BEFORE THE SPORTS DISPUTES TRIBUNAL
OF NEW ZEALAND
SDT/06/04

Anti-doping violation application

BETWEEN NEW ZEALAND OLYMPIC WRESTLING UNION INC

Applicant

A N D **MARK HOGARTH**

Respondent

Tribunal: Nicholas Davidson, QC (Deputy Chairperson)
Tim Castle
Adrienne Greenwood
Farah Palmer

DECISION

Dated 30 August 2004

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PARTICIPATION

Ian Hunt, counsel for Mr Hogarth
Brian Stannett, for the applicant, the New Zealand Olympic Wrestling Union Inc
Paul David, counsel for the New Zealand Sports Drug Agency
Megan Temperton, Registrar, Sports Disputes Tribunal

PART I INTRODUCTION AND PRELIMINARY DISCUSSION

Introduction

1. Mark Hogarth is a young wrestler who has admitted a doping infraction evidenced by a sample which contained Terbutaline, banned under the World Anti-Doping Code 2004 Prohibited List.

2. The sample was taken on 24 February 2004 as part of the New Zealand Sports Drug Agency's out of competition programme. He was involved in regular training at the time.

3. Mr Hogarth co-operated fully and showed the medication he took for his chronic asthma condition to those conducting the test. He is not a "*drug cheat*", and he could have obtained a therapeutic use exemption ("TUE") through the Agency.

4. He did not seek such exemption until after the sample was taken, but it was granted on 8 April 2004, too late to avoid the infraction. He did not challenge the finding by the Agency that it could not issue a TUE with retroactive effect.

5. The Tribunal has concluded that he was not aware of his obligations under the anti-doping rules adopted by his sport, nor that he could obtain a TUE.

6. The process of this Tribunal was interrupted and unusual. The application to this Tribunal by the New Zealand Olympic Wrestling Union Inc (usually referred to as "Wrestling New Zealand"), ("WNZ") is dated 27 April 2004. The position first taken by Mr Hogarth was that a TUE could be retroactively granted and he pursued that issue with the Agency. When that was refused on 9 July 2004, he

retained several other defences before they were formally abandoned on 9 August 2004. The Tribunal sought to have the facts agreed so far as possible, to minimise cost and delay. A full hearing was scheduled for 23 June 2004 but that would not have allowed a fair process and it was adjourned. When the matter came before the Tribunal on 18 August for the final time, the essential issue was that of sanction.

7. Other issues arose, not essential to the Decision, but the Tribunal has made observations given their importance.

Notice of doping infraction

8. The Determination by the Agency was that Mark Hogarth had committed a doping infraction following a sample taken on **24 February 2004**. This was an "*out of competition"* test. There was no challenge to the process of sampling and analysis carried out by the Agency, nor to its determination.

The application to the Sports Disputes Tribunal

9. WNZ stated in its application that the "*outcome sought*" was sanction under Clauses 7.1(b), 7.1(e), 7.1(j) of WNZ's Anti-Doping Code, including a ban from competition. WNZ altered softened its position on sanction when the athlete's medical background was better understood.

10. Mr Hogarth at first denied a violation, but accepted that the Tribunal has jurisdiction to hear and determine the proceedings. He later abandoned his various defences.

The Anti-Doping Code of the New Zealand Olympic Wrestling Union (Inc) ("WNZ")

11. WNZ has adopted an Anti-Doping Code which endorses education and the initiatives of Sport and Recreation New Zealand (SPARC), the International Olympic Committee (IOC) and the World Anti-Doping Agency (WADA).

12. Under clause 3.1 a doping infraction is committed if:

> *"(a) There is a **determination** made under section 16B of the New Zealand Sport Drug Agency Act that the competitor has committed the doping infraction …."*

Therapeutic Use Exemption

13. Athletes may seek a TUE, which must be obtained **prior** to testing, based on recognised medical authority for the therapeutic use. Clause 4 of the WNZ Code describes the criteria for effective application of a TUE. The Clause probably requires revision because the Tribunal considers the three limbs of Clause 4 are probably intended to be read conjunctively, i.e. there must be prior written approval, the level of use must be consistent with the approved therapeutic use, and the therapeutic use is not inconsistent with the International Federation's Rules. However, there is no conjunctive use of the word *"and"* to link **all** three provisions.

Process of Tribunal

14. A hearing was scheduled for 23 June 2004 but joinder of the Agency as a party, and the need for it and WNZ to respond to Mr Hogarth's case, necessitated an adjournment.

15. The Tribunal directed that the Agency should not be joined as a party while an application for a **retroactive** TUE was still to be determined by it, but it was then added as an interested party under Rule 33.1, having a *"sufficiently close interest in the outcome of any proceeding"* or *"who may be affected"* by the outcome of such a proceeding. The Agency's contribution as a party proved significant and helpful.

