



**Arbitration CAS 2000/A/312 L. / Fédération Internationale des Luttres Associées (FILA),
award of 22 October 2001**

Panel: Mr. Yves Fortier (Canada), President; Mr. Stephan Netzle (Switzerland); Mr. Jan Paulsson (France)

Wrestling

Doping (nandrolone)

Use of nutritional supplements

Strict Liability Rule

Interpretation of conflicting doping rules

Mitigating circumstances

- 1. The subjective element of the doping offence must be considered in assessing the appropriateness of suspensions, fines and other similar sanctions, irrespective of the terms of the doping control rules at issue. If the CAS is satisfied that the athlete did not intentionally or negligently commit the offence of doping, it then becomes necessary to consider the nature of the athlete's fault in relation to the impact of a two-year ban from international competition. In the event that a two-year suspension appears disproportionately severe, the CAS has a general discretion to reduce this sanction.**
- 2. On the basis of the circumstances of this appeal (the athlete had likely consumed food supplements containing a nandrolone precursor and had an outstanding and unblemished sports career), the CAS Panel concludes that there exist « *specific and exceptional attenuating circumstances* » which justify a reduction of the athlete's two-year suspension in accordance with the FILA Doping Regulations.**

On 30 September 2000, L. placed first in a men's freestyle wrestling event held at the XXVII Olympic Games in Sydney, Australia. As one of the top four competitors, L. was selected for doping control immediately following the gold medal match.

Due to the fact that this doping control took place during the Olympic Games, the procedure was conducted under the exclusive authority of the IOC with no involvement of any kind by FILA.

The facts relating to this doping control procedure are set out in full in the Arbitral Award rendered by the Panel in the Appellant's related appeal CAS 2000/A/310 L. v/ IOC (the "IOC Appeal"). It suffices to record the following main facts for the purpose of this appeal.

The Appellant's urine sample was submitted for analysis to an IOC-accredited laboratory, the Australian Sports Drug Testing Laboratory ("ASDTL"), in Pymble, Australia. ASDTL's analysis of the A sample and the B sample established the presence in the Appellant's body of metabolites of the prohibited substances nandrolone, 19-norandrostenediol or 19-norandrostenedione (19-norandrosterone and 19-noretiocholanolone) above the threshold of 2 ng/ml for males provided under the Substitute Appendix A to the OMAC.

Upon receipt of ASDTL's reporting letter on the B sample, the Chairman of the IOC Medical Commission invited L. and up to three representatives of the German delegation to attend a meeting of the IOC Medical Commission in Lausanne.

Further to this meeting, the IOC Medical Commission proposed the following sanctions to the IOC Executive Board:

- Disqualification of the athlete
- Withdrawal of medal
- Exclusion from the Games of the XXVII Olympiad

Upon review of the IOC Medical Commission's recommendation, the IOC Executive Board rendered the following decision pursuant to Rule 25, Paragraph 2.2.1 of the Olympic Charter on 23 October 2000 (the "IOC Executive Board Decision"):

1. *The athlete L., member of the Germany (GER) team, is disqualified and excluded from the Games of the XXVII Olympiad for use of prohibited substances (Chapter II, Article 2.2 of the Olympic Movement Anti-Doping Code).*
2. *The National Olympic Committee for Germany is hereby ordered to withdraw and return the gold medal and the diploma awarded to the athlete L. (...).*
3. *This decision shall enter into force immediately.*

In reliance upon the IOC Executive Board Decision and related documentary evidence, the FILA Sports Judge decided on 24 October 2000 to suspend the Appellant from all national and international wrestling competitions for two years (the "FILA Decision").

By letter dated 3 November 2000, the Secretary General of FILA formally notified the German Wrestling Federation of the FILA Decision and advised that the two-year suspension of L. would be effective as of 30 September 2000. The Secretary General of FILA requested the German Wrestling Federation to notify L. of the FILA Decision and to ensure the strict enforcement of the two-year suspension.

