



Arbitration CAS (Oceania registry) A2/2009 Australian Sports Anti-Doping Authority (ASADA), on behalf of Australian Sports Commission (ASC) and Golf Australia (GA) v. Daniel Nisbet, award of 2 February 2010

Panel: The Hon. Justice Tricia Kavanagh (Australia), Sole Arbitrator

Golf

Doping (DHEA)

Possession of a Prohibited Substance

No Significant Fault or Negligence

Disqualification of results in competitions subsequent to commission of an anti-doping rule violation

- 1. In considering the defence of No Significant Fault or Negligence, evidence such as the young age and the inexperience of the athlete, his exemplary record, his good character, his full co-operation with the investigation authorities, the absence of consumption of any prohibited substance, the fact that the substance was acquired at an over-the counter retail pharmacy and not on the black market, the incorrect labelling of the bottle, or the fact that the substance was for the use of another person, can be taken into consideration.**
- 2. So long as the decision-maker exercises its discretion in good faith, without bias, error, or undue influence, the provision according to which all competitive results obtained in competitions subsequent to commission of an anti-doping rule violation, through the commencement of any provisional suspension or ineligibility period, shall be disqualified unless fairness requires otherwise, extends to the decision-maker discretion to determine what fairness requires.**

Australian Sports Anti-Doping Authority (ASADA) on behalf of the Australian Sports Commission (ASC) and Golf Australia (GA) seeks from the Court of Arbitration for Sport (CAS) an Award imposing a sanction in relation to the fact that the athlete Daniel Nisbet was in possession of DHEA.

This matter involves Customs' seizure of products in the baggage of the athlete entering Australia in Brisbane from the USA.

The athlete is a 19 year old competitor in the sport of golf.

He is a former AIS scholarship holder, in receipt of ASC funding at the time of the alleged violation. The athlete is also a member of Golf Australia.

The athlete is bound by the Anti-Doping Policies of:

- the ASC; and
- GA.

On a date unknown to ASADA but prior to 10 August 2009 and whilst overseas the athlete purchased two bottles from a retail pharmacy, one labelled “Leukic Hardcore” and the other labeled “Decavol”.

On 10 August 2009 the athlete entered Australia via Brisbane. The athlete had been overseas participating in golf tournaments.

He arrived with four bags. One bag (with AIS logo) was searched by Customs and was found to contain the bottles referred to above, ie one labelled “Leukic Hardcore” and the other labelled “Decavol”. The athlete also had other prescription antibiotic medication.

The bottle labelled Decavol contained dehydroepiandrosterone (DHEA) established by the certificate of analysis of the National Measurement Institute dated 19 November 2009.

DHEA is a prohibited substance under category S1 anabolic androgenic steroids sub-category b, being prohibited at all times in and out of competition under the WADA 2009 prohibited list.

The athlete was provisionally suspended on and from 25 November 2009.

LAW

The Anti-Doping Policies as to Prohibited Substances and Possession

1. The ASC Anti-Doping Policy and the GA Anti-Doping Policy are relevantly identical for the purposes of the matters to be decided. Each replicates the relevant provisions of the WADA Code.
2. The GA Anti-Doping Policy by article 7 expressly adopts article 2 of the WADA Code. The relevant provision of the WADA Code is article 2.6 which follows:
 - 2.6 *Possession of Prohibited Substances and Prohibited Methods.*
 - 2.6.1 Possession by an *Athlete In-competition* of any *Prohibited Method* or any Prohibited Substance, or Possession by an *Athlete Out-of-competition* of any *Prohibited Method* or any Prohibited Substance which is prohibited *Out-of-competition* unless the *Athlete* establishes that the Possession is pursuant to a therapeutic use exemption granted in accordance with Article 4.4 (Therapeutic Use) or other acceptable justification.

2.6.2 Possession by an *Athlete Support Personnel In-competition* of any *Prohibited Method* or any *Prohibited Substance*, or Possession by an *Athlete Support Personnel Out-of-competition* of any *Prohibited Method* or any *Prohibited Substance* which is prohibited *Out-of-competition* in connection with an *Athlete*, *Competition* or training, unless the *Athlete Support Personnel* establishes that the *Possession* is pursuant to a therapeutic use exemption granted to an *Athlete* in accordance with Article 4.4 (Therapeutic Use) or other acceptable justification.

[Comment to Article 2.6.1 and 2.6.2: Acceptable justification would not include, for example, buying or Possessing a Prohibited Substance for purposes of giving it to a friend or relative, except under justifiable medical circumstances where that Person had a physician's prescription, e.g., buying Insulin for a diabetic child.]