16. On 7 July 2004 the Agency advised Mr Hogarth that it considered it had **no jurisdiction** to consider the application for a **retroactive** TUE. This was in part based on the Agency's decision that a determination of the Board is *"final and conclusive under section 16B of the Act".*

17. At a teleconference on 9 August 2004 Mr Hogarth withdrew the defences he had raised. Those defences had included:

    (1) A retroactive TUE could be granted even if sought after the determination was made. Although a possible review of the Agency's

decision that it had no such jurisdiction was indicated, the point was taken no further.

(2) Mr Hogarth had obtained a therapeutic use exemption by the date the Determination of the Agency was **notified**, although not at the date of testing.

(3) Mr Hogarth should not have been placed on the Drug Register, for out of competition testing, although he had agreed to this.

18. Although not pursued, the Tribunal will make observations about these defences, and the additional question of whether this Tribunal has any jurisdiction to consider defences such as those under (2) and (3) above, after a determination has been made by the Agency.

PART II MATTERS RELEVANT TO SANCTION

Mr Hogarth's history in wrestling

19. Mr Hogarth is 22 years old, and has been wrestling since 1998, in the first year as a cadet, four years as a junior, and in the year 2003 as a senior.

20. He has never been a New Zealand representative, nor on a national training squad, nor attended a national training camp. He won the national title in his last year as a junior; and there were two competitors in his grade. His transition to senior ranks occurred at the age of 20. At the National Championships in 2003 he was third out of four wrestlers in the Greco-Roman competition, and second in the Freestyle. In the latter event his club colleague withdrew, allowing a win by default.

Events of late 2003 – early 2004

21. On 3 December 2003 the Agency wrote to WNZ seeking up to date contact information for the Register for Out of Competition testing. It said:

> "*Enclosed is the list of athletes and contact information most recently provided to NZSDA by your program. Instructions for updating this list are on the attached page*".

This letter made it clear that the instructions were to be followed carefully before proceeding to update the list "***to ensure that the appropriate athletes are subject to OOC testing***".

22. Mr Hogarth's coach Mr McLaughlan returned from overseas in late December 2003. In January 2004 he told Mr Hogarth that he had received a request to update details on the Drug Register. On 19 January 2004 Ms Rotherham of WNZ wrote to coaches advising that she was working on the Drug Register and enclosing a list of *"your athletes"* and other information on the Register. There is a handwritten notation on this letter: *"sorry for delay – had to get some addresses when I finally located them"*. This is signed by "*Kevin*" i.e. Mr McLaughlan, who told Mr Hogarth he had advised WNZ of Mr Hogarth's asthma and hayfever, and the form was posted to WNZ on 6 February 2004. Mr Isaac for WNZ had contacted Mr McLaughlan on 9 February 2004 enquiring about the whereabouts of the forms sent out. On 17 February 2004 WNZ received advice of Mr Hogarth's asthma condition. This was passed to Mr Stannett as President, and then posted to the Agency on 18 February 2004.

23. The Agency wrote to Mr Stannett on **25 February 2004,** and said that without TUE's in place there was a risk that athletes would record a positive result. The Agency had seen a handwritten note indicating certain athletes suffered from asthma and/or hayfever. This informal note was not retained. Mr Hogarth's name was included. Mr Hogarth says that until this letter *"nobody within the Union was aware of this requirement"* – and he maintains that view. This was not denied by WNZ. Steps were then taken "*to obtain proper documentation*". Mr Hogarth took the form relevant to a TUE to his doctor and returned the completed form to Mr McLaughlan. Mr McLaughlan sought a form from another athlete, and enquired whether a further athlete was going to seek an exemption. This explains the delay between 25 February 2004 and 8 April 2004 when the TUE application was finally submitted to the Agency. It was held valid and became effective that day.

24. Had matters been handled with more despatch within WNZ, and if Mr Hogarth and his coaches better understood the need for a TUE and the required process, the TUE may have been in place before the test.

Circumstances of placement on the Out of Competition Drug Register

25. This was controversial but not determinative of this decision. It links with the question of who should be tested. Mr Hogarth was entered on the Register, and agreed to that, but he said that he did not understand why he was thought eligible for inclusion, and, in effect, that he should never have been asked to agree so.

26. He understood his name was placed on the Register in 2003 as one of the few senior wrestlers in the sport, and he thought that some competitors' names had to be put forward for testing *"to comply with some government requests"*.

27. Mr Hogarth says that the criteria for placing athletes on the Register were never discussed with him. He says *"I had no choice in this matter and was told I had to be part of it",* and he thought that if he declined to agree, *"this would be frowned upon",* and there would have been questions asked which might indicate that he had something to hide. So he thought there would be a *"fuss"* if he declined. He does not contend that he was under duress.

28. WNZ says it was under no obligation to comply with any "*Government*" request, nor to forward a certain number of names. It says that entry on the Register was Mr Hogarth's choice, and his alone, and he signed the initial forms under no duress (as he acknowledged). It denies that he was told that *"he had to be part of it"*.

Who should go on the Register?

