Fédération Internationale de Basketball

FIBA

International Basketball Federation

We Are Basketball

DECISION

in the matter

Kambala and WADA vs. FIBA
FIBA AC 2007-2

23 August 2007

1. **The Appeal by Kaspars Kambala against the decision of the Disciplinary Panel of the Respondent dated 27 April 2007 is dismissed.**

2. **The Appeal by the World Anti-Doping Agency against the Disciplinary Panel of the Respondent dated 27 April 2007 is allowed. The decision by the Disciplinary Panel is amended to the effect that Kaspars Kambala is suspended for a period of two (2) years. The suspension shall begin on 13 December 2006 and shall end on 12 December 2008.**

3. **The Respondent and Kaspars Kambala shall bear the costs of the proceedings in equal shares. The World Anti-Doping Agency is to be reimbursed for the costs advanced by it in the amount of CHF 3,000.00.**

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I.

1. The basketball player Kaspars Kambala (hereinafter referred to as "the Player" or "the First Appellant"), born on 13 December 1978, has Latvian nationality and was under contract to the Turkish basketball club Fenerbahce Ulker in the 2006/2007 season. On 13 December 2006 a doping control was carried out on the Player on behalf of the Respondent in connection with a Euroleague game. According to the analysis reports issued by the WADA accredited laboratory in Barcelona both the A sample - as well as the B sample of the doping control contain metabolites of cocaine. Cocaine is included on the 2006/2007 WADA list of prohibited substances. By letter of 30 January 2007 the Respondent informed the Player, inter alia, that as a consequence of the adverse analytical finding he was suspended from all international and national competitions with immediate effect. In addition the Respondent instituted an action against the Player before the Disciplinary Panel because of a violation of the Anti-Doping provisions. In this connection a hearing took place at the headquarters of the Respondent in Geneva on 12 March 2007. On 27 April the Disciplinary Panel decided as follows: *"Mr Kambala is suspended for a period of fourteen months (14) months. The suspension shall begin on 13 December 2006 (date of sample collection) and shall end on 12 February 2008.*"

   The facts surrounding the doping control of 13 December 2006 are largely undisputed between the parties and are as follows: In the period between 8 and 12 December 2006 the Player took three pills which he had previously received from a good friend (Mr. Oskars Muiznieks). The Player took said pills because at that time he was in a state of severe mental distress. At the time, a brother of the Player had fallen seriously ill. He was diagnosed as having "purulent meningoencephalitis". Since another brother of the Player had already died two years previously from an illness in the same hospital, the Player was now very worried about the brother who had fallen ill. The Player's friend, Mr. Oskars Muiznieks, knew of these circumstances and left the Player the pills saying that they would help him find mental relief. The parties in the present case assume that said pills were the cause of the adverse analytical finding in the Player. The Player had three of said pills, which he received from the same "source", analysed by the Respondent in a WADA-accredited laboratory in Lausanne. This showed that the pills contained cocaine.

The Respondent assessed said facts in its decision of 27 April 2007 as follows:

> *"However, the Player has the option to establish the basis for eliminating or reducing a sanction as per secs. H.7.8.2.4 a) and b) of the Regulations. On the other hand, there can be no doubt that the player was at least negligent by taking pills without checking if it contains a prohibited substance.*
>
> *The Disciplinary Panel decided to reduce the sanction from 2 years to 14 months. In doing so the Disciplinary Panel took into consideration the Player's extremely troubled personal situation in connection with the death of one of his brothers and the serious illness of his second brother, and further that he openly admitted his anti-doping rule violation and that he was very cooperative during the hearing.*
>
> *In the Panel's view, therefore, a reduction of the period of ineligibility not to the minimum provided for in the FIBA Internal Regulations governing Doping Control, that is one year, but to 14 month is appropriate. According to sec. H.7.8.2.7 the Panel decides that the period of ineligibility for Mr. Kambala shall begin on 13 December 2006, the date of sample collection, as dictated by the principle of fairness. Mr. Kambala has been taking the pills in an ordinary state of heavy mental distress on the advice of an old friend.*"

By letter dated 11 May 2007 the First Appellant filed an appeal against the Respondent's decision of 27 April 2007 to the FIBA Appeals' Tribunal, as did the Second Respondent, also by letter dated 11 May 2007.

