BEFORE THE SPORTS DISPUTES TRIBUNAL
OF NEW ZEALAND

STD 11/05

Anti-Doping Violation Application

BETWEEN	**NZ FEDERATION OF BODY BUILDERS INC.**
	Applicant
AND	**TONY LIGALIGA**
	Respondent

Date of Hearing: Wednesday, 23 November 2005

DECISION OF TRIBUNAL
DATED 8 December 2005

Representation:
M Stewart for Applicant
AW Flexman for Respondent
PW David and J Carlyon for Drug Free Sport New Zealand (interested party)

Tribunal Members Participating:
Hon Barry Paterson, QC (Chairman),
Kit Toogood QC
Dr Farah Palmer
Registrar, Brent Ellis

INTRODUCTION

1. This is an anti-doping rule violation proceeding brought to the Tribunal by the New Zealand Federation of Body Builders Incorporated ("the Federation"). Under the anti-doping policy of the Federation, the Federation is required to forward to this Tribunal any determinations from the New Zealand Sports Drug Agency ("the Agency") that a person to whom the policy applies has allegedly committed an anti-doping rule violation.

2. The determination by the Agency was communicated to the Federation by letter of 5 July 2005. It determined that Mr Ligaliga had committed a doping infraction, evidenced by the sample provided by him at the Auckland Body Building Championships on 21 May 2005. The sample contained Benzylpiperazine which is banned by the World Anti-Doping Code ("the Code") 2005 Prohibited List International Standard under S6 – Stimulants. Mr Ligaliga had a right of appeal against the Agency's determination under Section 20 of the New Zealand Sports Drug Agency Act 1994 ("the Act"). He did not so appeal.

3. In the early stages of this proceeding Mr Ligaliga acted for himself with the assistance of his manager and partner. During a telephone conference on 3 October 2005, a fixture for the application was made for 23 November 2005. Shortly after that date Mr Ligaliga appointed Mr Flexman to act as his legal counsel. Mr Flexman participated in a telephone conference on 17 October 2005 when the fixture for 23 November 2005 was confirmed.

4. By a memorandum filed in early November, Mr Flexman sought an adjournment of the hearing on the grounds that he wished to apply for a judicial review of the Agency's determination. This application was declined on 7 November 2005 but Mr Ligaliga's right to apply for judicial review is still in existence.

THE RESPONDENT'S POSITION

5. Mr Ligaliga's position before the Tribunal was:

   (a) he denied that he had committed an anti-doping infraction. This was, in effect, a challenge to the Agency's determination of 5 July 2005;

(b) if Mr Ligaliga was unable to challenge that determination, no period of ineligibility should be imposed because he bore no fault or negligence for the violation;

(c) alternatively, Mr Ligaliga bore no significant fault or negligence for the violation;

(d) if none of the previous grounds succeeded, Mr Ligaliga sought an order that the period of ineligibility run from the period when he last competed in the sport, namely the World Games in early July 2005.

MR LIGALIGA

6. All parties to this proceeding, including the Tribunal, accept that Mr Ligaliga is not a drug cheat. In fact, he entered for the Auckland Championships during which he was tested, with the deliberate aim of obtaining a drug-free test so that he could compete at the World Games. He has represented his country at many events, including the South Pacific Games, the Annual South Pacific Championships, the Annual Men's World Championships and the World Games. He has never before failed a drug test. As one witness said:

> "His message is very much a drug-free sport. He is constantly educating others on the dangers of performance enhancing drugs. The only drug education I have ever received as an athlete is through Tony…"

7. Mr Ligaliga spent time encouraging other athletes to attend the Annual General Meeting of the applicant and to vote in support of retaining drug testing in body building. He is seen as a role model in the sport of body building and has been heavily involved in the coaching and administration of the sport and is a well-respected member of the body building community.

BZP

8. Benzylpiperazine is not specifically listed on the WADA Prohibited List. It is a "party pill" widely and legally available in this country. A recent amendment to the Misuse of Drugs Act 1975 has now made BZP a "restricted substance", which means it can only legally be sold or supplied to persons 18 years of age and over. The Agency concedes that to its knowledge, it is not typically used as a performance-enhancing drug. The pill, however, is a stimulant which apparently is used mainly in social situations.

9. Although not specifically named on the Prohibited List, it is a prohibited substance because the definition of "Stimulants" in S6 of the Prohibited List contains a list of stimulants and then concludes with the words "and other substances with a similar chemical structure or similar biological effect(s)."

10. Before the positive test was received from the Sydney Testing Laboratory, the Agency was unaware that BZP fell within the catch-all definition in the Prohibited List. Because of the increased availability and use of "party pills" the Agency in 2004 asked the Sydney Laboratory whether BZP was a banned substance. No response was received to this request, although the Agency understands that the request was referred to the World Anti-Doping Agency ("WADA"). After the 2005 Prohibited List was published by WADA, the Agency made a further enquiry. This time an ambiguous response was received which said that BZP was not expressly on the Prohibited List but that it could be regarded as related to amphetamines. Because of the uncertainty of the status of BZP, the Agency did not specifically alert athletes to the possibility that the presence of BZP could result in a positive test. Since Mr Ligaliga's positive test, it has taken appropriate action to advise athletes of the position of BZP.

