SPORT DISPUTE RESOLUTION CENTRE OF CANADA

IN THE MATTER OF THE CANADIAN ANTI-DOPING PROGRAM;

AND

IN THE MATTER OF AN ANTI-DOPING RULE VIOLATION BY
VASILLIE PAVLOPOULOS (ATHLETE)
ASSERTED BY
THE CANADIAN CENTRE FOR ETHICS IN SPORT (CCES);

AND

IN THE MATTER OF A HEARING BEFORE THE DOPING TRIBUNAL

(SDRCC File No. DT 12-0170)
(Doping Tribunal)

SOLE ARBITRATOR:	JOHN P. SANDERSON, Q.C.
REPRESENTING THE CCES:	ALEXANDRE T. MALTAS
REPRESENTING THE ATHLETE:	STEPHEN B. JACKSON
DATE OF HEARING:	AUGUST 16, 2012
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF CLOSING SUBMISSIONS:	OCTOBER 3, 2012
DATE OF DECISION:	OCTOBER 16, 2012

DECISION

INTRODUCTION

This arbitration is pursuant to the application of Section 7 of the Canadian Anti-Doping Program (CADP) concerning Vasillie Pavlopoulos, a 21-year old athlete resident in Vancouver, who was a student at the University of British Columbia and a field goal kicker and punter with his university football team, the University of British Columbia Trojans. The issue in summary form is whether Mr. Pavlopoulos committed an anti-doping rule violation while on the team, and if so, what are the consequences of that violation.

POSITION OF THE PARTIES

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 submits to this tribunal that Mr. Pavlopoulos committed an anti-doping rule violation involving a prohibited substance. CCES further submits the appropriate sanction is a two-year period of ineligibility from competition, the mandated period of ineligibility under the CADP. The position of CCES is that there are no appropriate reasons for eliminating or reducing the required period of ineligibility.

Mr. Pavlopoulos does not dispute that an anti-doping rule violation occurred in the circumstances of this case. However, Mr. Pavlopoulos claims there are "exceptional circumstances" that justify a reduction in the two-year period of ineligibility. Mr.

Pavlopoulos submits that taking into account the totality of the evidence, the appropriate period of ineligibility should be reduced by eight to twelve months.

BACKGROUND FACTS

The Athlete testified that during his first year orientation for the University of British Columbia football team in August 2009, he participated in a mandatory CCES anti-doping learning module that included a section about the use of supplements and sport nutrition products and their dangers. He does not dispute that he and his teammates were informed that athletes are strictly liable for anything they consume, supplements may be mislabelled and may not list all of their ingredients, supplements can be cross-contaminated with banned substances, and a written guarantee from the manufacturer should be obtained before any non-NSF certified supplements are taken.

The Athlete testified that on several occasions he spoke with his trainers about the use of supplements. They directed him to various websites, including Global DRO. He agreed this website is not intended to provide information on supplements and it warned that supplements can contain prohibited substances that are not on the label. It also directed viewers to contact CCES if the substance could not be found "to find out if it is prohibited in sport". He did not do this. He reviewed the CCES website which had been identified and explained in the orientation meeting when he first joined the team. He said the CCES website advised against all athletes taking supplements, again because of the risk of contamination, regardless of what was on the label.

Because the position of field goal kicker and punter is somewhat specialized, the Athlete worked out and practiced on his own during the football season. He had been a member of the team for three seasons at the time of the random testing of team

members by CCES in January 2012. The Athlete testified that he did not conduct regular weight training during the football season, that is, from late-August to late-November. As a kicker, additional weight or strength was not necessary to his performance as a player. During the off-season he conducted weight training and ingested a number of supplements which he purchased in stores. He described his reasons for doing this as personal. He admitted he had been weight-training and consuming supplements while in Ontario and that this was the time when the banned substance was ingested by him.

When he was on school break in Ontario in December 2011, he purchased a new container of 1MR from a reputable retailer. He had learned that 1,3 dimethylamylamine, a stimulant that was banned from competition but allowed out of season, could be present in 1MR, although it was not listed on the label. Apparently, and incorrectly, he believed he could ingest the product as he was not competing at the time. He freely admitted reading the label on the container he bought, which reads "[t]his product may contain ingredients banned by certain sports organizations. User assumes all risk, liabilities or consequences respecting testing." He also spoke to a friend and fellow athlete who told him he thought the product was safe.

The Athlete admitted he was taking certain supplements at the time of his Winter break, one of which was 1MR. None of the other containers were labeled to indicate that stanozolol was present, or might be present, in the supplement. He testified he ingested the banned substance without any knowledge that the supplement was contaminated in any form.