29. WNZ said that it was "*under instructions*" from the Agency that those competitors required to be *"listed"* were ***"development onwards".*** *A*ppendix 1 to its Statement of Reply contains a heading *"Who should go on the Register?"* which records that OOC testing was *"currently limited"* to athletes within categories described:

- New Zealand representative level (open age competition)
- OAP squad members
- National ranked 1 – 10 (in at least one of the disciplines)

- NZ junior representative level
- Prime Minister scholarship athletes
- SPARC Academy athletes

30. By an email of 19 April 2004 the Agency advised the Union that athletes within wrestling who were not currently on the database should **not** be tested out of competition. It remains moot, and unnecessary to this decision, whether Mr Hogarth fell within the categories described but there is some doubt about the relevance and origin of references to *"development"* and "*elite athletes*" as categories discussed in the next paragraph. Mr Hogarth says that the Agency's Summary Guide makes no reference to "*development*".

Did Mr Hogarth qualify to go on the Register?

31. This issue is not strictly necessary to this decision but it is illustrative of how problems might arise. Mr Hogarth contended that the only category which might apply to him is that of athletes nationally ranked 1 – 10 in at least one discipline. He acknowledged that he placed three out of four wrestlers in the Greco-Roman style and second in the freestyle section in the 2003 championships. Nevertheless he contends that he was not *"regarded"* by the Union as a nationally ranked wrestler as of February 2004, but if *"nationally ranked"* then he said that was *"a nominal ranking",* largely due to an absence of competition in his weight group. He contended that WNZ should never have placed a wrestler *"of my level and capability*" on the Register. Mr McLaughlan says that Mr Hogarth is not considered an "*elite*" athlete but was "*added to the Register*" by WNZ. If, as suggested, the criteria includes "*elite*" and "*development elite*" Mr Hogarth says he was at no stage considered to be, let alone advised, that he was in the "*development*" stage or in a "*development squad*".

32. WNZ contended that Mr Hogarth filled the criteria for entry on the Register by being in the top ten in a division within New Zealand, so he was in the development stage. It refers to his *"admission"* that his objectives were to achieve in the sport and at some stage to represent New Zealand. It says this acknowledgment "**lends substance to our assumption he was in the**

Development Stage". It adds that individual coaches were required to seek out and nominate athletes they considered for development. There is no evidence of such process being followed through in this case.

33. All this demonstrates the need for clarity of the basis upon which athletes should be placed on the Register, and that WNZ, coaches and athletes (in all sports) should be equally clear about when someone does or does not qualify.

The athlete did not understand his need and entitlement to obtain a Therapeutic Use Exemption

34. Mr Hogarth has suffered asthma since he was 5 years old. He has taken medication since that time. His concern is that he will be thought of as a *"drug cheat", "quite simply because I did not understand everything".* He says WNZ had a responsibility to educate him but had not done so. He had been given "*bits of paper*", *"telling me things that I never understood and read properly",* but he later clarified this statement, that the only "*bit of paper*" providing information was the December 2003 newsletter from the Agency (discussed below), and he did not understand what it meant.

35. He says he thought drug tests applied to *"top athletes, going to World Championships, Commonwealth Games and Olympic Games",* not someone like himself who competes *"purely for enjoyment"*. He is an amateur and does not receive funding *"because I have never been good enough"*.

36. Mr Hogarth says that when his name was put forward for inclusion on the Drug Register he was not told of his obligations and need to seek a TUE. His *"substitute coach"* did not understand these matters in detail, and also did not receive help or advice from WNZ regarding Mr Hogarth's obligations.

37. After the President of WNZ forwarded the updated forms to the Agency Mr Hogarth was contacted and told that given his use of asthma medication he had to prepare a "*special dispensation*", have it signed by a doctor, and returned to the Agency.

38. He had not understood an exemption could and **needed to be obtained as of 1 January 2004**. He says coaches and athletes should have been told the

new Rules as of 1 January 2004 yet there was nothing to this effect in the letter sent to the coaches by the Union on 19 January 2004.

39. WNZ says that specified asthma medication was banned from 1 January 2004, and information was sent out in December 2003. It refers to a letter of 25 February 2004. Paragraph 3 records that a copy of the newsletter was sent to "*athletes and administrators*", *"late last year"*. This letter said some urgent and important matters were highlighted. Paragraph 2 recorded that athletes on the Out of Competition Register, who suffered from asthma and/or hay fever, could be affected by the new wider prohibitions for 2004, which banned the use of certain Beta[2] Agonists and glucocorticosteroids without a prior TUE. If they were tested with those medicinal substances in their system they would return a positive result. Mr Hogarth is critical of WNZ making contact with the coaches but not with the athletes when, as it is now apparent to him, athletes carry the responsibility to be free of banned substances. He says he had not seen documents concerning the request made to coaches in early December 2003, nor requests sent by WNZ's *"drugs officer"* in late December 2003. Mr Hogarth says that while WNZ's *"drugs officer"* may have telephoned individual athletes to finalise and update the list by 18 March 2004, nobody had made contact with him. If the "*drugs officer*" was aware that those suffering from asthma were required to obtain a TUE, then the issue may never have arisen.

