

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

UNITED STATES ANTI-DOPING AGENCY (**USADA**),

Claimant

and

JENNIFER SCHUMM,

Respondent

Re: AAA Case No. 01-17-0001-5091

AWARD OF ARBITRATORS

Pursuant to the American Arbitration Association's (**AAA**) Commercial Arbitration Rules as modified by the AAA Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes (the **Supplementary Procedures**) as set forth in the USADA Protocol for Olympic and Paralympic Movement Testing effective as revised January 1, 2015 (the **USADA Protocol**), pursuant to the Ted Stevens Olympic and Amateur Sports Act, 36 USC §220501, *et seq.* (the **Act**), a hearing was held in Aurora, Colorado, on December 18 and 19, 2017, before arbitrators David M. Benck, Maidie E. Oliveau and Barbara L. Shycoff (the **Panel**) with Claimant's legal counsel in attendance, Respondent and her legal counsels in attendance and offering argument and evidence. The Panel does hereby AWARD as follows:

I. THE PARTIES

1. Claimant, USADA, as the independent anti-doping agency for Olympic sports in the United States, is responsible for conducting drug testing and for adjudicating any positive test results and other anti-doping rule violations pursuant to the USADA Protocol. Jeffrey T. Cook, Director of Legal Affairs of USADA appeared and represented USADA.
2. Respondent, Jennifer Schumm (**Schumm**), is a 40-year-old female recreational cyclist who regularly competes in USA Cycling competitions. She was subject to random doping control at the regional Koppenberg road race in Superior, Colorado, on May 28, 2016, and her sample reflected values consistent with the administration of a steroid of exogenous origin. Schumm was represented by the Valparaiso University Law Clinic's Michael Straubel and the following legal interns: Ryan Amsler, Jenna Espinoza, Cole Galloway, Josef Holper and William Patacsil, with Mr. Amsler and Ms. Espinoza attending the hearing. Claimant and Respondent shall be referred to collectively as "the parties" and individually as a "party".

II. PROCEDURAL HISTORY

3. Respondent was notified of her adverse analytical finding on July 21, 2016 and accepted a Provisional Suspension. USADA formally charged Respondent with an anti-doping rule violation of Articles 2.1 (Presence of a Prohibited Substance) and 2.2 (Use of a Prohibited Substance) of the World Anti-Doping Code (**Code**) by letter dated March 8, 2017 and initiated these proceedings on March 10, 2017. In the interim, Respondent had filed a few Therapeutic Use Exemption (**TUE**) applications, which were denied by USADA and subsequently appealed by Respondent. Respondent has stipulated (1) to the adverse analytical finding in her sample, (2) that anabolic androgenic steroids are listed as Prohibited Substances in the class of Anabolic Agents on the World Anti-Doping Agency Prohibited List (**Prohibited List**), and (3) that the Prohibited List is applicable to any matter involving this sample.
4. A preliminary hearing was held on June 21, 2017, to address scheduling and the location of the hearing. Further motions by Respondent and responses by USADA were filed regarding the scope of the hearing. The Panel ruled that the hearing in this matter related solely to the adverse analytical finding appeal by Respondent and not to the various TUE applications. The originally scheduled hearing was postponed from November to December because of an injury sustained by Respondent during a cycling ride.
5. Respondent's request for relief is: that the default sanction for her anti-doping rule violation be two years, based on her having no intent to cheat and further reduced based on her bearing either no fault or negligence, or no significant fault or negligence because she was taking a "bioidentical/natural" testosterone for health reasons only; and that her sanction not be published/be anonymized due to the effects this would have on her career as a trainer and in order to prevent severe and unnecessary harm to her, based upon principles of fundamental justice and fairness, including proportionality.
6. USADA's request is for a sanction of four years based on Respondent's intentional violation of the rules in taking testosterone, an Anabolic Agent on the Prohibited List; and that the Award be published as required by Article 14.3.
7. Because Respondent is not contesting the adverse analytical finding or the use and presence of a Prohibited Substance, the issues before this Panel relate solely to the determination of the appropriate sanction applicable to the Respondent's anti-doping rule violation under the Code and the publication of the sanction.

III. JURISDICTION AND APPLICABLE LAW

A. Jurisdiction

8. The Panel has jurisdiction over this dispute pursuant to Paragraph 17 of the USADA Protocol, which provides, in pertinent part, that, "all hearings under the Protocol . . . will take place in the United States before the AAA using the Supplementary Procedures." In their stipulation the parties agreed that the mandatory provisions of the Code, including the USADA Protocol and the International Cycling Union (**UCI**) Anti-Doping Rules govern all proceedings involving Schumm's sample. This proceeding conforms to the requirements of Article 8.
9. Neither party disputed the Panel's jurisdiction, and in fact, both parties consented to it and participated in these proceedings without objection.

B. Applicable Law

10. The rules related to the outstanding issues in this case are in the USADA Protocol and UCI Anti-Doping Rules, which implement the Code. As the UCI Anti-Doping Rules are virtually identical to the Code, the applicable Code provisions are referenced throughout this Award and all references to “Articles” are to provisions of the 2015 Code unless otherwise noted.

