

## **INTERNATIONAL RUGBY BOARD**

IN THE MATTER OF REGULATIONS RELATING TO THE GAME

AND IN THE MATTER OF AN ALLEGED DOPING OFFENCE BY **NELO LUI**  
**(UNITED STATES OF AMERICA)** CONTRARY TO REGULATION 21

BEFORE A BOARD JUDICIAL COMMITTEE APPOINTED PURSUANT TO  
REGULATION 21.20 and 21.21 CONSISTING OF:

Judicial Committee:

**Gregor Nicholson** (Scotland)

**Barry O'Driscoll** (Ireland)

**Graeme Mew** (Canada – Chair)

Appearances and Attendances:

For the Board:

Susan Ahern (Counsel)

Tim Ricketts (Anti-Doping Manager)

For USA Rugby

John Broker (National Teams Administrator, USA Rugby)

The Player

Nelo Lui

In Attendance

Lea Lui (Player's spouse)

Heard: 23 January 2007 (by way of telephone conference)

### **DECISION OF THE JUDICIAL COMMITTEE**

1. Doping Control may be carried out at any time, whether "In Competition" or "Out of Competition", announced or unannounced. A Player who refuses, or fails without compelling justification, to provide a bodily Sample when properly requested to do so, commits an anti-doping rule violation pursuant to Regulation 21 of the Regulations

Relating to the Game (the “Regulation(s)”). All rugby players at any level of the game are bound by this regulation.

2. Nelo Lui (the “Player”) is an experienced, 33 year-old, American rugby player. He came to the United States from Tonga in 1994. He was a member of USA Rugby’s international Sevens squad between 1998 and 2002 and, in September 2006 was invited to a trial session for USA Rugby’s Sevens team. His club rugby is played for Riverside Rugby in California and, in Sevens, for the OMBAC team in San Diego.
3. At 6:30 a.m. on 26 November 2006, Tom McVay, a doping control officer (“DCO”) employed by the United States Anti-Doping Agency (“USADA”) knocked on the door of a residence in Moreno Valley, California for the purposes of requesting the Player to submit to Doping Control as part of the Out of Competition Testing programme which the International Rugby Board (the “Board”) administers.
4. USADA had been given the Player’s name, address and telephone number by the Board which had, in turn been provided with a spreadsheet by USA Rugby (the “Union”) containing the names, addresses and telephone numbers of American members of the Board’s Registered Testing Pool<sup>1</sup>.
5. It turned out that the Player no longer lived at that address. The DCO then tried the telephone number that he had been provided with and left a message at that number. At 8:15 a.m., the Player called the DCO back. He told the DCO that he had moved. He declined, when asked, to provide the DCO with his new address and ultimately said that he would not undergo drug testing by the DCO.
6. The foregoing events were reported to USADA and to the Board, on whose behalf USADA had conducted the testing, using two forms – an “Unavailable Athlete Form” and an “Athlete Refusal Form”. These forms were, in turn, transmitted to the Board which received them on 7 December 2006.

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<sup>1</sup> Defined in Regulation 21 as “The pool of International Level Players, established by the Board, that is subject to both In Competition and Out-of-competition Testing by the Board without limiting the Board’s rights under Regulation 21.8”.

7. On 22 December 2007, the Board wrote to the CEO of USA Rugby giving notice of the Player's refusal to provide a sample for doping control on 26 November 2006. A letter of the same date from the Board addressed to the Player was also sent to him care of USA Rugby. That letter informed the Player that he was provisionally suspended pursuant to Regulation 21.19.1 pending resolution of his case. The Player was also informed by the letter that a Board Judicial Committee ("BJC") would be appointed to consider his case.

8. The Union confirmed that the Player received the Board's letter on 23 December 2006. The Player has remained suspended since that date.

9. By a letter to the Player (via the Union) dated 12 January 2007, the Player was notified that the BJC had been appointed and informed that counsel for the Board would be seeking directions from the BJC with respect to the conduct of the hearing and that it was proposed to request a hearing by telephone conference on 23 January 2007.

10. The Player, via the Union, confirmed that he would participate in a telephone conference hearing on 23 January 2007.

11. The BJC gave directions requiring each party to provide the other with copies of all documents, witness statements, legal precedents and regulations being relied upon and the names, contact details and anticipated evidence of any witnesses to be called to give evidence orally.

12. In response the Board, the Union and the Player each furnished information in advance of the hearing. As a result of enquiries made at the hearing, further documentation and information was furnished subsequent to the hearing.

13. The hearing took place on 23 January 2007. Evidence was given orally by the DCO, Tom Broker (National Teams Administrator for USA Rugby) and the Player. Additional information was provided by the Player's spouse, Nea Lui, who was in attendance.

14. In addition to the oral evidence and submissions provided at the hearing, the BJC also considered the documents placed before it, including the following:

