SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)

NO: SDRCC DT 10-0124
(DOPING TRIBUNAL)

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)
CANADIAN INTERUNIVERSITY SPORT (CIS)

AND

BRANDON KRUKOWSKI
(ATHLETE)

AND

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

Before:

Graeme Mew (Arbitrator)

Appearances and Attendances:

The Athlete, CIS, WADA and the Government of Canada did not participate in the hearing.

The Canadian Centre for Ethics in Sport was represented by David Lech (Counsel)

AWARD

1. This appeal raises the question of whether a Waiver of Hearing Form, which resulted in a finding that an athlete was guilty of an anti-doping rule violation, can be subsequently revoked by the athlete, with the result that the athlete would get a new hearing on the issue of whether he had, in fact, committed an anti-doping rule violation.

2. By a notice dated 30 April 2010, the Canadian Centre for Ethics in Sport ("CCES") alleged that Brandon Krukowski (the "Athlete") had committed an anti-doping rule violation for failing to submit to sample collection (as required by Rule 7.31 of the Canadian Anti-Doping Program ("CADP")) during an out-of-competition doping control on March 31, 2010 in Waterloo, Ontario.

3. The notice informed the Athlete that the CCES proposed that the sanction for this alleged violation should be four (4) years ineligibility from sport (in accordance with CADP Rules 7.39 and 7.49).

4. On 24 May 2010, the CCES received by fax what purported to be a completed "Waiver of Hearing Form" (the "Waiver") signed and dated by the Athlete and witnessed by John Krukowski. That form contained the following narrative:

> I, Brandon Krukowski acknowledge the anti-doping rule violation set out in the CCES notice of April 30, 2010. I accept the sanction for this violation is four (4) years of ineligibility (in accordance with Rules 7.31, 7.39 and 7.49), and waive my right to a hearing. By waiving my right to a hearing and accepting the sanction(s) as proposed by the CCES, I understand that any period of ineligibility will commence on the date of my signed waiver, with a credit for any previous period of Provisional Suspension.
>
> I am aware that I have the right to seek legal counsel prior to waiving my right to a hearing. I acknowledge that signing a waiver in and of itself cannot be used as sufficient justification to make a claim under Rule 7.46 regarding substantial assistance.

5. On 23 June 2010 the Athlete filed a "Request for a Hearing – Doping" with the SDRCC, seeking to appeal the finding of the CCES on 24 May 2010 that he had committed an anti-doping rule violation and to revoke the Waiver.

6. I was appointed as the arbitrator to hear this appeal in accordance with Article 6.8(b) of the Canadian Sport Dispute Resolution Code (the "Code").

7. Following consultation with the parties, including the Athlete, a Preliminary Meeting (as provided for by Article 7.7 of the Code) was scheduled for 26 July 2010 at 10:00 a.m. (EDT) by way of telephone conference. Despite being notified of the time, date and toll-free call-in details of the telephone conference, the Athlete did not join the Preliminary Meeting call. Efforts by SDRCC staff to reach the Athlete on the contact phone number provided by him were unsuccessful.

8. Because the Athlete had not participated in the scheduled Preliminary Meeting, I directed (with the agreement of the lawyer for the CCES) that the SDRCC should write to the Athlete by email and registered mail and offer him another opportunity to participate in a Preliminary Meeting. That letter, which was dated and sent on 26 July 2010, also stated:

> Furthermore, we also wish to draw your attention to section 7.12 (f) of the Canadian Sport Dispute Resolution Code stating: *"In a hearing on an anti-doping rule violation, the Doping Dispute Panel may draw an inference adverse to the Party who is asserted to have committed an anti-doping rule violation based on the Party's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or by telephone as directed by the Doping Dispute Panel) and to answer questions from the Doping Dispute Panel or the CCES."*

9. The Athlete did not respond to this communication.

10. I then directed that a hearing would proceed on Friday 20 August 2010 at 1:00 p.m. EDT by way of telephone conference. A Notice of Hearing was sent to the Athlete by email, ordinary mail and UPS courier.

