**BEFORE THE SPORTS DISPUTES TRIBUNAL**
**OF NEW ZEALAND**
**SDT/11/04**

**Anti-doping violation application**

BETWEEN **NEW ZEALAND OLYMPIC WRESTLING UNION INC**

Applicant

A N D **TIMOTHY JOHN STEWART**

Respondent

Tribunal: Christopher Toogood QC (Deputy Chairperson)
Adrienne Greenwood
Ron Cheatley

Representation: Brian Stannett, President, Wrestling NZ for applicant
The respondent in person

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**DECISION OF TRIBUNAL**
**21 October 2004**

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## Introduction and background

[1] The Tribunal has received an application by New Zealand Olympic Wrestling Union Incorporated, known as "Wrestling New Zealand" ("WNZ"), alleging that the respondent has committed an anti-doping violation and seeking the imposition of a penalty pursuant to the Rules of the Tribunal and the Constitution and applicable Rules of WNZ. The application follows the receipt by WNZ of a certificate from the Australian Sports Drug Agency indicating that the respondent, Timothy Stewart, tested positive for the presence of cannabinoids after competing at the 2004 Australian National Wrestling Championships on 12 June 2004.

[2] In accordance with the Tribunal's Rules, Mr Stewart filed a notice of defence together with an accompanying letter in which he explained the circumstances leading to the positive test. In essence, Mr Stewart explained that he had become depressed as a result of the break-up of the relationship between himself and the mother of his son. He took advantage of an opportunity to smoke cannabis, which he had previously resisted, and "binged for two or three days". Mr Stewart said that, after that, he stopped sulking; he got more "motivated"

and went back to work and to training for the upcoming Australian National Championships. He said that he did not associate the use of cannabis with being drug tested, but now realised that its use "was naïve and irresponsible".

[3] To his credit, Mr Stewart told the Tribunal he accepts the positive test result and will not dispute it, as he takes all the responsibility on himself. Mr Stewart has expressed his regrets at the embarrassment he has caused to his sport.

[4] After hearing from the parties, and there being no objection, the Tribunal elected under rule 11.8.1 to determine the proceedings by reference only to the papers filed and the oral submissions made during the pre-hearing telephone conference held on 20 October 2004.

**Wrestling New Zealand's Anti-Doping Code**

[5] The material provisions in WNZ's Anti-Doping Code are these:

> *1.1 The New Zealand Olympic Wrestling Union (Inc) condemns the use of performance enhancing drugs and doping practices in sport. The use of performance enhancing drugs and doping practices in sport is contrary to the ethics of sport and potentially harmful to the health of athletes.*
>
> *…*
>
> *1.3 The New Zealand Olympic Wrestling Union (Inc) will;*
>
> *…*
>
> *[e] Support the initiatives of Sport and Recreation New Zealand [SPARC], [FILA], the International Olympic Committee and the World Anti Doping Agency to stop doping in sport.*
>
> *…*
>
> ***WHAT IS A DOPING OFFENCE?***
>
> *3.1 A doping offence occurs if*
>
> *…*
>
> *[c] There is a report to the New Zealand Olympic Wrestling Union (Inc) by a Drug Testing Authority other than the New Zealand Sport Drug Agency that a competitor has taken a prohibited substance or used a prohibited method or there is an exceeding of permitted level of a substance [as set out in the New Zealand Sport Drug Agency Schedule]*
>
> *…*

***REFERRAL OF A DOPING OFFENCE TO HEARING***

*5.1 Where the New Zealand Olympic Wrestling Union (Inc) receives information (including but not limited to, a notice regarding a doping offence from a Drug Testing Agency) that a person has or may have committed a doping offence, the New Zealand Olympic Wrestling Union (Inc) will:*

*[b] In all other cases, make application to the Sports Disputes Tribunal of New Zealand (the Tribunal) for the matter to be heard and determined by it, in accordance with its Rules. The New Zealand Olympic Wrestling Union (Inc) shall send a copy of its application to the person against whom it alleges has committed a doping offence (the Defendant).*

*…*

*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].*

*…*

***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.*

**Anti-Doping Violation admitted**

[6] Under clause 3.1[c] of the WNZ Anti-Doping Code it is necessary to refer to the NZ Sports Drug Agency Schedule to determine what is "a prohibited substance". The 2004 Schedule adopts the WADA Code 2004 Prohibited List, International Standard subject to the confirmation that the New Zealand Agency's previous policy with respect to cannabinoids is revoked. The WADA Code Prohibited List provides that cannabinoids are a prohibited substance.

[7] There is no doubt, therefore, that Mr Stewart has been guilty of a doping offence within the terms of the WNZ Code, and he has rightly acknowledged that. It is necessary to consider the appropriate sanction.

**Consideration of sanctions**

[8] WNZ's Anti-Doping Code is in what might be regarded as a transitional state between the application of the former Olympic Movement Anti-Doping Code and the WADA Code which came into effect on 1 January 2004. The difficulties of interpreting and applying WNZ's anti-doping policy in these circumstances were discussed by the Tribunal in the *Hogarth* case (SDT/06/04, Decision 30 August 2004).

[9] In *Hogarth*, the Tribunal said, in reference to the apparently mandatory requirement of a two-year ban under clause 8.2, that there must first be a decision as to which sanctions apply, and that the two-year period does not apply if the Tribunal does not think a ban is an appropriate remedy. We agree with the view of the members of the Tribunal in that case 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.