<b>Date</b>	<b>Document</b>
16-Jan-06	Memorandum from Board (Tim Ricketts) to Anti Doping Representatives / National Team Managers of selected IRB Member Unions re 2006 IRB Out of Competition Anti Doping Programme
15-Mar-06	Memorandum from Board (Tim Ricketts) to Anti Doping Representatives / National Team Managers of selected IRB Member Unions re 2006 IRB Out of Competition Anti Doping Programme - 2nd Quarter Updates
15-Jun-06	Memorandum from Board (Tim Ricketts) to Anti Doping Representatives / National Team Managers of selected IRB Member Unions re 2006 IRB Out of Competition Anti Doping Programme - 3rd Quarter Updates
03-Jul-06	Email traffic between Board (Ilaria Baudo) and USA Rugby (Rob Holder) concerning provision of whereabouts information
16-Sep-06	Memorandum from Board (Tim Ricketts) to Anti Doping Representatives / National Team Managers of selected IRB Member Unions re 2006 IRB Out of Competition Anti Doping Programme - 4th Quarter Update
28-Sep-06	Email from Union (John Broker) to Board (Ilaria Baudo) attaching USA player whereabouts information for period October-December 2006
22-Dec-06	Letter from Board (Tim Ricketts) to Union (Nigel Melville) regarding notification of alleged refusal
22-Dec-06	Letter from Board (Tim Ricketts) to the Player regarding notification of alleged refusal
22-Dec-06	Email from Union (Nigel Melville) to the Board (Tim Ricketts) acknowledging receipt of notification letters
12-Jan-07	Letter from the Union (John Broker) to the Player
12-Jan-07	Request for Directions from Board (Susan Ahern) to BJC
12-Jan-07	Letter from Board (Tim Ricketts) to Player regarding appointment of BJC
15-Jan-07	Letter from Kevin Sinibaldi (Manager USA Rugby National 7s Team) to John Broker
15-Jan-07	Letter from Board (Tim Ricketts) to Union (Nigel Melville)
15-Jan-07	Email traffic between the BJC (Graeme Mew) and the Board (Susan Ahern) regarding notification to Player
15-Jan-07	Letter from the Player to USA Rugby providing Player's account
17-Jan-07	Email from Player to Union acknowledging receipt of notice of hearing
18-Jan-07	Letter from the Union (John Broker) to the BJC
18-Jan-07	Letter from the Board (Tim Ricketts) to the Union (Tom Broker)
18-Jan-07	Email from Kevin Sinibaldi to John Broker regarding Player retirement issue
18-Jan-07	Email from Al Caravelli to John Broker regarding Player retirement issue
18-Jan-07	Email traffic between the Board (Susan Ahern) and the DCO (Thomas McVay)
18-Jan-07	Letter from the Board (Tim Ricketts) to the Player
19-Jan-07	Response to Directions from the Board (Susan Ahern)
23-Jan-07	Email from USA Rugby regarding the Player's USA appearances
Undated	Blank Declaration of Medication, Player Consent and Agreement and Union Consent and Agreement forms for IRB World Sevens Series 2001/2002

*Alleged Anti-Doping Rule Violation*

15. The Board alleges that the Player committed an anti-doping rule violation contrary to Regulation 21.2.3 which provides that "Refusing, or failing without compelling

justification, to submit to Sample collection after notification as authorised in [the] Anti-Doping Regulations or otherwise evading Sample collection” constitutes an anti-doping rule violation. Specifically, the Board alleges that on 26 November 2006, the Player refused to submit to Sample collection after being notified by an authorised DCO that he was required to do so.

*Burden and Standard of Proof*

16. Under Regulation 21.3.1 the Board has the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Board has established an anti-doping rule violation to the comfortable satisfaction of the BJC bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

*Evidence of an Anti-Doping Rule Violation*

17. The Board’s case is based on two forms completed by the DCO – an “Unavailable Athlete Form” and an “Athlete Refusal Form”. Both are pre-printed forms used by USADA.

18. The Unavailable Athlete Form contains the following information.

- a) The DCO attended a location identified on the form as “Primary Training Facility” on 16 November 2006 at 8:00 a.m. A security person told him that no-one was training at the present time.
- b) On 26 November 2006 at 6:30 a.m. the DCO attended at “Athlete Residence”. He departed at 7:15 a.m. He talked to a neighbour.
- c) At 7:30 a.m. on 26 November 2006 the DCO made telephone contact with the Player at the “Athlete’s Home”.
- d) The DCO’s comments on the form state:

1. Athlete not at residence waited 45 min
2. Called residence heard noises inside left message
3. Athlete called about 8:15 AM and told me he moved to Perris, CA a short distance away
4. He said he didn't play rugby any more but a member of the IRB.
5. He refused to give me his new address and refused to test so I told him the possible consequences
6. Called Stephanie and she gave me direction

19. As noted by the DCO in the Unavailable Athlete Form, he called Stephanie Isley, the DCO Manager, USADA, for directions. On Ms. Isley's advice, he also completed an Athlete Refusal Form.

20. The Athlete Refusal Form notes an arrival time of 6:30 a.m. and a departure time of 7:15 a.m. and the location as Moreno Valley, CA. For a section on the form for "Mailing Address", the DCO has written "Refused to give the address". The DCO made the following comments on this form:

1. Athlete not at given address waited 45 min
2. Heard noises inside called given phone # The number had changed correct # is [number then given] No one came to door, neighbor said he did not live there any more. Left message on phone answer machine.
3. Athlete called me about 815 AM. I identified myself and he told me he did not want to be tested. I asked for his address and he said he did not know it. I told him to call me back and give it to me. He said that he would not give the address to me. He was confused about the test and he did not play rugby but was a member of the IRB.

