

SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)

IN THE MATTER OF AN ARBITRATION
UNDER THE CANADIAN ANTI-DOPING PROGRAM (CADP)

BETWEEN:

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)
CANADIAN AMATEUR WRESTLING ASSOCIATION (CAWA)

AND:

AMANDA GERHART (*Athlete*)

AND:

GOVERNMENT OF CANADA
WORLD ANTI-DOPING AGENCY (WADA)
(Observers)

(SDRCC File No. DT 13-0192)
(Doping Tribunal)

SOLE ARBITRATOR:	JOHN P. SANDERSON, Q.C.
REPRESENTING THE CCES:	ALEXANDRE T. MATLAS
REPRESENTING THE ATHLETE:	DAVID ALEXANDER JARDINE
DATES OF HEARING:	APRIL 3 and 5, 2013
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF AWARD:	APRIL 18, 2013

DECISION

INTRODUCTION

1. This arbitration is pursuant to the application of Rule 7 (Doping Violations and Consequences Rules) of the CANADIAN ANTI-DOPING PROGRAM (CADP) concerning Amanda Gerhart, an athlete affiliated with Wrestling Canada. The issue in summary form is whether the *Athlete* committed an anti-doping rule violation, and if so, what are the consequences of that violation.

OVERVIEW

2. *The Canadian Centre for Ethics in Sport (CCES)* is an independent non-profit organization which is responsible for maintaining and carrying out the CADP, including providing anti-doping services to national sports organizations and their members. *CCES* alleges that on January 30, 2013, the *Athlete* committed an anti-doping rule violation by refusing to submit to *Doping Control Sample* collection after she was notified that she had been selected for *Out-of-Competition* testing, contrary to CADP Rule 7.31. It is further alleged that the mandated sanction for this violation is a two-year period of *Ineligibility* from *Competition* in accordance with CADP Rule 7.39.
3. The *CCES* administers the CADP and would have tested the *Athlete* on January 30, 2013 but for the *Athlete's* non-participation in testing that day. As a result of the *Athlete* not submitting to *Sample* collection on January 30, the *CCES* alleges not only that there was a refusal but there was no compelling justification for the refusal.

4. The *CCES* submits the *Athlete* was clearly notified that she had been selected for *Sample* collection. Further, the *Chaperone* and the *Doping Control Officer (DCO)* advised her that she had been selected but she left the premises without providing a sample and without the *DCOs* permission or approval. As a result of the *Athlete* not submitting to *Sample* collection on January 30, the *CCES* alleges an anti-doping rule violation was committed, namely a violation of CADP Rule 7.31, which reads: [r]efusing or failing without compelling justification to submit to *Sample* collection after notification as authorized in applicable anti-doping rules, or otherwise evading *Sample* collection is an anti-doping rule violation.
5. The *Athlete* acknowledges that she failed to submit to *Sample* collection but alleges there was compelling justification for her actions, namely her fear of losing her employment. Alternatively, the *Athlete* asserts there were “exceptional circumstances” warranting a reduction or elimination of the proposed period of *Ineligibility from Competition*.
6. A hearing was held in Vancouver on April 3 and 5, 2013. During the hearing, evidence was heard from the *DCO*, the *Chaperone*, the *Athlete*, the *Athlete's* employer and the *Athlete's* coach. All of the evidence was given under solemn affirmation.

THE EVIDENCE

7. The *Athlete* is an elite-level and accomplished wrestler. She has been subject to anti-doping control testing at least twice in 2012: once on March 12, 2012 and again on October 2, 2012. On each of these occasions she was advised of her

rights and responsibilities as set out in the *Athlete's* Selection Order and signed the *Athlete* Selection Order which specifically states “[p]lease be advised that failure or refusal to provide a *Sample* may result in an anti-doping rule violation”.