40. He says that he responded promptly to the requests made of him, and was the first athlete to return a properly completed TUE form to Mr McLaughlan. WNZ acknowledges that Mr Hogarth is correct in his assumption that it was aware of the changes in the Rules regarding asthma medication and proscription, but was unaware of the requirements regarding TUE forms. WNZ corrected its earlier statement about the letter to coaches requesting updated athlete information to say that the letter did not leave WNZ's office until 19 January 2004. This did **not** include a request for a TUE form. The reply from Mr Hogarth via his club coach stated that he required asthma medication, so WNZ says this indicates either Mr Hogarth or his coach were aware of the changes to the banned substances list and that if they were aware of that, then they must have been aware of the requirements to obtain a TUE. On the evidence, the Tribunal finds to the contrary.

41. Mr Hogarth says the drug test was held on 24 February, and at the time of the test he told the *"drug people"* what he took for asthma. He says he carries an inhaler with him at all times.

42. WNZ acknowledges that it may not have been proactive enough in keeping athletes informed, but was under the impression that all the Agency required was updated records, addresses, contact phone numbers etc., and that the Agency would keep athletes informed of all changes to the banned substances list. If athletes were required to complete a TUE form it says this should have been spelt out in the Agency's December 2003 newsletter, so that no one was in any doubt. Mr McLaughlan says that WNZ, the Club and Mr Hogarth did not know the TUE requirements, and the Club and its coaches were "*effectively left out of the loop…*".

43. Mr Hogarth says that there are obligations on WNZ to ensure information is available which athletes need in order to *"understand, comply with and support the anti-doping program"*, and that it has associated obligations of distributing educational materials, ensuring understanding of specific requirements of the sport, e.g. reporting of asthma education, and facilitating presentation to the athletes.

44. Specifically, he refers to the Agency's website when under the heading "*Anti Doping Education Programme*" which says that National Sporting Organisations must:

> "*…ensure that their members have all the information they need to understand, comply with and support the anti-doping programme.*
>
> *…*
>
> *[Distribute] educational materials to their members and particularly to those who will be affected by the anti-doping programme.*
>
> *…*
>
> *[Ensure] that their athletes understand any specific requirements of the sport, for example reporting of asthma medications, providing whereabouts details etc.*

> *Facilitating presentations to their athletes and particularly those moving through academy/development type programmes."*

45. He contends that the Summary Guide sent out by the Agency makes it plain that the responsibility for returning updated information for athletes on the Register rests with the National Sporting body. He refers to the Guidelines' reference to a *"wallet guide",* to a drug testing rights and responsibilities pamphlet, an asthma guideline sheet, and a nutritional supplements pamphlet. He says he has received the first two of these documents but not the last two. He says he has not received a copy of WNZ's Anti-Doping Policy and Rules. He does not accept responsibility to have identified those Rules for himself. Mr Hogarth says it was not until May 2004 that he received WNZ's Anti-Doping Rules through the Tribunal. He says an enquiry of the secretary of his wrestling club indicates that no such rules had ever been provided to the Club. He does not accept that it was his responsibility to request all relevant information just because he had allowed his name to be put on the Drug Register. His position is stated:

> *"I think it is reasonable for that information to have been provided to me by the Applicant, not needed for me to work out for myself what steps I was required to take"*.

46. WNZ says that it did not communicate with individual athletes as it presumed information was being relayed directly to athletes via the Agency. Neither the previous *"drug officer"* nor the current *"drug officer"* had ever been in contact with Mr Hogarth. It considers that it was a filter mechanism when forms for inclusion on the Drug Register were sent not to the athlete but to the coaches, so that athletes would not be registered if their coach did not think they should be included. WNZ accepts some responsibility for educating athletes but "*senior athletes*" are considered to be *"responsible enough"* to glean information for themselves. It adds that WNZ's drug policy is a matter of record and a copy is held by the Club Secretary. Before signing forms which registered him for out of competition drug testing WNZ said Mr Hogarth should have requested all relevant information.

47. The Agency said that it is the responsibility of all sports to educate their members about drugs in sport through newsletters, and other information provided by the Agency.