[Comment to Article 2.6.2: Acceptable justification would include, for example, a team doctor carrying Prohibited Substances for dealing with acute and emergency situations.]

3. Article 6.6 of the ASC Anti-Doping Policy is as follows:

6.6 *Possession of Prohibited Substances and Prohibited Methods*

6.6.1 Possession by an Athlete in Competition of any Prohibited Method or any Prohibited Substance, or Possession by an Athlete Out of Competition of any Prohibited Method or any Prohibited Substance that is prohibited Out-of-Competition unless the Athlete establishes that the Possession is pursuant to a therapeutic use exemption granted in accordance with Article 9 or other acceptable justification.⁹

6.6.2 Possession by an Athlete Support Personnel In-Competition of any Prohibited Method or any Prohibited Substance, or Possession by an Athlete Support Personnel Out-of-Competition of any Prohibited Method or any Prohibited Substance that is prohibited Out-of-Competition in connection with an Athlete, Competition or training, unless the Athlete Support Personnel establishes that the Possession is pursuant to a therapeutic use exemption granted to an Athlete in accordance with Article 9 or other acceptable justification.¹⁰

The footnotes 9 and 10 follow:

9 Acceptable Justification would not include, for example, buying or Possessing a Prohibited Substance for purposes of giving it to a friend or relative, except under justifiable medical circumstances where that Person had a physician's prescription, such as buying insulin for a diabetic child.

10 Acceptable justification would include, for example, a team doctor carrying Prohibited Substances for dealing with acute and emergency situations.

4. From the above it can be seen that the only difference between the Anti-Doping Policies is in the numbering and the layout. The ASC Anti-Doping Policy uses footnotes in lieu of comments.

5. Each Anti-doping Policy contains a definition of *possession*. The GA Anti-doping Policy does this in article 22 by expressly adopting WADA Code article 24. The relevant definition is as follows:

Possession: The actual, physical *Possession*, or the constructive *Possession* (which shall be found only if the person has exclusive control over the *Prohibited Substance/Method* or the premises in which a *Prohibited Substance/Method* exists); provided, however, that if the person does not have exclusive control over the *Prohibited Substance/Method* or the premises in which a *Prohibited Substance/Method* exists, constructive *Possession* shall only be found if the person knew about the presence of the *Prohibited Substance/Method* and intended to exercise control over it. Provided, however, there shall be no anti-doping rule violation based solely on *Possession* if, prior to receiving notification of any kind that the *Person* has committed an anti-doping rule violation, the *Person* has taken concrete action demonstrating that the *Person* never intended to have *Possession* and has renounced *Possession* by explicitly declaring it to an *Anti-Doping Organization*. Notwithstanding anything to the contrary in this definition, the purchase (including by any electronic or other means) of a *Prohibited Substance* or *Prohibited Method* constitutes *Possession* by the *Person* who makes the purchase.

[Comment: Under this definition, steroids found in an Athlete's car would constitute a violation unless the Athlete establishes that someone else used the car; in that event, the Anti-Doping Organization must establish that, even though the Athlete did not have exclusive control over the car, the Athlete knew about the steroids and intended to have control over the steroids. Similarly, in the example of steroids found in a home medicine cabinet under the joint control of an Athlete and spouse, the Anti-Doping Organization must establish that the Athlete knew the steroids were in the cabinet and that the Athlete intended to exercise control over the steroids.]

6. The ASC Anti-Doping Policy definition of *Possession* is identical save that it uses footnotes:

Possession: The actual physical, possession, or the constructive possession (which shall be found only if the Person has exclusive control over the Prohibited Substance or Prohibited Method or the premises in which a Prohibited Substance or Prohibited Method exists) of a Prohibited Substance or Prohibited Method, provided, that if the Person does not have exclusive control over the Prohibited Substance or Prohibited Method or the premises in which a Prohibited Substance or Prohibited Method exists, constructive Possession shall only be found If the Person knew about the presence of the Prohibited Substance or Prohibited Method and intended to exercise control over it. Provided, however, there shall be no anti-doping rule violation based solely on Possession if, prior to receiving notification of any kind that the Person has committed an anti-doping rule violation, the Person has taken concrete action demonstrating that the Person never intended to have Possession and has renounced Possession by explicitly declaring it to an Anti-Doping Organisation. Notwithstanding anything to the contrary in this definition, the purchase (including by any electronic or other means) of a Prohibited Substance or Prohibited Method constitutes Possession by the Person who makes the purchases⁵³

Footnote 53:

Under this definition, steroids found in an Athlete's car would constitute a violation unless the Athlete establishes that someone else used the car; in that event, ASADA or the ASC must establish that, even though the Athlete did not have exclusive control over the car, the Athlete knew about the steroids and intended to have control over the steroids. Similarly, in the example of steroids found in a home medicine cabinet under the joint control of an Athlete and spouse, ASADA or the ASC must establish that the Athlete knew the steroids were in the cabinet and that the Athlete intended to exercise control over the steroids.

