

Decision of the Japan Anti-Doping Disciplinary Panel

Case 2015-001

Name of Athlete: X

Sport: Softball

Pursuant to the decision of the Hearing Panel convened for this case, the Japan Anti-Doping Disciplinary Panel has made the following decision with respect to this case.

December 8, 2015

Japan Anti-Doping Disciplinary Panel

Chair: Yoshihisa Hayakawa

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Hearing Panel Decision

The Hearing Panel for this case, which is composed of the following members appointed by the Chair of the Japan Anti-Doping Disciplinary Panel pursuant to Article 8.3.2 of the Japan Anti-Doping Code (hereinafter, the “Code”), has made the following decision concerning this case pursuant to the results of the hearing (the “Hearing”) held on November 21, 2015.

December 8, 2015

Yoshihisa Hayakawa

Katsumi Tsukagoshi

Masahiro Murayama

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Decision:

- A violation of Article 2.1 of the Code is found to have occurred.
- In accordance with Articles 9 and 10.8 of the Code, all of the individual results of the Athlete obtained from the date of sample collection through the commencement date of the provisional suspension period shall be disqualified, and all medals, points and prizes obtained during such period shall be forfeited.
- In accordance with Articles 10.2.1.2, 10.2.2, 10.5.1.1 and 10.11.3.1 of the Code, a period of ineligibility shall be imposed for a period of eight months starting from July 7, 2015.

Reasons:

- The substances “oxilofrine” and “β-methylphenethylamine” which were detected from the Athlete in In-Competition testing conducted on May 30, 2015 are designated as prohibited substances as “oxilofrine (methysynephrine)” and “phenethylamine and its derivatives” under “S6. Stimulants” in The 2015 Prohibited List International Standard (the “Prohibited List”), and constitute “Prohibited Substances” as prescribed in Article 2.1 of the Code. In response to this, the Athlete requested an analysis of the B Sample, but the results detected were the same. The Athlete did not contest the test results or the process and procedure that led to those results at the provisional hearing or the hearing.
- Accordingly, the Athlete can be found to have violated Article 2.1 of the Code (Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample) in this case, and it is appropriate to consider that, in accordance with Articles 9 and 10.8 of the Code, all of the individual results of the Athlete obtained from the date of sample collection through the commencement date of the provisional suspension period shall be disqualified, and all medals, points and prizes obtained during such period (if any) shall be forfeited.
- The substances above which were detected in this case, while on the one hand constituting “Prohibited Substances,” also are “Specified Substances” under the Prohibited List. The Japan Anti-Doping Agency (“JADA”) did not assert or prove that the use of the detected substances above was intentional. In fact, it can be reasonably presumed that the detected substances above were contained in a supplement called “Dexaprine XR”, and that the substances above were detected because the Athlete took the product before the competition without being aware that such substances were contained. Therefore, since it does not fall under a case in which JADA could prove that the violation in this case was intentional, in accordance with Articles 10.2.1.2 and 10.2.2 of the Code, the period of ineligibility shall be for two years as a general rule.
- In addition, upon considering whether the period of ineligibility would exceptionally be eliminated in accordance with the provisions of Article 10.4 of the Code, the Athlete does not assert or prove the application thereof, and as a fact, no circumstances that the Athlete bears No Fault or Negligence can be found.
- The parties do not dispute the above.
- The issue disputed by the parties concerns the exceptional reduction of the period of ineligibility in accordance with the provisions of Article 10.5.1 of the Code. Said Article sets forth that such reduction is permitted when the Prohibited Substance detected is a Specified Substance if the Athlete is able to establish “No Significant Fault or Negligence” (Article 10.5.1.1 of the Code), or even if it does not fall under a Specified Substance, if it “came from a Contaminated Product” (Article 10.5.1.2 of the Code)
- In this regard, the Athlete asserts that the supplement “Dexaprine XR” taken by the Athlete is a “Contaminated Product” set forth in Article 10.5.1.2 of the Code, and that the period of

ineligibility should be reduced as a result of the application of said Article, and referring to precedents concerning Contaminated Product (FINA v. Cielo (CAS2011/A/2495), UCI v. Kolobnev (CAS2011/A/2645), UK Anti-Doping v. Warburton and Williams. UK Anti-Doping v. Murphy), asserts that the period of ineligibility should be four months. In response to this, JADA asserts that such supplement is not a “Contaminated Product” under Article 10.5.1.2 of the Code, and simultaneously, that the Prohibited Substances detected are Specified Substances, and considering that the circumstances the degree of fault or negligence of the Athlete cannot be said to be significant,, while it does not dispute that reduction should be permitted, it asserts that the period of ineligibility should be eight months.

