

THE APPEAL COMMISSION  
beside NATIONAL ANTI-DOPING AGENCY

File no. 1/2012

DECISION

**No. 1**

**Date: 29.08.2012**

**Chairman:** Florin Alin CÂRSTOIU

**Members:**

Diana ȘTEFĂNESCU

Elena Magdalena COSTACHE

Dan OANCEA

Paul NAIDIN

**Secretary:** Cristian DIMA

The Appeal Commission beside the National Anti-Doping Agency, summoned on 29.08.2012, 17.00 H, at the official seat of the National Anti-Doping Agency in Bucharest, Bvd. Basarabia no. 37-39, District 2, reviewed the appeal submitted by the athlete Balogh DOMOKOS and Delta Power Cluj Sport Club against the Decision no. 13/15.05.2012 of the *Hearing Commission for the athletes and their support personnel who violated the anti-doping rules* beside ANAD (named hereinafter “the Hearing Commission”) establishing that pursuant to article 44 paragraph (5) of the Law no. 227/2006 regarding prevention and fight against doping in sport with further amendments and article 10.10.2 of the World Anti-Doping Code, the two (2) years ineligibility period of the athlete Balogh Domokos, registered to Delta Power Cluj Sport Club stipulated by the Decision no. 31/16.09.2010, had began to run on 05.06.2011, namely the date when the National Championship for Masters held by Romanian Bodybuilding and Fitness Federation ended. The athlete participated to the championship although he was suspended from sport activity.

The athlete Balogh Domokos, his legal representative, the lawyer Bodescu Cosmin Leonard, as well as the representative of Delta Power Cluj Sport Club didn't attend the meetings of the Appeal Commission beside the National Anti-Doping Agency gathered with the purpose to solve the case, although they were all summoned to present themselves before the Appeal Commission through the notifications no. 3347/26.06.2012, 3367/03.07.2012 and 3388/10.07.2012. Following the last notification, the athlete Balogh Domokos and Delta Power Sport Club informed the Appeal Commission that they would not attend the meeting, asking the Commission to solve the case in their absence.

After reviewing the appeal no. 3341/28.06.2012, submitted against the Decision no. 13/15.05.2012 of the Hearing Commission, the Appeal Commission establishes the followings:

The athlete Balogh Domokos, registered to Delta Power Cluj Sport Club has been sanctioned following the doping control conducted on 05.06.2010 during the Bodybuilding National Championship held on the same date in Zalau. The analytical result of the athlete's sample revealed an atypical finding with the Testosterone/ Epitestosterone ratio  $>4$ . In order to establish the nature of the prohibited substance through IRMS analytical method, the sample with the code number 2541279A was sent to the Cologne Doping Control Laboratory, which indicated the administration of testosterone or pro-hormones of testosterone.

Through the Decision no. 31/16.09.2010, the Hearing Commission has decided a 2 years ineligibility for the athlete Balogh DOMOKOS pursuant to article 36 of the Law 227/2006 regarding prevention and fight against doping in sport with subsequent amendments, establishing that the athlete had violated the provisions of article 2 paragraph 2 let. a) of the above-mentioned Law.

The athlete submitted an appeal against the above-mentioned Decision to the Appeal Commission, which was denied as ungrounded through the Appeal Commission's Decision no. 10/09.12.2010.

Through the notification sent to National Anti-Doping Agency and registered with the number 4022/10.01.2011, the athlete informed the Appeal Commission about his intention not to submit an appeal against the Decision no. 10/09.12.2010 to the Court of Arbitration for Sport in Lausanne but to bring the action before the administrative contentious court.

On 26.01.2011, the athlete together with Delta Power Cluj Sport Club brought the case before the administrative court against the Hearing Commission and the Appeal Commission beside National Anti-Doping Agency, requesting primarily the annulment of the Decision no. 31/16.09.2010 of the Hearing Commission and the Decision no. 10/09.12.2010 of the Appeal Commission and subsidiary the replacement of the applied sanction with a reprimand. The case represented the object of the File no. 131/33/2011 pending before the Appeal Court of Cluj – the Commercial, Administrative Contentious and Fiscal Section.

Through the Resolution issued on 06.05.2011, the Appeal Court of Cluj invoked ex officio the unconstitutionality exception with respect to the provisions of the article 61 of the Law 227/2006 and disposed ex officio, meaning without any request from the athlete, the provisional suspension of the disputed Decisions until the unconstitutionality exception would be solved, thus disposing also the case suspension until the same date..

