

FINA Doping Panel 02/16
6 July 2016

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FINA Doping Panel

comprised of

Robert Fox	(SUI)	Chairman
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In the proceedings against

the swimmer **Vitalina Simonova ("the Athlete")**
affiliated to the: Russian Swimming Federation
("RSF")

represented by: Mr. Artem Patsev,
Legal Counsel

I THE PARTIES

1.1 The FEDERATION INTERNATIONALE de NATATION (**FINA**) is the International Federation governing the sport of Aquatics. 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 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, *Athletes, Athlete Support Personnel*, coaches, physicians, team leaders, and club and representatives under the jurisdiction of the RSF.

1.3 The Athlete was born on 18 September 1992.

II NATURE OF THE CASE

2.1 On 29 June 2015 the Athlete provided a urine sample pursuant to an out of competition test conducted by the World Anti-Doping Agency (**WADA**) in Naoussa, Greece during a training camp.

2.2 The Athlete's sample A3784833 was submitted to Laboratory for Doping Analysis – German Sports University Cologne, an accredited Laboratory of WADA on 1 July 2015.

2.3 On 25 September 2015 FINA received a notification from WADA that advised of an adverse analytical finding ("**the AAF**") for the Athlete which indicated:

*"an exogenous origin of the target compound(s) – S1.1B Endogenous AAS/The GC/IRMS result for Testosterone (T) and at least one of the Adiol (5aAdiol and/or 5b Adiol) ("**the Prohibited Substance**")"*

2.4 By letters dated 2 November 2015 the Athlete and RSF were advised by FINA of the AAF and provided with all appropriate confirmatory documentation. The primary issue for hearing concerned the appropriate period of ineligibility.

III THE PROCEEDINGS

3.1 By email on 6 November 2015 the Athlete acknowledged receipt of the AAF notification and advised:

*"I was preparing for the World Cup (training camp) in Greece, and purchased Tesrosterol (sic) 250 by megabol (Poland) in a local athlete's store ("**Testosterol**"):*

The Athlete provided a photo of Testosterol which photo showed a label which was clearly marked of "Testosterol 250".

3.2 By letter of 10 November 2015 to the Athlete FINA requested whether the Athlete accepted the AAF or required analysis of the B sample. FINA also advised that the Athlete was provisionally suspended from 10 November 2015.

3.3 By email of 16 November 2015 to FINA, the Athlete advised accepting the AAF and waived her right to have the B sample analysed. She further advised:

*"As I was never even intending to use any prohibited substance and/or methods, I do strongly believe that the AAF is a result of purchasing and ingestion of a contaminated nutritional supplement Testosterol by MegaBol (Poland)..." ("**the Admission**").*

3.4 On 16 November 2015 the Athlete was advised by FINA that this matter was now to be forwarded to the FINA Doping Panel ("**DP**") which was so confirmed on 19 November 2015 by Mr. Robert Fox, Chairman of the DP.

3.5 By email of 20 November 2015 the Athlete requested a hearing in front of the DP which hearing was appointed for 20 January 2016 ("**the Hearing**").

3.6 On 4 January 2016 the Athlete provided a written submission and attached exhibits ("**the Submissions**") and further advised that she would be present at the Hearing and was to be represented at the Hearing by her Legal Counsel Mr Artem Patsev ("**the Counsel**") and that her coach Ilin Aleksandr ("**the Coach**") would also attend.

