SPORT DISPUTE RESOLUTION CENTRE OF CANADA
(SDRCC DT 10-0128)

IN THE MATTER OF A DOPING TRIBUNAL HEARING CONDUCTED BY TELECONFERENCE ON AUGUST 16, 2010, INVOLVING THE PARTIES,

MATT SOCHOLOTIUK

(The Athlete)

AND

THE CANADIAN CENTRE FOR ETHICS IN SPORT

(The Respondent)

REASONS FOR DECISION

Representing the Athlete: Unrepresented

Representing the Respondent: David Lech

Arbitrator: Ed Ratushny

August 31, 2010

REASONS FOR DECISION

Background

1. On August 23, 2010, I issued a Decision that an anti-doping rules violation had been established in this matter and that the sanction under Rule 7.38 would be an extension of the period of ineligibility for a first violation from two years to three years commencing on June 4, 2010. These are my Reasons for that Decision.

2. On March 31, 2010, at the specific request of the University of Waterloo, the Canadian Centre for Ethics in Sport (CCES) attended at the university campus to conduct out-of-competition drug testing on the entire football team. The Athlete, Matt Socholotiuk, was tested as a player on the team and provided both a urine sample and a blood sample.

3. On May 7th, the CCES received the results from the analysis of the urine sample, which found the presence of Testosterone that was consistent with exogenous origin. The CCES requested that the Athlete provide a written explanation and on May 20th, he responded as follows: *I Matt Socholotiuk am addressing the drug testing that was done on March 31, 2010. It was to my understanding that the product I was taking was not a banned substance. I did not think this would have triggered a positive urine sample. I feel ashamed and embarrassed for not talking the time to look up this product on the banned substance list. I hope with further dissections, this does not jeopardize my career with the Waterloo Warriors football team. I fully accept all responsibility for my actions and understand the consequences. I look forward to discussing this further. Matt Socholotiuk.*

4. On May 28th, the CCES sent a Notice of this adverse analytical finding to the Athlete, pursuant to Rule 7.66. However, this Notice made no reference to the results of the analysis of the blood sample which still were pending. On the same date, the CCES sent a follow-up letter rescinding this Notice. The CCES then sent another Notice on June 4th, with respect to the urine sample, but this time also referred to a potential, additional adverse finding as a result of the pending blood analysis. Rule 7.66 requires that such a Notice must include specified details about the alleged violation, the procedures involved and the rights of the Athlete. The Notice indicated that the CCES would support the two-year ineligibility period normally contemplated under Rule 7.28 for a first violation. The Notice also provisionally suspended the Athlete, effective June 4th.

5. On June 17th, the CCES received the results from the analysis of the blood sample, which found the presence of recombinant Growth Hormone. The CCES again requested a written explanation from the Athlete and on June 21st he responded as follows: *I Matt Socholotiuk am addressing the drug testing that was done on March 31, 2010. The blood test for Human Growth Hormone is very unreliable. I hope with further dissections we can clear up this matter. I look forward to discussing this further. Matt Socholotiuk.*

6. On June 23rd, the CCES sent another notice pursuant to Rule 7.66, which amended the June 4th Notice by including the adverse analytical finding for the blood sample as well as the adverse finding for the urine sample that was included previously. The two findings were treated as a single violation but the CCES indicated that it now would seek a four-year period of ineligibility for this first violation rather than the two-year period indicated on June 4th.

Proceedings

7. On the same date, June 23rd, the Sport Dispute Resolution Centre of Canada (SDRCC) conducted a teleconference meeting for the purpose of clarifying the procedures that would follow. This meeting was attended by: The Athlete, representatives of the CCES, a Director of Canadian Interuniversity Sport and representatives of the SDRCC. The notes of this meeting indicate that the Executive Director of the SDRCC explained the nature of a "resolution facilitation" process. It is available for the parties to exchange information about the case in the presence of an SDRCC resolution facilitator, who can assist an athlete to understand the available options and the nature of a full hearing if one is required. The notes also indicate that the parties agreed to participate in such a meeting on June 30th. Since the resolution facilitation process is confidential and without prejudice, I am not aware of what transpired but understand that the Athlete did attend and participate.