2a. The First Appellant is of the opinion that the Respondent based the sanction on the correct legal basis, namely on sec. H.7.8.2.4 (b) of the Internal Regulations. The provision has two prerequisites. First, it is necessary that the athlete proves how the prohibited substance came to be in his body. Secondly, the provision requires that the athlete has "no significant fault" with regard to the breach of the provision. In the opinion of the First Appellant both prerequisites are fulfilled; for his adverse analytical finding was due to the taking of the pills which he had received from his friend. In addition, due to the situation with his family, he was in an "extraordinary state of heavy mental distress". He took the pills solely for the purpose of finding relief from this psychologically difficult situation and not for any sports-related reason. According to the First Appellant, this distinguished the present case from, in particular the category of cases concerning contaminated nutritional supplements, which had already been decided in numerous cases by the CAS. In view of the extraordinary circumstances of the present case, sec. H.7.8.2.4. (b) of the Internal Regulations was therefore applicable.

The First Appellant is additionally of the opinion that the Respondent made an erroneous decision as regards the extent of the penalty. Sec. H.7.8.2.4 (b) of the Internal Regulations provided for range of penalty from one to two years. In fixing the extent of the penalty the Respondent did not adequately appreciate the circumstances of the specific case. Both in personal and economic terms the penalty imposed by the Respondent was disproportionate. The Respondent should have taken more account of the fact that he had no intention to enhance his performance and that no such effect occurred in the present case. Furthermore, more account should be taken of the fact that his conduct was ultimately "totally excusable" given the personal circumstances at the time he ingested the pills. Furthermore, the First Appellant points out that at his age (28 years old) a suspension of 14 months or more would have disproportionate consequences for his further development in sport. Finally, the First Appellant is claiming that the World Anti-Doping Code (hereinafter referred to as the "WADC") is currently being revised. An effort was being made to strengthen the embodiment of the principle of proportionality. This particularly applied in the event "that the substance was not intended to enhance the athlete's sport performance or mask the use of a performance-enhancing substance." Finally, - according to the First Appellant - the present regulations now already had to be interpreted and applied in the light of these future legal developments.

2b. The First Appellant therefore moves for a finding, "*that the negligence incurred by Mr Kambala, if any, was extremely light and therefore – taking into account the principle of proportionality – the reduction down to a period of ineligibility of (at a maximum) 1 year must be applied.*"

3a. The Second Appellant is of the opinion that the penalty imposed by the Respondent on the Player was too low. According to sec. H.7.8.2.1 of the Internal Regulations the period of ineligibility for a violation of sec H.7.2.1.1 of the Internal Regulations is two years. Said standard penalty could be reduced to one year according to sec. H.7.8.2.4. (b). Although in the present case the Second Appellant is not disputing that the adverse analytical finding was due to the ingestion of the pills, which the Player received from his friend, sec. H.7.8.2.4 (b) of the Internal Regulations further requires that - when viewed in the totality of the circumstances - there was "no significant fault" on the part of the Player in relation to the anti-doping rule violation. However, the Player had not furnished any such proof. According to sec. H.7.2.1.1. (a) of the Internal Regulations it was the personal duty of each and every player to ensure that no prohibited substances enter his body. If, however, a player takes pills from a close friend in order to find mental relief without knowing or asking any questions about the pills' ingredients, this had to be considered

significant fault with the consequence that there was no possibility of reducing the "normal" period of ineligibility of two years. The Second Appellant is also basing its legal opinion that, in the present case, there is no *"truly exceptional case"* justifying the application of sec. H.7.8.2.4 (b) of the Internal Regulations on the case law of the CAS.