4. I tried to convince him to test and explained the possibilities if he refused to test. Athlete refuses and told me he now lived in Perris CA. A short distance away. I ask the athlete again he refused and hung the phone. I called Stephanie for directions.
21. The DCO gave evidence at the hearing. He has been conducting doping control testing since 1986 and has worked with USADA for 4-5 years. He stated that his DCO training through USADA covered how to deal with refusals. On the day in question he had been asked to test three athletes. The Player was the first athlete he attempted to test.
22. The DCO's evidence at the hearing generally accorded with the information he had written down on the two forms. Having failed 10 days earlier to locate the Player at a training facility, he attended a residence address in Morena Valley which he understood to have been provided by the IRB to USADA. He rang the doorbell but no-one came to the door. He could hear sound coming from inside. He then tried ringing the number he had been given. He received a recorded change of number advisory. He then spoke to a neighbour who told him "Nelo doesn't live here any more". He then called the phone number from the recorded message. He spoke to a lady who answered and left a message for the Player.
23. The Player called the DCO at 8:15 a.m. The DCO did not say whether the Player told him where he was calling from (e.g. home, work, or somewhere else). The DCO told the Player that he worked for USADA and was undertaking drug testing for the IRB. He said he had a letter of authority to do a drug test. The Player said he didn't understand. He said he didn't play rugby any more but was still a member of the IRB. The DCO acknowledged that he was not quite sure he understood what the player was saying. He did not recall the Player saying anything about the DCO's authority. The DCO told the Player that if he would provide his address, the DCO could come over and explain. He warned the Player that there was a possibility that he "could get a positive drug test" if he didn't allow the test to be done. The DCO started to read the letter of authority but had not read much of it before the player interrupted him and told him that he would not agree to be tested. The DCO said that he could not recall how many times during that

conversation he tried to persuade the Player to take the test or at least allow the DCO to come over and go over the information and explain. The DCO believed that the Player felt that if he was not playing, he did not have to be tested. The DCO stated that the Player eventually hung up on him. More specifically, in response to questioning, he said that the line just went dead.

24. The Board filed tournament documents including a blank Player Consent and Agreement Form which the Board says the Player would have signed when he participated as a member of the USA 7s team in the IRB World Sevens Series 2001/2002. That form includes a declaration by each player that "I have had an opportunity to read the Anti Doping Regulations and Procedures Manual" and "that I have read and understand the Manual". The Board was unable to produce a copy of this form as signed by the Player. It is also of relevance to note that at this time (2001/2002) the Board had not yet introduced a programme of out-of-competition testing on individuals named by a Union in its testing pool.

#### *The Player's Evidence*

25. Prior to the hearing the Player provided a written account of events from his perspective. He wrote:

I am writing this letter on behalf of myself to explain what happened on November 26, 2006.

I was away from home the morning the IRB doping representative called. My wife listened to the message that was left and called to tell me what was going on. She was confused, as I was, that the IRB was sending someone to administer an anti-doping test. When I finally spoke with the man, he explained that he'd already gone by our apartment trying to find me. I told him we had just moved to Perris, about 20 minutes away, and didn't live there anymore. He said he that the IRB had sent him and that he wanted to come by now and do a drug test.

I was not aware that the IRB had an anti-doping policy and because I had not played for USA Rugby for nearly 4 years I was even more wary of a stranger showing up at my door claiming to be from the IRB. I refused to give him my address and asked him why the IRB would send someone now when I had not played for the Eagles all this time. He tried to tell me that he would have to report that I was refusing to take the test. I told him to go ahead and do that, not



realizing what this meant for me and the consequences it would bring. Before I hung up with the guy he did say to me that he would put in his report that he could not find me.

When I received initial notification that I had violated an anti-doping policy, I was shocked. I wasn't aware that there was such a rule nor was I aware that any IRB member would be required to submit to a test, playing or not, having been previously notified or not. If I had been contacted previously via phone, email or mail letting me know that I was selected to be tested I would have gladly submitted. This notification via email immediately brought to mind my encounter over the phone with the IRB anti-doping rep. at the end of November. Of course I realized then that the guy had been legitimate with me and that now I was faced with a violation and possible suspension of my IRB membership and all that entailed.

Having been selected to attend USA 7's rugby camp last August, I was happy to once again be a possible candidate for the 2006 - 2007 7s season. I would not have willingly or knowingly jeopardized *[sic]* my chances to once again play and represent the United States. I love rugby and have been playing rugby all my life. I have never taken any illegal drugs or physical enhancing drugs that would affect my game or have a negative impact on me and my family.

I hope that the committee considers the facts, that this was a simple case of misunderstanding. If I had had prior knowledge of a standing rule that I could be selected at anytime to submit to a drug test, I would have cooperated without issue. I ask that the Board Judicial Committee please accept my apologies and allow me the chance to take the drug test and remain in good standing with the IRB.

26. The Player said he was at work when his wife called him to tell him about the DCO's attempt to make contact. The Player runs his own construction business. At the time, he was working in Redlands, California, which he says was one and a half hours away from where he lived. He did not want to give the DCO his address because he was not sure who he was. He said he was concerned about the safety of his family. Furthermore, the Player wanted to be at home if anyone was going to turn up. That was not possible because of his work commitments. He says that he cannot remember if the DCO asked where he was.

27. The Player also said that he was confused. While he understood who the DCO was, he was not sure why he was being contacted. He said that while he was familiar in a general way with doping in sport and knew that doping was illegal in rugby, he had not

encountered drug testing in rugby and, specifically, had never been tested while he was on the USA 7s team. He had “retired” from that squad in 2002 but had, from 8-10 September 2006, attended a trial session for the USA 7s team at the invitation of the coach, Al Caravelli. The Player says he tried to explain this to the DCO and told him that while he was still playing local rugby, he was retired from the national team.

28. The Player does not recall being told by the DCO that the consequences of him not taking a test would be serious. He did understand, though, that the DCO would write down that he had not taken the test. He denies hanging up on the DCO. He says that he and the DCO ended the call by saying goodbye to each other.