The Athlete agreed that he read and understood the label. Despite this, at no time did he contact or get a written guarantee from the manufacturer of 1MR regarding

the ingredients, despite the clear warning on the label indicating the risk of unlisted banned substances being in the supplement.

REGULATORY SCHEME

CCES is a signatory to the World Anti-Doping Code ("Code") and is responsible for ensuring that the CADP is consistent with international best practices. The general purpose of the WADC is to protect the rights of athletes and the integrity of sport.

On January 9, 2012, CCES conducted out-of-competition doping control in Vancouver, British Columbia. A sample collection took place which included Mr. Pavlopoulos. Mr. Pavlopoulos' sample was delivered by secure chain of custody to the appropriate laboratory in Montreal where it was analyzed. The certificate of analysis with respect to Mr. Pavlopoulos' sample was received by CCES and a provisional suspension was imposed effective February 21, 2012. The certificate of analysis indicated an adverse analytical finding, specifically, that the sample contained stanozolol.

Section 3.0 of the CADP incorporates the prohibited list international standard issued by the World Anti-Doping Agency, which list includes stanozolol. Mr. Pavlopoulos did not have a therapeutic use exemption from CCES. Consequently, the notice issued by CCES specified that Mr. Pavlopoulos had committed an anti-doping rule violation according to Rule 7.23 of the CADP. As this was a first violation, the CCES proposed a sanction pursuant to Rules 7.23 to 7.27 of two years ineligibility.

There is no dispute between the parties that Mr. Pavlopoulos committed an anti-doping rule violation due to the presence of stanozolol in his sample. CCES does not dispute that Mr. Pavlopoulos did not intentionally use or take stanozolol.

According to the CADP, an athlete is responsible for any prohibited substance(s) found to be present in his or her body. It is not necessary that intent, fault, negligence, or knowledge be demonstrated to establish a violation. A first "presence" violation requires a period of ineligibility for two years unless there are "exceptional circumstances". The CADP sets out what are exceptional circumstances. There are two categories: "no fault or negligence" and "no significant fault or negligence". If either can be established by evidence in accordance with a standard of proof on a balance of probability, the imposed sanction can be reduced or eliminated. Mr. Pavlopoulos claims "no significant fault or negligence" and seeks to reduce his sanction as set out above. CADP Rules 7.44 and 7.45 read as follows:

> **No Fault or Negligence**
> 7.44 If an *Athlete* establishes in an individual case that he or she bears *No Fault or Negligence*, the otherwise applicable period of *Ineligibility* shall be eliminated. When a *Prohibited Substance* of its *Markers or Metabolites is* detected in an *Athlete's Sample* in violation of Rule 7.23-7.27 (Presence) the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* eliminated. In the event this Rule is applied and the period of *Ineligibility* otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of *Ineligibility* for multiple violations under Rule 7.51-7.53. [Code Article 10.5.1]
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> **No Significant Fault or Negligence**
> 7.45 If an *Athlete* or *Person* establishes in an individual case that he or she bears *No Significant Fault or Negligence*, then the period of the *Ineligibility* may be reduced, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this

> section may be no less than eight (8) years. When a *Prohibited Substance* or its *Markers or Metabolites* is detected in an *Athlete's Sample* in violation of Rule 7.23-7.27 (Presence) the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* reduced. [Code Article 10.5.2]

The commentary to Articles 10.51 and 10.52 of the Code (which correspond to Rules 7.44 and 7.45 of the CADP), reads as follows:

> The Code provides for the possible reduction or elimination of the period of Ineligibility in the unique circumstances where the Athlete can establish that he or she had No Fault of Negligence, or No Significant Fault or Negligence, in connection with the violation. This approach is consistent with basic principles of human rights and provides a balance between those Anti-Doping Organizations that argue for a much narrower exception, or none at all, and those that would reduce a two-year suspension based on a range of other factors even when the Athlete was admittedly at fault. These Articles apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. Article 10.5.2 may be applied to any anti-doping rule violation even though it will be especially difficult to meet the criteria for a reduction for those anti-doping rule violations where knowledge is an element of the violation.
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> Articles 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.
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> To illustrate the operation of Article 10.5.1, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes

> are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence, (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.) For purposes of assessing the Athlete's or other Person's fault under Articles 10.5.1 and 10.5.2, the evidence considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article.

In this case, a prohibited substance—as distinct from specified—is involved. I agree with the position of CCES in their written submissions that the Athlete's intent in using the prohibited substance is irrelevant and not material to determining whether there are exceptional circumstances warranting a reduction in the sanction. Put otherwise, whether the Athlete intended to use the prohibited substance to enhance his sport performance (or whether his performance was enhanced) is not relevant.

