



FÉDÉRATION
INTERNATIONALE
DE NATATION

FINA Doping Panel 10/14 13 March 2015

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comprised of

Robert Fox	(SUI)	Chairman
William Bock, III	(USA)	Member
Toshiro Ueyanagi	(JPN)	Member

In the proceedings against

the swimmer **Vitalii Melnikov**,
affiliated to the Russian Swimming Federation

I. THE PARTIES

1.1 The FEDERATION INTERNATIONALE de NATATION (FINA) is the International Federation governing disciplines related to swimming. FINA has established and is carrying out, *inter alia*, a doping control program, both for in-competition as well as out-of-competition testing.

1.2 The RUSSIAN SWIMMING FEDERATION (RSF) is a member of FINA. RSF is required to recognize and comply with FINA's anti-doping rules which are set out in the FINA Doping Control Rules ("FINA DC"). The FINA DC is directly applicable to, and must be followed by, *Competitors, Competitor Support Personnel, coaches, physicians, team leaders, and club and representatives under the jurisdiction of the RSF.*

1.3 Vitalii Melnikov (hereafter, the athlete or the swimmer) is a Russian backstroke specialist born on 20 March 1990.

II. NATURE OF THE CASE

2.1 On 12 and 13 December 2013, Mr. Melnikov provided urine samples as a result of a doping control conducted by Ligue Européenne de Natation (LEN) during the LEN European Short Course Swimming Championships held between 12-15 December in Herning, Denmark.

2.2 Mr. Melnikov's samples were received at the World Anti-Doping Agency (WADA) accredited laboratory in the Norwegian Doping Control Laboratory in Aker University Hospital in Oslo, Norway on 17 December 2013.

2.3 On 29 January 2014, the Laboratory reported to FINA that Mr Melnikov's samples were both positive for the erythropoietin (EPO), which is a prohibited substance on the WADA Prohibited List 2013 (Class S2 Peptide Hormones, Growth Factors and Related Substances).

2.4 On 28 March 2014, the FINA Doping Control Review Board (FINA DCRB) considered that the case reflected the identification on two occasions of a prohibited substance, the results in each case revealing an adverse analytical finding. As a result the FINA DCRB recommended the case be forwarded to the FINA Doping Panel.

III. PROCEEDINGS

3.1 By letter dated 31 March 2014, the Executive Director of FINA made the athlete aware of the adverse analytical finding and exposed to him his rights to request an analysis of the B sample of his urine within 10 days of the receipt of the letter. He was provided with the result of the tests and the identity of the laboratory which had carried out the test.

3.2 On 1 April 2014, the Honorary Secretary of FINA provisionally suspended the swimmer as of 1 April 2014, pursuant to FINA Rule DC 7.1.11.

3.3 On 5 June 2014, the Russian Swimming Federation, by its First Vice-President informed FINA that Mr. Melnikov declined his right to a B sample analysis and that he would likely retire from swimming. On the same day, Mr. Melnikov also sent an email to FINA confirming that he did not intend to exercise his right to a B sample analysis.

3.4 On 6 June 2014, the Executive Director of FINA informed Mr. Melnikov of the opening of a procedure by the FINA Doping Panel as a result of the adverse analytical finding and his subsequent waiver of his right to a B sample test and that pursuant to FINA Rule DC 5.5.3, his retirement had no consequence over the jurisdiction on the matter, which remained with FINA Doping Panel (hereafter FINA DP).

3.5 On 16 June 2014, the FINA Doping Panel Chairman wrote to Mr. Melnikov and advised him of his opportunity to submit a written defence and evidence or any other information to the FINA DP and of his right to a hearing before the FINA DP. He was given a deadline to 30 June 2014 to act accordingly.

3.6 As the previous letter remained unanswered, the FINA DP Chairman on 24 July 2014 once again wrote to the athlete and gave

him a deadline to 7 August 2014 to request a hearing or file a written defence.

