ANADO Legal Note 16

What is the "default" period of ineligibility for an anti-doping rule violation involving a specified substance?

This is a comment that only the lawyers will love. It springs from a conversation between lawyers. It involves lawyers deconstructing language written by lawyers and exposes ambiguity that only lawyers would enjoy arguing about. Ambiguity that will require lawyers to fix.

Specified Substance cases occupy a considerable amount of time and effort of anti-doping organizations. The outcomes of hearings of such cases are not always consistent and, on their face, logical or even fair. In my view, Article 10.4 of the World Anti-Doping Code still needs fine-tuning to better address the consequences of an anti-doping rule violation involving a Specified Substance.

Article 10.4 is entitled "Elimination or Reduction of the Period of *Ineligibility* for Specified Substances under Specific Circumstances." It is supposed to operate as an exception to the Article 10.2 rule that a first anti-doping rule violation results in a two year period of ineligibility. Article 10.4 offers a range of lesser consequences if (a) the prohibited substance is a "Specified Substance," and (b) the athlete can establish how the Specified Substance entered his or her body, and (c) the athlete can establish no intent to enhance performance (which requires corroborating evidence in addition to the athlete's own assertion).

Graham Arthur of UKAD and I were recently discussing application of this provision in everyone's favourite type of Specified Substance case, one involving a so-called recreational or social drug. Graham reminded me that an athlete is better advised to try to show deliberate one-time use (say as part of a celebration or in reaction to some personal difficulty) than to try and prove mistake or sabotage or accidental exposure. The former (assuming some form of corroborating evidence) will generally result in a suspension of six months or less. Hearing bodies may not always be equipped to separate fact from fiction, or may be inclined to accept doubtful corroborating "facts" because the alternative of the full two year period of ineligibility seems overly harsh. On the other hand, sabotage, accidental exposure or some other exculpating explanation, even if true, can be very difficult to prove; the effort is likely to lead to the full two year period of ineligibility. Hearing bodies are more sceptical of such explanations (and the burdens of proof in the Code require them to be so).

The uncomfortable result is that the claim of deliberate use of a Specified Substance is treated less harshly than unintended even blameless circumstances.

That can lead counsel (and hearing bodies) to seek to mitigate the consequences of such a plea. The current wording of Article 10.4 may unintentionally permit this. The article is less than clear because it does not explicitly state that the two year period of ineligibility is the default requirement. Instead, it first states the range of consequences that may be imposed ("At a minimum, a reprimand and no period of *Ineligibility* from future *Events*, and at a maximum, two (2) years period of *Ineligibility*.") and secondly,

and separately, sets out justifications for "any elimination or reduction." In other words, instead of making it clear that a two year period of ineligibility is the starting point (and the end point, unless elimination or reduction is justified), the provision superficially invites a choice of consequence within the range, followed by a consideration of (further) elimination or reduction.

It would be better if the structure of Article 10.4 followed that of Articles 10.2 or 10.5 or 10.6. Article 10.2 clearly articulates to requirement for a two year period of ineligibility "unless" the conditions for elimination or reduction in Articles 10.4 or 10.5 are met. On this model, Article 10.4 should read:

> Where an *Athlete* 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 *Athlete's* sport performance or mask the *Use* of a *Prohibited Substance*,[1] the two year period of *Ineligibility* may be reduced or eliminated. At a minimum, a reprimand and a warning must be given. To justify reduction or elimination, the *Athlete* 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 intent to enhance sport performance or mask the *Use* of a *Prohibited Substance*. The *Athlete's* or other *Person's* degree of fault shall be the criterion considered in assessing any reduction or elimination of the period of *Ineligibility*.

Similarly, 10.5 does not replace the two year default with the range and then, separately, outline the factors justifying a case being treated within the range. Rather it makes reference to the "otherwise applicable period of ineligibility." Article 10.6 (Aggravating Circumstances) takes a similar approach. That fact that Article 10.4 is drafted differently than Article 10.5 and 10.6 in this respect increases the possibility it may be misapplied.

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[1] The current term in Article 10.4 is "performance-enhancing substance," which is used nowhere else in the Code. This is not helpful. It suggests some different group of substances than Prohibited Substances (which are of course defined as any on the Prohibited List). This further confuses application of the Article. The term "performance-enhancing substance" ought to be dropped.