On 27 November 2000, L. filed a Statement of Appeal against the FILA Decision with the Court of Arbitration for Sport (the "CAS"), pursuant to Article 37(C) of the FILA Constitution, Article 24 of the FILA Doping Regulations, Article 6 of the FILA Disciplinary Regulations and Article R47 of the Code of Sports-related Arbitration (the "CAS Code").

On 14 March 2001, after consultation with the parties, the Panel decided that this appeal would be conducted jointly with the Appellant's related appeal in CAS 2000/A/310 L. v. IOC.

The Appellant filed three Appeal Briefs with supporting exhibits and FILA filed two Answers with supporting exhibits in connection with the present appeal.

The hearing in this appeal and the IOC Appeal was held on 3 July 2001 in Geneva.

In the present appeal, the Appellant relies upon the identical arguments which he presented to the Panel in the IOC Appeal. These arguments are described in full in the Arbitral Award rendered by the Panel in the IOC Appeal.

In essence, the Appellant argues that the FILA Decision must be overturned if he is successful in challenging the IOC Executive Board Decision in the IOC Appeal.

The Appellant's sole request for relief in the present appeal was thus the following:

The decision of the FILA from the 3rd of November 2000, Ref Nr. 00/3571/mcv, send [sic] to the appellant by fax at the 6th of November 2000 shall be revoked.

In its Answer dated 26 March 2001, FILA avers that the doping control procedure at issue in this appeal was conducted under the authority of the IOC. FILA relies upon the results of this doping control procedure, which it considers to have been carried out correctly, in application of the FILA Doping Regulations and FILA Disciplinary Regulations.

FILA makes a number of submissions in support of the validity of the doping control procedure conducted by the IOC. Many of them overlap with the submissions made by the IOC in the IOC Appeal. Those submissions which do not overlap with the IOC's submissions are summarised in the Arbitral Award rendered in the IOC Appeal.

With respect to the validity of the FILA Decision, FILA argues that the IOC Executive Board Decision and underlying documentary evidence justify a finding that the Appellant committed the offence of doping.

Pursuant to Article 13 of the FILA Disciplinary Regulations, FILA states that the applicable sanction for a doping offence is a two-year suspension from competition. In FILA's submission, the Appellant has failed to raise any valid argument which could lead the decision of the FILA Sports Judge being overturned.

Based upon the above submissions, FILA requests the CAS arbitral panel to reject the appeal and to confirm the decision to suspend the Appellant for a duration of two years.

LAW

1. The jurisdiction of the CAS and the Panel arises from the provisions of the CAS Code, the FILA Constitution, the FILA Doping Regulations and the FILA Disciplinary Regulations.
2. Article R47 of the CAS Code provides the following in respect of appeal arbitration proceedings:

Appeal

A party may appeal from the decision of a disciplinary tribunal or similar body of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body.

3. Article 37(C) of the FILA Constitution provides the following in regard to appeals against the decisions of FILA Sports Judges:

Article 37. – Disciplinary Procedure [...]

C. Appeal against the decision

Conflicts between the FILA and one of its members or between members among themselves which are not resolved by a decision of the FILA Sports Judge, Disciplinary Tribunal or FILA Bureau will be submitted to the CAS for judgment notwithstanding the jurisdictions of the countries concerned.

As a last resort, the “Court of Arbitration for Sport” (CAS) will decide and judge all the valid appeals which are submitted to it by the affiliated National Federations or one of the FILA members against the decision(s) made by the FILA Sports Judge, the Disciplinary Commission or the FILA Bureau.

The appellants must be willing to conform exclusively to the CAS Constitution and Regulations and to the decision it makes.

4. Moreover, Article 24 of the FILA Doping Regulations provides the following in regard to appeals:

Article 24 – Wrestler’s rights [...]

Any wrestler sanctioned by the FILA has the right to appeal against the decision to the Court of Arbitration in [sic] Sport in Lausanne, Switzerland, in accordance with the IOC Regulations.

5. Finally, Article 6 of the FILA Disciplinary Regulations provides the following in regard to appeals against sanctions imposed by FILA:

Article 6 – Appeal against penalties imposed [...]