3.7 In summary the Submissions assert and submit:

- the Athlete accepted that she had violated DC 2.1 through the presence of the Prohibited Substance in her sample;
- the Admission is timely in terms of DC 10.11.2 and prompt in terms of DC 10.6.3 and the Athlete is co-operating and providing substantial assistance in accordance with DC rules and further her conduct was not intentional in terms of DC 10.2.3;
- as the Athlete was in a training camp in Greece and her nutritional supplement stocks were running low, and after consultation with her doctor, the Athlete, together with her Coach and a Greek Coach ("**the Greek Coach**") on 20 June 2015 visited the nearest sport store in Naoussa, Greece ("**the Store**") to purchase additional nutritional supplements;
- after advising the Store manager that the Athlete was a professional swimmer and required to comply with anti-doping rules, he recommended Testosterone which the Athlete commenced using the following day or two;
- the delay of some months in notifying the Athlete of the AAF and that the asserted anti-doping rule violation ("**Violation**") occurred in Greece, has undermined the ability of the Athlete to provide evidence in defence of herself and receive a timely hearing and of the right to be fairly and timely informed of the Violation in accordance with DC 8.1;
- the Athlete has received an analysis of a Testosterone capsule from the relevant blister pack from the National Anti-Doping laboratory of Belarus (Minsk) which analysis ("**Minsk Analysis**") has shown

the presence of dehydroepiandrosterone ("DHEA") a banned anabolic agent;

- the presence of DHEA is not mentioned on the relevant pack of Testosterol, neither on the outside nor the inside of the pack and neither is any mention made of the natural metabolites of the substances (plant sterols) included in Testosterol;
- that in line with DC 10.5.1.2 where the Athlete can establish no significant fault or negligence and where the detected prohibited substance arose out of a contaminated product, then the period of ineligibility shall be the minimum a reprimand and no period of ineligibility and at a maximum two years ineligibility. The Athlete requests that the DP sanction her with a reprimand or with a possible minimum period of ineligibility commencing on the date of sample collection (29 June 2015);
- the Athlete declared on the Doping Control Form that she had taken inter alia Testosterol;
- Questioned by the DP the Athlete:
 - advised that she had been swimming since she was 10 years of age and inter alia competed in 2006 Junior World Championships in Brazil where she won gold and silver medals respectively in the 200m and 100m backstroke, selected and attended 2007 FINA World Championships in Melbourne though did not compete, 2012 World Short Course Championships in Istanbul, 2013 European Championships in Denmark, 2014 European Championships in Berlin and 2015 FINA World Championships in Kazan;
 - understands the anti-doping regime and has gained her knowledge of doping through education run by RUSADA, is advised by her sports doctor and the Coach and her current and previous coaches during her career;

- advised that the name Testosterol is "frightening" and it is why she questioned the Store Manager through the Greek Coach if Testosterol was "OK for athletes";
- in response to the DP question "*Testosterol*" product states it is for "*muscle tissue growth*", did this not raise any concern and increase your caution? The Athlete stated that every supplement which is not prohibited always has this labelling;
- that Testosterol is stated to contain a precursor which 'might be lead to DHEA' raised concerns however her internet search stated that it was not prohibited as it is a precursor.

3.8 In summary the Athlete:

- acknowledges her mistake;
- she didn't intend to enhance her sport performance;
- she had no idea Testosterol contained a prohibited substance;
- on the balance of probabilities there is no significant fault or negligence;
- there were delays not attributable to the Athlete.

3.9 The Legal Counsel submitted that the Minsk Analysis confirms that:

"the testosterone detected (in the Athlete's) urine sample and its diols of exogenous origin (including dehydroepiandrosterone) are definitely and undoubtedly the natural metabolites of the substances (plant sterols) included in Testosterol 250 by MegaBol. The dehydroepiandrosterone detected in (the Athlete's) sample is evidently a result of using of a contaminated product – Testosterol 250 by MegaBol".

3.10 The Hearing was adjourned to enable the DP to seek the advice of the the FINA Doping Control Review Board ("DCRB") in terms of the DP's letter to them of 20 January 2015 wherein the DP requested

scientific evidence and sought further information or guidance arising out of their decision to stay any potential sanction. In terms of such letter the DCRB were requested to reply to the undermentioned queries:

- can substances contained in Testosterol 250 metabolise into prohibited substances? (the use of the word "metabolise" as opposed to "metabolite").
- is it possible in your opinion that the use of Testosterol 250 yield the adverse analytical finding such as found in this case?
- do you have any other comment based on the information provided herein?"