Following the suspension decided through the above-mentioned Resolution, in approximately one (1) month – on 5-6 of June 2011, the athlete competed in the National Championship for Masters, where gained the 3<sup>rd</sup> position, as it results from the notification no. 107/25.04.2012 sent by the Romanian Bodybuilding and Fitness Federation.

National Anti-Doping Agency submitted an appeal against the Resolution issued on 06.05.2011 by the Appeal Court of Cluj, which has been solved by the High Court of Cassation and Justice – Administrative Contentious and Fiscal Section through the Decision no. 5634/24.11.2011, which admitted the appeal and disposed the amendment of the Sentence issued on 6.05.2011 by the Appeal Court of Cluj, as to reject all dispositions regarding the suspension of the disputed Decision and of the case.

After reopening the case, the Appeal Court of Cluj pronounced the Civil Sentence no. 277/06.04.2012, denying the appeal submitted by athlete Balogh Domokos and Delta Power Cluj Sport Club as inadmissible.

In this context, the Hearing Commission has issued the Decision no. 13/15.05.2012, establishing the fact that, by participating to the National Championship for Masters on 04-05.06.2012, the athlete Balogh Domokos violated the provisions of article 44 paragraph (4) of the Law no. 227/2006, when he competed in a competition although he was aware of his ineligibility established through the Decision no. 31/16.09.2010 of the Hearing Commission.

Consequently, the Hearing Commission has applied the provisions of article 44 paragraph (5) of the Law no. 227/2006 and decided that the 2 years ineligibility provided by the Decision no. 31/16.09.2010 of the Hearing Commission should begin to run again starting with 05.06.2011, the date when the National Championships for maters ended.

The athlete and Delta Power Cluj Sport Club contested this Decision, showing that as opposed to the enforceable nature of the Resolution issued by the Appeal Court of Cluj on 06.05.2011, the effects of the suspension Decision no. 31/2010 of the Hearing Commission were adjourned on the date of the National Championships for Masters, meaning that the ineligibility sanction wasn't in force anymore on that date and, therefore, by participating to the above-mentioned competition, the athlete didn't violate by any means the provisions of article 44 paragraph (4) of the law. They also declared illegal the interpretation given by the Hearing Commission according to which the admission of the appeal submitted by National Anti-Doping Agency against the Resolution issued by the Appeal Court of Cluj through the Decision no. 5634/24.11.2011 pronounced by the High Court of Cassation and Justice leded consequently to the retroactive rejection of the measure disposed by the Appeal Court of Cluj. Pursuant to the provisions of the Law no. 554/2004, the decisions taken by the administrative contentious courts are enforceable by law and, by adjourning the effects of the disputed administrative document, these effects were "temporarily paralyzed" during the period established by the court, when all the actions undertaken by the legal subject of the provisional suspension should be considered lawful. The cessation of the disputed administrative document effects' adjournment due to the Decision no. 5634/24.11.2011 taken by the High Court of Cassation and Justice means that,

starting with 24.11.2011, the effects disposed by the Appeal Court of Cluj are ceased, while the effects of the ineligibility established through the Decision no. 31/2011 of the Hearing Commission should be resumed starting with the same date, as the effects of the decisions taken by the High Court of Cassation and Justice don't apply retroactively.

Given these considerations, the case doesn't include any of the elements referred to in article 44 paragraphs (4) and (5) of the Law; the athlete didn't violate the ineligibility sanction but he acted in compliance with the enforceability of the Resolution issued on 06.05.2011, competing on the date of the Championship as any other eligible athlete.

With respect to the above-mentioned legal dispute, the Hearing Commission drawn up its point of view, requesting the denial of this last dispute as ungrounded; the Hearing Commission representative has also expressed this point of view verbally when the dispute was solved. It has been pointed out that the athlete gave up to the appeal set forth in article 61 of the Law no. 227/2006 and therefore, the Decisions taken by the Hearing Commission and Appeal Commission remained definitive and they were enforceable for the athlete on the date of the above-mentioned competition. It has been also stated that, through the Resolution issued on 06.05.2011, the Appeal Court of Cluj illegally decided to adjourn the case until the unconstitutionality exception raised by the court would be solved and it didn't settle a suspension request grounded on the provisions of article 15 of the Law no. 554/2006; only the Resolutions grounded on these legal provisions are enforceable and are not suspended when an appeal is submitted. Therefore, the appeal submitted by National Anti-Doping Agency (NADA) against the Resolution issued on 6.05.2011 suspended this Resolution and the Decision taken by the High Court of Cassation and Justice completely dismissed this Resolution. The appeal submitted by NADA and admitted by the court eliminated the effects of the disputed Resolution until the date when it had been taken, respectively 06.05.2011. Pursuant to article 65 of the Law no. 227/2006, only the Appeal Commission, respectively the Court of Arbitration for Sport, could suspend the Decisions of the Hearing Commission and Appeal Commission. In this case, the adjournment of these decisions has been done by violating the material competency norms and by exceeding the jurisdictional power limits.