48. The Tribunal has considered all these perspectives in this Decision.

49. The Tribunal does not accept the criticism of the Agency with regard to communication. The Agency material shown to the Tribunal demonstrates clear and graphic warnings regarding the 2004 Banned List. The Agency's December 2003 newsletter has some compelling headings such as *"2004 Banned List – Where are the traps?"*. The advice of a new Prohibited List was published by WADA for application from January 1 2004. The Agency's advice said ***"the List includes some extremely significant changes and there are new potential traps for all athletes"***

50. Under the heading *"Glucocortico steroids*" the newsletter warns *"beware of treating your* ***asthma****, itchy skin or runny nose!"*. There is an express reference:

> *"these are substances in widespread use for a range of common medical conditions. In some cases they are available in over the counter products.*
>
> *Athletes and doctors need to be aware of the following circumstances in which it will be necessary to have a doctor complete a medical notification form and submit to the agency before being tested"*
>
> *"Asthma use of the brown cortico steroid "preventatives" such Becloforte, Becodisk, Becotide, Flexotide, Pulmicort, and Respocort"*

51. The second page of the newsletter contains *"Doping News Update for Athletes".* It records that most athletes and others would receive this newsletter in hard copy and that *"the Agency is keen to provide future newsletters by email wherever possible".* The Agency provides updates on doping issues and;

> *"we would be happy to send the most significant ones directly to athletes who are interested. We do not wish to over load you with material but try to keep you up to date with significant issues".*

52. It is the athlete's responsibility to be familiar with his/her obligations. So too is it the responsibility of the relevant National Sporting Organisations to assist in the education and administrative process. Mr Stannett was frank that WNZ did not do enough in this case. But the Tribunal can see no reason for criticism of the Agency.

53. In summary, Mr Hogarth is not a "*drug cheat*". However, he should have made his own enquiries to clarify his position. In the Tribunal's view, WNZ could have done more to assist him. WNZ did not do enough to recognise the potential problem and should have moved quickly to familiarise itself with the 2004 regime and the TUE process.

PART III SANCTION AND FORMAL ORDERS

54. Mr Hogarth and WNZ came to the end of this process with a joint submission that Mr Hogarth should be sanctioned only under Rule 7.1(e) of the WNZ Anti-Doping Code, which would require him to remain on the Agency's annual testing program for out of competition testing and be subject to the Rules of Wrestling New Zealand for a period of 2 years. This was a step back by WNZ which had first sought a ban from competition.

55. They added that each party should bear its own costs.

56. A threshold question is where terbutaline falls under the WNZ Code. Rule 7.1 provides:

> *"7.1 The Tribunal **will** apply one or more of the following sanctions;*
>
> *[a] Ban the person from selection to represent New Zealand in International Competition.*
>
> *[b] Ban the person from competing in any event and competition conducted by or under the auspices of the New Zealand Olympic Wrestling Union [Inc].*
>
> *[c] Make the person ineligible to receive direct or indirect funding or assistance from the New Zealand Olympic Wrestling Union [Inc.]*
>
> *[d] Ban the person from holding any position within the New Zealand Olympic Wrestling Union '[Inc] or being involved in any other way within the New Zealand Olympic Wrestling Union [Inc].*

[e] Require the person remain on the New Zealand Sports and Drug Agency annual testing program for the purposes of out of competition testing and be subject to the rules of the New Zealand Olympic Wrestling Union [Inc.]

[f] Recommend that;

[1] The New Zealand Olympic Wrestling Union [Inc.]
[2] SPARC

Require the person to repay financial assistance given to the person from the date of the doping offence.

[g] Require the person go to counselling for a specific period.

[h] Withdraw awards, placings and records won by the competitor or the competitors team in events and competitions conducted by or under the auspices of the New Zealand Olympic Wrestling Union [Inc].

[i] Reprimand the person.

[j] Fine the person or direct the person to pay costs.

[k] Suspend the person from membership of the New Zealand Olympic Wrestling Union [Inc].

7.2 Where the tribunal confirms a doping offence by an employee or contractor of the New Zealand Olympic Wrestling Union [Inc], the New Zealand Olympic Wrestling Union [Inc] will take disciplinary action against the employee or contractor, having regard to the Employment Relations Act.

57. The WNZ Code then provides, beginning at paragraph 8.1:

HOW LONG DO SANCTIONS APPLY?

8.1 Where the drug offence involves ephedrine, phenylpropanolamine, pseudoephedrine, caffeine, strychnine or related subsyances (sic), *as listed and defined as stimulants, class A, in the Olympic Movement Anti-Doping Code the following sanctions under clause 7.1 will apply.*

[a] Two months or less for first doping offence.
[b] Two years for a second doping offence.
[c] Life for a third doping offence.

8.2 Where the doping offence involves

[a] A prohibited substance other than one of those identified in clause 8.1 above.
[b] A prohibited method.
[c] A refusal to provide a sample

[d] Trafficking
[e] Any other cases

Sanctions under clause 7.1 will apply for

[1] A minimum of two years for a first doping offence.
[2] Life for the second doping offence"

58. Mr Hogarth and WNZ accepted that terbutaline falls within the provisions of clause 8.2 of the WNZ Code and the Agency agrees. The Tribunal agrees and so holds.

59. Whether a breach occurs under clause 8.1 or 8.2 the **sanctions** as such are still imposed under clause 7.1. Clause 8.1 and 8.2 prescribe the time periods under the heading *"How **long** do Sanctions apply?"* and they have a similar reference in that *"sanctions under clause 7.1 will apply"* and *"… the following sanctions under clause 7.1 will apply".*

60. Clause 7.1 has a range of 13 sanctions. Clause 8.1 (not applicable in this case) says that specified periods *"will apply"* but does not say **to which** sanctions. Nor does clause 8.2 specify **which** sanctions are affected by the periods stated.