Conflicts between the FILA and one of its members or between members among themselves which are not resolved by a decision of the Judge of the FILA Bureau shall be submitted to the Court of Arbitration for Sport (CAS) to the exclusion of all state jurisdiction.

The CAS is the last instance of appeal.

The appellant parties must conform exclusively to the CAS Constitution and Regulations and carry out the penalties imposed.

6. In view of Article 37(C) of the FILA Constitution, Article 24 of the FILA Doping Regulations and Article 6 of the FILA Disciplinary Regulations, it is clear that this appeal against the FILA Decision meets the jurisdictional requirements set out in Article R47 of the CAS Code.
7. Furthermore, the parties expressly confirmed the jurisdiction of the CAS and the composition of the Panel by countersigning the Order of Procedure.
8. In accordance with Article R28 of the CAS Code, the seat of this appeal arbitration proceeding is Lausanne, Switzerland.
9. In accordance with Article R29 of the CAS Code, the language of this appeal arbitration proceeding is English.
10. The applicable procedure is that specified for appeal arbitration proceedings in Article R47 *et seq.* of the CAS Code and in the Order of Procedure.
11. Article R57 of the CAS Code provides the following in respect of the Panel's scope of review: "*The Panel shall have full power to review the facts and the law.*" Accordingly, the Panel is not bound by the evidence adduced before, or the factual or legal findings of, any other body or court which has ruled on this case.
12. With respect to appeal arbitration proceedings, Article R58 of the CAS Code provides the following in regard to the applicable law:
Law Applicable
The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports body which has issued the challenged decision is domiciled.
13. The "*applicable regulations*" in this case are contained in the FILA Constitution, the FILA Doping Regulations, the FILA Disciplinary Regulations and the OMAC, as described above in Section 1.2. These rules do not specify any choice of law in respect of an appeal to the CAS or otherwise.
14. In the absence of a choice of law by the parties, Article R57 of the CAS Code stipulates that the law of the country in which FILA is domiciled shall apply. Article 3 of the FILA Constitution provides that the domicile of the FILA is in Lausanne, Switzerland. Accordingly, the Panel shall apply the law of Switzerland.
15. In order to ascertain the offence of doping at issue in this appeal, it is necessary to consider a number of different and somewhat inconsistent provisions contained in the FILA Constitution, the FILA Doping Regulations and the OMAC.

16. As a starting point, Article 9 of the FILA Constitution sets out the following definition of the offence of doping:

Article 9 – Doping

The absorption of any substance intended to artificially improve the performance of the athlete is strictly prohibited. The IOC’s official list is authoritative.

17. Article 1 of the FILA Doping Regulations sets out, *inter alia*, the following definitions of the offence of doping:

Article 1 – Definition of doping in sport

Doping is defined as the use, intake or administration of any substance that may affect the mental state or the physical performance of the competitor in a positive or negative way. [...]

Doping consists of: [...]

- c) the presence in the athlete’s organism of forbidden substances or the certification of the use of methods which are not allowed, by referring to the list provided by the IOC and to its successive updates. [...]*

18. Read together, Articles 2 and 5 of the FILA Doping Regulations identify nandrolone, 19-norandrostenediol, 19-norandrostenedione and related substances as “*forbidden substances*”.

19. However, insofar as the Olympic Games are concerned, Article 27 of the FILA Doping Regulations refers to the applicability of the OMAC:

Article 27 – Particular and Final Provisions [...]

2. Concerning anything which is not indicated in these Regulations, the standards and provisions laid down by the IOC’s anti-doping code are applicable. [...]

6. Bearing in mind that the anti-doping code of the Olympic Movement has been drawn up in close collaboration with the International Federations, it must apply to the Olympic Games, to various Championships, to competitions to which the IOC gives its patronage or its support, to all other competitions organised by the FILA and also at coaching sessions outside these events.

Therefore, any problems of interpretation of any article in these Regulations or for any question not dealt with here, must be referred to the IOC’s Anti-doping Code Lausanne 2000.

