DTTB has not initiated proceedings within two months of knowledge of an "analysis result deviating from the norm" does not justify any other assessment and in particular does not mean that exclusively the NADA has the right to initiate proceedings with the DOG under the aforementioned conditions. Instead, the DTTB remains free to examine its discontinuation decision before and also after the expiry of the aforementioned period and, in the event of subsequent doubts about the correctness of its decision, to initiate proceedings with the DOG, even if this right has not explicitly been recorded in the provisions of the ADO.

This also corresponds to the legal situation following the discontinuation of criminal law investigation proceedings according to § 170, sub-section 2, Code of Criminal Proceedings, in which there is also no "consumption of criminal claims" and recommencement of the investigation proceedings after a prior discontinuation decision is possible as a matter of principle. In the event of subsequent justified doubts about the correctness of its discontinuance decision, the DTTB must therefore be granted the right to revise this decision in a new legal assessment and to initiate disciplinary proceedings, also and in particular against the background that there are no indications for the decision having been made arbitrarily.

However, no ban is to be imposed according to Art. 10.5.1, ADO.

No long explanations are necessary that the positive test for the substance "Clenbuterol" represents a breach of Art. 2.1 ADO, even though it makes one sceptical that there is no limit standardised all over the world and thus binding for "Clenbuterol", as in the end this is the only way in which equal treatment of all sportspeople can be guaranteed.

As a matter of principle, the athlete is also responsible for the fact that he does not allow any forbidden substances to enter his body on the basis of Art. 2.1.1, ADO. Nevertheless, the ban provided for in this case is not to be imposed as the athlete is not guilty of "culpability" in the sense of Art. 10.5.1, ADO. To the conviction of the DOG, the athlete stated that the substance in all probability entered his body without his knowledge by consumption of nutrition during the China Open and has thus exceeded the degree of evidence demanded in Art. 3.1, ADO.

The four further analyses held with various institutions have proven that other sportspeople attending this event have consumed “Clenbuterol” – albeit in very small quantities.

The low values show that the substance must have been consumed during the stay in China, as it is degraded within a few days, which explains why the figures subsequently established were lower than those of Athlete.

Over and above this, Athlete’s hair sample was negative, which means that longer or intensive use of substances containing “Clenbuterol” did not take place. Consumption of nutrition in the hotel of the “Marriott” chain selected by the team management, one of the most renowned hotel chains in the world, also cannot seriously be blamed on Athlete. One also cannot expect that Athlete only feeds on food which he has brought along himself with a view to the problems in the Chinese foodstuffs industry, if he had even known about them.

Finally, we would also point out that according to the estimation of the experts, Dr. Schänzer and Dr. Thieme, taking “Clenbuterol” in therapeutically effective doses (approx. 0.02 milligrams = 20,000 picograms!/per day) would have led to considerably higher test values and that the occurrence of the known negative side-effects – tremor, dizziness, nervousness, nausea – which can occur in consumption of “Clenbuterol” and are absolutely counterproductive for a table tennis player, would have had to be expected.

Due to a lack of concrete regulations in the ADO, the decision as to costs is based on §§ 27, 26, sub-section 3, of the code of procedure of the legal instances of the DTTB.

sgd. H.-Ph. Hübinger    sgd. M. Neeb    sgd. Dr. St. Lieck    sgd. Dr. H. Zschau

Certified to be a correct engrossment:

(signature)

(Philipp Hübinger)

Bad Kreuznach, 15.01.2011