3.7 On 7 August 2014, Mr. Melnikov wrote to FINA stating he would file no written defence, nor request a hearing.

3.8 The FINA DP was formed pursuant to FINA Rule C 23.10.

3.9 On 11 September 2014, the Chairman of the FINA DP advised Mr. Melnikov of the composition of the Panel and gave him a deadline to 22 September 2014 to raise any objections he may have regarding its composition. Mr. Melnikov did not respond to the letter.

3.10 Upon initial examination of the case, the FINA Doping Panel considered the nature of the substance which was found in the analysis carried out on the samples provided for by the athlete. EPO is a substance which is unlikely to be ingested by chance by an athlete. In addition, Mr. Melnikov made no attempt to explain the manner or the reasons which could have been underlying the adverse analytical finding. In addition, the Panel considered that this could have been an instance where there was a third party assistance involved.

It was therefore decided by the FINA Doping Panel to give the athlete an opportunity to provide information regarding the circumstances which could have led to the adverse finding. The athlete, if cooperative, could be considered to have provided substantial assistance in discovering or establishing Anti-Doping Rule violations.

3.11 The FINA Doping Panel decided to give a mandate to Mr. Jean-Pierre Morand attorney-at-law in Lausanne to reach out on behalf of FINA and explore with the athlete the possibilities of providing FINA with substantial assistance. Mr. Morand was given a deadline to 15

December 2014 to report his findings. The athlete was informed of this by letter from the FINA Doping Panel Chairman dated 14 November 2015.

3.12 On 9 December 2014, Mr. Morand sent an email to the athlete stating the following:

"Dear Mr Melnikov,

I refer to the above-mentioned anti-doping proceedings presently pending against you in front of the FINA Doping Panel.

In these proceedings, you did not request the B-sample analysis and have waived your right to a hearing. Consequently, the FINA Doping Panel is now about to proceed and issue a decision on the basis of the elements in file including two Adverse Analytical Findings indicating the presence of a Prohibited Substance (EPO) in bodily samples collected from you on December 12 and 13, 2013.

However, before proceeding to decision stage, the FINA Doping Panel has considered that it could be appropriate to offer you the opportunity to provide Substantial Assistance as per clause DC 10.5.3 of the applicable FINA Doping Control Rules in providing relevant information on the circumstances, which led to the above mentioned Adverse Findings.

As you have learnt from the communication of the FINA Doping Panel Chairman dated November 14, 2014, I have been appointed to contact you in this respect. In the event you would accept to cooperate, my mission will be to conduct the required investigation and report its outcome to the FINA Doping Panel.

I would like first to briefly remind what a Substantial Assistance process represents and what potential consequences such a process may have for you in the event you would effectively accept to provide Substantial Assistance.

The rules governing Substantial Assistance are set forth in Clause DC 10.5.3. A copy of said clause as well as the definition of Substantial Assistance is attached for your convenience.

In a nutshell, a Competitor having committed a doping violation may obtain that part of the period of ineligibility which would have been normally applicable as a consequence of the violation be suspended if he/she provides so called Substantial Assistance i.e. relevant information which results in the discovering or establishing of an anti-doping violation by another Person (or Other Persons).

In the event a Competitor provides Substantial Assistance, the decision in respect to which part of sanction may be suspended is to be made by the FINA Doping Panel, notably in view of the importance of the Substantial Assistance provided. The factors, which have to be taken into account in this respect are set forth in clause DC 10.5.3. It is expressly clarified that a full three quarter suspension is applicable only to exceptional cases.

Please note that Substantial Assistance is not limited to providing the information. It implies full and active cooperation, as may be needed to effectively use the information provided for the purpose of establishing doping violations by Other Persons. The suspended ineligibility period may be reinstated if this duty of full cooperation is not respected. This could be the case if, for example, a Competitor initially provides relevant information and obtains on that basis a partially suspended ineligibility period, would then fail to appear as witness in front of a hearing body to confirm his or her statement.