Section 7.81 of the Code provides that an athlete bears the burden to establish exceptional circumstances on a balance of probabilities. Section 7.81 reads as follows:

> The *CCES* shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the *CCES* has established an anti-doping rule violation to the comfortable satisfaction of the Doping Tribunal bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. When these Rules place the burden of proof upon the *Athlete* or other *Person* alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except

> as provided in Rule 7.42-7.43 and Rule 7.49 where the *Athlete* or other *Person* must satisfy a higher burden of proof. [Code Article 3.1]

DECISION

As I have already noted, the essential facts surrounding the manner in which the prohibited substance became present in the Athlete's body are not in dispute. Rather, the issue is the proper conclusions to be drawn from those facts.

I accept the submission of CCES that the correct analytical framework for determining whether the two-year sanction should be reduced on the basis of *No Significant Fault or Negligence* requires consideration of:

> (a) first, whether the Athlete can prove how the prohibited substance entered his system; and
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> (b) second, and only if the Athlete proves (a), above, whether the Athlete's conduct in all of the circumstances of the case establishes no significant fault or negligence as articulated in the commentary to the Code and in the *Despres* and *Knauss* decisions.

The Athlete contends that the cause of the adverse analytical finding was his use of the supplement 1MR. A number of supplements that had been used by the Athlete were analyzed between May 15, 2012 and May 25, 2012, some four months after he tested positive for stanozolol. The only supplement that was found to contain a banned substance was the 1MR supplement, which contained stanozolol.

In the circumstances, it cannot be said with certainty that the Certificate of Analysis from Maxxam Analytics is conclusive and absolute proof of how the banned substance entered the Athlete's system. The Certificate does not indicate how and

when stanozolol contaminated the supplement or whether the supplement that was tested is the actual supplement the Athlete had been taking before the test was made. In addition, there is a possibility that the Athlete could have added something to the supplement before it was tested by Maxxam Analytics. Also, the chain of custody of the various containers is not clear and the length of time before any of the supplements were tested is a period in excess of four months.

At the same time, I find the Athlete testified in a clear and credible manner. I see no reason to doubt his honesty or his sincerity as a witness. The legal standard to be met by the Athlete is to prove on a balance of probability how the prohibited substance entered his body. In these particular circumstances, I am prepared to find the Athlete has established the first element of proving exceptional circumstances under Rule 7.45 of the CADP to the extent of the required standard of proof and that it is more likely than not that the stanozolol came from the 1MR container that was tested in May 2012.

I turn now to the second substantive issue in this case, namely whether the Athlete's conduct in all the circumstances, establishes *No Significant Fault or Negligence.* I accept the position of CCES that the leading case in this inquiry as to the application of Rule 7.45 is the *Despres* case. In that decision, the Court of Arbitration confirmed the very high standard expected of athletes to make diligent and detailed inquiries before ingesting supplements and set out the relevant factors in determining whether the athlete has met this standard. The relevant factors from that decision have been correctly summarized by CCES as follows:

(a) whether the athlete contacted the manufacturer directly;

(b) whether the athlete sought advice and instruction from appropriate medical personnel;

(c) whether the athlete conducted thorough and appropriate research respecting the supplement;

(d) if this initial research provoked reasonable caution, what further steps the athlete took to seek information and assurances about the supplement;

(e) whether the adverse analytical test was the result of a common multiple vitamin with no connection to prohibited substances as opposed to a nutritional supplement; and

(f) whether the athlete exercised due care in taking other nutritional supplements.

In this case, the Athlete had been informed of the risks associated with supplement use. He had received and had available to him educational information and training about anti-doping generally and supplements specifically, including information regarding the likelihood that supplements may contain ingredients not listed on their labels, including banned substances. Clearly, he knew that athletes bear the ultimate responsibility for the products they ingest.

The Athlete agreed he had read and understood the warning on the label of the 1MR supplement. The 1MR label warned against the possible presence of banned substance(s). Coupled with the Athlete's knowledge that supplements can contain unlisted ingredients, I find it was unwise and unreasonable for the Athlete to conclude that 1MR was "safe".

Both counsel have provided me with their analysis of how the facts in this case apply in relation to the facts in *Despres*; however, they have come to opposite conclusions. Counsel for Mr. Pavlopoulos submits his client was more careful and cautious than Mr. Despres and that as a result, he should receive the benefit of a

reduced sanction. Counsel for CCES submits that Mr. Pavlopoulos was less careful than Mr. Despres in guarding against the risk of contamination and therefore does not qualify to have his sanction reduced.