8. *Athletes* are required to fill out a *Whereabouts Filing* as that term is defined in the CADP Glossary. The *Athlete* completed such a filing, which stated that on January 30, 2013 she would be attending training at the Simon Fraser University (SFU) gym in Burnaby, BC between 4:00 p.m. and 6:00 p.m.
9. On January 30, 2013, in accordance with the anti-doping administration orders, DCO Gerry Kennedy and *Chaperone* Dorothy Mundie, attended at the SFU gym at 4:30 p.m. to conduct an *Out-of-Competition* doping test of six (6) athletes who were all scheduled to be at the gym at that time, including the *Athlete*. Upon their arrival, the *Athlete's* Coach advised the DCO that the *Athlete* had just finished her training and was in the women's change room. As a result, the DCO instructed the *Chaperone* to enter the change room and notify the *Athlete* that she should provide a *Sample* as she had been selected for testing.
10. Sometime between 4:37 p.m. and 4:40 p.m. the *Chaperone* approached the *Athlete* in the change room, identified herself and advised the *Athlete* that she had been selected for *Sample* collection. The *Chaperone* testified the *Athlete* became agitated and responded by stating she had to report for work at 5:30 p.m. The *Athlete* said she would not sign the *Athlete's* Selection Form as requested by the *Chaperone* and further stated that she knew the anti-doping rules and that the *Chaperone* should follow her to work. At this point, the two of them left the change room together.

11. At 4:40 p.m. the *Athlete* went up to the *DCO*. She advised him that she had not signed the *Athlete's* Selection Form, that she had to go to work and that she would not stay for the test. The *DCO* told the *Athlete* that the *Sample* collection could be done immediately and that following her to work was not a possible option because he did not know which of the other five athletes scheduled for testing were on the premises and which athletes had already been notified at that point in time.
12. The *DCO* said that just as he was about to pull out an *Athlete* Refusal Form from his briefcase to advise the *Athlete* of the consequences of refusing to comply with the *Sample* collection process, the *Athlete* told the *DCO* that she needed to speak to her Coach. According to the *DCO*, the *Athlete* said she would return to speak to him after speaking with the Coach. The statement that she would return was denied by the *Athlete*.
13. The *Athlete* went into the gym to speak to her coach, followed by the *Chaperone*. The *Athlete* advised her Coach that she had been selected for *Sample* collection but that she could not stay because she had to report for work and she was afraid she would lose her job if she was late. The Coach advised her that he did not know the testing protocol and that she should stay and speak with the *DCO* as the representative of *CCES*.
14. The *Athlete* did not follow her Coach's advice. She immediately left the gym area and exited the building, followed by the *Chaperone*, who told her a number of times that she had to return to the *Doping Control Station* to speak with the *DCO* or she would be in trouble.

15. The *Athlete* left the vicinity without speaking with the *DCO*. The *Chaperone* returned to the *Doping Control Station* and advised the *DCO* that the *Athlete* had left the building.
16. The *Athlete's* employer was called as a witness. He confirmed that the *Athlete's* starting time at work on the date in question was 5:30 p.m. He said her employment status was as a probationary employee and lateness could have cost her her job. He also stated she is a good employee. He was aware of her status as an athlete. He said she did not call or contact him about her issue with the testing and that "she just came to work".
17. The *DCO* testified that the *Athlete's* decision to leave the premises meant he had no opportunity to engage in any discussion with the *Athlete* respecting any options that might have existed to accommodate her situation while allowing a *Sample* collection to be conducted, such as contacting her employer explaining the situation.
18. Following the *Athlete's* departure, the *DCO* wrote out a Report to the *CCES* describing what had happened and his discussion with the *Athlete*. That Report, in part, reads as follows:
 - At 16:40 the *Chaperone* returned to the *Doping Control Station* with Gerhart; the following exchange took place between Gerhart and myself:

GERHART: I have to be at work ... and can't stay, I have not signed the Form and can't stay.

KENNEDY: My name is Gerry, *Doping Control Officer* with *CCCES* and you've been selected for *Doping Control* testing.

GERHART: I have to work, I have not signed the Form, I have to go.

KENNEDY: I am notifying you that you have been selected for *Doping Control Testing*; we can conduct the test immediately.

GERHART: I have to work, it is not my timeslot, I changed my whereabouts to 6-7 at home and do not have to be tested here.

KENNEDY: Your whereabouts info for training is 16:00 – 18:00, is that correct?