In a first step, I need to know whether you are in principle willing and able to provide Substantial Assistance. In order to enable an informed decision in this respect, I would like to underline the following elements:

- *Providing Substantial Assistance is and must be a voluntary process. Your decision in this respect must be made without any reservation. Accepting to provide Substantial Assistance is accepting to provide, without any omission or restriction, the entire*

information you may have in regard of any and all circumstances, which may be relevant in connection with potential doping violations committed by other persons. If needed, you must also be prepared to appear, as required, as witness before hearing and investigating bodies or authorities. In the absence of a clear commitment in this respect, there is no point in engaging a process of Substantial Assistance.

- *The information you provide must be truthful, relevant, specific and useful to discover and/or establish doping violations against other persons, which may subject to prosecution as a consequence. General explanations and/or indications such as for example the fact that you were provided the Prohibited Substance by persons, which you would not be able to identify, would typically not be sufficient.*

- *No firm indication nor, a fortiori, any warranty can be given as to which part of the normally applicable sanction could be suspended if you decided to provide Substantial Assistance. The FINA Doping Panel will be solely competent to set the applicable ineligibility period in application of art. DC 10 and, if and once Substantial Assistance is provided, the part of such period which would be suspended. What can be said in general terms is that, given Prohibited Substance at stake, the range of the normally applicable ineligibility period goes from 2 to maximum 4 years (in the event the FINA Doping Panel would hold that aggravating circumstances are given in this case). Theoretically, the application of the potential suspension of three quarters of the ineligibility would thus allow reducing the effective ineligibility period to a minimum of 6 months (suspension of 3/4 of 2 years) to 1 year (suspension of 3/4 of 4 years). It is however reminded that the application of the maximum suspension is reserved to exceptional circumstances. Further, in this case, a provisional suspension is in effect since April 1, 2014. This already objectively already sets a minimum effective duration of the ineligibility above the minimum indicated above. Assuming however that you would provide effective*

Substantial Assistance, the FINA Doping Panel would nevertheless and in any event dispose of a significant period during which the ineligibility could be suspended in recognition thereof. In practice, this could mean that you could be entitled to start competing again in 2015 instead of on April 1, 2016 at the earliest (or April 1, 2018) in the event no Substantial Assistance would be considered.

I hope that the above explanations allow you a first evaluation (sic) of the opportunity you may have to offer Substantial Assistance and thus to be potentially subject to a significantly reduced sanction.

I stay at your disposal for further clarifications. You may contact me in writing (by email) or even by phone (at my office or mobile number: [REDACTED]).

I would like to strongly underline the fact that our preliminary contacts will be conducted on the basis of strict confidentiality.

In the event you would finally decide not to engage a process of Substantial Assistance or if it would appear that you are objectively not able to provide relevant information, I will not provide to the FINA Doping Panel any material element or information you may have provided or communicated to me in the context of our preliminary exchange but simply report either your decision not to engage in a process of Substantial Assistance or the lack of sufficient basis to do so.

This undertaking to preserve full confidentiality at preliminary stage is made in full agreement with the FINA Doping Panel. Its purpose is to give you the opportunity to discuss freely with me before making an informed decision to engage a process Substantial Assistance or not. If and once the decision to engage in Substantial Assistance is made, it goes without saying that the process would then imply full and unrestricted disclosure in my report to the FINA Doping Panel of any information you would be providing.

Whatever your decision may be it is important that you inform me rapidly whether or not you are interested in principle to engage a process of Substantial Assistance or at least to further explore such possibility.

I therefore ask you to send me a determination in this respect in writing and/or to contact me by phone until December 15, 2014 at the latest.

If you do confirm an interest in principle, we will determine together how to best proceed. We will notably need to hold a meeting. In this respect, please note that reasonable travel costs you may have to incur to come to a meeting would be covered by FINA. This would be of course subject to submission for approval before the costs are incurred.

In the contrary case or in the absence of an answer or a contact until the above indicated date, I will report to the FINA Doping Panel that there is no basis for the conduct of a Substantial Assistance process. The proceedings before the FINA Doping Panel would be resumed.

Looking forward to hearing from you,

Yours Sincerely

(signature)

3.13 On 17 December 2014, Mr. Morand wrote a second email to the athlete:

Dear Mr Melnikov,

I have had no answer from your part on my mail below.