3.11 The DCRB responded on 8 March 2016 to the request for Further Scientific Advice and in part responded that "...the outcome indicated no evidence of phytosterol related anabolic steroid's excretion in urine after consumption of phytosterol. Therefore, taking into account that the dose of phytosterols in Testosterol 250 is even lower . . . it seems improbable that these phytosterols may metabolise into prohibited substances" which response the Athlete rebutted on 12 April 2016 (though dated 16 January 2016) by additional submissions and a scientific opinions dated 11 April 2016 ("Additional Submissions") by Dr Arthur T Kopylov, PhD of the Institute of Biomedical Chemistry, Department of Proteomic Research and Mass Spectrometry, Laboratory of System Biology, Moscow, Russian Federation wherein it was submitted inter alia that "there was no scientific opinion presented by the FINA DCRB experts" and that "(DCRB) . . . has not answered any of the scientific questions . . . but instead invaded into 'legal territory' . . ."

In summary Dr Kopylov suggests that there are several possible ways of presence of the detected DHEA in urine sample of a female swimmer, and also he suggests that some substances contained in Testosterol 250 (made by MegaBol, Poland) may metabolite in prohibited substances in a human system.

3.12 A further response was received from the DCRB by email of 6 May 2016. In summary the DCRB concludes:

"The expert report (Dr Kopylov's)... tries to emphasise the possibility that the reason for the adverse finding observed is due to conversion in humans of phytosterols into prohibited substances detected. In spite of their similarity to cholesterol, the bio transformation of phytosterols to steroid hormones has not been demonstrated in humans."

IV JURISDICTION AND APPLICABLE RULES

4.1 The jurisdiction of the FINA Doping Panel arises out of the provision of the following provisions of the FINA Rules C 22.8, C 22.9 and FINA DC 8.1.

4.2 The applicable Rules in this case are the FINA Doping Control Rules in effect since 1 January 2015.

V. MOTIONS AND CONTENTIONS

A. The Athlete's motions and contentions

5.1 The Athlete did not question or dispute the AAF and admits that she has committed an Anti-Doping Rule Violation.

5.2 According to DC 10.5.1.2 in cases where the Athlete can establish no significant fault or negligence and that the detected prohibited substance came from a contaminated product then the period of ineligibility shall be at a minimum a reprimand and no period of

ineligibility and at a maximum two years ineligibility and the Athlete requests that the DP sanction her with a reprimand or with a possible minimum period of ineligibility commencing on the date of sample collection (29 June 2015).

5.3 Pursuant to DC 3.1 the burden of proof placed upon the athlete to rebut a presumption is by a balance of probability which the Athlete by the Submissions and her testimony has established in her favour.

VI LEGAL DISCUSSION

A. THE FACTS

6.1 The Prohibited Substances are included in the Class S1.1B Endogenous Anabolic Androgenic Steroids in the Prohibited List which is published and revised by WADA and is therefore prohibited at all times, in and out of competition, pursuant to FINA DC 4.1.

B. THE LAW

6.2 FINA DC 2.1.1

"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes 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 Athlete's part to be demonstrated in order to establish an anti-doping violation under DC 2.1."

6.3 FINA DC 2.1.2

"Sufficient proof of an anti-doping rule violation under DC 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the

Athlete waives analysis of the B Sample and the B Sample is not analysed..."

6.4 FINA DC 10.2

"The period of Ineligibility imposed for a violation of DC 2.1, DC 2.2 or DC 2.6 shall be as provided in DC 10.2.1 and if DC 10.2.1 does not apply then pursuant to DC 10.2.2, subject to potential reduction or suspension of sanction pursuant to DC 10.4, 10.5 or 10.6."

6.5 FINA DC 10.2.1

"The period of ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a Specified Substance and FINA or the Member Federation can establish that the anti-doping rule violation was intentional."

6.6 The rules further consider that the term "intentional" identifies those athletes who cheat. The term therefore requires that the Athlete or other person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk (FINA DC 10.2.3).