29. The Player states that he was never informed that he was part of an out of competition testing pool. Although he had played in international competition he did not recall having ever received doping control information or having signed a Player Consent and Agreement form. He acknowledged that upon being contacted by the DCO he made no attempt to find out from USA Rugby what was going on.

30. The Player’s spouse informed the BJC that, culturally, his written address was not important to him and the Player genuinely did not know his new home address “by heart” at the time of these events. She said that while he could find the house, its street address was not something he would have known so soon after moving there.

#### *The Union’s Perspective*

31. The following letter was submitted to the BJC by Mr. Broker:

I wish to provide information with regard to the iRB case involving Mr. Nelo Lui. As the National Teams Administrator it is my role to provide information to the team managers with regard to players that have been identified as eligible for iRB Anti-Doping tests, as well as ensuring the players themselves have received this information.

In October 2006, the USARUGBY Sevens team selected a pool of players that would compete during the 2006-2007 season. This list was provided to me and I based the 1-October-2006 iRB Whereabouts document on this. I did not properly notify the Sevens manager that I had used the entire pool for this document.

In turn, Mr. Lui has never progressed beyond the player pool. At subsequent assemblies, the Sevens Manager thoroughly briefed selected players on iRB Anti-Doping rules, as noted in the manager, Kevin Sinibaldi's 15-Jan letter addressed to me. Mr. Lui was never in a location to be briefed on these rules.

As USARUGBY, we should have done a better job communicating to managers and players their submission to iRB Anti-doping eligibility. I take full responsibility for the organization not ensuring that this player was informed of his eligibility for testing.

32. The 15 January 2007 letter from Kevin Sinibaldi, referred to by Mr. Broker, stated, *inter alia*:

Nelo competed at the initial training/selection camp in September 2006, and was subsequently selected as part of the 7s player pool for the 2006-2007 season. Nelo however, [currently] has not been selected for any follow-on assemblies with the national 7s team.

The first team assembly for the season was in October, 2006 in preparation for the Bangkok 7s. At that time, the players at the assembly were briefed on iRB doping procedures and completed forms required by the national union, providing physical addresses so as to be available for out-of-competition testing.

Since Nelo was not at that assembly, he was not briefed on the current procedures in place, nor was his physical address updated appropriately for out-of-competition testing. I accept responsibility for this oversight; pool players that have not been invited to a follow-on training/selection camp have not been briefed on current doping procedures, nor have the requisite physical addresses required for out-of-competition been updated.

33. Mr. Broker described 2006 as a "transition year" for the Union. New coaches and managers had been appointed at both the 15s and 7s levels of men's rugby. There were also interim and/or new people in the roles of CEO, COO and Director of Rugby Operations. It was not until 1 January 2007 that a Medical Services Co-Ordinator took on responsibility for the anti-doping programme.

34. Mr. Broker confirmed the information contained in his written statement, with emphasis on the fact that, while the Player had been selected as part of a wider pool of players, he had not been selected for the USA 7s squads which subsequently competed. Only those selected had been briefed on anti-doping procedures and requirements. Mr. Broker commented that better anti-doping awareness among players "is something we're

addressing and taking seriously going forward”. He described Mr. Lui’s case as “exceptional” and conceded that “we should have done a much better job at informing the Player”.

*Roles and Responsibilities*

35. Any Player at any level of the Game is subject to the anti-doping rules contained in Regulation 21. Regulation 21.6 addresses the personal responsibilities of players which include “ensur[ing] that no Prohibited Substance is found to be present in his body and that Prohibited Methods are not Used” and “that he does not commit any other anti-doping rule” (Regulation 21.6.1). Under Regulation 21.6.2, “It is the sole responsibility of each Player and Person to acquaint himself with all of the provisions of these Anti-Doping Regulations including the Guidelines.”

36. The requirements to undergo doping control, in- and out-of competition doping control and player whereabouts for out of competition testing are contained in Regulations 21.8 to 21.10. Pertinent sections of these regulations include the following:

**21.8 REQUIREMENTS TO UNDERGO DOPING CONTROL**

21.8.1 Doping Control may be carried out at any time. Doping Control may be random or specific. All Players shall submit to Doping Control at any time and any place whenever requested by an authorised official. For the avoidance of doubt, this includes both In-competition and Out-of-competition Doping Control. Out-of-competition Doping Control may be undertaken with or without prior notice (No Advance Notice). A Player may be selected to provide any number of Samples for Doping Control in any calendar year. The Board, and/or Member Unions shall be entitled to undertake Target Testing of Players.

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**21.9 IN-COMPETITION AND OUT-OF-COMPETITION DOPING CONTROL**

21.9.1 Each Union must include within its regulations the following provisions:

- (a) a provision that entitles the Union to conduct both In-competition and Out-of-competition Doping Control on a No Advance Notice basis or otherwise;

b) a provision allowing the Board, WADA and Anti-Doping Organisations to conduct Out-of-competition Doping Control on a No Advance Notice basis or otherwise on Players within or under that Union's jurisdiction; and

c) a provision allowing the Board, WADA and Anti-Doping Organisations to conduct Doping Control on Players at Matches that form part of a Union's national competitions or similar events.

21.9.2 Each Union shall make it a condition of membership and a condition of participation in their competitions that their members agree to be subject to these Anti-Doping Regulations including their agreement to be subject to In-Competition and Out-of-competition Doping Control on a No Advance Notice basis or otherwise by the Union, the Board, WADA and Anti-Doping Organisations.