Before I report to the FINA Doping Panel, I would like to be sure that you received this mail.

Can you please confirm receipt and indicate what your position is.

Kind regards

(signature)

Beforehand, the FINA Doping Panel Chairman extended the deadline provided to Mr. Morand to 8 January 2015 to report his findings. The

swimmer made no use of the deadline. Hence, by letter dated 16 January 2015, the FINA Doping Panel Chairman gave the athlete a final opportunity to file any argument he wished no later than 23 January 2015. The athlete did not use this deadline.

IV. JURISDICTION AND APPLICABLE RULES

4.1 The jurisdiction of the FINA Doping Panel arises out of the following provisions of the FINA Rules: C 23.9., C 23.10 and FINA DC 8.1.

4.2 The applicable Rules in this case are the FINA Doping Control Rules in effect since 1 January 2009 (amended on the occasion of the FINA General Congress on 24 July 2009).

V. MOTIONS AND CONTENTIONS

A. Vitalii Melnikov's motions and contentions

5.1 Mr. Melnikov made neither motion nor contention. He did not question or dispute the adverse analytical finding, nor did he request a B sample test to be carried out in his presence. Despite being provided the opportunity to give information and benefit from a defense in which he could have pleaded substantial assistance in discovering or establishing anti-doping rule violations, Mr. Melnikov did not seize the possibility.

VI. LEGAL DISCUSSION

A. THE FACTS

The FINA DP has found that the following facts were established in this case:

6.1 EPO is a prohibited substance in Class S2 of the 2013 WADA Prohibited List and is therefore prohibited at all times, in and out of competition, pursuant to FINA DC 4.1.

6.2 In this matter FINA DCRB highlighted the fact that the laboratory information it reviewed showed that on two separate occasions in two separate tests, the prohibited substance EPO in its recombinant form (rEPO) was detected. In this, the FINA DCRB assessed the laboratory findings on each occasion that the prohibited substance was identified.

6.3 The Doping Panel considered the fact that this matter was taking time to be decided on, but also considered weighing this against providing the athlete with an opportunity to provide valuable information which could not only have helped his personal cause, but assisted in the fight against doping in sports.

B. THE LAW

6.4 FINA DC 2.1.1 reads:

"It is each Competitor's personal duty to ensure that no Prohibited Substance enters his or her body. Competitors are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Competitor's part to be demonstrated in order to establish an anti-doping violation under DC 2.1."

FINA DC 2.1.2

“Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Competitor’s A Sample where the Competitor waives analysis of the B Sample and the B Sample is not analysed; or, where the Competitor’s B Sample is analysed and the analysis of the Competitor’s B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Competitor’s A Sample.”

FINA DC 9

“A violation of these Anti-Doping Rules in individual Sports in connection with an in-Competition test automatically leads to Disqualification of the result obtained in that Event with all resulting consequences, including forfeiture of any medals, points and prizes.”

FINA DC 10.1

“An anti-doping rule violation occurring during or in competition with a Competition may, upon the decision of the ruling body of the Competition, lead to Disqualification of all of the Competitor’s individual results obtained in that Competition with all Consequences, including forfeiture of all medals, points and prizes (...).”

FINA DC 10.2

“The period of ineligibility imposed for a violation of DC 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), DC 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or DC 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of ineligibility, as provided in DC 10.4 and 10.5, or the conditions for increasing the period of ineligibility, as provided”.

FINA DC 10.4

“When a competitor or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Competitor’s sport performance or mask the Use of a performance-enhancing substance, the period of ineligibility found in DC 10.2 shall be replaced by the following:

First violation: At a minimum, a reprimand and no period of ineligibility from future Competitions, and at a maximum, two years’ of Ineligibility.

To justify any elimination or reduction, the Competitor or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance enhancing substance. The Competitor’s or other Person’s degree of fault shall be the criterion considered in assessing any reduction of the period of ineligibility.”