4. The Respondent is moving to *"reject both appeals"*.

The Respondent substantiates its motion with the argument that in the present case sec. H.7.8.2.4. (b) of the Internal Regulations applies. The requirements to be met by the qualifying element "no significant fault or negligence" should – according to the Respondent - "not be excessively high". This applied all the more in the present case because the anti-doping rule violation here bore no relation to the Player's sporting activity, but was instead attributable solely to his private sphere. Due to his personal circumstances the Player had been in a situation of extreme emotional stress, which he tried to conquer by taking the pills. Moreover, he received the pills from a close personal friend who was perfectly familiar with the Player's activities as a professional athlete. In a sphere of private life that was so removed from the athlete's participation in sport, an athlete did not have to assume that his conduct could lead to an adverse analytical finding. The standard of care that he had to meet may not therefore be overstretched. In view of the circumstances of the case the Player's conduct was to be considered (slightly) negligent, but in no way as grossly negligent. Finally, the Respondent points out that changes to the existing WADC were planned at the World Anti-Doping Conference in Madrid at the end of 2007. The effect of these would be that the substance cocaine was to be downgraded to a "specific substance". The consequence of this would be that (in future) if cocaine has been taken it would be possible to reduce the standard penalty of 2 years if the athlete furnishes proof that he did not take the substance for the purposes of enhancing his performance. According to the Respondent, in taking its decision the Disciplinary Panel had in mind this future amendment of the doping rules and the increased flexibility in sanctioning and applied the doctrine of *lex mitior*.

5. By order of the President of the Appeals Tribunal, Mr. Olafur Rafnsson, of 18 May 2007 Prof. Dr. Ulrich Haas was appointed as a Single Arbitrator for the present case. By letter of 24 May 2007 the Single Arbitrator advised the First Appellant that he acted as an external expert for the World Anti-Doping Code Revision Team, appointed by the Second Appellant. By letter of 25 May 2007 the First Appellant advised that he had no objections against Mr. Haas acting as the Single Arbitrator in this matter.

Upon motion by the Respondent and according to sec. L.1.6 of the Internal Regulations the Single Arbitrator summoned the Turkish Basketball Federation as a third party to the action. In all other respects reference is made to the content of the Order of Procedure of 13 June 2007 issued by the Single Arbitrator and signed by the parties. By letter of 24 July 2007 the Single Arbitrator advised the First Appellant that it was up to the parties to ensure that the witnesses, upon whose testimony they were relying, were also present at the oral hearing. The oral hearing, held on 30 July 2007 in Geneva, was attended by the First Appellant together with his lawyer, Dr. Cesare Jermini, the Second Appellant represented by Mr. Claude Ramoni and the Respondent represented by Dr. Dirk-Reiner Martens.

II.

1. Both the appeal by the First Appellant as well as the appeal by the Second Appellant are admissible, particularly since both Appellants are authorised to file an appeal and the appeals were filed in due form and in due time. Furthermore, according to sec. L.1.1.1 of the Internal Regulations the FIBA Appeals' Tribunal is also competent to rule on the Appellants' motions.

2. On the merits, the appeal by the First Appellant is to be dismissed and the appeal by the Second Appellant is to be allowed.

a) At the centre of both appeals is the decision by the Disciplinary Panel of 27 April 2007, with which a period of ineligibility of 14 months starting on 13 December 2006 was imposed on the First Appellant. The Disciplinary Panel based its decision on sec. H.7.8.2.4. (b) of the Internal Regulations. According thereto, it is possible to reduce the period of ineligibility from two to one year subject to two conditions. First, the Player had to establish how the prohibited substance entered into his system. This condition is not disputed between the parties. Furthermore, the Player must prove that he bears no significant fault or negligence in relation to the anti-doping rule violation.

b) According to sec. H.7.2.1.1. (a) of the Internal Regulations it is the duty of each player to ensure that no prohibited substances enter his or her body. In the present case the Player indisputably breached this duty. It is also undisputed between the parties that the Player was at fault in committing this breach of duty. The only

question is what level of fault there was; in other words whether the Player bears "no significant fault or negligence" or whether he bears "significant" fault or negligence.

aa) The term *"no significant fault or negligence"* stems from Art. 10.5.2 of the WADC with the consequence that when interpreting said terms one can fall back on, inter alia, the Appendix to the WADC and to CAS jurisprudence in relation to the WADC. The Appendix to the WADC defines the term as follows: *"The athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for 'no significant fault or negligence', was not significant in relationship to the anti-doping rule violation."* From this it follows that the term *"no significant fault or negligence"* must be interpreted in the light of two parameters, namely firstly in the context of the other provisions and secondly taking into account the specific circumstances of the individual case.