11. The test results from Mr Ligaliga was the first time that the status of BZP had been confirmed to the Agency. Counsel for the Agency advised the Tribunal that it understands there had been a previous positive test for BZP in Germany and that a number of positive tests have subsequently been returned in Australia.

NO ANTI-DOPING VIOLATION

12. This ground of appeal was in effect that the Tribunal should not accept the determination of the Agency because it had failed to adhere to its statutory obligations under s 6 of the Act. Because of the view which the Tribunal takes on this point, it is only necessary to briefly summarise the submission. The basis of it was that the Agency had failed to maintain a schedule of banned drugs, had failed to implement an educational programme and, in particular, to advise that BZP may come within the proviso that it was a substance of "similar chemical structure or similar biological effect" to other prohibited substances and that the Agency had failed to collect and disseminate information about the use of drugs in sport. The factual basis for the allegations was that the Agency had failed to clarify the status of BZP and advise athletes accordingly.

13. This ground of appeal cannot succeed before this Tribunal because the Tribunal is obliged to accept a determination of a doping infraction determined by the Agency. Under s 14(5) of the Act, a determination by the Agency is "final and conclusive", unless challenged either by appeal or judicial review proceedings in the District Court. Further, the anti-doping policy of the applicant, which applies in this matter, provides in clause 12.4 that:

> "The Tribunal will accept as a proven fact a Positive Test Result determined by a Test conducted by the Agency in accordance with the Act (subject to ss 20 and 23 of the Act)".

Sections 20 and 23 of the Act contain the rights of appeal and judicial review.

14. The Tribunal's own rules at Rule 11.9.2 also contains a provision that the Tribunal shall accept as a proven fact the determination of a doping infraction under s 16B of the Act. As there has been such a determination in this case, it was not open to the respondent to challenge the determination in this case.

NO FAULT OR NO SIGNIFICANT FAULT

15. Mr Flexman submitted that the Tribunal should find "no fault or negligence" under Article 10.5.1 of the Code or, if it were unable to do this, should find "no significant fault or negligence" under the provisions of Article 10.5.2 of the Code. The relevant portions of the two articles read:

> "10.5.1 No Fault or Negligence
>
> If the athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1… that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance… is detected in an Athlete's Specimen in violation of Article 2.1… the Athlete must establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated.
>
> 10.5.2 No Significant Fault or Negligence
>
> This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1… If an Athlete establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable."

There is also an obligation on the Athlete to "establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced."

16. The fundamental ground for these defences was that the strict liability test imposed by the Code imposes a particularly onerous obligation on the Athlete. In order for such a regime to function effectively, where the onus falls on an athlete to prove no fault/no significant fault, the process leading up to a "determination" needs to be beyond reproach. In other words, the grounds upon which the respondent sought to challenge the determination were those upon which these defences were based.

17. The factual basis was:

    (a) BZP was not listed on the WADA Prohibited List;

    (b) the Agency knew that BZP was a concern and marginal;

    (c) the Agency had an obligation to educate, inform and notify before determining that a violation had occurred if it was going to rely on a positive test for BZP;

    (d) the Agency had, in effect, determined on or about 5 July that BZP should have been in the Schedule and then applied the decision retrospectively to testing that occurred on 21 May.

    (e) the determination was made notwithstanding BZP's unknown status.

18. The Tribunal had the assistance of helpful submissions from Mr David from the Agency and has considered several relevant statements from the Court of Arbitration for Sport on the application of the relevant provisions of the Code. There is not, to the best of the Tribunal's knowledge, any relevant New Zealand precedent on the topic.

19. Article 24.2 of the Code states that the comments annotating various provisions of the Code are included to assist in the understanding and interpretation of the Code. The comments in Article 10.5 state that the Article "*is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases*." Other relevant portions of the commentary state:

- to illustrate the operation of Article 10.5, an example where No Fault or Negligence would result in the total elimination of the 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 mis-labelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest)… 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 the 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).

20. Article 2.1 of the Code provides that the presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily specimen constitutes an anti-doping rule violation. It states that it "*is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping*

violation under Article 2.1". The Code is a strict liability code, as has been demonstrated in many subsequent CAS cases.

21. *Edwards v IAAF and USA Track and Field* (CAS OG 04/003, 17 August 2004) was a case where CAS accepted that Nikethamide, a stimulant, entered the Athlete's body through a glucose tablet. Edwards had conducted herself with honesty, integrity and character and she had not sought to gain any improper advantage or to "cheat" in any way. However, the Athlete was negligent in not ascertaining that no Prohibited Substance was present within the tablets as would have been clear to any person reviewing the tablets that there was more than one ingredient in the tablets. CAS noted the obligation and duty of the Athlete to ensure that no Prohibited Substance entered his/her body tissues or fluid. It was noted that the case provided an example of the harshness of the operation of the IAAF rule (similar to the present Code provision) relating to the imposition of the mandatory two-year sanction. It regretted the circumstances of the case did not make the threshold for the sort of rare and "fairly exceptional" facts necessary for a reduction of the minimum sanction applicable for a doping offence.