FINA DC 10.5.2

“If a Competitor or other Person establishes in an individual Case that he or she bears No Significant Fault or Negligence, then the otherwise applicable period of ineligibility may not be less than one-half of the period of ineligibility otherwise applicable. If the otherwise applicable period of ineligibility is a lifetime, the reduced period under this Article may be no less than eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in a Competitor’s Sample in violation of DC 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers), the competitor must also establish how the Prohibited Substance entered his or her system in order to have the period of ineligibility reduced.”

C. THE SANCTION

6.5 In this matter taking into consideration the adverse analytical finding and no explanation provided by the athlete regarding the conditions or circumstances to explain this, the Panel has no option but to apply the maximum sanction provided for by the rules. EPO is a powerful pharmaceutical and performance enhancer, with severe health risks, that it is the scourge of sport. The route of administration of EPO is invariably injection, making inadvertent use highly unlikely. The best way for an athlete to demonstrate his commitment to clean sport is not to use such a drug. However, when such a drug is used, the best way for an athlete to demonstrate his remorse and commitment to clean sport in the future is to come forward with a full explanation for his positive test. Hence, the FINA Doping Panel insisted on providing the athlete a chance of doing this. Ultimately, the FINA Doping Panel is disappointed that after being given such an opportunity to do so, Mr. Melnikov chose not to take this step.

6.6 The FINA Doping Panel also is aware of the fact that this matter has taken time to be decided on. It gave serious consideration to reducing the sanction based on the time which has transpired since the analytical finding. This must however be weighed against the procedure in which the athlete was given an opportunity to be of assistance, which whilst it took some time, was carried out expeditiously. It also must be weighed against the fact that under the new Anti-Doping Rules which come into effect on 1 January 2015, the athlete would have risked a sanction of 4 years. The FINA Doping Panel first of all notes that it bears no responsibility in the athlete's use of EPO. Investigations in relation with EPO use are to an extent *sui generis*. It is not uncommon for any disciplinary body within a federation entrusted with the mission of sanctioning athletes' use of prohibited substances, as well as enforcing or verifying the correct application of anti-doping rules, faced with an adverse analytical finding involving EPO, question the fact of

whether the athlete cheated or not. Whilst the evidence is lacking in the case to point to intentional cheating, which could have led to a 4 year ineligibility, any reduction of the sanction based on delay in undertaking a required investigation when that investigation appears to have been undertaken expeditiously would be to provide a benefit to the athlete for not cooperating. One may legitimately question the athlete's choice to not assist and provide information regarding the circumstances and be tempted to draw conclusions which could lead to surmising that his use of EPO was intentional. Ultimately, the FINA Doping Panel falls short of drawing these conclusions, which at the best would be relying on circumstantial evidence. However, The FINA Doping Panel considers therefore that under the present circumstances, it could not consider a reduction based on the passing of time.

6.7 According to FINA DC 10.8 all competitive results obtained from the date of a positive sample through the commencement of any provisional suspension or ineligibility period shall, unless fairness requires otherwise be disqualified.

6.8 Therefore, all competitive results of Mr. Melnikov as of 12 December 2013 through and including the date of this decision shall be disqualified. Any medals, points and prizes achieved during that period shall be forfeited.

VII. SUMMARY OF THE DECISION

7.1 Mr. Vitalii Melnikov receives a twenty-four (24) month period of ineligibility commencing on 12 December 2013, and ending at the conclusion of 12 December 2015, for his first anti-doping rule violation.

7.2 All results obtained by Mr. Vitalii Melnikov as of 12 December 2013 and through and including the date of this decision are

disqualified. Any medals, points and prizes achieved during that period shall be forfeited.

7.3 All costs of this case shall be borne by the RSF in accordance with FINA DC 12.2.

7.4 Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland not later than twenty one (21) days after receipt of this judgement (FINA Rule C 12.10.4 and DC 13.6).

Robert Fox
Chairman

William Bock III
Member

Toshiro Ueyanagi
Member

Signed on behalf of all three Panel Members

A handwritten signature in black ink, appearing to be 'R. Fox', written over a horizontal line.

Robert Fox