bb) In the Panel's opinion it follows from the systematics of the rule that the requirements to be met by the qualifying element *"no significant fault or negligence"* must not be set excessively high (see also CAS 2005/A/847 *Knauss v/ FIS* [20.7.2005] marg. no. 7.3.5; CAS 2004/A/624 *IAAF v/ ÖLV & Lichtenegger* [7.7.2004] marg. no. 81 *et seq*.). Once the scope of application of sec. H.7.8.2.4 (b) of the Internal Regulations has been opened, the period of ineligibility can range between one and two years. In deciding how this wide range is to be applied in a particular case, one must closely examine and evaluate the athlete's level of fault or negligence. The element of fault or negligence is therefore ultimately "doubly relevant". Firstly it is relevant in deciding whether sec. H.7.8.2.4 (b) of the Internal Regulations applies at all and, secondly, whether, in the specific case, the term of the appropriate sanction should be set somewhere between one and two years. However, the higher the threshold is set for applying the rule, the less opportunity remains for differentiating meaningfully and fairly within the (rather wide) range of the sanction. But the low end of the threshold for the element *"no significant fault"* must also not be set too low; for otherwise the period of ineligibility of two years laid down in sec. H.7.8.2.1 of the Internal Regulations would form the exception rather than the general rule (see also CAS 2003/A/484 *Vencill v/ USADA* [18.11.2003] marg. no. 47). In the light of these requirements the provision in sec. H.7.8.2.4 (b) of the Internal Regulations will basically have to be interpreted such that its scope of application has been opened when the Player has not failed to take the clear and obvious precautions, which a reasonable athlete would take under

the specific circumstances of the case (see CAS 2005/A/847 *Knauss v/ FIS* [20.7.2005] marg. no. 7.3.6). The time when the act was committed is, of course, the relevant point in time for this assessment.

cc) As a starting point, the First Appellant rightly assumes that the standard to be met by the conduct of a reasonable player, cannot be determined abstractly. Rather, this depends - as already indicated by the definition in the Appendix to the WADC - on the specific circumstances of the individual case. The requirements to be met by the conduct expected of every reasonable athlete will, in the specific situation, be set at a higher level the more obvious the risk of an anti-doping rule violation connected with the conduct is (see FIBA AC 2005-6 *WADA & Kurtoglu v/ FIBA*, II 2 c cc). By contrast, the athlete's standard of care in connection with the duty arising out of sec. H.7.2.1.1 (a) of the Internal Regulations is generally to be set lower wherever an athlete's private life removed from his/her sporting activities is concerned. As the distance between a specific set of facts and the practice of the sport increases, so the intensity of the sports-related obligations, which can reasonably be expected of the athlete, decreases as well (see FIBA AC 2005-6 *WADA & Kurtoglu v/ FIBA,* II 2 c cc). One will also have to decide similarly in emergencies, where the athlete cannot reasonably be expected to meet certain duties of care.

dd) The Single Arbitrator is of the opinion that in the present case the Player did not observe the clear and obvious precautions that every reasonable athlete would undertake. If an athlete ingests pills, without knowing where they come from and what is in them, he is entering into a particular risk (of which a reasonable athlete is also aware). In other words, in such a case the athlete is required to take increased care so that he does not breach the duty under sec. H.7.2.1.1 (a) of the Internal Regulations. This applies all the more if the pills have been procured not from a doctor but from someone else, the container containing the pills is not the original packaging or sealed and furthermore there is no label stating the composition, the manufacturer or the product name of the pills. In view of the high risk associated with ingesting the pills under these circumstances the Player did not even observe the most obvious standards of care. Although he pointed out to his friend that he was not allowed to ingest any "performance-enhancing" products, beyond that he did not make any enquiries or make any effort. However, there was cause to do so; for the Player's friend had neither any medical training nor any similar training which would have allowed him to give a professional assessment of the dangers. It would therefore have been at least obvious for the Player to enquire from where and under what

circumstances the friend procured the pills or whether they were only available on prescription. He could also have asked what the composition of the pills was. Nor did the Player try to obtain expert advice from a third-party. None of these precautions could be dispensed with just because the Player received the pills from a "close and longstanding friend", who knew about the Player's personal and professional situation; for, having due regard for the overall circumstances of the specific case, there was no reason whatsoever for such "blind reliance" on the advice of a third party.