22. Another CAS cases which is relevant to this case was *Hipperdinger v ATP Tour* (CAS 2004/A/690, 24 March 2005) where CAS stated:

> "Under the applicable anti-doping regulations, it is not the duty of the respondent to warn athletes against the use of certain substances. While it is certainly desirable that the respondent and any IF should make every effort to educate athletes about doping, it is principally the sole duty of the individual athlete to ensure that no prohibited substances enter his body."

23. There was no obligation in the present cases for either the Agency or the applicant to warn the respondent against the possibility that BZP may produce a positive test.

24. The final CAS case for comment is that of *Knauss v International Ski Federation* (CAS 2005/A/847, 20 July 2005). The prohibited substance in that case was contained in a nutritional supplement taken by *Knauss*. Because it is widely known that nutritional supplements may contain prohibited substances or be contaminated, the initial Tribunal determined that it could not be said there was no fault or negligence on the part of *Knauss*. CAS noted that the requirement to meet the qualifying element "No Significant Fault or Negligence" must not be set excessively high. The Athlete did not know that the nutritional supplement contained a prohibited substance until the adverse findings were made. Furthermore, neither the packet itself, nor the leaflet with the packet, stated that the product contained a prohibited

substance. He did take the precaution of enquiring of the distributor as to what was in the product. If he had not done so, he would have displayed Significant Fault or Negligence.

25. In the present case, the respondent had the obligation of establishing how the product entered his system. His evidence was that he took UP at a night out with friends two nights before the Auckland Championships began on 21 May 2005. This evidence was somewhat at variance with an explanation he gave in a letter to the Agency dated 27 June 2005. In that letter he said:

> "Research on my part has since discovered that a product called "UP" which contains the substance Benzylpiperazine (referred to by some as a Party Pill) is actually packaged and distributed by my employer Leppin Sports International. Considering this coincidence of source, the only explanation I can give is that I have unknowingly consumed traces of this product because Leppin Sports International are also my sponsor in that they provide me with protein powder and related supplements, which I would not otherwise be able to use due to the cost."

26. The respondent's evidence as to how BZP got into his system was, at the best, economical. There was no evidence as to the ingredients in UP nor was a label from an UP bottle produced. The respondent did, however, accept in evidence that the packaging of UP does indicate the ingredients which are in it. He also acknowledged that he had read newsletters from the Agency and was aware of his responsibility. Indeed, he had promoted that responsibility to other athletes.

27. In the circumstances, the Tribunal has concluded that neither the defence of No Fault or Negligence or, alternatively, No Significant Fault or Negligence are available to the respondent. If it is accepted that the BZP entered his system through taking the party drug UP, he was, in fact, taking a substance which he would have known was a stimulant. He did so two days before a pending championship. It was his obligation to ensure that no prohibited substances entered his system. In the words of a submission made at the hearing he made a "careless mistake" which does not bring him within the exceptional circumstances test for No Significant Fault or Negligence.

28. In coming to this decision, the Tribunal has not overlooked the respondent's evidence that he did make some enquiries as to what the ingredients of UP were. This is a matter which was not mentioned either in his original letter to the Agency or in his evidence in chief. It came out during questioning. The Tribunal is unable to accept that the enquiries made were of such a character to discharge the exceptional circumstances requirement. Further, we see no significance in the submission that

Benzylpiperazine is not noted in the Prohibited Substances list. It falls within the "similar chemical structure or similar biological effect" addition. It stands to reason that there will be substances containing similar chemical structures to Prohibited Substances which have different names or appear in different products. This would be an easy way to cheat the system, if it was necessary for a new product containing a similar chemical structure to be specifically listed in the Prohibited list.

29. The Tribunal accepts that the result is harsh. Mr Ligaliga who supported the work of the Agency and drug-free sport has made a careless mistake. The strict liability provisions of the Code which are there for the betterment of sport and the limited nature of the No Significant Fault exception do not allow the Tribunal to make any other decision other than that of imposing a two-year period of ineligibility upon the respondent.

STARTING DATE

30. The Tribunal, having heard submissions, is of the view that it is appropriate in this case to commence the period of ineligibility from the date on which the respondent last competed in July. Mr. Ligaliga last competed on 16 July 2005 and the period of ineligibility will commence from that date.

DECISION

31. The respondent, having committed an anti-doping infraction, has not established either No Fault or Negligence or, alternatively, No Significant Fault or Negligence and the decision of the Tribunal is that a two-year period of ineligibility commencing from 16 July 2005 is imposed on him. In addition, it is noted that under Clause 10.2 of the applicant's Anti-Doping Policy the applicant will withdraw awards, placements and records won by the respondent at the Auckland Championships in May last.

SUPPRESSION ORDER

32. The suppression order previously made will remain in force for a further seven days from the date of issue of this decision. It will then lapse unless renewed. The decision will not be released to the media during the seven days but will be released if the suppression order is not renewed.

Hon. B J Paterson QC (Chairman)
8 December 2005