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22 June 2005

DECISION

in the matter

FIBA AC 2005-1

WADA World Anti-Doping Agency

vs.

FIBA Fédération Internationale de Basketball

regarding the Player David Morgan

1. The decision by the FIBA Commission of 5 April 2005 is set aside and the matter is referred back to the FIBA Commission to be re-decided.
2. The advance on costs paid by the Appellant is to be reimbursed to the Appellant save for the non-reimbursable fee in the amount of USD 1,200. In all other respects each party shall bear its own expenses.

I.

1. The basketball player, David Morgan (hereinafter referred to as "the Player"), is a Canadian citizen and in the 2004/2005 season played for the Norwegian basketball club Harstad Vikings, which is a member of the Norwegian Basketball Association (hereinafter referred to as "BLNO"). BLNO is in turn a member of the Respondent.

On 26 November 2004 a doping test was performed on the Player during a national competition. The A-sample was analysed at Aker University Hospital HF. According to said laboratory's analysis report of 16 December 2004 the A-sample contained the substance ephedrine in a concentration of more than three times the



Fédération Internationale
de Basketball

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permitted threshold of 10 µg/ml. Ephedrine is on WADA's list of banned substances (stimulant, group S1).

Anti-Doping Norway, the anti-doping organisation, on behalf of whom the doping test was performed on 26 November 2004, informed the Player of the results of the analysis by letter of 17 December 2004 and asked him to comment on the finding within a deadline of 5 days. Furthermore, the letter advised the Player about the possibility of having the B-sample analysed. The Player did not exercise this possibility. By letter of 10 January 2005 the basketball club Harstad Vikings notified Anti-doping Norway that it had terminated its contract with the Player because of the urine sample found to be positive, whereupon the Player returned to Canada.

By letter of 16 January 2005 the Player gave Anti-Doping Norway his comments on the events for the first time. In his letter he stated inter alia:

"... I have taken numerous drug tests without any incidents. During all these experiences, teams have always had a nutritionist or trainer available to assist with providing accepted health supplements and by reviewing any supplements already being used. Upon arriving in Harstad, there was no assistance available to players and I was left to find my own supplements.

I began taking 'Thermalean' a natural energy supplement that was sent to me in Harstad by my girlfriend. It had been purchased 'over the counter' at Westwood Vitamins in Port Coquitlam, BC ... I was unfamiliar with this product and had only recently commenced taking it. I would take approximately three capsules a week, and had taken one approximately an hour before the game (on the day I had the drug test). The label recommends that individuals take one or two capsules with each meal daily to obtain maximum results.

I was completely unaware that this product contained a prohibited substance; and had I known, I never would have taken the supplement. I was completely ignorant and uninformed regarding this matter. Under no circumstances was I attempting to enhance my 'sport performance'. The same effect that I received from taking 'Thermalean', I could have obtained by having an energy drink or by using any other unprohibited supplement.

I did not realize that I was taking a prohibited substance. During the urine test I was open and honest, and reported taking energy supplement. ... "

By letter of 28 January 2005 Anti-Doping Norway informed the Respondent that, in view of its own rules and regulations and in view of Norwegian civil law, it was not in a position to institute or continue proceedings against the Player for an alleged anti-doping rule violation. The Respondent then instituted an action against the



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Player on the basis of its own rules and regulations (Art. 6.8.5.5 Internal Regulations) and notified the Player thereof by letter of 21 February 2005. By letter of 2 March 2005 the Player then, in accordance with the Internal Regulations, applied for a hearing before the FIBA Commission, the competent body for this action. Following the hearing by way of a conference call on 16 March 2005 the FIBA Commission decided on 5 April 2005 that the Player be suspended for four months as a consequence of an anti-doping rule violation. The FIBA Commission ordered that the sanction begin on 18 December 2004 and end on 17 April 2005. In its reasons the FIBA Commission stated, inter alia:

"There can be no doubt that Mr Morgan acted negligently when he ingested a food supplement without ensuring that this supplement does not contain a prohibited substance. There is established case law within FIBA and the Court of Arbitration for Sport that it does not exculpate an athlete if he is unaware of the presence of a prohibited substance in a food supplement. On the other hand ephedrine is a substance which is particularly susceptible to unintentional use in connection with food supplements which are generally available in drugstores. For the benefit of Mr Morgan the Panel assumes that Mr Morgan did not intend to enhance his sport performance. In the Panel's view, therefore, a period of ineligibility of four months seems to be appropriate."

The Appellant received this decision by the FIBA Commission on 5 April 2005 and filed an appeal against it with the FIBA World Appeals' Commission by letter of 19 April 2005.

