



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2009/A/1954 WADA v. Confederação Brasileira de Judô (CBJ) & Victor Penalber

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr. Lars Halgreen, Attorney-at-law, Copenhagen, Denmark
Arbitrators: Dr. Martin Schimke, Attorney-at-law, Düsseldorf, Germany
Mr. Andrés Gurovits, Attorney-at-law, Zürich, Switzerland

in the arbitration between

WORLD ANTI-DOPING AGENCY (WADA), Montreal, Canada

represented by Mr. Francois Kaiser, Attorney-at-Law, Lausanne, Switzerland,

as Appellant

and

CONFEDERACÃO BRASILEIRA DE JUDÔ (CBJ) RIO de Janeiro, Brazil

(not represented by counsel)

as 1st Respondent

MR. VICTOR PENALBER, C/O CONFEDERACÃO BRASILEIRA DE JUDÔ (CBJ)

Rio de Janeiro, Brazil

represented by Mr. Mícheel Asseff Filho, Rio de Janeiro, Brazil

as 2nd Respondent or the Athlete

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I. FACTUAL BACKGROUND

1. Parties

- 1.1 The World Anti-Doping Agency (the "Appellant" or "WADA") is an international independent organisation created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms. It coordinates the development and implementation of the World Anti-Doping Code (the "WADC"). It is a Swiss private law foundation which has its corporate seat in Lausanne, Switzerland, and its headquarters in Montreal, Canada.
- 1.2 The Confederação Brasileira de Judô (the "1st Respondent" or "CBJ") of Rio de Janeiro, Brazil, is the Brazilian national member association of the International Judo Federation (the "IJF"). The 1st Respondent has its seat in Rio de Janeiro, Brazil.
- 1.3 Mr. Victor Penalber (the "Athlete" or "2nd Respondent"), born on 22 May 1990, is a professional judoka, who is affiliated with the 1st Respondent.

2. Facts

- 2.1 This is a doping offence case regarding the alleged use of Furosemide, a diuretic and masking agent which appears on the WADA 2008 and 2009 Prohibited Lists in class S5.
- 2.2 The Athlete tested positive for Furosemide on the occasion of an in-competition test performed on a bodily urine sample provided by him on 5 October 2008 during the course of the 2008 World Judo Team Championships which were organised in Japan by the IJF.
- 2.3 The Athlete did not request the analysis of the B sample.
- 2.3 On 11 November 2008, the 1st Respondent decided to temporarily suspend the Athlete from all judo competition. On 31 May 2009, the Brazilian Supreme Court of Sports

Justice of Judo imposed a one year period of ineligibility on the Athlete for his violation of the anti-doping rules, which period of ineligibility commenced on the date of the decision and was reduced by the period of the provisional suspension already served.

3. Proceedings before the CAS

WADA's position and arguments:

- 3.1 On 21 September 2009, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Brazilian Supreme Court of Sports Justice of Judo's decision of 31 May 2009. The court office fee in the amount of CHF 500 was paid by the Appellant.
- 3.2 The Statement of Appeal included the following requests for relief:
1. *The appeal of WADA is admissible.*
 2. *The decision of the IJF in the matter of Mr. Victor Penalber is set aside.*
 3. *Mr. Victor Penalber is sanctioned with a 2 year period of ineligibility starting on the date, on which the CAS award enters into force. Any period of ineligibility (whether imposed to or voluntarily accepted by Mr. Victor Penalber) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
 4. *All competitive results obtained by Mr. Victor Penalber from 5 October 2009 [2009 (as opposed to 2008) appears to be a typo – see further at 6.15 below] through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.*
 5. *WADA is granted an award for costs.*
- 3.3 On 1 October 2009 the Appellant filed its Appeal Brief. The Appellant's submissions in support of its requests for relief may, in essence, be summarized as follows:

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- 3.4 According to Art. 2.1 of the 2009 IJF Anti-Doping Rules, the presence of a Prohibited Substance or its Metabolites or Markers in an athlete's bodily specimen constitutes an anti-doping violation.
- 3.5 Art. 4.1 of the IJF Anti-Doping Rules states that "these anti-doping rules incorporate the Prohibited List, which is published and revised by WADA as described in Art. 4.1. The IJF will make the current Prohibited List available to each Union and National Federation, and each Union and National Federation shall ensure that the current Prohibited List is available to its members and constituents".
- 3.6 Furosemide is a diuretic and masking agent which appears on both the WADA 2008 and 2009 Prohibited Lists in class S5. It is prohibited in and out-of-competition under both Prohibited Lists. Furosemide was not defined as a Specified Substance under the 2008 Prohibited List, however, since 1 January 2009, Furosemide has been considered as a Specified Substance under the 2009 Prohibited List.
- 3.7 The Prohibited List may identify Specified Substances which are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medical products or, which are less likely to be successfully abused as doping agents. Doping violations involving such substances may result in a reduced sanction, provided the athlete can establish that the use of a Specified Substance was not intended to enhance sports performance.
- 3.8 The presence of Furosemide was detected in a bodily sample provided by the Athlete.
- 3.9 The Athlete did not establish that he had filed an application for a TUE in order to be authorised to take this substance. The Athlete has not provided any convincing explanation as to how the Prohibited Substance entered his body, and has not challenged the presence of the Prohibited Substance in his bodily sample, nor the validity of the test result.
- 3.10 The Athlete has not provided any proof as to how the Prohibited Substance entered into his system, nor has he provided any explanation or submitted any documents

which could give rise to an elimination or reduction of the 2 year sanction applicable in accordance with Art. 10.4, 10.5.1 or 10.5.2 of the IJF Anti-Doping Rules.

3.11 Thus, the Athlete shall, according to Art. 10.2 of the 2009 IJF Anti-Doping Rules, incur a 2 year period of ineligibility for his doping offence.

CBJ's position and arguments:

3.12 The 1st Respondent has chosen not to be represented during these CAS proceedings and has not filed any answer to the appeal.

Mr. Victor Penalber's position and arguments:

3.13 The Athlete, on the other hand, filed a statement of defence dated 28 October 2009 in which he requests that the decision of the Brazilian Supreme Court of Sports Justice of Judo imposing a 1 year period of ineligibility be upheld.

3.14 The Athlete's submissions may in essence be summarized as follows:

3.15 He maintains that, having been suddenly called upon to represent Brazil in the World Judo Team Championships in Japan, he went on an intense diet as he was overweight and would otherwise not be able to participate in his weight class. He contests that he knowingly consumed any medication that contained Furosemide.

3.16 Furthermore, the Athlete has argued that the positive test may have resulted from the innocent ingestion of any contaminated food or drink, but that he never had the intention to illegally benefit in the sense of enhancing or increasing his performance.

3.17 He maintains that he has always been an exemplary athlete, and that his conduct throughout his career has been based on ethics, sports morals, humility and honesty. More than fifty statements sent by Olympic Judo Athletes Association administrators, teachers and coaches etc. were presented in the Athlete's defence during the procedure that took place in the Brazilian Supreme Court of Sports Justice of Judo.

- 3.18 The Athlete referred to a similar case involving the Brazilian athlete Joao Derly, who allegedly was suspended for 6 months after having consumed Furosemide. The Athlete claims that he should be treated the same as Joao Derly.
- 3.19 Finally, the Athlete maintains that the present case should be decided pursuant to the 2009 WADC despite the fact that the alleged doping offence occurred in 2008 as the 2009 WADC constitutes a "lex mitior" in his favour.

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- 3.20 After having discussed the possibility of conducting a hearing by teleconference in order that witnesses identified by the Athlete could be heard, the parties have decided to not request a hearing in the present case.
- 3.21 On 10 March, 16 March and 17 March 2010 respectively, the 2nd Respondent, 1st Respondent and the Appellant signed the Order of Procedure, in which the Panel, pursuant to Art. R57 of the Code of Sports-related Arbitration (the "Code"), deemed itself to be sufficiently well informed and decided to render an award without a hearing. By signing the Order of Procedure, the parties have confirmed that the Panel may decide this matter based entirely on the parties' written submissions.

II. IN-LAW

4. CAS Jurisdiction and Admissibility

- 4.1 The jurisdiction of CAS is not disputed. Furthermore, all parties signed the Order of Procedure in which specific reference is made to the competence of CAS based on Art. 13.2.1 of the 2009 IJF anti-doping rules.
- 4.2 As for the Appellant's right to appeal, reference is made to Art. 13.2.1 of the 2009 IJF anti-doping rules, which provision was also contained within the 2008 IJF anti-doping rules. It follows from this provision that "in cases arising from competition in an In-

ternational Event or in cases involving international-level athletes, the decision may be appealed exclusively to the CAS in accordance with the provisions applicable before such court". The decision rendered by the Brazilian Superior Court of Sports Justice of Judo against the Athlete is a final decision, which, accordingly, the Appellant may appeal to CAS pursuant to Art. 13.2.3 of the 2009 IJF anti-doping rules.