IV. FINDINGS, ARGUMENTS AND SUBMISSIONS**A. Witness Testimony**

11. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, this Award summarizes and refers only to the submissions and evidence considered necessary to explain and support the Panel’s reasoning.
12. In addition to Schumm, the Panel heard sworn testimony from the following witnesses during the hearing, all by telephone, except for Jim Schumm and Respondent:

For Respondent

- a. Jim Schumm, Respondent’s father
- b. Sally Schumm, Respondent’s mother
- c. Jim Kraychy, fellow cyclist
- d. Gregory Hollar, Doctor of Osteopathy
- e. Katherine Peterson, Naturopathic Doctor

For Claimant

- a. Matthew Fedoruk, Ph.D, USADA’s Senior Managing Director of Science and Research
 - b. Bradley Anawalt, MD, FACP
 - f. Amy Brenner, USADA Doping Control Officer
 - c. Jonathan Whiteman, Risk Protection Manager at USA Cycling
13. Schumm and her parents testified that she had been suffering from various medical ailments for many years, was a dedicated athlete and after graduation from college pursued a career as a trainer. She was quite successful as a trainer and ultimately specialized in training cyclists. Schumm promoted her cycling accomplishments as part of her trainer qualifications. She also testified that she actively sought the assistance of non-traditional doctors as she preferred natural remedies to taking drugs to help with her various medical conditions.
 14. After many years, she was not achieving the results hoped for regarding her medical conditions. Her cycling coach referred her in 2015 to a specialist who gave her a bioidentical testosterone implant -BioTe- which Respondent found to be very effective in helping her with her complaints. She had suffered for so long that she was thrilled and wanted to continue to take

the BioTe, even after she thought that testosterone beyond a “normal” level was prohibited under the cycling rules. She promptly applied for a TUE when her coach told her in 2016 she needed a TUE to compete, and then raced in the local Kloppenberg cycling event. She did not wait for the TUE to be granted or denied before racing but instead tried to keep her testosterone levels in the “normal” range.

15. Both of the doctors who testified for Respondent provided details of her symptoms and their attempts to diagnose and treat her, which treatments Schumm reported as unsuccessful. Schumm testified that only the BioTe worked for her. The evidence was that Schumm sought the relief the BioTe provided for her conditions and that she also wanted to improve her muscle to fat ratio and energy.
16. Respondent testified that she believed her treatment was essential to her health, that bioidentical testosterone was “natural,” and was not the same as taking a prohibited exogenous steroid.

B. Applicable Default Sanction

17. Under Article 10.2, the Panel must first analyze the applicable “default sanction” before considering the elimination or reduction of that “default sanction.”
18. Pursuant to Article 10.2.1.1, the “default” or starting period of Ineligibility is four years where the anti-doping rule violation does not involve a Specified Substance, as in this case, unless the athlete can establish that the anti-doping rule violation was not intentional, in which case under Article 10.2.2, the period of Ineligibility is two years.
19. As used in Article 10.2, the term “intentional” is meant to identify those athletes who cheat. The term therefore requires that the athlete engaged in conduct which 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.
20. Because Respondent was unable to prove by a balance of probability that her violation was unintentional, the default sanction in this case is four years.

C. Reduction of Sanction

Source of positive sample

21. In order to obtain a reduction in the default sanction, Schumm must prove (on a balance of probability) the source of her positive sample, which she has done.

No fault or negligence

22. Respondent argues that if she can establish that she bears No Fault or Negligence, then under Article 10.4, the otherwise applicable period of ineligibly is eliminated. The standard to establish No Fault or Negligence is as follows:

The athlete ... establishing that ...she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that ... she had used or been administered the Prohibited Substance ... or otherwise violated an anti-doping rule.

No significant fault or negligence

23. Respondent argues further that should this Panel determine that Article 10.4 does not apply, Article 10.5.2 should apply, in which case the sanction could be reduced to two-three years, depending on the degree of fault.
24. The Panel looks to the definition of Fault in the Code to determine whether Respondent bears No Significant Fault for her anti-doping rule violation. “Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete[’s]. . . degree of Fault include, for example, the Athlete’s . . . experience, whether the Athlete . . . is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete’s . . . degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete’s . . . departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.”
25. The Panel finds that Schumm knew she was taking testosterone, and was initially confused about the applicability of the anti-doping rules to her as a recreational cyclist. She also had the initial impression that, since her testosterone was taken for medical reasons only, not to improve her sport performance, and was natural, it would not be considered the same as exogenous testosterone taken to improve performance. Nevertheless, she learned before the Kloppenberg race that it was in fact prohibited and she needed a TUE to continue to take it in order to compete. She chose to continue to take the testosterone, apply for the TUE and race, without declaring the testosterone on the doping control Declaration of Use Form when asked what substances she had taken, and gave her urine sample. While the Panel is persuaded that Schumm was not taking BioTe for the primary purpose of improving her cycling results, the Panel did conclude that she was aware that her actions were an anti-doping rule violation. These factors indicate Significant Fault under the Code definition of Fault.
26. The Panel finds that Respondent knew before racing in the Kloppenberg event that she was being administered the Prohibited Substance, thus no reduction of her period of Ineligibility of four years is possible.