*Range of sanctions available*

[10] It is clear from the discussion of the relevant provisions of the WNZ Code in the *Hogarth* case that the Tribunal has a range of sanctions which may be imposed. Because this is the first case of its kind to come before the Tribunal, the Tribunal's decision as to the appropriate sanction will be likely to provide a benchmark for other cases of its type. We were concerned to ensure, therefore, that we obtained such relevant information as is available from international sources to assist us with our deliberations, in addition to such submissions as the parties may have wished to make.

[11] Consistently with the approach which the Tribunal adopted in the *Hogarth* case, we consider that clauses 8.1 and 8.2 of WNZ Code has no application where the Tribunal decides that a ban or period of ineligibility is not to be imposed. Further, bearing in mind clause 1.3[e] of the WNZ Code, we consider that the Tribunal is entitled to have regard to the manner in which a violation such as this would be treated under the WADA Code, so as to ensure consistency with the international approach to similar cases.

*Request for information under Rule 9.1.2(c)*

[12] For these reasons, the Tribunal exercised the power available to it under Rule 9.1.2(c) to request the executive director of the New Zealand Sports Drug Agency to provide the Tribunal with information as to the types and levels of sanctions imposed in other jurisdictions where athletes have returned positive tests for the presence of cannabis or cannabinoids. The response from the Agency indicates that, for first offences involving cannabis, disciplinary bodies in other jurisdictions generally take a more lenient approach than would be taken in relation to performance-enhancing substances. This view confirms the research undertaken by the Tribunal into cannabis violations or infractions over the past three years: the predominant penalty imposed has been of a warning or reprimand; imposing a period of ineligibility would appear to have been considered appropriate only where there are aggravating circumstances.

[13] For WNZ, Mr Stannett said that the report from NZSDA had caused him to reflect on whether the mandatory period of two years' ineligibility would be appropriate. He acknowledged the importance of consistency with international standards, and the WADA

Code in particular, but submitted that the Tribunal should reflect WNZ's view that violations of this kind should be treated seriously. Mr Stewart emphasised the relatively more lenient approach which was taken in respect of cannabis violations but accepted that some measure of punishment was appropriate.

[14] We have found the report from the NZSDA, and the submissions of the parties, helpful and take them into account along with Mr Stewart's early admission of the doping offence.

**No intention to enhance performance**

[15] The seriousness with which the use of illegal 'recreational' drugs in sport should be viewed will depend on the circumstances of each case. It is likely to be a common consideration that the use of illegal drugs tarnishes the image of sport generally and tends to bring an athlete's particular sport into disrepute. In other cases – shooting, for example - the use of cannabis or other illegal substances may not only have a beneficial effect in relaxing the athlete, but may also present a danger for officials and other competitors. It is to be expected that heavier penalties will be applied where such factors are present.

[16] Having considered Mr Stewart's written representations, the Tribunal is satisfied that the use of the specified substance in this case was not intended to enhance sport performance. There is no evidence that Mr Stewart represented a danger to other competitors. Article 10.3 of the WADA Code indicates that the appropriate sanction to be imposed in such circumstances, for a first offence, is within a range from a minimum of a warning and reprimand and no period of ineligibility to a maximum period of one year's ineligibility. Clause 7.1 of the WNZ Code indicates that it is open to the Tribunal to reprimand the athlete (clause 7.1[i]) and that a fine or direction for the payment of costs (clause 7.1[j]) may be imposed in appropriate cases.

[17] It is noteworthy that clause 7.1[j] expresses the ability to impose a fine or award costs in the alternative, rather than conjunctively. That is an unusual approach, and it may not have been intended to be read strictly in that way. Although the financial impact may be identical, fining an athlete and awarding costs have different rationales, and it is common in other jurisdictions for both types of order to be made.

[18] However, we consider that the clause was not intended to have, and does not have, the effect of depriving the Tribunal of the power under rule 25.2 of its Rules to make an order for payment of "a symbolic amount" of costs to a party. The Tribunal considers also that, in a case such as this where there are no aggravating factors, it should be mindful of the level of penalty which would be imposed in the District Court for a first offence of possession of cannabis. There, a modest fine and an order for payment of court costs would be imposed.

[19] We agree with Mr Stannett's observation that the appropriate sanction must involve a punitive element, not least so that it will serve as a deterrent to others. We think it is also relevant that this decision will be released publicly, with resulting embarrassment for Mr Stewart in his family and employment relationships, and generally. We take account also that this has been a salutary experience for the athlete who does not appear to require any further disincentive to commit violations in the future, but Mr Stewart should be in no doubt that a further doping offence would result in a substantial period of ineligibility.

[20] Mr Stewart confirmed during the pre-hearing telephone conference on 20 October 2004 that he was in a position to meet a modest fine and a costs award, and we think those sanctions are appropriate, in addition to a reprimand. Although WNZ did not engage legal counsel in this matter, it has been put to trouble and expense. Moreover, Mr Stewart's actions have brought his sport into disrepute. In the circumstances, we think the costs should be paid to the sport.

**Formal orders**

[21] For the reasons given, the Tribunal finds Timothy John Stewart of 62 Corstophine Rd, Dunedin guilty of a doping offence under clause 3.1[c] of the Anti-Doping Code of New Zealand Olympic Wrestling Union Incorporated in relation to the presence of 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid, a metabolite of cannabis, in a sample provided in competition on 12 June 2004. The Tribunal reprimands Mr Stewart and directs him to pay a fine of $250 (which should be paid to the Tribunal) and to pay costs of $250 to New Zealand Olympic Wrestling Union Incorporated. The fine and costs should be paid within 28 days of this decision, or within such further period as the Tribunal may direct on application from Mr Stewart.

Deputy Chairperson, for the Tribunal