

Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2018/A/5866 Madisyn Cox v. Fédération Internationale de Natation (FINA)

CONSENT AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Raphaëlle Favre Schnyder, Attorney-at-law, Zurich, Switzerland

in the arbitration between

Madisyn Cox, USA

Represented by Paul J. Greene, attorney-at-law with Global Sports Advocates LLC, Portland, Maine USA

Appellant

and

Fédération Internationale de Natation (FINA), Lausanne, Switzerland

Represented by Mr Jean-Pierre Morand, attorney-at-law with Kellerhals Carrard, Lausanne, Switzerland

Respondent

I. PARTIES

1. Madisyn Cox (the “Athlete” or “Appellant”) is a professional swimming athlete and member of the USA Swimming. She resides in Austin, Texas, USA.
2. Fédération Internationale de Natation (“FINA” or the “Respondent”) is an association established under Swiss law as the world governing body for swimming. It is responsible for anti-doping control in its sport and adheres to the World Anti-Doping Agency Code and its list of prohibited substances.

II. FACTUAL BACKGROUND

3. This summary is provided by way of background facts largely drawn from the Appellant’s Statement of Appeal and the Settlement Agreement signed by the Parties on 21/22 August 2018 (the “Settlement Agreement”) as referred to below.
4. On 5 February 2018, the Athlete provided out-of-competition urine and blood samples at her training location in Austin, Texas. The sample collection was authorized by FINA and FINA is the results management authority.
5. The Athlete’s urine sample was sent to the World Anti-Doping Agency (“WADA”) accredited laboratory located in Montreal, Canada (the “Montreal INRS laboratory”). On 2 March 2018, the Montreal INRS laboratory reported in an “A” Certificate that the Athlete’s urine sample returned an adverse analytical finding (“AAF”) for the presence of Trimetazidine, a non-specified substance listed under Class S.4 (Hormone and Metabolic Modulators) of the WADA Prohibited List, 2018. Trimetazidine is banned at all times.
6. By letter dated 29 March 2018, the Athlete and other relevant parties were properly notified by FINA regarding the AAF reported in the “A” Certificate. The Athlete requested that her “B” sample be analysed. This was done by the Montreal INRS laboratory and the “B” sample analysis matched the “A” sample analysis. A “B” Certificate was duly issued by the Montreal INRS laboratory.
7. On 14 May 2018, FINA asserted in a Notice of Charge that the Athlete had committed an anti-doping rule violation (“ADRV”) involving the Presence of Trimetazidine. The Athlete was provisionally suspended by FINA from this date. All confirmatory documents were sent by FINA to the Athlete.
8. In response to the Notice of Charge, the Athlete admitted the ADRV and requested a hearing before the FINA Doping Panel to determine the sanction, if any, that should apply to her ADRV.
9. A hearing took place on 6 July 2018 in Lausanne and a decision issued by the FIINA Doping Panel on 10 August 2018 (the “Appealed Decision”) pursuant to which the Athlete was found to have committed an ADRV under FINA DC 2.1, presence of a prohibited substance Trimetazidine in an athlete’s sample (Class S.4 of the WADA Prohibited

- List, 2018 – Hormone and Metabolic Modulators) and sanctioned with a two (2) year ineligibility period starting on 3 March 2018, the day she last competed and ending on 2 March 2020.
10. In the Appealed Decision, the FINA Doping Panel held that it was persuaded that *“based on the totality of the evidence the Athlete did not act with intent in association with the AAF for Trimetazidine. However the Trimetazidine got into the Athlete’s system, it was inadvertent. The Athlete did not intend to dope.”*
 11. However, the Panel *“was not persuaded that the Athlete has demonstrated the source of the Trimetazidine in her system. It found among other things that “despite eliminating many potential sources of Trimetazidine due to the rather extensive testing that was performed, the Doping Panel is not satisfied, by a process of deduction alone, that the only possible remaining cause for the Athlete’s AAF is the ingestion of contaminated tap water. While this remains a possibility - the Trimetazidine may have entered the Athlete’s system through her food, in her supplements, by incidental contact with food handlers or through social contacts with friends or strangers. This remains unknown. As stated earlier, the Athlete must satisfy the Doping Panel that a single route of entry of the Trimetazidine into her system is more likely than not to have occurred. Despite many scenarios not being at all likely, the Doping Panel is not prepared to conclude on the basis of the evidence it heard and evaluated that tap water contaminated with Trimetazidine in Austin, Texas was more likely than not the cause of the AAF. There is simply not sufficient evidence to support this conclusion.”*
 12. Thus, the Doping Panel concluded that *“the Athlete has failed to prove how the Trimetazidine entered her body. This remains unknown. As a result, she is not eligible for a sanction reduction below two years as she has failed to demonstrate that she is at “no fault or negligence” as described in FINA DC 10.4. No sanction below two years is permitted in such a case.”*
 13. After having been notified of the Appealed Decision, the Athlete, in an effort to 100% eliminate the possibility that any of the supplements she was taking were the source, decided to test the Cooper Complete Elite Athlete multivitamin she was taking prior to her 5 February 2018 test (along with some other remaining supplements). She had not tested the Cooper Complete Elite Athlete multivitamin or her other supplements as part of her FINA case because there had never been a recorded case of Trimetazidine supplement contamination and the supplements she was taking seemed extremely safe and clean. The Athlete had been taking the Cooper Complete Elite Athlete multivitamin without incident for 7 years and had tested negative 20 plus times over that span.
 14. With the cooperation of both FINA and USADA, the Athlete sent two bottles of the Cooper Complete Elite Athlete multivitamin to be tested (one opened, one sealed) at the SMRTL WADA-accredited lab in Salt Lake City, Utah.
 15. Trimetazidine was detected at approximately 4 nanograms per tablet in both the opened and sealed bottles of the Cooper Complete Elite Athlete multivitamin. The Athlete had