61. Clause 7.1 is an overarching provision. The Tribunal "*will apply one or more of the following sanctions"*. There should be at least one sanction.

62. The sanctions do not all lend themselves to a period of time. For example *"reprimand"* has no period attached. The subheading to clause 8 *"how long do sanctions apply?"* can only refer back to sanctions which sensibly have a time period attached. Clause 8.1 is specific, that *"the following sanctions under clause 7.1 will apply"*, but what follows are not *"sanctions"* but **periods** attaching to sanctions.

63. Clause 8.2 deals with what, on the face of it, are more serious breaches and records that **sanctions** imposed under clause 7.1 will apply for a minimum of two years for a first doping offence and life for a second doping offence.

64. Clause 7.1 is the dominant section, which reserves to the Tribunal a discretion as to **which** sanction should apply. That discretion is unfettered on reading clause 7.1 alone. The Tribunal could thus impose the sanction sought by Mr Hogarth and supported by WNZ if the Tribunal thought this appropriate. If clause 8.2 is mandatory that there **must** be a minimum of two years sanction for a first doping offence, then to what sanctions does the two year period relate? There must first be a decision as to which sanctions apply. If a ban from competition is thought appropriate then it **must** be for two years for a first offence. (Application of the WADA code would allow a less severe result as discussed below.) But a ban may not be thought appropriate.

65. In this case the Tribunal is unanimously of the view that the provisions of clause 7.1 of the WNZ Code leave the Tribunal with a wide discretion as to sanctions and time periods will apply only if relevant sanctions are imposed. Clause 7.1 should not be read down by clauses 8.1 and 8.2 which stipulate the period which attaches to some sanctions. The contractual nature of the WNZ Rules does not allow for an implication that clauses 8.1 and 8.2 fetter the discretion. These are penalty provisions and doubt as to interpretation must favour the athlete.

The WADA Code – relevance in this case

66. The provisions of the WNZ Rules and Anti-Doping Code make specific reference to the new international Anti-Doping Code and protocols – the World Anti-Doping Code ("the WADA Code") which came into force 1 January 2004. The WADA Code is being progressively adopted throughout the world. The Agency observed in its counsel's memorandum of 16 August 2004 that both the International Sporting Organisation for Wrestling ("FILA") and the New Zealand Olympic Committee ("NZOC") adhere to the WADA Code and the WADA Prohibited List. WNZ is affiliated to FILA and is a constituent sport of the NZOC.

67. The WNZ Anti-Doping Code provides as follows:

> *"1.3(e) The New Zealand Olympic Wrestling Union (Inc) will … support the initiatives of … FILA, the IOC and the World Anti-Doping Agency to stop doping in sport."*

68. The Rules of WNZ provide that its objects include the following statement:

> *"the Anti-Doping Policy of the New Zealand Olympic Wrestling Union (Inc) will be the Anti-Doping Policy as approved by FILA and the new Zealand Olympic and Games Association (Inc)."*

69. Mr David's submission of 17 August 2004 for the Agency was that the WNZ Code does not reflect the WADA Code, which has been adopted by FILA, the International Federation to which WNZ belongs. His submission is that WNZ's Code should be construed in a manner consistent with the WADA Code if possible, and he refers to clause 1.3 of the WNZ Code, that it will support WADA. He describes the general approach under the WADA Code as being that accident or negligence will be no defence for an athlete.

70. Because of the intent that the WADA Code have application. Mr David submitted that WNZ's Code should be interpreted in a way that complies with the WADA Code, or that Code be treated as the policy applicable to the violation. It was on that basis, and given WADA's *"general approach*" that he submitted a doping offence under clause 8.2 attracts a sanction of two years of ineligibility unless a proper basis for reduction is available. He said that WNZ's Code does not incorporate procedures under WADA clauses 10.3 or 10.5, allowing reduction of the two year period of ineligibility in certain circumstances, which he put down to a failure to update the WNZ Code.

71. We are satisfied that the Tribunal may have regard to, and if necessary apply, the provisions of the WADA Code in the event the provisions of the WNZ Anti-Doping Code either require that, or should otherwise be applied to ensure consistency of approach between the national Code and the WADA Code adopted by FILA, to which WNZ is affiliated.

72. To do justice to the careful and helpful submissions from counsel for the Agency, the Tribunal has considered the issue of WADA Code application to Mr Hogarth's case.

73. Under clause 10.3 of the WADA Code the prohibited list established by WADA may identify specified substances which are particularly susceptible to unintentional Anti-Doping Rules violations because of their general availability

in medicinal products, or which are less likely to be successfully used as doping agents. Where an athlete can establish that the use of such a specified substance was not intended to enhance sport performance, periods of ineligibility from future events set out in the WADA Code (see Article 10.2) may be replaced with, in the case of a first violation, at a minimum, a warning and reprimand and no period of ineligibility from future events and, at a maximum, one years ineligibility.