GERHART: Yes

KENNEDY: But you only trained until 16:30? You understand I have the authority to conduct the test now?

GERHART: I have not signed the form, which means you have to follow me to home downtown and to work at the hockey game.

KENNEDY: You have been notified, we are conducting the test here, it is not feasible for me to send a *Chaperone* all the way downtown and then attempt to conduct testing at your work. We are testing here; we can discuss but I need to get a Form from my bag.

GERHART: I have to talk to my Coach and come back.

- Gerhart began to walk towards the women's change room. I immediately directed *Chaperone* Dorothy Mundie to go with Gerhart and have her return to the *Doping Control Station* after speaking with her Coach. Time was 16:41.
- At 16:46 *Chaperone* Dorothy Mundie returned to the *Doping Control Station* without the *Athlete*; the *Chaperone* advised that Gerhart had briefly spoken to her Coach and the (sic) decided to leave. Prior to leaving the *Chaperone* advised me that she asked Gerhart to "please come and talk to Gerry". But Gerhart refused and left.
- At 16:49 I contacted the CCES on the "off hours" number...; I left a voice message. I also called the office number of CCES Natasha Danschinko to leave a voice message.
- At 16:57 I returned to the wrestling gym to speak to Coach Mike Jones and the following Exchange took place:

KENNEDY: Are you aware that Amanda Gerhart was notified that she was selected for *Doping Control Testing* but decided to leave?

JONES: Yes, she had asked me if I knew the protocol about where they can test her and I said I was not sure but you should probably stay, but Amanda said she had to work and was going to leave.

KENNEDY: Is Amanda aware that leaving without authorization after being notified could be deemed as a refusal, which could result in an anti-doping violation?

JONES: I'm not sure, but what could happen?

KENNEDY: I can't say with certainty, but if it is deemed a refusal it could lead to a sanction and possible *Ineligibility*.

JONES: It's her decision and she will have to deal with it.

- Coach Jones then walked back into the wrestling gym, time was 16:59.

19. Upon completion of a review of all of the information, the *CCES* concluded that there was "no compelling justification" for the *Athlete* not submitting to *Sample* collection in the circumstances. Accordingly, they concluded the *Athlete* had committed an anti-doping rule violation.

ANTI-DOPING RULE VIOLATION

20. The *CCES* has the burden of establishing that an anti-doping rule violation has occurred. The standard of proof is whether the anti-doping rule violation has been established to the "comfortable satisfaction" of the Doping Tribunal, bearing in mind the seriousness of the allegation. For the reasons set out below, I find that standard has been met in this case.
21. To establish a breach of Rule 7.31 based on a failure to submit to *Sample* collection, the *CCES* must prove both that there was a failure without compelling

- justification to submit to *Sample* collection and that the *Athlete* had been notified of the *Sample* collection to be conducted.
22. I am satisfied on the evidence that the *Athlete* was notified of *Sample* collection in accordance with the CADP. She was told this by the *DCO* and the *Chaperone*. She obviously understood what she had been told and the seriousness of not complying because she sought out her coach who advised her that she should return to the *Doping Control Station* and talk with the *DCO* to see what could be done. Unfortunately, the *Athlete* elected to ignore her Coach.
 23. In the circumstances, it is common ground that the *Athlete* did not in fact submit to *Sample* collection. The question is whether there is compelling justification for the *Athlete's* failure to do so.
 24. Both the Coach and the *Chaperone* urged the *Athlete* to return to the *Doping Control Station* to try and work something out with the *DCO*. Indeed, the *Chaperone* followed the *Athlete* for some considerable distance down the hallway and out of the building, repeating a number of times that the *Athlete* should go back and talk with the *DCO*. In this case, the *Athlete's* failure to submit to *Sample* collection was not only without compelling justification but was voluntary and intentional.
 25. In an important decision cited to me by the *CCES* (*CCES v. Boyle*, SDRCC DT07-0058) the Doping Tribunal confirmed that in cases of refusing to submit to *Sample* collection the *CCES* must establish there was no compelling justification for the failure or refusal and that to be compelling, the failure must have been "unavoidable". I agree with that analysis and conclusion. As I have said, the

failure here was a deliberate and intentional act by the *Athlete*. Accordingly, I find that on January 30, 2013 the *Athlete* committed an anti-doping rule violation, namely failing without compelling justification, to submit to *Sample* collection after notification as authorized pursuant to the CADP.