Proceeding With the Hearing in the Absence of the Athlete

11. Article 6.18 of the Code provides for arbitration in the absence of a party[1] in these terms:

> An Arbitration may proceed in the absence of any Party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a Party. The Panel shall require the Party who is present to submit such evidence as the Panel may require for the making of an award.

12. I am satisfied that all reasonable steps have been taken to ensure that the Athlete was notified of the hearing and that he has been afforded the opportunity to participate and to be heard. I therefore elected to proceed with the hearing in the absence of the Athlete, as provided for by Article 6.18 of the Code.

Hearing

13. The CCES participated at the hearing through counsel. During the hearing I heard brief submissions from counsel and also requested that I be provided with copies of further documentation. I then reserved my decision.

The Parties

14. The Athlete is a 22 year old student attending the University of Waterloo during the 2009-2010 academic year. He was registered as a student athlete in the sport of Canadian football.

15. Competitive university football in Canada falls under the auspices of Canadian Interuniversity Sport ("CIS"). The CIS administers the CIS Drug Education and Doping Control Program to all CIS student-athletes.

16. The CCES is a non-profit organisation, independent from sport organisations and government. It is the body responsible for administering the CADP.

17. As part of his registration as a CIS student-athlete, the Athlete signed an acknowledgement that he had read, understood and would abide by the Doping Control Regulations.

Assertion of Anti-Doping Rule Violation

18. On 31 March 2010 a Doping Control Officer ("DCO") and a Chaperone assigned by the CCES attended the Athlete's residence at 7:14 a.m. for the purposes of conducting out-of-competition doping control testing pursuant to the CADP. The Athlete informed the DCO that he was no longer a member of the University of Waterloo football team due to injury. He refused to be tested despite being warned of the consequences of refusing.

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[1] Article 6.18 applies to SDRCC arbitrations generally. Article 7, which contains specific rules for doping appeals, provides (in Article 7.1) that "[i]n connection with all Doping Disputes and Doping Appeals, the specific procedures and rules set forth in .. Article 7 shall apply in addition to the rules specified in the Anti-Doping Program. To the extent that a procedure or rule is not specifically addressed in .. Article 7 or in the Anti-Doping Program, the other provisions of this Code shall apply, as applicable."

19. By a fax to the CCES dated 15 April 2010, the Athlete informed the CCES that had refused to be tested because on 12 September 2009 he had suffered a career-ending injury and had had no involvement with the Waterloo Warriors football team or the University of Waterloo football organisation since then. He also complained about the manner in which the DCO had behaved stating that "[t]his was a disrespectful act and illegal as it is a violation of my privacy and human rights…".

20. As noted already, the Athlete subsequently received notification of an assertion by the CCES that he had committed an anti-doping rule violation by failing to submit to sample collection. On the Waiver of Hearing form signed by the Athlete on 24 May 2010, he seemingly acknowledged that he had refused to submit to sample collection, and thereby had committed an anti-doping rule violation. He waived his right to a hearing and accepted the sanction of four (4) years Ineligibility proposed by the CCES.

21. Upon receipt of the Athlete's signed Waiver of Hearing Form, the sanction of four years Ineligibility commenced. The Athlete is presently Ineligible and, unless his appeal succeeds, his period of Ineligibility will not expire until 24 May 2014.

Grounds for Appeal

22. In his Request for a Hearing, the Athlete indicates the following grounds for his appeal:

> I feel the waiver letter I signed was not fully explained, and wish to revoke my waiver letter.