declared the Cooper Complete Elite Athlete multivitamin on her 5 February 2018 doping control form and had also documented her use of the Cooper Complete Elite Athlete multivitamin in her food log prepared in the aftermath of her positive test.

III. PROCEDURAL HISTORY

16. On 15 August, the Athlete filed a Statement of Appeal against the Respondent with the Court of Arbitration for Sport (the “CAS”) in accordance with Articles R47, 48 and 49 of the Code of Sports-Related Arbitration (the “CAS Code”), challenging the Appealed Decision. In her statement of appeal, the Athlete nominated Ms. Cameron Myler, attorney-at-law in New York, USA as arbitrator.
17. On 23 August 2018, the Parties informed the CAS Court Office that they had settled their dispute and that in doing so, they requested that the CAS appoint a Sole Arbitrator to enter a Consent Award confirming the terms of the Parties’ Settlement Agreement.
18. On 24 August 2018, the CAS Court Office, on behalf of the Deputy President of the Appeals Arbitration Division, informed the Parties that Ms Raphaëlle Favre Schnyder, attorney-at-law in Zurich, Switzerland was appointed as Sole Arbitrator.

IV. JURISDICTION AND ADMISSIBILITY

19. Article R47 of the CAS Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS 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-related body.

20. The Appellant relies on Articles FINA Rules C 12.11.4 and DC 13 which expressly provided for appeals to the CAS against decisions of the FINA Doping Panel involving an international level athletes so long as such appeals are filed no later than 21 days after receipt of the complete and reasoned judgement.
21. The Appealed Decision was notified to the Appellant on 10 August 2018. The Appellant thereafter filed her Statement of Appeal on 15 August 2018.
22. The jurisdiction of the CAS over this matter is not disputed by the Respondent.
23. The Sole Arbitrator, therefore, confirms that the CAS has jurisdiction and that this appeal has been filed timely and is admissible.

V. THE PARTIES' SETTLEMENT

24. On 22 August 2018, as part of the Settlement Agreement, the Parties requested that the factual recitals contained therein be reflected and paragraph 1 of the Settlement Agreement be embodied in an Arbitral Award rendered by consent of the Parties in accordance with R56 of the CAS Code.

25. In the Settlement Agreement, the Parties stated that

“WHEREAS Appellant is a professional swimming athlete;

WHEREAS following the establishment of the presence of a Prohibited Substance in an urine sample collected on 5 February 2018, the Athlete was declared ineligible for a period of two (2) years by the FINA Doping Panel in a decision rendered on 10 August 2018 (the "Appealed Decision")

WHEREAS the Athlete timely appealed the Appealed Decision to the CAS where her appeal is currently pending;

WHEREAS further to the identification by the Athlete after the issuance of the Appealed Decision of the actual source of the banned substance Trimetazidine being a contaminated product that she declared on her 5 February 2018 doping control form named the Cooper Complete Elite Athlete multivitamin, Respondent has agreed that a reduction of Appellant's sanction from two (2) years to six (6) months beginning on 3 March 2018 and ending on 2 September 2018 could be appropriate in application of Art Article 10.5.1.2 of the FINA Anti-Doping Control Rules.

WHEREAS pursuant to said provision, the sanction may be reduced from two years to a sanction as low as a reprimand depending on the degree of fault of the concerned competitor.

WHEREAS in consideration of the overall circumstances and notably of the now established source of Prohibited Substance, Ms. Cox's degree of fault appears light and accordingly a six (6) month period of ineligibility appears proper

WHEREAS In light of the circumstances, it appears that no further consequences, including disqualification in application of Article 10.8, need to be considered.”