2. The Appellant is of the opinion that the decision by the FIBA Commission is unsound with regard to the measure of the sanction, i.e. the length of the ban, because it is not in conformity with the prevailing rules (Internal Regulations). As a general rule Article 6.8.2.1 of the Internal Regulations orders a two-year ban for a first-time anti-doping rule violation. Although Art. 6.8.2.2 of the Internal Regulations allows the FIBA Commission to order a milder sanction there are two conditions for this. Firstly, the substance in question must be a so-called "specified substance" within the meaning of the 2004 WADA Prohibited List. Secondly the player must establish that the use of the substance was not intended to enhance his/her sport performance. The Player has at least not shown the latter condition adequately. Objectively, the substance ephedrine is – according to the Appellant – likely to enhance a player's sport performance. This would at least suggest that also subjectively the athlete took the substance for precisely this purpose, i.e. for the purpose of enhancing his performance. The high concentration of the substance in the Player's urine sample would, amongst other things, also be a fact supporting this argument. The latter fact makes it appear less likely that the positive finding is due to a contaminated food supplement. Moreover, the Player has also not furnished any evidence that precisely the food supplement he used was contaminated, let

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alone that he even took the food supplement in question. Finally, according - to the Appellant - it has also not been proven that the instruction leaflet with the food supplement or its packaging did not include any reference to the substance ephedrine. Whether therefore the Player took the prohibited substance unknowingly and not for the purposes of enhancing his performance has not been established with the requisite certainty.

In the alternative, the Appellant argues that even if the Player did not intend to achieve any enhancement in his performance by taking the prohibited substance, the FIBA Commission has set the ban too low. In view of the high level of concentration of the prohibited substance in the urine sample, the particularly significant negligence of the Player and taking into account the precedent case law of the CAS on doping bans in connection with nutritional supplement contaminations only a suspension of one year was reasonable. In addition reference was made to the Appellant's written pleadings of 17 May 2005.

3. The Appellant therefore moves *"to pronounce a two year suspension against the Player; alternatively, to pronounce a 1-year suspension against the Player"*.
4. The Respondent moves that the Appellant's motion be dismissed. The Respondent is basing the reasons for its motion on, inter alia, the wording of Art. 6.8.2.2 of the Internal Regulations. According to this the milder sanction is applicable where the Player can establish that the use of such a specified substance was not intended to enhance sport performance. Since, however, the Player - according to the Respondent - cannot prove a particular state of mind and the rules also do not require the Player to show and prove circumstances which allow conclusions to be drawn about his state of mind at the time of taking the prohibited substance, the Player has satisfied the requirements of Art. 6.8.2.2 of the Internal Regulations if he shows prima facie that he did not take the prohibited substance for the purposes of enhancing his performance. The Respondent argues that the Player has done this in the present case. Therefore - according to the Respondent - it was up to the Appellant to show and prove circumstances making the Player's submissions implausible or not credible. However, the Appellant has not furnished such proof. In all other respects reference was made to the Respondent's written pleadings of 30 May 2005.
5. By order of the President of the Appeals Commission, Mr. Antonio Mizzi, of 21 April 2005 Prof. Dr. Ulrich Haas was appointed as a sole arbitrator (hereinafter referred to as "Chairman") for the present case. Upon application by the Respondent of 26 April 2005, the Chairman summoned the Player and Anti-Doping Norway to the proceedings in accordance with Article 12.6 of the Internal Regulations. In all other respects reference is made to the content of the "order of



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procedure" of 19 April 2005 issued by the Chairman and signed by the parties and by the joined parties. The Appellant and the Respondent were both represented at the oral hearing on 7 June 2005 in Geneva. The joined parties did not attend the oral hearing. For the content of the oral hearing reference is made to the minutes.

II.

The appeal against the Respondent's decision of 5 April 2005 is admissible. In particular, the Appellant has a right to appeal. In this regard Art. 12.1.1 of the Internal Regulations provides that "the Appeals Commission ... shall hear appeals filed by an affected party against decisions of FIBA ...". The Appeals Commission has in past cases consistently given a broad interpretation to the term "affected party". In the present case the Appellant has the right to have decisions by the Respondent in doping-related matters reviewed by the CAS on the basis of Art. 6.8.4.2.2 of the Internal Regulations. This right was granted to the Appellant – in the course of implementing the World Anti-Doping Code (hereinafter referred to as "WADA") – so as to work towards globally uniform standards in the fight against doping. This office of guardian held by the Appellant is sufficient to deem the Appellant – in doping-related matters – to be an affected party within the meaning of Art. 12.1.1 of the Internal Regulations. Furthermore, the Appellant filed the appeal in due form and in due time.

The appeal is well founded. Art. 6.8.2.1 of the Internal Regulations provides that for an anti-doping rule violation within the meaning of Art. 6.2.1.1 of the Internal Regulations the sanction is in principle two years of ineligibility for a first offence. By way of exception said ban can be reduced pursuant to Art. 6.8.2.2 of the Internal Regulations. This provision reads as follows:

"The Prohibited List may identify specified substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents. Where a player can establish that the use of such a specified substance was not intended to enhance sport performance, the period of ineligibility shall be:

First violation: at a minimum, a warning and reprimand and no period of ineligibility from future events, and at a maximum one (1) year's ineligibility ..."