SANCTION

26. The CCES seeks a full two-year suspension in the circumstances of this case. It submits there are no exceptional circumstances which would warrant a reduction as required by Rule 7.39. On behalf of the *Athlete* it is submitted that she did nothing wrong; that her actions were reasonable in the circumstances and that she was deeply concerned with the possibility she would lose her employment and be unable to find alternative work.
27. On the evidence, I have found the *Athlete's* departure from the training facility was both voluntary and intentional and does not meet the standard of being "unavoidable". The *Athlete* ignored the advice of her Coach and the *Chaperone* as well as the DCO. She deprived herself and the DCO of the opportunity to discuss alternatives and seek out some possible way to accommodate her concerns and at the same time maintain the integrity of the anti-doping *Sample* collection process. In the result, I cannot find there was *no fault or negligence* or *no significant fault or negligence* on behalf of the *Athlete*. The CCES submits that both CADP Rules 7.44 and 7.45 do not apply in this instance. I agree.
28. The last issue is the date when the period of *Ineligibility* shall end. While I have found the *Athlete's* exit from the premises was an intentional act that was not "unavoidable", the *Athlete* is entitled to be given credit for the time since the date

she was provisionally suspended on March 13, 2013 by Wrestling Canada.

Accordingly, the period of *Ineligibility* shall end at midnight on March 12, 2015.

29. On April 10, 2013, in accordance with the SDRCC Rules, I issued the following Decision Summary to the parties:

The hearing of this matter took place in Vancouver, British Columbia, on April 3 and April 5, 2013.

I have reviewed and carefully considered the evidence together with the helpful and comprehensive submissions of the parties. I will provide full written reasons for my Decision in due course. However, in accordance with the SDRCC Rules, a Decision must be made with respect to an anti-doping matter that proceeds to a hearing, as in this case, within five days of such hearing. Accordingly, my Decision in summary form is as follows:

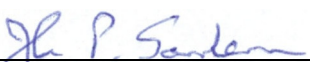
1. The evidence, together with the admissions and stated positions of the parties, establishes that the *Athlete* committed a Canadian Anti-Doping Program (CADP) rule violation (of CADP Rule 7.31) when the *Athlete* refused to submit to *Sample* collection after notification and without compelling justification on January 30, 2013.
2. Consequently, I must decide whether the standard two-year *Suspension* for such violation should be reduced, having regard to the totality of the evidence and the conduct of the *Athlete*. More specifically, the question is whether the *Athlete* bears *No Fault or Negligence* or alternatively, *No Significant Fault or Negligence* and if so, what is the appropriate reduction, if any, to the two-year period of *Ineligibility* of the *Athlete* from *Competition*.
3. In the particular circumstances of this case, after a careful review of the evidence, I have determined:
 - a. There was no compelling justification for the *Athlete's* failure to submit to *Sample* collection and to leave the training facility without explanation and against the express advice of her coach and the *Chaperone*;
 - b. The *Athlete* did not accept her responsibility to discuss the situation in an appropriate manner after notification by the *Doping Control Officer (DCO)* that she had been selected for *Sample* collection or even to advise the *DCO* that she was leaving the premises;

- c. The *Athlete* has not established that she bears *No Fault or Negligence* or alternatively, that she bears *No Significant Fault or Negligence*. In fact, the evidence is to the contrary on both headings;
- d. On the basis of the evidence, I find the appropriate sanction is a two-year period of *Ineligibility* of the *Athlete* from *Competition*, in accordance with Rule 7.39. The *Athlete* shall be credited with the time spent since the *Provisional Suspension* was imposed and accordingly, the period of *Ineligibility* shall commence March 13, 2013.

30. In the result, for the reasons expressed above, I hereby confirm the above Summary Decision. I wish to thank counsel for their able assistance in dealing with this case.

Dated at Vancouver, British Columbia this 18th day of April 2013.

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John P. Sanderson, Q.C.
Sole Arbitrator