21.9.3 The nature of Out-of-competition Doping Control makes it desirable that little or no prior warning is given to the Player being tested and may be undertaken on a No Advance Notice basis. When an Out-of-competition Doping Control is undertaken reasonable efforts will be made to avoid interruption to a Player's training and/or social plans, however, neither the Board, or its designees, shall be liable for any inconvenience or loss resulting from Out-of-competition Doping Control whether on a No Advance Notice basis or otherwise.

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## **21.10 PLAYER WHEREABOUTS REQUIREMENTS FOR OUT OF COMPETITION TESTING**

21.10.1 The Board shall identify a Registered Testing Pool of International Level Players who will be required to provide up to date whereabouts information to the Board via their Union for the purpose of Out-of-competition Testing.

21.10.2 The Board will determine the number of Unions whose International Level Players will be required to submit whereabouts information for Out-of-competition Testing and will establish a Registered Testing Pool based on the ranking of Unions that participate in IRB Tournaments and select a set number of Players who are eligible for inclusion per Union. This may include U19, U21, Seven's, Women and Senior Men who are part of a Union's National Squad. The Board may revise its Registered Testing Pool from time to time as appropriate.

21.10.3 International Level Players shall provide the relevant Player whereabouts information on request from the Board via their Union who will forward such information to the Board within 14 days of receipt of the request. Such information will specify where the Player is residing, training and playing (both national and club/team) along with the appropriate times and dates. The Board will request an update on Player whereabouts information to all applicable Unions every 4 months or as it is made known that a Players whereabouts details are

incorrect following an unsuccessful attempt. Players and Unions shall also keep the Board updated as to any changes to or additional information in relation to the provided Player whereabouts information that occurs within the 4 month period.

21.10.4 The ultimate responsibility for providing whereabouts information rests with each Player, however it shall be the responsibility of all applicable Unions to use its best efforts to assist the Board in obtaining and providing updates of whereabouts information as and when requested by the Board.

21.10.5 Each Member Union shall also assist, as appropriate, their National Anti-Doping Organisation in establishing a national level registered testing pool of top level national Players who may or may not already be included in the Board's Registered Testing Pool. Member Unions and/or as may be appropriate, subject to Member Union approval, National Anti-Doping Organisations may establish its own whereabouts reporting requirements and criteria for Regulation 21.2.4 violations applicable to those Players but such requirements and criteria shall be consistent with those applied by the Board.

21.10.6 Any Player in a registered testing pool who is unavailable for Testing on three attempts during any period of 6 consecutive months shall be considered to have committed an anti-doping rule violation pursuant to Regulation 21.2.4. For each attempt, the Doping Control Officer shall visit all locations during the dates/times specified by the Player/Union for that date and shall stay two hours at each location. Notification shall be sent to the Player via the Player's Union of each attempt, which is to be counted as an unavailable test.

21.10.7 Any Player in a registered testing pool who fails to timely submit whereabouts information after receipt of two formal written warnings from the Board or his Union to do so in the preceding 3 months shall be considered to have committed an anti-doping rule violation pursuant to Regulation 21.2.4.

37. Schedule 1 to Regulation 21 contains Doping Control Procedural Guidelines (the "Guidelines") including, inter alia, guidelines for the conduct of Out-of-Competition Testing. Section 20 of the Guidelines address "Notification of Players Out-of-Competition". The full text of this Guideline is as follows:

- a) A Player may be notified for Out-of-competition Doping Control by either:
  - (i) "No Advance Notice" notification, where the DCO or Chaperone appears unannounced and notifies the selected Player in person. The selected Player is then kept under constant supervision until the Sample is sealed and appropriate documentation completed.
  - (ii) "Short notice" notification, where the Player is informed by telephone or by written notification by an authorised Doping Control Official and must report for Sample collection to a

- (i) The DCO shall make every effort to collect the urine Samples as discreetly as possible and with maximum privacy. It must be recognised that certain circumstances may impose difficulties on the DCO that cannot be easily overcome.
- (j) If the facilities are not suitable at the venue where notification took place the DCO may conduct Doping Control on the selected Player at another location. The DCO will make this decision. The Player may not leave the venue of notification unless the DCO permits and will be accompanied by the DCO or Chaperone at all times if the testing session is to be relocated.
- (k) If the Player wishes to leave the venue against the DCO's decision the DCO shall inform the Player that he is required to provide a Sample for Out-of-competition testing at the current location and outline the possible consequences of not complying with a request to provide a Sample and that it constitutes an anti-doping rule violation in accordance with the IRB Anti-Doping Regulations. If the Player still does not comply, then a failure to comply is recorded. The DCO shall compile a written report relating to the circumstances of the refusal.

38. These lengthy extracts from the Regulations have been included in these reasons for decision because the BJC regards as important the context in which the DCO's efforts to meet with, and test, the Player occurred. They also inform a discussion of whether the DCO's efforts in this case constituted "notification as authorised in [the] Anti-Doping Regulations" and whether the Player's conduct in response constituted a "refusal" for the purposes of Regulation 21.2.3.

39. The pertinent factors, having regard to the circumstances of this case include:

- a) Any Player is required to submit to Doping Control at any time and any place whenever requested by an authorised official;
- b) Out of Competition Doping Control may be undertaken with or without prior notice;
- c) International Level Players shall provide whereabouts information on request from the Board via their Union (such information to specify where the player is residing training and playing - both national and club/team) along with the appropriate times and dates;

- d) Players and Unions shall keep the Board updated as to any changes to or additional information in relation to the provided Player whereabouts information;
- e) The ultimate responsibility for providing whereabouts information rests with each player, however it is also the responsibility of Unions to use best efforts to assist the Board in obtaining and providing updates of whereabouts information as and when requested by the Board; and
- f) When a DCO makes contact with a Player who is the subject of Out-of-Competition Testing, he should show the Player a valid form of identification and, where appropriate, a letter of authorisation.