7. It is admitted the facts relating to the athlete satisfy the definition of *Possession* by being the actual, physical possession of the prohibited substance. That possession, in accordance with 2.6.1 of the WADA Code, was possession of a prohibited substance by an athlete, namely DHEA, which substance is prohibited in competition or out of competition. In this case, possession was in out of competition.

The Anti-Doping Policies as to Sanction

8. The GA Anti-Doping Policy by Articles 7 incorporates WADA Code 9 and 10. Of those the WADA Code 10.2 provides:

10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods

The period of Ineligibility imposed for a violation of Articles 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:

First violation: Two (2) years *Ineligibility*.

[Comment to Article 10.2: Harmonization of sanctions has been one of the most discussed and debated areas of anti-doping. Harmonization means that the same rules and criteria are applied to assess the unique facts of each case. Arguments against requiring harmonization of sanctions are based on differences between sports including, for example, the following: in some sports the Athletes are professionals making a sizable income from the sport and in others the Athletes are true amateurs; in those sports where an Athlete's career is short (e.g., artistic gymnastics) a two year Disqualification has a much more significant effect on the Athlete than in sports where careers are traditionally much longer (e.g., equestrian and shooting); in Individual Sports, the Athlete is better able to maintain competitive skills through solitary practice during Disqualification than in other sports where practice as part of a team is more important. A primary argument in favor of harmonization is that it is simply not right that two Athletes from the same country who test positive for the same Prohibited

Substance under similar circumstances should receive different sanctions only because they participate in different sports. In addition, flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting bodies to be more lenient with dopers. The lack of harmonization of sanctions has also frequently been the source of jurisdictional conflicts between International Federations and National Anti-Doping Organizations.]

9. The ASC Anti-Doping Policy article 19.2 (which is the same as WADA Code 10.2) follows:

19.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods

The period of ineligibility imposed for a violation of Articles 6.1, 6.2 or 6.6 shall be as follows, unless the conditions for eliminating or reducing the period of ineligibility, as provided in Articles 19.5 and 19.6, or the conditions for increasing the period of Ineligibility, as provided in Article 19.7, are met:

First violation: Two (2) years' ineligibility.²⁸

- Footnote 28 (which is the same as the comment to WADA Code 10.2) follows:

Harmonisation of sanctions has been one of the most discussed and debated areas of anti-doping. Harmonisation means that the same rules and criteria are applied to assess the unique facts of each case. Arguments against requiring harmonisation of sanctions are based on differences between sports including, for example, the following: in some sports the Athletes are professionals making a sizeable income from the sport and in others the Athletes are true amateurs; in those sports where on Athlete's career is short (*such as* artistic gymnastics), a two-year disqualification has a much more significant effect on the Athlete than in sports where careers are traditionally much longer (such as equestrian and shooting); in Individual Sports, the Athlete is better able to maintain competitive skills through solitary practice during Disqualification than in ether sports where practice as part of a team is more important. A primary argument in favour of harmonization is that it is simply not right that two Athletes from the same country who test positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports. In addition, flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting organisations to be more lenient with dopers. The lack of harmonisation of sanctions has also frequently been the source of jurisdictional conflicts between International Federations and National Anti-Doping Organisations.

10. The effect of the above articles is that the appropriate sanction for Mr Nisbet's possession of a prohibited substance is two years *Ineligibility* unless the athlete can make out the requirements of *No Fault or Negligence* or *No Significant Fault or Negligence* (*No Significant Fault or Negligence*' is covered in WADA Code 10.5.2 which is expressly incorporated into the GA Anti-Doping Policy and is replicated as 19.6.2 of the ASC Anti-Doping Policy).

No Significant Fault or Negligence

11. The evidence and written submissions of the *Athlete* Mr Nisbet relies upon the following:
- (a) an admission he is bound by the Anti-Doping Policies;
 - (b) an admission he has committed an Anti-Doping Rule Violation as alleged; and
 - (c) the *Athlete* does not dispute the facts alleged, noting that ASADA only alleges one of the two bottles (the Decavol) contained DHEA.