ee) It was also reasonable to expect the First Appellant to observe these standards of care. The Single Arbitrator is not thereby denying that the Player found himself in an exceptional situation and was in a state of mental distress due to the fact that he feared for the life of his brother. However, according to the Player's own submissions in the oral hearing, this state did not reach a level where the Player's ability to control his own conduct was notably lost or diminished. The Player described himself as a pro who could give top sporting performances even under high psychological strain. He was therefore not limited in his sporting activities by reason of the events within his family. He merely felt "down" personally. He did not feel any need to consult a doctor for help or advice. Rather - according to the Player - he considered the self-medication to be sufficient. In the oral hearing the Player described the effect of the pills as "euphorigenic". This too ought to have given the Player cause to make enquiries as to whether the "self-medication" he had taken complied with the Respondent's anti-doping provisions.

ff) Weighing up all the above circumstances and having due regard for CAS case law according to which, *"the requirements to be met by the qualifying element 'no significant fault or negligence' must not be set excessively high* (see above) the Single Arbitrator therefore comes to the conclusion that the present case is not one of *"no significant fault or negligence"* and therefore reducing the period of ineligibility in accordance with sec. H.7.8.2.4 (b) of the Internal Regulations is not a consideration.

c) A reduction in the "normal period of ineligibility" of two years is also not a consideration under other aspects.

aa) The First Appellant is claiming in the present case that, on the grounds of the principle of proportionality, which cannot be restricted or excluded by

the rules of an association, the period of ineligibility should be reduced, irrespective of the wording of the Internal Regulations, to 12 months in the present case. It must be agreed with the First Appellant that the WADC and the Internal Regulations that follow it considerably restrict the principle of proportionality (see CAS 2005/A/847 *Knauss v/ FIS* [20.7.2005] marg. no. 7.5.2; CAS 2004/A/690 *Hipperdinger v/ ATP* [24.3.2005] marg. no 86 et seq.; CAS 2005/A/830 *Squizzato v/ FINA* [15.7.2005] marg. no 10.26).

However, not every curtailment of this principle by the Respondent's rules is incompatible with human rights and the general legal principles of Swiss law (CAS 2005/A/847 *Knauss v/ FIS* [20.7.2005] marg. no. 7.5.4). Rather the principle of proportionality for the athlete's benefit must be weighed against the legitimate interests of the sports federations. This particularly includes the legitimate aim of effectively fighting against doping and the objective of the sports federations to harmonise doping penalties (CAS *Hondo et al v/ Swiss Olympic Asociation et al* [10.1.2006] marg. no 141 seq). Therefore, insofar as the restriction of the principle of proportionality in the Internal Regulations is not unlawful or incompatible with the basic principles of Swiss law, the Single Arbitrator must accept the weighing up of the mutual interests undertaken in the Internal Regulations. He particularly cannot substitute the federation rules with his personal sense of justice. This basic principle of being bound by the federation rules is also clearly expressed in the following CAS decision (CAS 2005/A/921 *Fina v/ Kreuzmann & German Swimming Federation* [18.1.2006] marg. no. 36): *"The Panel … wishes to point out that, if the substance in question had been listed as a Specified Substance under Art FINA DC 10.3, it may have reduced the period even further. The Panel is bound by the sanctioning parameters set forth in Art FINA DC 10.2 in conjunction with Art FINA DC 10.5.2*."