The substance detected in the Player's urine, ephedrine, is undeniably a specified substance within the meaning of the above provision. Therefore, whether Art. 6.8.2.2 of the Internal Regulations applies in the present case depends only on whether the player can establish that the use of the specified substance was not intended to enhance sport performance.



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What is questionable – and disputed between the parties – is how far the Respondent's power of review extends in relation to the statements made by the Player regarding Art. 6.8.2.2 of the Internal Regulations.

In the Respondent's opinion the provision in Art. 6.8.2.2 of the Internal Regulations applies in favour of the Player already if the latter submits that he did not take the specified substance for the purposes of enhancing his performance. The Respondent argues that the provision does not require the Player to show and if necessary also prove facts or surrounding circumstances which allow a conclusion to be drawn about his state of mind at the time of taking the prohibited substance. However, since one cannot prove an inner state – such as a particular state of mind – directly, rather at most indirectly, and Art. 6.8.2.2 of the Internal Regulations does not expressly provide for the latter, the Player already satisfies the requirements of said provision if he contends that he had no intention to enhance his performance. It was then up to the sanctioning authority to show and if necessary prove circumstances making the Player's submission implausible and therefore irrelevant.

When interpreting the provision in Art. 6.8.2.2 of the Internal Regulations one must look at the wording and particularly the context of the provision. Webster's Unabridged Dictionary describes the term "to establish" by, inter alia, the words "to prove" or "to demonstrate". This implies that the Player must do more than merely "bring forward" or "contend". Rather the Player must convince the sanctioning authority – to a certain degree – of the presence of the inner fact, namely that he did not intend to enhance his performance. The Respondent now wishes to correct this meaning of the term because the inner will or the state of mind of the person concerned cannot be proven directly. However, this argument cannot be followed with this absoluteness. Although it must be admitted that the Respondent is right in that inner facts are not events which can be perceived externally and cannot therefore be proven directly, the legal system considers inner facts as legally significant in many areas; this is so not only in civil law, but equally also in criminal law. Such facts can, in state proceedings in any event, be established by establishing circumstances which according to experience allow one to conclude the presence of facts to be established. Codes of procedure for state proceedings do not, as a general rule, require the express admission of such indirect exploration of the facts by means of circumstantial evidence. This follows from the fact that otherwise there would be a risk of legal protection being diminished. Of course, admitting circumstantial evidence for (indirectly) proving inner facts also involves imponderables. However – state law – takes these imponderables sufficiently into account by means of the rule of freedom in the assessment of circumstantial evidence and by means of the standard of proof and the burden of proof if the fact cannot be proven. These possibilities available under state evidentiary law preclude us from considering inner facts as not being open to a court finding. In the Panel's opinion these principles developed for state proceedings also apply to the present internal proceedings of an association. It is not apparent that the Respondent's rules and regulations wish to exclude the possibility of reviewing the facts on the basis of circumstantial evidence. Just as in the case of state proceedings, there is, in the



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Panel's opinion, in any event no need for circumstantial evidence to be codified in the rules and regulations governing the internal proceedings of an association. This applies all the more in that both forms of determining the facts (direct evidence and circumstantial evidence) are, in principle, equal. Furthermore, the concomitant limitation on the sanctioning authority's power of review would mean that the principle of "strict liability" laid down in Art. 6.8.2.1 would be further undermined.

In the present case, by imposing a limited power of review on itself in relation to the statements made by the Player, the Respondent has committed a procedural error. There can be no question that in the present case this had an effect on the outcome of the decision. However, since the Player was not present at the oral hearing, the Panel could not in the present proceedings – despite its extensive powers of review – determine and review the facts of its own accord instead of the FIBA Commission and thereby cure the procedural error. In view of the far-reaching consequences of an anti-doping violation for the Player and in view of the fact that, due to a procedural error, the Respondent was prevented from reviewing the full facts of the subject matter of the dispute, the Panel considers it appropriate to set aside the Respondent's decision and to refer the matter back to the FIBA Commission to be re-decided.

III.

Under Art. 12.11.5 of the Internal Regulations the Panel must - inter alia - determine whether and to what extent the appealing party is to be reimbursed for the costs advanced by it according to Art. 12.11.2. When making its decision the Panel must take into account the outcome of the proceedings and the conduct and the financial resources of the appealing party. Since in the present case the Appellant's motion has succeeded the Panel orders that the advance on costs paid by the Appellant be reimbursed by the Respondent save for the non-reimbursable fee of USD 1,200.

Wiesbaden, 22 June 2005

Prof. Dr. Ulrich Haas



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Notice of Right to Further Appeal
(Art. 12.9 of the FIBA Internal Regulations)

A further appeal against the decision by the Appeals Commission can only be lodged with the Court of Arbitration for Sport in Lausanne, Switzerland, within thirty (30) days following receipt of the reasons for the award. The Court of Arbitration for Sport shall act as an arbitration tribunal and there shall be no right to appeal to any other jurisdictional body.