8. On July 6th, The Executive Director wrote to the Athlete by email and noted that he neither signed a waiver of hearing nor requested an arbitration hearing. She asked that he either sign such a waiver or provide the names of up to three arbitrators to conduct a hearing. She added that if he failed to respond by noon on July 9th, an arbitrator would be selected from the SDRCC rotating list of arbitrators. Since the Athlete did not respond, I was designated from the rotating list as the Arbitrator in this matter on July 13th. On the same day, the SDRCC gave notice to the parties of a preliminary hearing to be held by teleconference on July 21st.

9. The teleconference was convened as scheduled, with representatives of the CCES and SDRCC present, but the Athlete did not attend. The Executive Director attempted to reach him, through

the telephone number used to communicate with him previously, but was unsuccessful. On July 26th, the Executive Director sent a "Warning Letter" to the Athlete requesting an explanation for his failure to participate on July 21st, indicating that a hearing could be held in his absence and noting that adverse inferences could be drawn against him from a failure to participate. She added that, in view of the potential four-year period of ineligibility, she believed it would be in his best interests to respond. He did not respond. On August 2nd, the SDRCC wrote again and told him that a teleconference hearing could be held on either the morning or afternoon of August 9th or 11th. He was invited to select his preference but did not respond. On August 13th, a notice was sent advising the parties that the hearing would be held on August 16th.

10. The hearing on the merits was held on August 16th, by teleconference, in accordance with the notice to the parties. The Athlete did not attend. Counsel for the Respondent was granted leave pursuant to Rule 7.87 (d) to prove the violation in his absence as well as to make submissions and file a supplementary affidavit on the period of ineligibility.

The Violation

11. Counsel for the Respondent filed extensive documentation in advance of the hearing, which was anchored by the affidavit of Jeremy Luke, who is the Director of the Anti-Doping Program of the CCES. He has had extensive experience in anti-doping over the past decade, both nationally and internationally and including responsibility for the anti-doping programs for the 2010 Olympic and Paralympic Winter Games. The documentation filed by the Respondent includes doping control officer reports, certificates of analysis, records related to chain

of custody and reviews of procedures. While some of this evidence is hearsay, I consider it to be highly reliable and not unfair to consider.

12. Counsel simply relied on this evidence to establish the violation but offered to make Mr. Luke available for questioning by me. I did not consider that to be necessary and have no hesitation in concluding, from this documentation, that a violation of the anti-doping rules has been proven to my comfortable satisfaction, bearing in mind the seriousness of the allegation which is made, as required by Rule 7.81. Rule 7.85 authorizes a Doping Tribunal to draw an inference adverse to the Athlete due to a refusal to appear at the hearing. The circumstances of the Athlete's failure to attend constitute a "refusal to appear" under Rule 7.85. However, this only reinforces the proof contained in the documentation. Finally, all procedural requirements with respect to notification of the Athlete have been met. Rule 7.23 provides that the presence of a prohibited substance in an Athlete's bodily sample is an anti-doping rule violation. This violation has been established, both in relation to the urine sample and the blood sample.

The Sanction

13. My decision of August 23rd stated that the period of ineligibility commenced on June 4, 2010. This was the date on which the Athlete received notice from the CCES of his provisional suspension and Rule 7.14 provides that the Athlete shall receive a credit for such period of provisional suspension against any period of ineligibility which may ultimately be imposed.

14. Rule 7.38 provides that the period of ineligibility for a first violation of Rule 7.23 shall be two years but may be reduced or eliminated based on the existence of supporting Exceptional Circumstances. No evidence has been presented, either in the

Athlete's explanations or otherwise, that would meet this requirement. Rule 7.38 also provides that the two-year period may be increased on the basis of Aggravating Circumstances. Rule 7.49 provides that the maximum period of increased ineligibility for the presence of a prohibited substance is four years. The Respondent took the position that the Aggravating Circumstances in this case warranted the imposition of the maximum four-year period of ineligibility.