74. Clause 10.5 allows for an athlete to establish that he or she bears no fault or negligence for the violation in which case the applicable period of ineligibility will not apply. The athlete would be required to establish how the prohibited substance entered his or her system in order to have the period of ineligibility eliminated. In other circumstances (see Article 10.5.2) if an athlete establishes in an individual case involving Anti-Doping Rule violations such as that in this case, that he or she bears no significant fault or negligence, then the period of ineligibility may be reduced. The period of reduction of ineligibility may be not less than one half of the minimum period of ineligibility otherwise applicable.

75. These clauses signal the philosophy underpinning the WADA Code. Violations by athletes will in the ordinary course involve the imposition of a period of ineligibility. Against that underlying philosophy athletes must be given an opportunity to establish a basis for eliminating or reducing that sanction. The WADA Code specifically allows for such opportunity.

76. Mr Hogarth may have been able to satisfy the Tribunal that the provisions of clause 10.3 of the WADA Code should apply, to reduce his first violation to a warning and reprimand with no period of ineligibility as a minimum and, at a maximum, one year's ineligibility. Mr Hogarth may also have persuaded us that although there was fault on his part, there was no significant fault or negligence for the purpose of clause 10.5 of the WADA Code.

77. We are satisfied that the discretion left to this Tribunal under clause 7.1 can be exercised by us by imposing something less than a period of ineligibility for Mr Hogarth, in a manner and upon the grounds which are on the face of it consistent with the provisions of the WADA Code. This case is to be

considered on its own merits and circumstances. It provides no precedent for future cases, where appropriate sanctions are to be fixed by the Tribunal.

78. The formal Anti-Doping Code/Rules/Protocols for New Zealand sports are in various stages of development or refinement following the coming into effect of the WADA Code across the world from 1 January 2004. Many of the national sporting organisations in New Zealand have previously adopted a model Code prepared some years ago by the Hillary Commission in New Zealand, with additional refinements incorporated progressively as the Olympic Movement Anti-Doping Code has developed, and more recently the WADA Code has taken shape. A new model Anti-Doping Code has been recently produced by Sport and Recreation New Zealand (SPARC) and is, so the Tribunal understands, under consideration by national sporting organisations in New Zealand. It will be important for both SPARC and national sporting organisations to ensure that the provisions of that new model Code are consistent with, or otherwise adopt, the WADA Code.

79. The Tribunal is aware that the progressive development and refinements to an internationally acceptable Anti-Doping Code have meant that national sporting organisation have been required to change their rules and constitutional protocols. This can be expensive and time consuming for sports administrators, many of whom are volunteers. Nevertheless this process is necessary to ensure an effective fight against performance enhancing doping in sport.

Sanction and formal Orders

80. The determination against Mr Hogarth of a doping infraction must stand. This is unfortunate, as there is no suggestion whatsoever of his being a drug cheat, and because the position could readily have been avoided had he understood his obligations, or been assisted to understand those obligations through WNZ.

81. While Mr Hogarth criticises the Agency's newsletter and the lack of information or guidance otherwise given him, the fact is he did read it, and the need to take steps when using an asthma inhaler is spelled out. For that Mr Hogarth must accept some responsibility. He knew he was on the Register, like it or not.

82. Mr David for the Agency was understanding of Mr Hogarth in describing the breach as more a *"technical breach"* but it was nevertheless a breach. WNZ was also understanding and acknowledged deficiencies in its own processes.

83. The WADA Code, in particular the provisions of clause 10.3, demonstrate the range of sanctions which may be applicable in a case like this. Although this Tribunal sought references which might act as a guide, neither the Agency, WNZ nor Mr Hunt considered there was anything of sufficient equivalence to guide us. Aside from the assistance that the Agency has given in the process, the memorandum by Mr David of 6 August 2004 records that *"the Agency does not believe that it should make submissions as to the appropriate sanction"*. Mr Hunt points to the acknowledgement by Mr David during the teleconference on 9 August that this kind of violation *"is more of a technical failure on the part of the Rules rather than any deliberate flouting of them"*. The Agency properly did not enter the debate about sanction.

To remain on the Drug Register for out of competition testing

84. There is an element of fault on the part of Mr Hogarth, although minor. He did not take the clear caution in the Agency's newsletter and made no enquiries of his own. In the circumstances the Tribunal accepts the submission for WNZ and Mr Hunt made jointly, that Mr Hogarth should remain on the Drug Register for Out of Competition testing for a period of two years, pursuant to the provisions of clause 7(1)(e) of the Code.

Reprimand

85. Despite our having some sympathy for Mr Hogarth the importance of emphasising the athlete's own responsibility to comply with anti-doping provisions generally leads the Tribunal to reprimand him. Ignorance of what is required is not to become a charter for minimising an infraction. Awareness of obligations should be heightened by this Decision being available to sport generally.