- Upon reviewing, first of all, the facts can be reasonably recognized that, even though the Athlete confirmed through the product label as to whether or not the supplement “Dexaprine XR” contained any substances listed in the Prohibited List, the Athlete subsequently took the supplement since there was no description that Prohibited Substances were contained, and JADA did not raise any specific assertions or proof to the contrary.
- Next, with respect to whether the supplement falls under a “Contaminated Product”, in the case in which Prohibited Substances detected are not Specified Substances, falling under a “Contaminated Product” is a requirement necessary for the sanctions to be reduced as set forth in Article 10.5.1 of the Code; however, in a case like this in which the Prohibited Substances detected were Specified Substances, it is possible to reduce the sanctions regardless of whether or not it falls under a “Contaminated Product”. On the other hand, with respect to the proportionality (of period of ineligibility) with precedents regarding “Contaminated Product” referred to by the Athlete, all the precedents except UK Anti-Doping v. Murphy are cases under the anti-doping rules prior to the amendments of 2015, and are not such that must be considered without reservation in relation to the current anti-doping rules. Therefore, what is important in relation to this case is not the strict recognition as to whether the Prohibited Substances detected fall under a “Contaminated Product” under Article 10.5.1.2 of the Code, but rather, how the characteristics of the supplement called “Dexaprine XR” containing the Prohibited Substances and the state of use of said product by the Athlete should be evaluated in relation to the “degree of Fault” of the Athlete under Article 10.5.1 of the Code.
- Accordingly, upon reviewing the characteristics of the supplement called “Dexaprine XR” and the state of use of said product by the Athlete, it is true that there was no indication of the Prohibited Substance in the product label of said product. However, as is clear also from the existence of the precedents referred to by the Athlete, with respect to supplements, the risk that substances not indicated on the product label are contained, in other words, the risk that not all substances contained are described on the product label, is not small. Athletes should use supplements with constant consideration of the existence of such risk.
- In addition, the product label of said product clearly indicates that it contains a substance called

“Acacia Rigidula” which is considered to contain the Prohibited Substance. In other words, there was a clear indication that it contained a substance the nature of which was not necessarily clear, and the Athlete should have carefully considered the possibility of a Prohibited Substance being contained in such substance the nature of which was not necessarily clear.

- However, the Athlete asserts that, before taking “Dexaprine XR”, she researched the internet as to whether it contained Prohibited Substances, and that she confirmed the safety of the supplement through an “official” website of the manufacturer of said product. However, the current version of this website as of the end of November 2015 clearly states that it contains “Methylsynephrine” (<http://www.dexaprine.org/ingredients>). The correct spelling of “Methylsynephrine”, which is another name for oxilofrine (one of the Prohibited Substances detected in this case), is “Methylsynephrine”, and the “l” was omitted. However, if the Athlete had noticed this description, it would have been possible for her to have been aware of the possibility of such Prohibited Substance being used in said product.
- In this regard, it is not clear as to whether such description existed on said website in May 2015 when the Athlete took the product, and the possibility that the description did not exist when the Athlete confirmed safety cannot be absolutely denied. However, in the first place this manufacturer was a person who failed to indicate the Prohibited Substances on the product label of said product, and was a person who disregarded the danger of a substance, the nature of which was not clear, called “Acacia Rigidula” containing a Prohibited Substance. With respect to supplements (other than medical drugs under strict legal regulations), it is sufficiently possible that an “official” website of such a manufacturer, the more a manufacturer of such nature, is not a reliable source for the purposes of confirming safety. The Athlete should have confirmed safety with careful consideration of such risks as well.
- Through an actual attempt, from such viewpoint, to conduct an internet search using the product name “Dexaprine XR”, articles prior to May 2015 are found warning of the dangers of said product, as well as websites of sellers clearly indicating that it contains the Prohibited Substance. Although the search results differ depending on the search engine used, it can be stated that there were sufficient circumstances, even then, of being aware that it was a product with the danger of violating anti-doping rules. The acts of the Athlete to have considered it “safe” by sole reliance upon the “official” website of the manufacturer of said product (at least, in the current website version, it is possible to be aware that it contains the Prohibited Substance) cannot be said not to have been problematic.
- In relation to the state of use of said product by the Athlete, there was a language issue in this case in that the Athlete, an American, was leading an athletic life in a Japanese team. The Medical Committee of the Japan Softball Association prepared pamphlets called “For Anti-Doping” and distributed it to related persons. In this pamphlet there is a column called “3. Regarding Supplements”, where it is explained that “Supplements or nutritional supplements are not subject to governmental regulations as strict as medical drugs, and may contain Prohibited Substances”.