Counsel also referred to other cases, which deal with the difficult task of deciding whether the negligence in question is "significant" in the particular circumstances. In addition to *Knauss*, I find the following commentary in *Vencill*, helpful:

> 62. Indeed, the Panel finds that Appellant's conduct in the circumstances amounts to a total disregard of his positive duty to ensure that no prohibited substance enters his body. Without wishing to attribute any particular motivation to Mr. Vencill in this case, we hold that for an athlete in this day and age to rely—as this athlete claims he did—on the advice of friends and on product labels when deciding to use supplements and vitamins, is tantamount to a type of willful blindness for which he must be held responsible. This "see no evil, hear no evil, speak no evil" attitude in the face of what rightly has been called the scourge of doping in sport—this failure to exercise the slightest caution in the circumstances—is not only unacceptable and to be condemned, it is a far cry from the attitude and conduct expected of an athlete seeking the mitigation of his sanction for a doping violation under applicable FINA Rules.

As I said in the initial *Despres* decision, I do not believe there is any abstract formulation that can be applied in all cases. The answer depends on a review of the actual facts of each case, an analysis of the totality of the relevant evidence, and the principle of proportionality. In addition, the fundamental principles that underlie the anti-doping program must be maintained, in particular the idea that an athlete who takes dope commits an act of selfishness, one that destroys the right of other athletes to compete fairly.

I have carefully considered all of the evidence and the submissions of the parties. In this case, in light of the evidence and his admissions, I find Mr. Pavlopoulos was significantly negligent and did not comply with the standard required by the *Despres* decision. Specifically, Mr. Pavlopoulos ignored what he had learned from the CCES briefing, ignored the clear and obvious warning on the 1MR label, ignored the warnings given to him on the various websites that he consulted, and most importantly, did not make contact with, or make inquiries from, the manufacturer of the product to obtain a guarantee that the supplement he was considering to purchase and ingest did not contain any prohibited substance(s). Essentially, he did the opposite of what he was told to do by CCES and his team trainers. As I understand his reasoning, he knew other team members were using this or similar supplements, they had had no difficulties and the people he talked to about the product in Ontario expressed no concerns either. Sadly, I must conclude that his conduct was negligent and reckless. He created a level of risk to himself that made his situation precarious; in the event the supplement contained a prohibited substance(s), sooner or later he would be caught.

Mr. Pavlopoulos assumed an impossible risk when he knowingly purchased a product that expressly stated on the label that it could contain banned substances and he was assuming "…all risk, liabilities or consequences…" He compounded that risk when he made no effort to contact the maker of the product, at the very least, to ask questions and better still, get a guarantee it was free of any prohibited substances. He must now bear the consequences.

I wish to thank both counsel for the excellence of their presentations and the benefit of their insights. I also offer my appreciation to the Athlete for his candour and honesty. I wish him well.

On October 9, 2012, in accordance with the SDRCC Rules, I issued the following decision summary to the parties:

> The hearing of this matter took place in Vancouver, on August 16, 2012, followed by oral final submissions on October 3, 2012.
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> 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 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:
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> 1. The evidence, together with the admissions and stated positions of the parties, establishes that an anti-doping violation occurred involving the presence of stanozolol in the Athlete's collected sample. Stanozolol is a prohibited substance according to the Prohibited List Rules of the CADP.
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> 2. The evidence, together with the admissions and stated positions of the parties establishes there was fault or negligence by the Athlete in ingesting this prohibited substance. I find on a balance of probabilities that the source of the prohibited substance was stanozolol and the way it entered the Athlete's system was a 1MR (One More Rep) supplement product provided by the Athlete for testing by Maxxam Analytics in May 2012.
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> 3. The issue before me is whether the two-year provisional suspension* pursuant to Rule 7.38 should be reduced, having regard to the totality of the evidence and the conduct of the Athlete. More specifically, and in accordance with Rule 7.45, the question is whether the athlete bears "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.
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> 4. In the particular circumstances of this case, after a careful review of the evidence, I have determined:

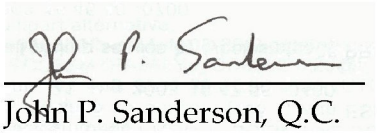
* This sentence should read "The issue before me is whether the two-year period of ineligibility pursuant to Rule 7.38 should be reduced…

a. I am compelled to find that the evidence establishes that the Athlete's conduct cannot be characterized as insignificant fault or negligence.

b. Accordingly, I find there is no proper basis to reduce the mandated two-year period of ineligibility. I further find that the period of ineligibility shall commence as of January 9, 2012, in accordance with Rule 7.13 and the agreement of the parties concerning the prompt admission of the Athlete of the rule violation.

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

Dated at Vancouver, British Columbia this 16th day of October 2012.



John P. Sanderson, Q.C.
Sole Arbitrator