Costs

86. In this case the defences raised fell away, but not before a good deal of time and trouble was expended. For the reasons expressed below the Tribunal has serious reservations about whether the defence regarding placement on the Drug Register could ever have been successfully argued in this Tribunal, at least in the context of a determination based on a positive test.

87. WNZ and Mr Hogarth have agreed that neither party will seek costs and each will bear their own.

88. Mr Hunt submits that the Agency joined in this process as an interested party for reasons outlined earlier, but that does not indicate that the Agency's costs should be met. It does not seek costs.

89. Mr Hunt refers to the discretion as to costs but that the Tribunal *"shall usually make an order that requires each party to bear their own costs or … the payment of costs limited to a symbolic amount"*.

90. As a general principle, an order for costs will be considered by this Tribunal in an unsuccessful defended proceeding, and where a reasonable level of enquiry is necessary by this Tribunal in determining the appropriate sanction. That will reflect an early admission of an infraction. This is not a criticism of Mr Hogarth, simply that matters were raised as defences which required close consideration, before they fell away. Rather than a fine, which is inappropriate having regard to the reprimand, Mr Hogarth is directed to pay costs of $250 to the Tribunal, through the Registrar, and may arrange time for payment.

PART IV OTHER OBSERVATIONS

Observation regarding TUE

91. Mr Hogarth reserved his position regarding the correctness of the Agency's decision that it had no jurisdiction to consider the application for a retroactive TUE, but he indicated he did not wish to pursue a right of review or appeal. The Tribunal makes no finding on this matter.

92. Mr Hogarth also took the position that a valid TUE was required at the date he was tested, not at the date of the Notice of Determination. The Agency submitted that after the Determination the TUE could not have retroactive effect but the situation may have been different if Mr Hogarth's application for a retroactive application had been made **before** the determination and met the test that he showed *"exceptional circumstances"* to support a retroactive TUE being granted. Mr Hunt casts doubt on that as he suggests *"exceptional circumstances"* must exist at the date of the test. He questions whether the Agency's view is in harmony with the provisions of section 16E(b) of the New Zealand Sports Drug Agency Act. The Tribunal makes no finding on this issue but the point should be noted, although the Agency's stance is in favour of the athlete.

Observation regarding withdrawal from the Register

93. Mr Hunt submits that clause 7 of the model form for competitor consent records that Mr Hogarth's name would not be withdrawn from the List for out of competition testing until he has *"formally notified"* WNZ that *"I no longer fall within the criteria which determines the competitor's whose names are to be submitted to the NZSDA"*. So the athlete may say this but may be wrong in his/her reasoning.

94. Only WNZ can authorise the Agency to remove the athlete's name from the register. There is a question as to whether athletes in the *"elite or development stage"* were intended to be on the register, and what that means. There is a need for absolute clarity as to who should go on and go off the Register, and when and how that is effected.

Observations regarding a defence that the athlete should not have been on the Register

95. While Mr Hogarth maintained his defences. They included an argument that he should not have been on the out of competition register, because he did not fall within the criteria established by the Agency for this purpose. This fell away with the abandonment of the defence. The Tribunal considers it may be useful to make some observations about this.

96. The Act directs the Agency on the course of action consequent on a failure to provide a sample, under sections 13 and 14, and section 16A provides for the procedure after a positive test is returned. The Board of the Agency must then **determine** whether a competitor has committed a doping infraction, pursuant to section 16B. It is bound by time limits and **must** bring to account the matters set out in section 16D. Under s16D the Agency must bring to account submissions made by or on behalf of a competitor, and whether the second test confirms the initial test. It would appear that submissions by the competitor are not confined under section 16D.

97. Once a determination has been made regarding a positive test result, pursuant to section 16F the Agency must enter the determination on the Register in accordance with section 17(2).

98. There is then a right of appeal to the District Court under s20 of the Act but this right is restricted. Section 20(2)(a) applies where it is alleged there was reasonable cause for failing to provide a sample. Section 20(2)(b) applies where there has been a positive test result and provides for grounds of appeal which are technical in nature, for example, if the sample was not tested by a laboratory.

99. Mr Hogarth raised a defence that he should not have been on the Register although he had agreed to that. Section 16D requires the Board to take into consideration submissions for the competitor. Those submissions could extend to whether a test should have been taken, but that appears more applicable to a refusal to provide a sample. However, there is no ground for appeal to the District Court where a determination is based on a positive test, based on the fact that the athlete should never have been tested in the first place. This emphasises the need for entry in the Register being carefully managed, in the description of the athletes to be included, and dissemination of that.

Conclusion

100. This Decision covers many aspects of the law and practice involving doping infractions. It is for that reason lengthy, but endorses the importance of clear

anti-doping Rules and the need for vigilance by National Sporting Organisations, coaches, and athletes alike.

For the Tribunal
N R W Davidson, QC (Deputy Chairperson)
30 August 2004