15. The Affidavit of Jeremy Luke, on behalf of the Respondent, states*: The CCES bases its proposed sanction of four (4) years on the following Aggravating Circumstances: (i) the athlete was a member of the University of Waterloo Football Team and the CCES believes he committed the violation as part of a plan or scheme, acting alone or with others; (ii) the athlete used multiple Prohibited Substances; (iii) the CCES believes the Athlete used the multiple Prohibited Substances on multiple occasions; (iv) the CCES believes the athlete used recombinant Human Growth Hormone precisely because he felt he was unlikely to be requested to provide a blood sample and thus his doping would never be detected.* In the course of his submissions on these issues, counsel for the Respondent offered to provide a Supplementary Affidavit by Mr. Luke by way of elaboration and I requested that he do so. This was distributed by the SDRCC to the parties on August 18th. I will address this evidence in relation to each of the above four aggravating circumstances that were advanced, in reverse order, and specifically in relation to Mr. Luke's Supplementary Affidavit

16. I agree that the Athlete's use of recombinant Human Growth Hormone (rhGH) was based on sophisticated deception related to the difficulty of detection. This is an Aggravating Circumstance. The World Anti-Doping Agency (WADA) approved test to detect rhGH requires blood collection. The Athlete would not expect blood testing since

collecting blood sample had never been done before with CIS football athletes. The Athlete's adverse analytical finding for rhGH is the first such reported case in Canada and, indeed, this is only the second such violation in the world. This Athlete was target tested to provide a blood sample because of his size and strength, which caused the CCES specifically to look for rhGH in his blood sample. This clearly amounts to an Aggravating Circumstance.

17. The factor of use on multiple occasions was based on the Athlete's explanation reproduced in Paragraph 3 above and, in particular, the phrase "the product I was taking". This certainly is more consistent with a regular practice rather than a single event. However, this explanation only related to the Notice with respect to the Testosterone detection and not to the rhGH detection. This is an Aggravating Circumstance, although not highly significant, since at least some regular use might be anticipated for most of the first violations to which the two-year period of ineligibility is applicable

18. The Supplementary Affidavit relates an opinion of Dr. Christiane Ayotte, whose expert scientific evidence has been accepted frequently in anti-doping cases. I accept her view that the Athlete's use of two separate and highly potent performance enhancing banned substances, that are highly controlled pharmaceuticals, suggests a "sophisticated, involved and regimented doping program". In particular, there is additional enhancement from using these specific substances in combination. Both of these are also natural endogenous substances which may have led the athlete to believe the synthetic versions would be more difficult to detect. The use of more than one such substance, particularly in combination for a cybernetic effect, is certainly an Aggravating Circumstance.

19. The first allegation advanced by the Respondent is that the Athlete's violation was committed "as part of a plan or scheme, acting alone or with others". There can be no doubt that the Athlete was acting according to a personal plan or scheme that had sophisticated features. This conduct has been taken into account in the above findings of Aggravating Circumstances. The Athlete also must have interacted with a supplier and received advice from the supplier or others. But this also might be anticipated for most of the first violations to which the two-year period of ineligibility is applicable. The question that remains, then, is whether the Athlete planned or schemed "with others" in some further way to constitute an Aggravating Circumstance.

20. The evidence presented in Mr. Luke's Supplementary Affidavit invites such a finding, vaguely based on some conspiracy or other organized or group-related plan to engage in doping collectively or on a large scale. The evidence provided is circumstantial but that is normally the only way that such conduct can be proven. People engaging in surreptitious conduct do not document their mutual intentions in express agreements so that acting in cartels, organized crime or in concert for other such purposes can only be proven by drawing inferences from other documents, events and actions. In my view, a finding of such conduct would be very serious and might, in itself, be a sufficient Aggravating Circumstance to warrant the maximum four-year period of ineligibility. There is no suggestion that the coaches or other university officials were so engaged. Mr. Luke relates the following evidence.