6.7 The strict liability principle is clearly set forth in the FINA Doping Control Rules, as mentioned above. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part to be demonstrated in-order to establish an anti-doping violation under DC 2.1.

6.8 The burden of proof is put on the athlete's shoulders and FINA DC 3.1 defines that the standard of proof shall be by a balance of probability.

6.9 The DP closely and attentively examined the Athlete's assertion, which in fact basically considers that the Athlete did not knowingly engage in conduct which could lead to an anti-doping offence. The Panel first of all is mindful of the fact that the Rules which govern anti-doping set the cardinal principle of strict liability. Hence upon findings which result in the presence of a prohibited substance in the Athlete's system, lead to the suspension for a four year period with a substance which is not specified unless the Athlete is able to prove that the violation was not intentional.

6.10 The burden of proof lies with the Athlete who in this system must establish:

- a) how the prohibited substance entered her system;
- b) that in this case she bears no fault nor negligence or no significant fault or negligence (cf. CAS 2005/A/ 922 & 9215 UCI & WADA v. Hondo & Swiss Olympic; CAS 2006/A/1067 IRB v Keyter; CAS 2011/A/2384 UCI v Alberto Contador Velasco & RFEC; CAS 2011/A/2386 WADA v Alberto Contador Velasco & RFEC).

6.11 The Athlete is an experienced swimmer who understands the doping rules and has been fully informed of the doping rules since she began competition. As such, in testimony before the DP she acknowledged the damages and pitfalls of the use of supplements. She should also have been wary of relying on advice from the Store Manager.

6.12 The Athlete with her knowledge and experience should have been alert to the similarity in the name Testosterol and the prohibited

substance Testosterone. The Athlete in her Submissions and testimony acknowledges that though the wording on the packaging of Testosterol was in Polish, she understood much of the wording due to the similarity of the Polish and Russian languages.

6.13 The Athlete did not provide any evidence to establish how the Prohibited Substance entered her system other than that "testosterone and its diols of exogenous origin are the material metabolites of the substances (plant sterols) included in Testosterol 250 by MegaBol".

6.14 The DP has received advice from the DCRB which clearly rebuts the Athlete's contentions in regard to phytosterols metabolizing into prohibited substances in Testosterol.

6.15 The DP finds that on the balance of probabilities that the Prohibited Substance found in the system of the Athlete came from the ingestion by the Athlete of Testosterol. Ultimately, the DP comes to the conclusion that the Athlete was careless and intentionally took the risk of ingesting a product which contained a prohibited substance. In addition, the DP is hard pressed to follow the argument of the athlete, especially in light of the fact that the product name contains an indication of containing an anabolic agent such as testosterone ("Testosterol"). This behaviour leaves no room for discussion and the DP can only conclude a violation of anti-doping rules, more specifically FINA DC 10.2.1.

C. THE SANCTION

6.16 According to FINA DC 10.8 all competitive results obtained from the date of a positive sample was collected through the commencement of any Provisional Suspension or Ineligibility period,

shall, unless fairness requires otherwise be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.

6.17 Therefore, all competitive results of the Athlete as of 29 June 2015 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 DECISION

7.1 The Athlete is found to have committed an Anti-Doping Rule Violation under FINA Rules.

7.2 The FINA Doping Panel is not satisfied that on the balance of probability the Athlete has not intentionally committed an Anti-Doping Rule Violation.

7.3 The Athlete receives a four year period of ineligibility commencing 29 June 2015 and ending at the conclusion of 28 June 2019, for his first Anti-Doping Rule Violation.

7.4 All results obtained by the Athlete as of 29 June 2015 and through the date of this decision are disqualified. Any medals, points and prizes achieved during that period shall be forfeited.

7.5 All costs of this case shall be borne by the RSF in accordance with FINA DC 12.3.

7.6 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 judgment.

Robert Fox
Chairman

Farid Ben Belkacem
Member

Peter Kerr
Member

Signed on behalf of all three Panel Members

A handwritten signature in black ink, appearing to be 'R. Fox', written in a cursive style.

Robert Fox