### *Sanctions*

40. Pursuant to Regulation 21.22.3, the sanction for refusing or failing to submit to Sample collection is two years' Ineligibility for a first violation and lifetime Ineligibility for a second violation.

41. Where there has been a "failure" (as opposed to a "refusal") to submit to Sample collection under Regulation 21.2.3, the applicable sanction may be reduced by up to one-half of the minimum period of Ineligibility otherwise applicable if the Player establishes, on a balance of probabilities, that he bears "No Significant Fault or Negligence" in respect of the violation.<sup>2</sup> There is no similar provision for a reduced sanction if the violation is a "refusal" to submit to Sample collection after notification

42. Accordingly, the sanction for the anti-doping rule violation which the Player is alleged to have committed carries a mandatory minimum sanction of two years' Ineligibility with no possibility of reduction for exceptional circumstances.

### *Analysis and Discussion*

43. At the outset the distinctions between a "refusal" and a "failure" should be noted. The full text of Regulation 21.2.3 is:

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<sup>2</sup> Regulation 21.22.4(b)



The following constitute anti-doping rule violations:

21.2.3 Refusing, or failing without compelling justification, to submit to Sample collection after notification as authorised in these Anti-Doping Regulations or otherwise evading Sample collection.

44. Neither the Regulations nor the World Anti-Doping Code contain a definition of “refusing” or “refusal”. In both, however, the word “refusing” is followed by a comma before the phrase “or failing without compelling justification”. Thus the word “failing” is qualified by the term “without compelling justification”, whereas the word “refusing” is not.

45. Counsel for the Board submits that a refusal – any refusal – to submit to testing when asked to do so, constitutes an anti-doping rule violation under Regulation 21.2.3.

46. In support of the Board’s position, the BJC was referred to two decisions of the Sports Dispute Resolution Centre of Canada. In *CCES v Zardo* (2005), the athlete was selected for targeted out-of-competition testing. A written notice was delivered to his home, receipt of which was signed by the athlete’s mother. The written notice included the warning “Failure to comply with this request may be considered an anti-doping rule violation”. Having not heard from the athlete by the following day, the DCO spoke to both the father and the mother of the athlete. The DCO was unable to speak to the athlete, but was told by the athlete’s parents that he would receive a fax from the athlete’s lawyer. A lawyer’s letter written two days later claimed that the athlete had retired approximately three weeks previously and that he was not, therefore, obliged to submit to any sample collection. The athlete gave evidence of the contentious relationship he had had with his national sports organisation, Bobsleigh Canada Skeleton, (“BCS”) with the result, he said, that his state of mind at the time that he was requested to submit to doping control was such that his relationship with BCS had deteriorated to the point that he decided to leave the sport because he was too upset and frustrated. The arbitrator looked at analogous Canadian criminal law and concluded that the anti-doping rule violation of “Refusing .. to submit to Sample collection after notification” fell into a category of “Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open

to the accused to avoid liability by proving that he took all reasonable care.” The learned arbitrator concluded:

[165] In the present case, at the hearing and in his submissions, the Athlete made it clear that even though he was aware of the notification to submit to doping control, his state of mind and that of his parents and his lawyer’s advice lead him to decide not to do so.

[166] It is simply not acceptable for an Athlete to hide a fault or a negligent conduct behind a lawyer’s legal opinion particularly when the provisions of the Rules of the CADP are clear and the advice and information from the representatives of the CCES have both been given on numerous occasions to the Athlete’s parents.

[167] I therefore find that the Athlete did not submit to doping control during the appropriate time on April 21, 22, 23, 2005 and though he never personally directly refused to do so, his negligent conduct was equivalent to a refusal.

47. The arbitrator in *Zardo* was in no doubt that the Athlete had been properly notified that he was being required to provide a sample. While the Athlete challenged the motives behind the notification, his “refusal” appears to have arisen in the context of a deliberate response following a contentious relationship with Bobsleigh Canada Skeleton and the CCES. This ultimately allowed the arbitrator to reach the conclusion that, although the athlete had never personally directly refused to take a test, “his negligent conduct was equivalent to a refusal”.

48. The facts and circumstances in *Zardo* stand in stark contrast to Mr. Lui’s situation, where the nearest the DCO got to providing any sort of notification was through a telephone call with a Player who was at a place of work some distance away and unaware that he was part of a testing pool. Whereas the athlete in *Zardo* was fully aware of the notification and the process through which the notification had been made, the same cannot be said of Mr. Lui.

49. In *CCES v Kelleher* (2006), the athlete, after enquiring what the consequences would be, and consulting with his coach, wrote on the Doping Control Form “I refuse to take the test.” He did not appear at the subsequent hearing and received a two year sanction. This case does not appear to have particular application to the case at hand.

50. In our view, for an anti-doping rule violation to be established, we must be comfortably satisfied that:

- a) The Player was notified of testing “as authorised in [the] Anti-Doping Regulations”;
- b) That having been so notified, the Player refused to submit to Sample collection.

51. The procedures for Notification of Players Out-of-Competition are contained in section 20 of the Guidelines. The Guidelines are just that – guidelines. Section 1 of the Guidelines provides:

These Guidelines should be followed as far as is reasonably practicable. However, any deviation or deviations from the procedures set out in the Guidelines shall not invalidate a finding of a [*sic*] anti-doping rule violation unless it was such as to cast real doubt on the reliability of such a finding.