D. Disqualification of Results

27. Respondent’s competitive results are to be disqualified from the date of her positive test, May 28, 2016, through the date she accepted a Provisional Suspension, July 21, 2016. The Panel understands that Respondent has only competed in the Kloppenberg during this time and thus those results are the only ones to be disqualified.

E. Award Publication

28. Respondent asked the Panel to either (i) stay the publication of its Award until such time as her appeal of the denial of her application for a Recreational TUE, recently filed, could be decided, or (ii) order that the Award not be published. She argues that she has accepted a Provisional Suspension; that she would suffer irreparable harm to her job and career if the Award is published; and that the Code definition of Athlete requires USADA not to publish her sanction.

29. With respect to the first argument, the Panel has ruled that this proceeding is an appeal of the anti-doping rule violation only, and this proceeding is not to consider her TUE applications or appeals. Respondent filed her first TUE application on May 27, 2016, the day before she raced at the Koppenberg, and has supplemented and re-filed applications since. The Panel deems that there is no legal basis under the Code for it to stay the publication of its Award in this matter.
30. Respondent argues that the principle of proportionality allows publication of the Award in a manner (e.g. anonymization) such that her job and career would be protected. She argues that it is excessive punishment measured by the overall effect of the sanction on an amateur athlete to lose her job and career because of the publication of the Award. She bases her argument on the specific facts of her case as set forth above. The Panel did not find the principle of proportionality to allow the Panel to dictate non-publication of the Award, based on the mandatory provisions of the Code and that the principle of proportionality is already reflected in the current Code provisions, for example allowing for reduction of a sanction for unintentional violations.
31. The Code definition of Athlete specifically excepts the requirement of publication of the hearing panel's decision as one of the Consequences of an anti-doping rule violation under Article 2.1, 2.3 or 2.5 for a lower than international or national-level athlete, such as Respondent:

Athlete: Any Person who competes in sport at the international level (as defined by each International Federation) or the national level (as defined by each National Anti-Doping Organization). An Anti-Doping Organization has discretion to apply anti-doping rules to an Athlete who is neither an International-Level Athlete nor a National-Level Athlete, and thus to bring them within the definition of "Athlete." In relation to Athletes who are neither International-Level nor National-Level Athletes, an Anti-Doping Organization may elect to: conduct limited Testing or no Testing at all; analyse Samples for less than the full menu of Prohibited Substances; require limited or no whereabouts information; or not require advance TUEs. However, if an Article 2.1, 2.3 or 2.5 anti-doping rule violation is committed by any Athlete over whom an Anti-Doping Organization has authority who competes below the international or national level, then the Consequences set forth in the Code (except Article 14.3.2) must be applied. . . (emphasis added).

32. USADA argues that this publication exception reference (Article 14.3.2) in the definition of Athlete is to be exercised at its discretion, based on the second sentence of the definition. USADA has consistently published all sanctions for all Athletes. The Respondent argues this exception to the publishing requirement is mandatory. The Panel does not need to determine whether this is a discretionary or mandatory provision, as Respondent has committed an anti-doping rule violation under both Article 2.1 (Presence of a Prohibited Substance) and Article 2.2 (Use of a Prohibited Substance), and Article 2.2 violations are not subject to this publication exception. Thus, the Panel has no basis to preclude the publication of this Award, even in the case of a non-international or non-national-level athlete such as Respondent.

Findings and Decision

The Panel therefore rules as follows:

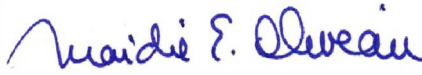
- A. Respondent has committed an anti-doping rule violation under Article 2.1 (Presence of a Prohibited Substance) of the Code and Article 2.2 (Use of a Prohibited Substance) of the Code;
- B. The period of Ineligibility for the anti-doping rule violation under Article 10.2.1 of the Code is four years, starting on July 21, 2016, the date Respondent accepted a Provisional Suspension, and ending July 20, 2020. Respondent shall be prohibited during this period from participating in any capacity in a Competition (as defined in the Code) or activity authorized or organized by any Signatory (as defined in the Code), Signatory's member organization, or a club or other member organization of a Signatory's member organization, or in Competitions authorized or organized by any professional league or any international- or national-level Event organization or any elite or national-level sporting activity funded by a governmental agency, all as set forth in Article 10.12 of the Code;
- C. Respondent's competitive results from the date of her positive test, May 28, 2016, through her acceptance of Provisional Suspension, on July 21, 2016, are to be disqualified, and any medals, points and prizes earned during that period shall be forfeited;
- D. The parties shall bear their own attorneys' fees and costs associated with this Arbitration;
- E. The administrative fees and expenses of the American Arbitration Association, and the compensation and expenses of the Panel, shall be borne by USADA and the United States Olympic Committee; and
- F. This Award shall be in full and final resolution of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.
- G. This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.



David M. Benck



Barbara L. Shycoff



Maidie E. Oliveau
Chair

Dated: January 19, 2018