20. In the IOC Executive Board Decision, the Executive Board ruled that the Appellant committed the offence of doping set out in Chapter II, Article 2.2 of the OMAC:

Article 2

Doping is: [...]

- 2. The presence in the athlete’s body of a Prohibited Substance or evidence of the use thereof or evidence of the use of a Prohibited Method.*

21. The term “*prohibited substances*” is defined in Substitutes Appendix A to the OMAC to include nandrolone, 19-norandrostenediol, 19-norandrostenedione and related substances.

22. As has been observed in a recent decision of the CAS, the “*cocktail*” of definitions contained in the FILA Constitution, the FILA Doping Regulations and the OMAC falls short of the clarity and certainty desirable in the fight against doping: CAS 2001/A/317 A. v/ FILA. The Panel agrees with this observation.
23. Nevertheless, the Panel is required to interpret these various provisions in a manner “*which seeks to discern the intention of the rule maker, not to frustrate it*”: CAS 96/149 A. C. v/ FINA, Digest I, p. 251 at p. 259.
24. The Panel finds that the threshold issue of whether the Appellant committed the offence of doping must be determined in accordance with the provisions of the OMAC. The issue of whether FILA was justified in imposing a two-year suspension for this offence must, however, be determined in accordance with the FILA Doping Regulations and FILA Disciplinary Regulations.
25. This finding is based primarily upon the express terms of Article 27.6 of the FILA Doping Regulations. In the opinion of the Panel, this provision is specifically intended to address cases, such as the present, which arise in the context of the Olympic Games. In such cases, Article 27.6 of the FILA Doping Regulations requires that any inconsistency between the FILA doping control rules and the OMAC be resolved in favour of the OMAC.
26. As illustrated by the provisions quoted above, there exist certain obvious inconsistencies between the various definitions of the offence of doping under the FILA doping control rules and the OMAC. Specifically, the Panel has found in the IOC Appeal that the express terms of Chapter II, Article 2.2 of the OMAC justify the application of the principle of strict liability which is defined in the IOC Appeal, to the offence of doping. It is not evident that the FILA doping control rules justify the same conclusion. Indeed, the FILA Constitution defines the offence of doping with specific reference to the athlete’s intention to affect his or her performance. However, Article 27.6 of the FILA Doping Regulations sensibly specifies that the OMAC definition of the offence of doping must prevail in the proceedings before FILA and in this appeal.
27. If the OMAC definition of the offence of doping did not prevail in cases arising out of the Olympic Games, it would be necessary for both the IOC and, subsequently FILA, to determine the threshold question of whether the athlete committed the offence of doping based upon potentially inconsistent legal standards set out in the OMAC and the FILA doping control rules. This could give rise to the possibility of conflicting legal decisions. Such an outcome would be inconsistent with the objectives of clarity and certainty in the fight against doping.
28. For the above reasons, the Panel finds that the offence of doping at issue in this appeal is that set out in Chapter II, Article 2.2 of the OMAC. For the reasons set out in the Arbitral Award in the IOC Appeal, the Panel has concluded that the Appellant committed this offence of doping during the freestyle wrestling competition held at the Olympic Games in Sydney.

29. Having concluded that the Appellant committed a doping offence under Chapter II, Article 2.2 of the OMAC, the Panel must consider the Appellant's challenge to the two-year suspension from competition imposed by the Decisions of the FILA Sports Judge.

30. Where it has been found that a wrestler committed a first offence of doping, Article 13 of the FILA Disciplinary Regulations provides for various sanctions in the following terms:

Article 13 – Doping Test [...]

Moreover, if the examinations or tests carried out under the conditions laid down in the FILA Medical Regulations give a positive result, the doped wrestler shall be disqualified for the entire competition, and shall have his results cancelled, without prejudice to any penalty banning him from international contests for a period of two years.

If he offends again, the wrestler at fault shall be banned for life.