52. What happened to the Player bore little resemblance to the process set out in Guideline 20.

53. It is undisputed that the Player was unaware that his name had been included in the Union’s list of players included in the Registered Testing Pool. Indeed, although the Player had been included in a larger pool of players that would be considered for selection for the USA 7s teams, the Player was not, in fact, selected, and, hence, was not at any of the briefings to players on IRB doping procedures which the Union conducted.

54. In short, the Player had no reason to believe that he might be part of a pool of players subject to out of competition drug testing.

55. While it seems to us improbable that, when he was an active participant in World Sevens Series matches several years ago, the Player had never signed a player consent and agreement form or encountered other doping regulation information, we accept that the Player had no particular awareness of out-of-competition doping procedures and/or the existence of registered testing pools. Perhaps more importantly, he had been out of international rugby for over four years.

56. It follows that the Player must have been, and was, completely taken by surprise when he was contacted by the DCO. That is not, in and of itself, an excuse for failing to take a test when asked to do so.

57. We accept that, at the time the DCO and the Player made contact, the Player was at a worksite.

58. The Player, as an “International Level Player”<sup>3</sup>, would, had he been informed that he was part of a testing pool, have been obliged under Regulation 21.10.3 to keep his Union updated on his whereabouts. Had he failed to do so, he might well have found himself running afoul of Regulation 21.10.4 (failure to provide whereabouts information) or worse.

59. But the Player was not informed he was in a testing pool. Instead, he found himself on the telephone with a complete stranger in a context that made no sense to him, being asked to tell the stranger his residential address at a time when his wife was home alone.

60. While in the ordinary course, the Guidelines would require the DCO, having made contact with the Player, to have then have shown the Player his ID and, where appropriate, a letter of authorisation (Guideline 20(f)), he could not do so because he only made contact over the telephone.

61. The whole process associated with No Advance Notice Out-of-Competition testing is predicated on the DCO attending at a place where the Player is. For example, the Guidelines provide that the DCO is required to obtain identification from the Player. The DCO may permit the Player a reasonable time to complete an activity in which the Player is engaged before Testing is conducted (provided the Player remains within the DCO’s clear and continuous view) or can relocate the place of testing if the venue where notification took place is not suitable.

62. Obviously none of these things happened. Through no fault of the Player, who was unaware of the need to provide updated address information because he had not been told

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<sup>3</sup> Players designated by the Board as being within its Registered Testing Pool.

he was part of the testing pool, the DCO attended at an address the Player no longer lived at. The Player and the DCO never met.

63. This is not a case where a DCO was confronted with someone clearly trying to evade testing (which can be a separate anti-doping violation) or standing inside his or her home refusing to come out. Nor is it a situation where an inference of refusal can be safely drawn from an athlete's conduct, as was the case in *Zardo*. It is not even, in our view a case where there was "a hot-headed, spur of the moment over-reaction" on the part of the Player.<sup>4</sup>

64. Rather, this is a case where the DCO was unable to physically locate the Player, other than at some unspecified place at the end of a telephone connection. The Player's refusal to provide his home address to a complete stranger, whose identity the Player could not have easily verified, is, in our view, understandable. We accept the Player's evidence that he was concerned about the safety of his family. We also accept his evidence that had he had any reason to believe that he was part of a testing programme, he would have co-operated.

65. While hindsight is a valuable commodity, we note that the DCO did not ask the Player where he was at work or whether he could come to the Player's workplace. Nor did he suggest that the Player contact USA Rugby or USADA to confirm that the DCO was genuine and his request proper. We would add, in relation to the contradictory reports by the Player and the DCO regarding how their telephone call ended (see 23 and 28 above), that it would have been preferable if an attempt had been made by the DCO to

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<sup>4</sup> In the case of *New Zealand Rugby League v Tawera* (2005, Sports Disputes Tribunal of New Zealand), a rugby league player was randomly selected for in competition testing at a match. When he was ready to give a sample, a DCO accompanied the player into a bathroom cubicle to observe the sample passing from him. The DCO could not see properly and asked the player to turn side on so that the DCO could better observe the process. The player became agitated and eventually discarded the sample into the toilet and said "fail me". After being warned of the consequences of failing to provide a sample, the player said "fail me, I don't care". The case against the player was prosecuted as one of an unreasonable failure to provide a sample, rather than a refusal. This enabled the tribunal to consider "exceptional circumstances" and reduce the otherwise mandatory minimum sanction. The tribunal noted in this regard that the player's "failure to provide a sample was a hot-headed, spur of the moment over-reaction to momentary inconvenience or embarrassment and was not motivated by a desire to avoid the detection of an anti-doping rule violation".

re-contact the Player if, as the DCO testified, “the line just went dead”, especially given the possible consequences of the Player being deemed to have refused.

66. We pause to note that, on the consent of all parties, this hearing was conducted by telephone. Some of the traditional means of judging credibility – in particular the ability to assess the demeanour and tone of the witnesses – can not be employed as effectively on a telephone call as they can at an “in-person” hearing. In such circumstances we feel that fairness requires that where there have been different versions of events or we have had to weigh the Player’s word against the other available evidence, we have given the Player the benefit of the doubt where the evidence for or against a particular conclusion or finding is otherwise evenly balanced.

67. While the Player is not free from criticism – he could have asked to speak to a supervisor or someone in authority or have contacted someone in the rugby community – the Board has not, in our view, met the onus of demonstrating to our comfortable satisfaction that the Player was adequately notified of testing “as authorised in [the] Anti-Doping Regulations”. As a result, the Player’s subsequent lack of compliance – or even refusal – was not, in our view, the result of a valid notification process.