21. On March 31, 2010, the CCES attended at the university campus and conducted drug tests on the entire football team at the request of the university's administration. This unprecedented request

was generated by criminal charges laid previously by local police against a member of the team for possession and trafficking in substances which also are banned in sport. Subsequent to this testing, a second team member was charged by the police. The CCES tested 61 athletes and collected 61 urine samples and 20 blood samples. It is currently managing potential anti-doping rule violations involving 9 of these athletes. These 9 athletes do not include the two who were criminally charged, since the CCES has decided to postpone their consideration pending the conclusion of the criminal proceedings against them. The large number of athletes from the same team who tested positive is also unprecedented.

22. Regular out-of-season testing on a much smaller scale continued to target CIS football athletes at other schools during and after the Waterloo tests. This testing across the country resulted in alleged anti-doping rule violations against only 3 athletes. One of these athletes is currently negotiating a confidential agreement with the CCES pursuant to Rule 7.46 which authorizes the CCES to suspend a part of an ineligibility sanction of an athlete who provides Substantial Assistance to the CCES or other enforcement bodies in the investigation or proof of violations or offences against other persons. Although the CCES attempts to obtain Substantial Assistance in all doping cases, not one of the 9 Waterloo players has co-operated in this respect.

23. The Athlete in this case was the only one to test positive for either rhGH or Testosterone but the team-mate, who was first charged criminally, is alleged to have trafficked in both of these substances.

24. The circumstances summarized in the previous three paragraphs raise a suspicion that there may have been a concerted attempt to engage in trafficking as well as doping to enhance the performance of

a large number of players and hence the team. However, under closer scrutiny, this suspicion is not based on proof that is sufficient to establish an additional Aggravating Circumstance.

25. The large number of positive tests is exceptional but so was the comprehensive testing. And there is no evidence of a connection or nexus between the Athlete and at least some of the others in relation to these positive tests. The Athlete used two of the substances which were included in the first criminal charges but this only suggests that the player who was charged may have been the Athlete's supplier. The criminal allegation has yet to be proven. Even if it were proven, the consequence may be simply to enhance the possibility that the person charged was the Athlete's supplier. The limited potential value of such a finding was addressed in Paragraph 19, above. Moreover, the Athlete was the only one of the nine who tested positive for either rhGH or Testosterone, which does not suggest group conduct. The lack of any co-operation with the CCES on the part of the 9 players who tested positive also may be suspicious but, as the Respondent frankly acknowledges, there is absolutely no obligation on the part of an Athlete to engage in the Substantial Assistance opportunity established under the rules.

26. It should be noted again that Rule 7.85 authorizes a Doping Tribunal to draw an inference adverse to this Athlete due to his refusal to appear at the hearing. In my view, such an inference is not sufficient to transform the circumstantial suspicion in this case into sufficient proof to establish an additional Aggravating Circumstance. It must be drawn in relation to some evidentiary basis that has probative value.

27. In his submissions in relation to the appropriate period of ineligibility, counsel for the Respondent was also frank in

acknowledging that the circumstances in this case do not represent a "worst case scenario". This characterization is sometimes helpful in determining whether a maximum penalty or sanction should be imposed. I have concluded that the maximum ineligibility period of four years is not warranted but that the Aggravating Circumstances are very serious and do require an increase of one year from the minimum of two years under Rule 7.38.

Decision

28. As stated in the decision issued on August 23, 2010, and based on the reasons provided above, an anti-doping rule violation by the Athlete has been established pursuant to Rule 7.81. The sanction imposed is a period of ineligibility of three years commencing on June 4, 2010.

Dated at Ottawa this 31st day of August 2010.

Ed Ratushny, Arbitrator