The Single Arbitrator is of the view that the normal period of ineligibility does not violate Swiss law, even if it does appear harsh. In this regard his opinion is supported by the opinion by Gabrielle Kaufmann-Kohler, Antonio Rigozzi and Giorgio Malinverni.[1] Although they are of the opinion that the rigid system of fixed sanctions in the WADC considerably restricts the doctrine of proportionality, they nevertheless come to the conclusion that, in their opinion, said restrictions are compatible with human rights and

[1] Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, dated 26 February 2003, by Gabrielle Kaufmann-Kohler/Antonio Rigozzi/Giorgio Malinverni, available at http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf.

general legal principles (see notes 175-185). These experts justify this characteristic by citing the legitimate aim of harmonising doping penalties (see notes 171-174). Furthermore, the Single Arbitrator also bases his decision on the following consideration. In the opinion of the Swiss Federal Tribunal, sports bodies can limit in their rules the circumstances to be taken into account when fixing sanctions and thereby also restrict the application of the doctrine of proportionality (Decision dated 31 March 1999 in re N. et al./FINA, see Reeb (Ed.) Digest of CAS Awards, Volume II, 2002, p. 775, in particular p. 780, cons. 3.c). According to the Federal Tribunal, the sport associations exceed their autonomy only if these rules constitute an attack on personal rights, the nature and scope of which is extremely serious and totally disproportionate to the behaviour penalised. In the Panel's opinion, this threshold has not been exceeded in the present case.

bb) The First Appellant and the Respondent were right to point out that a revision of the WADC is under way. The objective of said revision of the WADC is to take more account of the principle of proportionality in the WADC. This is to be done by, in particular, considerably extending the list of so-called specific substances. This would have the consequence that in cases, in which the athlete establishes that the use of such a substance was not intended to enhance his sports performance, it would be possible to reduce the "normal" period of ineligibility of two years. However, the Single Arbitrator cannot anticipate this planned amendment of the rules today already. The current Internal Regulations provide for a reduction of the period of ineligibility of two years not simply if the Player furnishes proof that he did not have the intention of enhancing his performance. Rather, in addition, he must prove that the substance in question is a so-called specific substance (sec. H.7.8.2.2 of the Internal Regulations). However, according to the law at present - cocaine is not to be classified as such a substance. Whether this will change in future is uncertain and is of no relevance to the present decision; for the Single Arbitrator must - in principle - decide the case in accordance with the rules and regulations in force at the time when the offence was committed. However, according thereto, in order for the "normal" period of ineligibility to be reduced it is not sufficient for the athlete not to have the intention of enhancing his sports performance by taking a prohibited substance or that the sanction is a heavy burden on the athlete economically. There is likewise no scope for applying the principle of *lex mitior* in the present case; for said principle requires that conflicting rules are or were in force. However, this is not the case.

It is pointed out here, merely as a precaution, that if the WADC is amended in future and cocaine is declared to be a specific substance this would not be completely without consequences for the Player - for the draft of a (new) WADC provides in Art. 25.3:

"*Application to Decisions Rendered Prior to Code Amendments.*

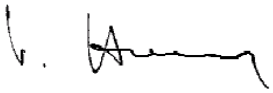
With respect to cases where a final decision finding an anti-doping rule violation has been rendered prior to the 2007 Code Amendments, but the Athlete or other Person is still serving the period of Ineligibility as of the Effective Date, the Athlete or other Person may apply to the Anti-Doping Organization which had results management responsibility for the anti-doping rule violation to consider a reduction in the period of Ineligibility in light of the 2007 Code Amendments. Such application must be made before the period of Ineligibility has expired. The decision rendered by the Anti-Doping Organization may be appealed pursuant to Article 13.2 The 2007 Code Amendments shall have no application to any anti-doping rule violation case where a final decision finding an anti-doping rule violation has been rendered and the period of Ineligibility has expired."

From the Single Arbitrator's point of view there are good reasons in support of the argument that in the present case the First Appellant did not have any intention of enhancing his performance by taking cocaine. Rather, on the contrary, all the indications are that this was done merely out of gross carelessness. This is indicated by the type of substance ingested, the circumstances surrounding the offence and the cooperative and reasonable pleas by the Player during the case.

III.

Pursuant to sec. L.1.11.5 of the Internal Regulations the Panel must decide on the costs of the case beyond the non-reimbursable fee (sec. L.1.11.1 of the Internal Regulations). Since the First Appellant and the Respondent did not succeed with their motions in this case, they must share the costs of the action 50:50. The Second Appellant, whose motion was upheld in full, is to be reimbursed the advance it paid. Pursuant to sec. L.1.11.4 of the Internal Regulations the parties and the joint parties must each bear the costs of their counsels themselves.

23 August 2007



Prof. Dr. Ulrich Haas

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.