It is true that this pamphlet is prepared only in the Japanese language and does not make direct sense to persons who lack understanding of the Japanese language. In addition, specific anti-doping education using such items as this pamphlet is entrusted to each team, and anti-doping education was not necessarily institutionally guaranteed to persons without understanding of the Japanese language (moreover, according to the Athlete's assertion, anti-doping education in the English language was not, as a fact, sufficiently provided by the team to which she belonged). In this regard, the possibility that the Athlete was not able to receive sufficient anti-doping education cannot be denied. However, on the other hand, the Athlete belonged to the US softball team in the past, and she should have had the opportunity to receive sufficient anti-doping education in the English language, her native language, there. It is therefore difficult for her to state an excuse for disregard towards the risks of supplements.

- However, it is necessary to take into consideration the fact that, while the Prohibited Substance is a "substance prohibited In-Competition", the Athlete's actual use of the product occurred before the competition. In other words, for instance, in *Cilic c. ITF (CAS2013/A/3327)* referred to by the Athlete, as long as the substance was taken before the competition, the anti-doping rule violation regarding such substance is not directed towards the act of taking the substance itself, but rather towards the fact that the athlete participated in the competition while the substance remained in the athlete's body, and said case finds that the "degree of Fault" differs from the case in which the substance was taken during the competition. While it is without saying that the anti-doping rule violation is not denied because the substance was taken before the competition, this should be taken into consideration in relation to the "degree of Fault" of the Athlete under Article 10.5.1 of the Code.
- Taking into consideration the above circumstances, the Athlete is reasonably found to have had "No Significant Fault or Negligence" in this case. Considering that the Prohibited Substances detected were Specified Substances, and the fact that this was a first violation, it is appropriate to impose an eight-month period of ineligibility pursuant to Articles 10.2.1.2 and 10.2.2 of the Code, as well as Article 10.5.1.1 of the Code.
- The Athlete asserts that it is necessary to consider the proportionality with the period of ineligibility in the precedents above regarding "Contaminated Product". However, as stated above almost all of these are precedents under the anti-doping rules prior to the amendment of 2015, and it is not such that the precedents must be considered without reservation in relation to the current anti-doping rules which impose stricter sanctions for violations. On the other hand, *UK Anti-Doping v. Murphy* is a precedent under the anti-doping rules after the amendments of 2015; however, it was a case in which the athlete was a minor, and in which there was no possibility of being aware of a prohibited substance being contained in the supplement at issue not only through the product label but also through an internet search as well, and the result above in this case cannot be considered disproportionate in relation to the fact that a period of ineligibility

of six months was imposed in such case.