4.3 As to the time limit to lodge an appeal before CAS, Art. 13.6 of the 2009 IJF Anti-Doping Rules states that "the time to file an appeal to CAS shall be twenty one days (21) from the date of receipt of the decision by the appealing party ...". It is not contested by the Respondents that, on 30 August 2009, the Appellant received information from the National Anti-Doping Agency that the Athlete had tested positive for Furosemide and was sanctioned with a 1 year period of ineligibility for his violation of the anti-doping rules. The Statement of Appeal filed by the Appellant on 21 September 2009 was lodged before the expiry of the 21 day time limit set forth in Art. 13.6 of the 2009 IJF Anti-Doping Rules.

4.4 Thus, it follows that the appeal is admissible.

5. Applicable Law

5.1 Art. R58 of the Code provides the following: "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 related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

5.2 The Panel notes that the IJF is the international federation governing judo and, like all international Olympic federations, it is a signatory of the WADC. The Athlete was tested while competing in the 2008 World Judo Team Championships which were held under the jurisdiction of IJF. Accordingly, the starting point is that the IJF Anti-Doping Rules applicable at the time of the positive test (including the 2008 WADC) are applicable to the present case.

- 5.3 However, the appealed decision rendered by the Brazilian Superior Court of Sports Justice of Judo expressly refers to the fact that the decision was rendered under the 2009 WADC. Accordingly, it is necessary for the Panel to consider which rules are in fact applicable. In these circumstances, the IJF Anti-Doping Rules in force at the time of the Brazilian Superior Court of Sports Justice of Judo's decision should also be considered.
- 5.4 Although the positive test occurred in 2008, according to Art. 18.7.1 of the 2009 IJF Anti-Doping Rules, the pending case shall be governed by the substantive anti-doping rules in effect at the time the anti-doping rule violation occurred, unless the Panel hearing the case determines that the principle of "lex mitior" should apply under the circumstances. Art 18.7.1 of the 2009 IJF Anti-Doping Rules mirrors the principles set forth in Art. 25.2 of the WADC ('non-retroactive unless principle of "lex mitior" applies'). Under the WADA 2008 Prohibited List the prohibited substance found in the Athlete's urine sample, Furosimide, was not considered as a Specified Substance. However, under the WADA 2009 Prohibited List Furosemide was considered a Specified Substance. In its Appeal Brief, the Appellant has accepted that the Prohibited List in force since 1 January 2009, namely the 2009 Prohibited List, constitutes a "lex mitior" in favour of the Athlete.
- 5.5 The Panel agrees that the principle of lex mitior applies in this case, and that the 2009 IJF Anti-Doping Rules shall be applicable.

6. Merits

Establishing a doping offence under the Code

- 6.1 Art. 4.1 and 4.2 of the 2009 IJF Anti-Doping Rules provide that the Prohibited Substances and Methods under the rules are identified on the Prohibited List issued by the Appellant. Art. 2.1 of the 2009 IJF Anti-Doping Rules provides that the presence of a Prohibited Substance or its Metabolites or Markers in an athlete's bodily specimen constitutes an anti-doping rule violation. As provided under Art. 2.1.1 of the Rules "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 bodily specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Art. 2.1. Art. 2.1.2 further provides that sufficient proof of an anti-doping rule violation under Art. 2.1 is established by either of the following:

"Presence of a Prohibited Substance or its Metabolites or Markers in an athlete's A sample, where the athlete waives analysis of the B sample, and the B sample is not analysed; or, where the athlete's B sample is analysed, and the analysis of the athlete's B sample confirms the presence of a Prohibited Substance or its Metabolites or Markers found in the athlete's A sample".

- 6.2 Based on the analysis of the A sample of his bodily specimen, the Athlete tested positive for Furosemide, a diuretic and masking agent which appeared on both the WADA 2008 and 2009 Prohibited Lists in class S5. Furosemide is prohibited in and out of competition as indicated in the Prohibited Lists, and no quantitative reporting threshold is specifically identified for it.
- 6.3 The Athlete did not request an analysis of a B sample, nor had he filed an application for a TUE in order to be authorised to take this substance.
- 6.4 Based on the undisputed test result of the A sample, and the lack of any evidence disputing the validity of this positive result, the Panel is of the opinion that the Athlete has violated Art. 2.1 of the 2009 IJF Anti-Doping Rules.