23. In an email to the CCES dated 10 June 2010, the Athlete wrote:

> I did not give consent to disclose my name publicly. I was told by the cces on the conferecne call that my name was going to be disclosed regardless, I was unaware that I have the right to not give the right to give disclosure of my name to the public. I have There for i withdraw my waiver to a hearing becasue of this lack of information and neglect by the cces and the false information i was given. I have contact my attorney and am requesting a hearing and if my name is made public monday there will be a lawsuit to the cces. Concerning the violation of my human rights and privacy. As well the procesdures the cces did not adhere by when they entered my home without consent and before disclosing there idenity, which i have witness for. Please respond back quicky before this circumstance gets out of hand *[sic]*

24. No further evidence or information has been provided to this tribunal concerning the circumstances under which the Athlete signed the Waiver of Hearing Form.

Discussion

25. In the SDRCC case of *CCES v Waselenchuk*, an athlete who had tested positive for cocaine signed a Waiver of Hearing Form and received a sanction of two years Ineligibility. He subsequently said that he had not realised at the time of signing the waiver that he would be Ineligible to participate in his sport not only in Canada, but, also, in the United States, where he resided. He claimed that he should have been told to get legal advice before signing the waiver. He moved to have the waiver set aside. The procedural

arbitrator indicated that it would be incumbent on the Athlete to successfully argue that his waiver was not properly given "because of alleged failures and omissions which were in breach of the principles of natural justice and procedural fairness."[2]

26. At the full hearing of the appeal in *CCES v Waselenchuk*, the arbitrator, referring to the decision of *Baker v Canada (Ministry of Citizenship and Immigration)*[3] observed that a high level of procedural fairness is required when an athlete is contemplating whether or not to waive his or her right to a hearing.[4]

27. The evidentiary record in this case shows that:

    a) The DCO explained to the Athlete what his rights and responsibilities were;
    b) The DCO read out to the Athlete the entire information on the Athlete Selection Order, pointing out to him in particular the area regarding possible consequences of refusal;
    c) The Athlete signed an Athlete Selection order which he acknowledged having read and which provided, *inter alia*, "…failure or refusal to provide a sample may result in an anti-doping rule violation";
    d) The Athlete was given an opportunity to discuss his concerns with senior representatives of the CCES prior to confirming his refusal;
    e) The Athlete was given the opportunity to, and did, provide a written account of the circumstances and his reasons for refusal;
    f) When, following the forgoing, the CCES decided to assert that an anti-doping rule violation had been committed, the Notification sent to the Athlete advised him to consult legal counsel during the process of determining his options, one of which was to waive his right to a hearing;
    g) The completed Waiver of Hearing Form which the Athlete signed confirmed his awareness that he had the right to seek legal counsel prior to his waiving his right to a hearing;
    h) There is no support for the Athlete's assertion that he was misled into believing that his name would not be made public if he signed the waiver[5]. Indeed there is evidence to the contrary.

28. I am satisfied that the level of procedural fairness accorded to the Athlete has more than satisfied the *Baker* standard. I see no reason for invalidating the waiver.

Decision

29. The appeal is denied. Because the waiver was validly given, the Player's acknowledgement that he committed an anti-doping rule violation, his acceptance of the sanction proposed by the CCES, and the resulting decision of the CCES stand.

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[2] *CCES v Waselenchuk*, SDRCC DT-06-0038, Preliminary Ruling of Bernard A. Roy dated 11 January 2007 at para 38.
[3] [1999] 2 S.C.R. 817
[4] *CCES v Waselenchuk*, SDRCC DT-06-0038, Decision of Ross C. Dumoulin dated 23 March 2007 at p. 20
[5] As was subsequently explained to the Athlete, Article 7.22 (Confidentiality and Transparency) mandates the public disclosure when there has been a determination of an anti-doping rule violation.

30. Accordingly, the Athlete remains Ineligible[6] and his period of Ineligibility will continue until 24 May 2014.

Costs

31. If the CCES is seeking an award of costs pursuant to Article 7.69 of the CADP, it should file with the SDRCC a brief written submission of no more than two typewritten letter sized pages to that effect by no later than 2 September 2010 at 5:00 p.m. (EDT).

25 August 2010

Graeme Mew, Arbitrator

[6] Rule 7.13 of the CADP provides, inter alia, that "[n]o Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any Signatory or Signatory's member organization."