26. The Settlement Agreement duly signed by the Parties on 21/22 August 2018 included the following:

1. *“The parties agree that the Appealed Decision shall be amended as follows:*
 - a. *The presence of trimetazidine in the Athlete's sample constitutes an anti-doping rule violation.*
 - b. *The Athlete shall be sanctioned with a period of ineligibility of 6 months in respect of the anti-doping rule violation, commencing on the date of sample collection on 3 March 2018 and ending on 2 September 2018.*

2. *For the avoidance of doubt, the Appellant Ms. Cox will be immediately eligible to return to training pursuant to FINA DC 10.12.2 and will be eligible to compete on 3 September [2018].*
 3. *The parties shall bear their own legal costs and other expenses in connection with the CAS Appeal.*
 4. *As soon as reasonably practicable following the execution of this Agreement by all of the Parties, the Athlete shall send a letter in the form set out in Annex 1 to the CAS Court Office, enclosing a signed copy (or, if signed in counterparts, copies) of this Agreement and seeking the ratification of the terms of paragraph 1, and an integration of the factual recitals, of this Agreement in a CAS Arbitral Award rendered by consent of the Parties in accordance with R56 of the CAS Code ("Consent Award").*
 5. *Without limitation to paragraph 4 above, the Parties shall do all things reasonably necessary in order to procure, as soon as reasonably practicable following execution of this Agreement, that the substantive terms of their agreement, as set out at paragraph 1 above, shall be embodied in a Consent Award.*
 6. *The Parties acknowledge that they have had the terms of this Settlement Agreement explained to them by legal counsel thereby knowingly understanding and agreeing to all provisions contained herein.*
 7. *For the convenience of the parties and to facilitate execution, this Agreement may be executed in counterparts.*
 8. *The Parties agree that any dispute related to this Agreement should be exclusively governed by Swiss law and shall be submitted to the Court of Arbitration for Sport."*
27. Under Swiss Law, an arbitration tribunal has authority to issue an award embodying the terms of the parties' settlement if the contesting parties agree to a termination of their dispute in this manner. The Sole Arbitrator's ratification of their settlement and its incorporation into a consent award serves the purpose of enabling the enforcement of their agreement.
28. Moreover, in accordance with Article R56 of the CAS Code:
- "[...] Any settlement agreement may be embodied in an arbitral award rendered by consent of the parties."*
29. The Parties have requested that the Sole Arbitrator ratify and incorporate the Settlement Agreement reproduced above into a Consent Award. It is the task of the Sole Arbitrator to verify the *bona fide* nature of the Settlement Agreement to ensure that the will of the parties has not been manipulated by them to commit fraud and to confirm that the terms of the Settlement Agreement are not contrary to public policy principles or mandatory rules of the law applicable to the dispute.

30. After reviewing the terms of the Settlement Agreement, the Sole Arbitrator finds no grounds to object or to disapprove of the terms of the Settlement Agreement and is satisfied that the Settlement Agreement constitutes a *bona fide* settlement of the dispute brought to her attention, with the exception of a correction as to the date of commencement of the suspension on 3 March 2018 being the date she last competed and not the date of the sample collection.
31. In view of the above, and in particular of the joint request made by the Parties, the present Consent Award puts an end to the arbitration procedure CAS 2018/A/5866 *Madisyn Cox v. FINA* on the terms indicated in the Settlement Agreement and those detailed below.
32. The above conclusion, finally, makes it unnecessary for the Sole Arbitrator to consider the other requests submitted to her by the Parties. Accordingly, all other prayers for relief are rejected.

VI. COSTS

33. Article R65.2 of the CAS Code provides that:

“Subject to Article R65.2, para. 2 and R65.4, the proceedings 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 borne by CAS... Upon submission of the statement of appeal, the appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.-- without which CAS shall not proceed and the appeal shall be deemed withdrawn.”
34. Article R65.3 of the CAS Code states:

“Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.”
35. Based on Article R65.2 of the CAS Code, these proceedings are free of charge as the appeal concerned a decision of FINA regarding purely disciplinary measures in relation to an Adverse Analytical Finding of the Athlete. Further the Parties agreed to waive any claims they may have to costs or other expenses in connection with the appeal. Therefore, the Sole Arbitrator decides that each Party shall bear their own costs.

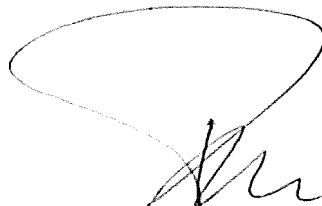
ON THESE GROUNDS

The Court of Arbitration for Sport renders the following:

1. The Sole Arbitrator, with the consent of Madisyn Cox and Fédération Internationale de Natation (FINA), hereby ratifies the Settlement Agreement executed by the Parties on 21/22 August 2018 and incorporates its terms into this consent arbitral award.
2. Paragraph 1 of the Decision of the FINA Doping Panel dated 10 August 2018 is amended so that: (a) The presence of trimetazidine in the Athlete's sample constitutes an anti-doping rule violation, (b) The Athlete shall be sanctioned with a period of ineligibility of 6 months in respect of the anti-doping rule violation, commencing on 3 March 2018, the date she last competed, and ending on 2 September 2018.
3. Each party is hereby ordered to perform the obligations and duties as per the Settlement Agreement executed by the Parties on 21/22 August 2018.
4. The award is pronounced without costs, except for the Court Office fee of CHF 1000 (one thousand Swiss Francs) paid by Madisyn Cox, which is retained by the CAS.
5. Each party shall bear its own legal costs and expenses.
6. All other requests or prayers for relief are rejected.

Done in Lausanne, 31 August 2018

THE COURT OF ARBITRATION FOR SPORT



Raphaëlle Favre Schnyder
Sole Arbitrator