Strict liability principle and sanction

- 6.5 In accordance with Art. 10.2 of the 2009 IJF Anti-Doping Rules, the period of ineligibility imposed for a violation of Art. 2.1 (presence of Prohibited Substance or its Metabolites or Markers), Art. 2.2 (use or attended use of Prohibited Substance or Prohibited Method) or Art. 2.6 (possession of Prohibited Substances and Methods) shall be as follows: unless the conditions for eliminating or reducing the period of ineligibility,

as provided in Art. 10.4 and 10.5, or the conditions for increasing the period of ineligibility, as provided in Art.10.6, are met - First violation two (2) years ineligibility.

- 6.6 Pursuant to Art. 10.5 of the 2009 IJF Anti-Doping Rules, an athlete can establish that, in view of the exceptional circumstances of his individual case, the otherwise applicable period of ineligibility shall be eliminated (in case of no fault or negligence as per Art. 10.5.1) or reduced (in case of no significant fault or negligence as per Art. 10.5.2). In the present case, however, it is necessary to examine the specific provision in Art. 10.4, which, under specific circumstances, may lead to a reduction of the period of ineligibility found in Art. 10.2. Art. 10.4 reads as follows: "When an athlete or other person can establish how a Specified Substance enters his body or came into his possession, and that such Specified Substance was not intended to enhance the athlete's sports performance or mask the use of a performing enhancing substance, the period of ineligibility found in Art. 10.2 shall be replaced with the following: First violation - At a minimum, a reprimand and no period of ineligibility from further events and at a maximum, two (2) years of ineligibility"
- 6.7 In order to invoke the applicability of Art. 10.4, 10.5.1 and 10.5.2, it is a prerequisite that the athlete is able to establish exactly how the Specified Substance entered into his body.
- 6.8 After having carefully examined the submissions of the Athlete and the evidence presented to support such submissions, it is the conclusion of the Panel that the Athlete has not in a satisfactory manner been able to prove how Furosemide entered into his bodily specimen. In his defence, the Athlete has stated that he went on an intense diet after having been called to represent Brazil in the Judo World Tournament, but that he did not consume any medication that contained Furosemide. He admits that it may have been possible that he consumed the substance in an innocent, but never deliberate way, but he offers no specific explanation or proof as to how the substance entered into his body.
- 6.9 The Panel's assessment of the Athlete's lack of evidence must be rather strict in accordance with CAS jurisprudence in similar cases (see e.g. CAS 2009/A/1413 WADA vs. Vig & Ms. N. Vysotskaya and CAS 2009/A/1778 WADA vs. Raben & Isa). The

Athlete has made reference to statements by Dr. Flores and the Derly case involving another Brazilian judoka. However, neither Dr. Flores' statement nor the findings in the Derly case have been presented as evidence in the present matter. In any event, the Panel finds it unlikely that, had they been presented, either would have made any difference to the outcome. The Athlete simply has not come up with anything which might explain how Furosemide was in his body.

- 6.10 Accordingly, the Panel finds that the Athlete has not satisfied the necessarily strict evidentiary threshold and there seems to be no need to enter into an examination of whether the two year period of ineligibility should be eliminated or reduced for no fault or negligence on the part of the Athlete. Such an elimination or reduction requires proof of how the substance entered into his body. Accordingly, a two year period of ineligibility in accordance with Art 10.2 of the 2009 IJF Anti-Doping Rules shall apply, without any possibility of reduction or elimination of the sanction.

Age/inexperience of the Athlete

- 6.11 Outside the framework of the available legal remedies for reduction of the sanction due to no fault or negligence, the Superior Court of Sports Justice of Judo held in the appealed decision that the Athlete was entitled to benefit from a reduction in the sanction due to his young age and inexperience.
- 6.12 Having examined the WADC and commentary, specifically the provisions regarding granting athletes the right to a reduction or elimination of the period of ineligibility, the Panel has found little support for the proposition that youth or inexperience in itself can be considered mitigating circumstances in a doping violation offence. In the commentary relating to Art. 10.5.2 of the 2009 WADC the following is stated: "While minors are not given special treatment per se in determining the applicable sanction, certainly youth and lack of experience are relevant factors to be assessed in determining the athlete or other person's fault under Art. 10.5.2 as well as Art. 10.3.3 and 10.5".
- 6.13 The Athlete was, according to the evidence presented in this case, a multiple national and continental champion, both in the junior and senior categories since at least 2006,