68. We would add that even had Testing been conducted, it would not really have been “No Advance Notice” testing, because it could not have occurred for at least 90 minutes after the DCO and the Player spoke, due to their different locations. During that 90 minutes the Player would not have been in anyone from USADA’s clear and continuous view, which is a requirement of the “No Advance Notice” process. The Player’s “refusal” should, we feel, be considered in that context.

69. Furthermore in our view even if it could be said that the Player was “notified”, what the Player then refused to do, at least initially, was to tell the DCO where he lived. We are not satisfied that the refusal was of the nature and character required for there to be a “refusal” under Regulation 21.2.3.

70. Alternatively, although this was not an argument put forward at the hearing, it might be considered that when the DCO contacted the Player, he was, effectively, giving the

Player “Short notice” notification of out of competition doping control. Under section 20(a)(ii) of the Guidelines, “Short notice” notification occurs where the Player is informed by telephone or by written notification by a DCO and must report for Sample collection to a designated location by a designated time (no more than 24 hours after notification).

71. The DCO evidently did not consider utilising the “Short notice” procedures. We do not criticise him for that, as his instructions were to perform “no advance notice” out of competition testing. However, had he done so and the Player had not subsequently shown up at the designated time and place, Section 20(c) of the Guidelines provides that “the Player may be deemed to have refused or failed to comply with a request for Doping Control and thereby may have committed an anti-doping rule violation” (emphasis added). The BJC in such circumstances could then have considered all of the circumstances in determining whether there was a “refusal” or a “failure to provide” and, in the case of a failure to provide, whether there was compelling justification for the failure and, if not, whether there were nevertheless special circumstances that would warrant a reduced sanction.

72. In coming to the conclusion that there was not a true “refusal” by the Player, we adopt the observation by the New Zealand Sports Disputes Tribunal in *New Zealand Rugby League v Tawera*<sup>5</sup> that “any remedial set of rules such as the WADA Code calls for a purposive approach to interpretation and application; that is, an approach which looks at the purpose of a rule and applies that purpose in its interpretation”.

73. The purpose of the refusal rule is to maintain the integrity of the Regulations and the WADA Code and the strict application of the procedures set out in both. Hence, the strict liability of an athlete, with a mandatory minimum penalty of two years’ ineligibility where a refusal is established. However, where there is imperfect compliance by the testing authority with its Guidelines, while not fatal to the establishment of an anti-doping rule violation, we are of the view that a purposive approach requires consideration of the

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<sup>5</sup> *Ibid.*

objectives of the rule as well as the circumstances in which the alleged violation has occurred.

74. The circumstances of this case are most unusual. Once again, the Union has let down one of its players in relation to doping matters.<sup>6</sup> The Guidelines do not directly address circumstances such as these. Indeed the circumstances made it impracticable for the DCO to have conducted testing on the Player that day. Factors of time, location and distance played their part as did a justifiable reticence on the Player's part given his lack of understanding and his concern about the safety of his family.

75. If there is not "notification as authorised in these Anti-Doping Regulations" there cannot be a "refusal". While there may have been better ways for the Player to have dealt with the situation that he found himself confronted with, the circumstances are such that we cannot be comfortably satisfied that a "refusal" occurred under Regulation 21.2.3, with its attendant mandatory penalty of two years' ineligibility.

76. Although the Board's case against the Player was based on his alleged refusal, rather than failing to submit to Sample collection, we did consider whether the Player's actions could be regarded as "failing to submit". Even if they could, there remains a requirement of "notification as authorised in these Anti-Doping Regulations" before there can be a failure to submit. Furthermore, the offence is "failing without compelling justification to submit to Sample collection." We would consider that in this case there was "compelling justification" for the failure, for the reasons already set out.

#### *Decision*

77. We have decided that the allegation of an anti-doping rule violation against the Player should be dismissed. We have done so for all of the reasons set out above but, principally, because we have concluded that the Player was not adequately notified that he was required to submit to Sample Collection as authorised in the Regulations due to:

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<sup>6</sup> See the comments of the BJC in the matter of *Andrew Hanks* (2006)



- a) the failure of the Union to inform the Player that he was part of the Board's Registered Testing Pool;
- b) the failure of the DCO to establish in-person contact with the Player which would have enabled each of the DCO and the Player to identify the other and for any questions or concerns which the Player had to be dealt with more effectively;
- c) the failure of the DCO to suggest alternative arrangements which could have allayed some of the Player's expressed concerns.

78. We would add that the general level of non-conformity with the Board's Doping Control Procedural Guidelines was, in any event, sufficient to cast real doubt on whether such notification as was given was adequate and, hence, whether any finding resulting therefrom could be regarded as reliable.

79. The Player's provisional suspension is therefore lifted, with immediate effect.

80. This decision is subject to referral to a Post Hearing Review Body (Regulation 21.24.1) and an appeal to the Court of Arbitration for Sport (Regulation 21.27). In this regard attention is also directed to Regulation 21.24.2 which sets out the process for referral to a Post Hearing Review Body, including the time limit within which the process must be initiated.

81. If any party wishes us to exercise our discretion in relation to costs pursuant to Regulation 21.21.9, written submissions should be provided to the Judicial Committee via the Board's Anti-Doping Manager by 17:00 Dublin time on 4 May 2007.

24 April 2007

A handwritten signature in black ink, appearing to read 'Graeme Mew'. The signature is stylized with a large initial 'G' and a horizontal line under the name.

Graeme Mew (for and on behalf of the Board Judicial Committee)

Gregor Nicholson

Barry O'Driscoll