After reviewing the appeal and the evidences within the file, the Appeal Commission establishes that it is legally grounded.

Consequently, the measures disposed through the Resolution issued on 06.05.2011 by the Appeal Court of Cluj could be censored only by the superior court, according to the judicial control mechanisms provided by the law, while the legal exigencies imply that the measures disposed by the judicial bodies should produce their effects and be respected until this control would take place. The law provides that the appeal court might suspend a court decision until the

appeal is solved, but such a measure wasn't disposed in this case. The athlete cannot be sanctioned for benefiting of the effects of a measure he didn't ask for, as it was taken ex officio by the court, while the sport event organizer couldn't legally oppose to accept the participation of an athlete to whom a court had provisionally suspended the restrictions imposed by the disputed decisions.

The lack of material competency of the administrative contentious court to which the athlete submitted the appeal requesting the annulment of the Decision no. 31/16.09.2010 of the Hearing Commission and Decision no. 10/09.12.2010 of the Appeal Commission could be established only by the seised court or the judicial control court and the athlete couldn't be found guilty for addressing to the common justice, based on the constitutional principle of free access to justice provided by article 21 of the Constitution of Romania, taking into account that at that time there wasn't any decision of the Constitutional Court to settle the inadmissibility to address the doping cases to common justice.

However, the Constitutional Court has taken the Decision no. 560/26.05.2012 in the file 629D/2011 whose object was to solution the unconstitutionality exception referring to the provisions of article 61 of the Law no. 227/2006 regarding prevention and fight against doping in sport, raised by the Appeal Court of Cluj – Commercial Section, deciding to deny this exception as ungrounded.

Therefore, the effects of admitting the appeal submitted by NADA to the High Court for Cassation and Justice and invalidating the adjournment of the disputed administrative document have been produced for the future, starting with the date of this appeal.

Accordingly, it cannot be established in this case that during 06.05.2011 – 24.11.2011 the athlete was suspended from sport activity and, therefore, he violated the provisions of article 44 paragraph (4) of the Law 227/2006 when competed to the National Championship for Masters.

The minute of the Appeal Commission meeting, drawn up on 29.08.2012 is part of the current Decision.

Complying with the provisions of article 28 let. b) of the Order no. 112/2011 for the approval of the Regulation for the organization and functioning of the Appeal Commission, with the unanimity of the present members,

#### **D E C I D E S:**

Admits the appeal submitted by the athlete Balogh DOMOKOS, registered to Delta Power Cluj Sport Club, residing in Cluj Napoca, 50 Horea Street, apt. 6, identifying himself with the ID Card no. KX 428803, issued by the Clus Napoca Police, with the personal code number

(C.N.P.) 1491010120664, as well as by Delta Power Cluj Sport Club having the official seat in Cluj-Napoca, 21 Porțile de Fier Street, Cluj County;

Annuls the Decision no. 13/15.05.2012 of the Hearing Commission for athletes and their support personnel who violated the anti-doping rules beside ANAD;

Establishes that the ineligibility period of the athlete Balogh DOMOKOS began to run from 16.09.2010, which is the date of the Decision no. 31/2010 of the Hearing Commission for the athletes and their support personnel who violated the anti-doping rules and, until 06.05.2011, when this measure was adjourned by the Appeal Court of Cluj, the ineligibility has been resumed starting 24.11.2011, when the High Court for Cassation and Justice took the Decision no. 5634 dismissing the Resolution taken on 06.05.2011 by the Appeal Court of Cluj, the adjournment of the measure disposed through the Decision no. 31/16.09.2010 of the Hearing Commission until the termination of the initial ineligibility.

The current Decision may be appealed to the Court of Arbitration for Sport in Lausanne, in 21 days from its communication.

Mandatory.

**CHAIRMAN,**