He was born in 1990 and was more than 18 years old at the time of the offence. Thus, the Panel is of the opinion that he was neither a minor nor inexperienced with respect to participation in national and international judo events governed by the WADC. The Panel's view in this regard is also in line with other similar CAS decisions involving doping offences committed by young athletes (see e.g. CAS 2006/A/1032 Karatenscheva vs. International Tennis Federation and CAS 2003/A/447 Anna Stylianou vs. FINA).

- 6.14 Notwithstanding the assessment of the Athlete's youth and inexperience, it is, nevertheless, still a pre-requisite according to Art. 10.5.2 that the Athlete can prove, how the Prohibited Substance entered his system, cf. the discussion above.
- 6.15 Based on the foregoing, the Panel considers that the appealed decision of 31 May 2009 taken by the Brazilian Superior Court of Sports Justice of Judo should be set aside and the sanction replaced by a two year period of ineligibility for violation of Art. 4.2, cf. Art. 10.2 of the 2009 IJF Anti-Doping Rules. Consequently, the Athlete's ineligibility shall commence at the date of this award. However, the period of ineligibility already served (namely from 11 November 2008 to the date of this award) shall be credited against the total period of ineligibility to be served. The Panel notes that the Athlete did not, pursuant to Article 10.9.4 of the WADC, voluntarily accept a provisional suspension in writing in advance of the provisional suspension imposed by the 1st Respondent and, accordingly, credit may not be given for the period between 5 October 2008 and 11 November 2008. Separately, all competitive results obtained by the Athlete from 5 October 2008 (the date of the positive test) through the commencement of the period of ineligibility shall be disqualified with all of the resulting consequences, including forfeiture of any medals, points and prizes. The Panel notes that the Appellant requested that competitive results obtained by the Athlete be disqualified from 5 October 2009, however, the Panel assumes this was a typo as it would not be logical for the Athlete to benefit from competitive results obtained for 1 year from the date of the positive test.

7. Costs

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- 7.1 As this is a disciplinary case “of an international nature ruled in appeal”, Art. R65 of the Code governs the allocation of costs.
- 7.2 According to Art. R65.1: “Subject to Art. R65.2 and R65.4 the proceeding shall be free. The fees and costs of the arbitrators calculated in accordance with the CAS fee scale, together with the costs of the CAS, are born by the CAS”.
- 7.3 Art. R65.2 of the Code provides: “Upon submission of the Statement of Appeal, the Respondent shall pay a minimum court office fee of CHF 500 (five hundred Swiss Franc) without which the CAS shall not proceed, and the appeal shall be deemed withdrawn. The CAS shall in any event keep this fee”.
- 7.4 Art. R65.3 of the Code provides: “The costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them, or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties”.
- 7.5 As this is a disciplinary case of an international nature brought by the Appellant, the proceedings will be free except for the minimum court office fee, already paid by the Appellant, which is retained by CAS.
- 7.6 Having taken into account the outcome of the arbitration, the financial resources of the parties and their conduct during the proceedings, and the fact that no hearing was held, the Panel is of the view that each party shall bear its own legal costs in connection with this arbitration proceedings.

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ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by the World Anti-Doping Agency on 21 September 2009 is upheld.
2. The decision of the Brazilian Supreme Court of Sports Justice of Judo dated 31 May 2009 is set aside.
3. Mr. Victor Penalber is sanctioned with a two year period of ineligibility starting on the day on which this award enters into force. Any period of ineligibility already served from 11 November 2008 to the date of this award shall be credited against the total period of ineligibility to be served.
4. All competitive results obtained by Mr. Victor Penalber from 5 October 2008 through the commencement of the period of ineligibility shall be disqualified with all of the resulting consequences, including forfeiture of any medals, points and prizes.
5. This award is pronounced without costs, except for the court office fee of CHF 500 (five hundred Swiss Franc) paid by WADA which will be retained by CAS.
6. Each party shall otherwise bear its own legal costs and all other expenses incurred in connection with this arbitration.
7. All other motions or prayers for relief are dismissed.

Lausanne, on 20 May 2010

THE COURT OF ARBITRATION FOR SPORT


Lars Hagreen
President of the Panel