- In this case, the Athlete has been under a provisional suspension pursuant to Article 7.9.2 of the Code from the date of the notice of July 7, 2015 by the responsible person at JADA until the time of the present decision (a provisional hearing was held on November 21, 2015 concerning the relevant provisional suspension). Accordingly, pursuant to Article 10.11.3.1 of the Code, the commencement date for the period of ineligibility shall be July 7, 2015.
- The Athlete asserts that, due to there being a “Timely Admission” under Article 10.11.2 of the Code in this case, the commencement date for the sanctions should be retroactively applied to May 30, 2015, the testing date. However, after the notice of provisional suspension on July 7, 2015, the Athlete requested an analysis of the B sample, and after the notice on August 7, 2015 to the effect that the results detected did not differ, the Athlete notified that she desired to directly attend the hearing by coming to Japan, and that she desired that the hearing be held at a the dates from October 1, 2015 to October 7, 2015 (excluding Saturday and Sunday). Accordingly, a hearing was scheduled within the scope of such dates and the time and dates were notified to the Athlete; whereupon she asserted that she could not come to Japan because the doctor did not grant her permission for the flight due to injury, and furthermore, she requested that the hearing not be held during such dates but extended due to time being required for the selection of an agent. An extension was determined accordingly, and a notice of assumption of office of agent was provided by a US attorney who assumed the position of the Athlete’s agent; therefore an offer was made to the Athlete to hold a hearing (using a video conference) in the latter half of October 2015. However, the Athlete notified that she needed further time due to preparations for defense; therefore an offer was made to hold a hearing in the latter half of November 2015, and a hearing (using a video conference) was ultimately held on November 21, 2015. Under such circumstances, a claim for “admission of anti-doping rule violation” was submitted only on November 18, 2015, which was immediately prior to the hearing (please refer to the “Attachment” regarding an overview of these procedures with respect to the above). Considering such circumstances as the above, even if the language barrier and all other related circumstances were taken into account, the Athlete cannot be found to have admitted the anti-doping rule violation “promptly after being confronted with the anti-doping rule violation”, and the commencement date for the sanctions cannot be retroactively applied before the date of imposition of the provisional suspension period.

Based on the foregoing, we have made our decision as stated above.

Case 2015-001 Decision of the Anti-Doping Disciplinary Panel Attachment

Date	Overview of Procedures
May 30, 2015	In-Competition testing was conducted.
Dated July 7, 2015	The provisional suspension notice (Japanese) was dispatched from JADA to the Athlete.
July 17, 2015	AAF notice of charge with provisional suspension (English) were dispatched from JADA to the Athlete
July 28, 2015	Analysis of the B sample was conducted.
August 7, 2015	A notice regarding the results of analysis of the B sample was dispatched from JADA to the Athlete.
September 16, 2015	The Athlete notified the Japan Anti-Doping Disciplinary Panel (hereinafter, the “Disciplinary Panel”) through JADA that she would come to Japan and attend the hearing, and that she desired the dates from October 1 to October 7 (excluding Saturday and Sunday).
September 25, 2015	The Disciplinary Panel dispatched notice that the provisional hearing and the hearing would be held from 9:30 a.m. on October 1.
September 28, 2015	The Athlete notified the Disciplinary Panel that she could not come to Japan because the doctor did not grant permission for flight due to injury.
September 29, 2015	The Athlete notified the Disciplinary Panel that she desired that the hearing be extended due to procedures for selecting an agent attorney.
Same day	The Disciplinary Panel determined an extension regarding the provisional hearing and hearing scheduled from 9:30 a.m. on October 1.
October 3, 2015	Mr. Howard L. Jacobs, attorney-at-law, notified the Disciplinary Panel of assumption of office of agent of the Athlete.
October 13, 2015	The Disciplinary Panel notified the Athlete of possible dates for the provisional hearing and the hearing (two days in the latter half of October), and notified the required time and venue, etc. of the hearing.
October 15, 2015	The Athlete’s agent proposed to the Disciplinary Panel that more time should be granted for preparation of defense.
October 16, 2015	The Disciplinary Panel notified the Athlete of possible dates for the provisional hearing and the hearing (three days from mid-November to the latter half of November).
October 17, 2015	The Athlete notified the Disciplinary Panel that November 21 and 22 would be convenient, that she requested for a video conference with the meeting room of the office of the Athlete’s agent under the presence of an interpreter, and other matters.

October 20, 2015	The Disciplinary Panel dispatched a notice for the provisional hearing and the hearing from 10:00 a.m. on November 21, and decided to make subsequent notifications regarding preparations for the video conference.
November 18, 2015	The Athlete submitted to the Disciplinary Panel documents and evidence containing assertions of “admission of anti-doping rule violation”.
November 21, 2015	The Provisional hearing and the hearing were held using video conference.