Therefore reliance is placed upon the defence of *No Significant Fault or Negligence*

12. In considering the defence of *No Significant Fault or Negligence*, I have also taken into account from evidence before me the following:
- (a) at the time of the commission of the Anti-Doping Rule Violation, he athlete was young and relatively inexperienced;
 - (b) there was no consumption of any prohibited substance;
 - (c) the substance was acquired at an over-the-counter retail pharmacy not on the black market;
 - (d) the bottle falsely purported to have “legal” content on its label;
 - (e) Mr Nisbet (albeit negligently) believed he was not carrying a prohibited substance;
 - (f) the bottle was not for his own use, as there was evidence which satisfied me that he was requested to purchase it for a friend, a ‘non-athlete’; and
 - (g) the breach was committed during a time of severe illness and when Mr Nisbet was on a course of significant medication which in his hurry to return home I accept could have clouded his judgment.
13. Further, it is of note there is no evidence Mr Nisbet has ever consumed a ‘prohibited substance’; he is of good character (as evidenced in references); has an exemplary record in his sport; he fully co-operated with the investigating authorities; the circumstances surrounding the breach are corroborated to a significant degree; he has since been tested and not been found positive. I accept this conduct was not aimed at cheating in Mr Nisbet’s chosen sport.
14. While the theoretical range for this breach of Anti-Doping Policies is between one and two years, in all the circumstances I find the appropriate sanction is 18 months. The date of commencement of the sanction is 25 November 2009 and ends on 24 May 2011.

Golfing Record

15. One further matter needs attention. The Athlete has completed successfully in three events since the substance was seized but before his notification under article 19.9 of the ASC Anti-Doping Policy.

The ASC Anti-Doping Policy article 19.9 (which is the same as WADA Code 10.9 [recte: 10.8]) follows:

19.9 Disqualification of results in Competitions subsequent to Sample collection or commission of an anti-doping rule violation

In addition to the automatic *Disqualification* of the results in the *Competition*, which produced the positive *Sample* under Article 18, all other competitive results obtained from the date a positive *Sample* was collected (whether *In-Competition* or *Out-of-Competition*), or other anti-doping rule violation occurred, 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.

19.9.1 As a condition of regaining eligibility after being found to have committed an anti-doping rule violation, the *Athlete* must first repay all prize money forfeited under this Article.

19.9.2 Allocation of forfeited prize money

Unless the rules of the applicable *IF* provide that forfeited prize money shall be reallocated to other *Athletes*, it shall be allocated first to reimburse the collection expenses of the *Anti-Doping Organization* that performed the necessary steps to collect the prize money back, then to reimburse the expenses of *ASADA* and/or *ASC* in conducting results management in the case, with the balance, if any allocated in accordance with the applicable *IF* rules.

16. The athlete successfully competed in golfing tournaments in September and October 2009 after the substance was found in his possession but before he was on notice as to the substance being prohibited and held to be in his possession.

17. As said in CAS 2007/A/1283 at [55]-[56]:

55. WADA's contention that it is a rule to disqualify results unless the athlete has shown exceptional circumstances has no basis in the language of the Policy. Article 13.8 of the Policy stands on its own with no specific conditions to the requirement of fairness. So long as the decision-maker exercises its discretion in good faith, without bias, error, or undue influence, article 13.8 extends to the decision-maker discretion to determine what fairness requires. WADA's further assertions that K. ingested the prohibited substance without reading the label and therefore fairness requires the disqualification of his results is an incomplete view of the facts. In consideration of all the circumstances of this case, as referenced in ASADA's decision and the investigator's final report, ASADA properly applied its discretion.

56. There is no basis to WADA's assertion that K. was not actually sanctioned because of the combination of K.'s results not being disqualified between 26 June 2005 and the commencement of his period of ineligibility and his ineligibility period commencing after he elected to cease competing. In fact, K. ceased competing upon learning of the

ASADA investigation, nor can he make a living as a professional weightlifter as he had done previously. This can most certainly be deemed a sanction. Furthermore, the sanction eliminates his participation in the sport as a coach, trainer or in any other capacity. Those are real and continuing sanctions even if the athlete has no intention of competing in the future.

18. In my view, fairness, in the circumstances, requires that the in-competition record of the athlete, Mr Nisbet, which reflects his success in competition events in September and October 2009 be retained as part of his athletic golfing record.

The Court of Arbitration for Sport rules:

1. The period of ineligibility of Mr Daniel Nisbet will be 18 months from 25 November 2009.

(...)