31. Annex D to the FILA Doping Regulations also provides for a two-year suspension from competition in such cases:

Annex D

Sanctions

1. *In the event of proving responsibility, the sanctions laid down by the IOC and quoted in Annexe 1 which is an integral part of the FILA anti-doping Regulations. [sic] Any updates by the Olympic Movement will be introduced following deliberation by the Executive Committee and defined as follows:*

Constitutes a violation of the anti-doping standards:

A. *Administering or use of substances which are part of the following classes of forbidden medication: stimulants – narcotics – anabolising [sic] agents – diuretics – peptides, mimetics [sic] and their equivalents. [...]*

2. *For violations mentioned in point 1, letters A, B, C, the following sanctions are applicable:*

- *two years for the first offence;*
- *life ban for the second offence.*

32. In addition, Chapter II, Article 3.1(b) of the OMAC provides for a two-year suspension for a first doping offence, to the extent that the OMAC is relevant by operation of Article 27.6 of the FILA Doping Regulations.

33. It should, however, be noted that Articles 26.4 and 26.5 of the FILA Doping Regulations expressly provide for the possibility of modifying the sanctions applicable for a doping offence:

Article 26 – Violations of the anti-doping standards and the relative sanctions

[...]

3. *The FILA, depending on the case, for positive doping results, can apply heavier sanctions than those laid down in the Regulations.*

5. *The FILA, through its own justice bodies, can find specific and exceptional attenuating circumstances which will enable the sanction to be reduced.*

34. Based upon these differing provisions and the jurisprudence of the CAS, the Panel finds that the Appellant's challenge of the two-year suspension imposed on him by FILA must be analysed in two stages.
35. Initially, the Panel must determine whether the Appellant has established that the presence of the prohibited substance in his body was not due to any intentional or negligent act on his part. This subjective element of the doping offence must be considered in assessing the appropriateness of suspensions, fines and other similar sanctions, irrespective of the terms of the doping control rules at issue: CAS 2001/A/317 A. v/ FILA. If the Panel is satisfied that Appellant did not intentionally or negligently commit the offence of doping, it then becomes necessary to consider the nature of the Appellant's fault in relation to the impact of a two-year ban from international competition. In the event that a two-year suspension appears disproportionately severe, the Panel has a general discretion to reduce this sanction: CAS 95/141 C. v/ FINA, Digest I, p. 215 at pp. 220-223; CAS 92/73 N. v/ FEI, Digest I, p. 153 at pp. 158-159; CAS 2001/A/317 A. v/ FILA.
36. If the Appellant fails to discharge his burden of proof in regard to the subjective element of the doping offence, the Panel must, as a second stage of analysis, evaluate whether there are nevertheless "*specific and exceptional attenuating circumstances which will enable the sanction to be reduced*" pursuant to Article 26.5 of the FILA Doping Regulations.
37. In this appeal, the Appellant advances only one submission which bears on the question of whether he intentionally or negligently committed the offence of doping (all of the Appellant's other submissions in this appeal relate to the threshold question of whether he committed the offence of doping, i.e., the objective element of the offence. The Panel has considered and rejected these other submissions for the reasons set out in the Arbitral Award in the IOC Appeal). The Appellant submits that the elevated concentration of 19-norandrosterone detected in the A and B samples may have been caused by contaminated food supplements or medication.
38. However, as discussed in the Award in the IOC Appeal, the Appellant has adduced no evidence to support the factual claim that he consumed such contaminated products. The Appellant's case can be contrasted with another recent nandrolone case in which the athlete went to some length to demonstrate that he had consumed a specific nutritional supplement and that this supplement was contaminated with nandrolone precursors: CAS 2001/A/317 A. v/ FILA.
39. As noted above, the IOC Medical Commission made the following statement in regard to the Appellant: "*The general consensus was that there had clearly been a nandrolone precursor in one of the preparations that the athlete had been taking*". Nevertheless, absent some evidence that the Appellant consumed a specific contaminated food supplement or medication, the Panel has no factual basis for assessing whether or not he did so intentionally or negligently.
40. Even if one assumes that the Appellant consumed contaminated products and did so unintentionally, the Panel notes that the risk of consuming food supplements contaminated

with prohibited substances is well-known in the sporting world. In the recent nandrolone case mentioned above, the CAS panel made the following remarks in regard to this issue: CAS 2001/A/317 A. v/ FILA:

As a general remark, the Panel observes that the sporting world has, for quite some time even before the 2000 Sydney Games, been well aware of the risks in connection with using so called nutritional supplements, i.e. the risk that they may be contaminated or, in fact, “spiked” with anabolic steroids without this being declared on the labels of the containers. There have been several cases of positive tests for nandrolone which have been attributed to nutritional supplements and which have been widely publicised in the sports press. This fact was the likely motive for the IOC press releases in October 1999 and February 2000 (...) which gave an unequivocal warning about the use of imported and unlicensed nutritional supplements and their possible mislabelling.

Based upon widespread knowledge of the risks associated with food supplements, and certain other factors specific to the A. v/ FILA case, the CAS panel in that case held that the athlete in question had been negligent in using such products even though the labels of the food supplements did not list any prohibited substance: CAS 2001/A/317 A. v/ FILA.

41. In view of the current level of awareness regarding contaminated food supplements, the Panel considers that even if the Appellant had adduced evidence of his consumption of contaminated products, he would have faced considerable difficulty in proving that he had not been negligent in consuming such products. In this regard, we are mindful of the IOC Medical Commission observation in this case, that “[i]t was hard to understand why such a high-level athlete had been taking so many substances”.
42. For these reasons, the Panel finds that the Appellant has not proven that he did not intentionally or negligently commit the offence of doping. Accordingly, it is necessary to proceed to the second stage of analysis in regard to the two-year suspension imposed by FILA.
43. After carefully considering all of the circumstances of this appeal, the Panel concludes that there exist “*specific and exceptional attenuating circumstances*” which justify a reduction of the Appellant’s two-year suspension in accordance with Article 26.5 of the FILA Doping Regulations.
44. Firstly, the Panel places some weight upon the IOC Medical Commission’s view that the Appellant had likely consumed food supplements containing a nandrolone precursor. This view led the IOC Medical Commission to state: “*It was unfortunate that the athlete did not appear to be guilty, however the results of the tests were clear*”. Although the Appellant did not offer any evidence in this appeal to substantiate his claims regarding contaminated food supplements, the IOC Medical Commission’s observations cannot be ignored.
45. Secondly, as in the Award in the IOC Appeal, the Panel wishes to record its general concern arising from the on-going debate regarding the possible impact of contaminated food, food supplements and medication on positive findings of nandrolone. The Panel urges the IOC, FILA and other sports federations to investigate this matter further and do everything

possible to educate athletes about the risks associated with the consumption of certain products in particular, food supplements.

46. Finally, the Panel notes that the Appellant is a world-class wrestler who has won or placed highly in his weight category at the European Championship, the World Cup and the World Championship. His victory in the gold medal match at the Olympic Games would have been the pinnacle of an outstanding and unblemished sports career. Viewed in this context, the Appellant's disqualification for doping and the resulting forfeiture of the Olympic gold medal are, in themselves, very severe penalties. The Panel does not wish to imply that the Appellant's forfeiture of the Olympic gold medal justifies, by itself, any reduction in the two-year suspension. Rather, it is one of several factors to be taken into account in assessing the overall appropriateness of the sanction.
47. Considering all of the above mitigating factors, the Panel concludes that it is just and appropriate to reduce the two-year suspension provided under the rules and regulations of FILA. The Appellant is therefore suspended for a period of one year (12 months) from 30 September 2000 to 29 September 2001.

The Court of Arbitration for Sport hereby rules:

1. The appeal filed by L. on 27 November 2000 against the decision made by the FILA Sports Judge dated 24 October 2000 is granted in part.
2. The decision made by the FILA Sports Judge dated 24 October 2000 shall be modified as follows:

L. is suspended for a period of one year (12 months) from 30 September 2000 to 29 September 2001.
3. (...).