

FINA Doping Panel 1/02

The

FINA Doping Panel,

comprised of

Harm Beyer	Chairman
Ben Belkacem Farid	Member
Jean Lob	Member

in the proceedings against

the swimmer

Claudia Poll

affiliated to the

Federación Costarricense de Natación y

Afines

on 3rd June 2002 decided:

The athlete is found to have committed a doping offence
under FINA Rules DC 2.1(a) and DC 9.1.1.

She shall be

suspended for four (4) years,

commencing on 26 March 2002.

This judgement shall become effective immediately.

All results achieved by the swimmer during the period from
26 September 2001 to 26 March 2002 shall be cancelled.

The swimmer shall be responsible for all costs related to this
case with the exception of the costs of the Panel and the
members of the Panel.

I THE PARTIES INVOLVED

The Fédération Internationale de Natation (FINA) is the world-wide swimming sports organisation. FINA has established and is carrying out *inter alia* an "Out-of-Competition-Doping Control Program".

Ms Claudia Poll is a female elite class swimmer. She is affiliated to the Federación Costarricense de Natación y Afines (CRC) which is a Member Federation of FINA. She has been engaged in national and international competitions for twenty two years including successful representation of her country in, *inter alia*, Olympic Games and World Championships.

II THE FACTS

On 25 February 2002 Ms Poll underwent an out-of-competition doping control. During a training session at the Cariari Country Club in San Jose, Costa Rica, urine samples were taken by the sampling agent (herein after referred to as "SA") Dr. Rafael Robles (GUA). He took the samples with him, home to Guatemala, from where they were shipped on 2nd March 2002 to the IOC accredited "Laboratoire de Controle du Dopage" in Québec, Canada (LDCD). The samples arrived at LDCD on 5 March 2002 and were subsequently analysed, beginning on the same day.

According to the report of LDCD, dated 19 March, 2002, the A sample (No. A358 277) showed the presence of metabolites of nandrolone. The test results showed a level of Norandrosterone (herein after referred to as "NA") of 7.3 ± 0.3 ng/ml (4.1 %).

On 26 March 2002 the FINA Executive applying FINA Rule DC 8.3.5 issued a provisional suspension on Ms Poll, beginning on the same day *"until a hearing before the FINA Doping Panel can be made following the test result of the B sample"*.

The B sample (No. B358 277) was tested at the request of Ms Poll and in her presence on 15 April 2002. According to the laboratory report of 16 April 2002 the sample revealed a concentration of 7.5 ± 0.3 ng/ml (3.6 %) of NA.

III PROCEEDINGS

On 18 April 2002 the matter was referred to the FINA Doping Panel in accordance with FINA Constitutional Rule C 19.5.

On 24 April 2002 Ms Poll was informed by the Panel about her right to a hearing before the FINA Doping Panel. Such a hearing was requested by her on the same day. The hearing was then held in the FINA Office in Lausanne (SUI) on 31 May 2002.

The hearing was attended by

- Ms Poll,
- Mr. Dr. Jürgen Schäfer, Attorney-at-Law, representing Ms Poll
- Mr. Francisco Rivas Espinoza, Coach
representing the Federación Costarricense de Natación y Afines (CRC) and
- Mr. Gunnar Werner, FINA Immediate Past Hon. Secretary, representing FINA.

III MOTIONS and CONTENTIONS

1. In general Ms Pull wishes to draw attention to her positive and strictly co-operative attitude in regard to competitive swimming, to FINA's Rules and Regulations and to FINA's efforts in the fight against doping. She is emphasising that she never did take, never will take any prohibited substance and that she is conducting her life accordingly. She is reporting that during all her long career she had to undergo doping control tests numerous times, more than 55 times during the past nine years including eleven tests in 2001 and 2002. None of these tests were positive with the exception of the samples taken from her on 25 February 2002. Also samples collected from her by FINA on 26 March 2002 showed a negative test result. Likewise a series of urine and blood tests initiated by herself at the hospital in San Juan de Dios in San Jose / Costa Rica and another urine test conducted on 2nd April 2002 by the laboratories of the UCLA were all tested negative.

2. In regard to the taking of samples on February 25, 2002 Ms Poll is putting forward that the procedures applied were highly irregular and did not comply even with the required minimum standards established in FINA's DC Rules.

She is describing the procedures carried out as follows:

- The SA showed up in the Cariari Swimming Pool the first time early on Saturday, 23 February 2002, at 7.10 a.m. and requested her to deliver a urine sample for an out-of-competition doping test.. As she and her coach were involved in a time keeping job at that time, the SA agreed to wait. She finished her time keeping duties at 7.50 a.m. and presented herself to the SA. He presented his letter of appointment from FINA and she conceded to give the requested urine samples.
- The SA had only two sampling kits with him, both containing bottles with the label "FIFA".
- Two days later, on 25 February 2002, at 3.20 p.m. the SA came again to the Cariari Swimming pool and requested from her to undergo another urine test. He expressed his wish to exchange the new samples with those taken on February 23, 2002. At this occasion the SA did not present any legitimisation / power of authorisation from FINA.
- On 25 February 2002 Ms Poll was in the final day of her menstruation cycle.
- At the time of the SA's request on February 25, 2002, Ms Poll was undertaking her second work-out of that day. The training phase would have ended at 4.00 p.m. However, the SA urged her to give the sample prior to the end of the intense training period. Ms Poll's coach asked the SA to wait with the taking of the samples until the end of the training period and to give Ms Poll time to somewhat regenerate. The SA, however, stressed that he needed to have the samples taken immediately. Ms Poll reluctantly interrupted her work-out and agreed the samples to be taken right away.

- Again the SA had brought only two kits to collect the samples. Ms Poll chose one of the kits and tried to open the first bottle from that kit. However, that bottle locked and could hence not be used. As a result of this she had no choice but to take the second kit.
- Ms Poll noticed that the bottles in both kits were missing the usual red security rings. Despite her request the SA did not note this on the drug collection control form. He stated that it was not unusual that such security rings are lacking. However, according to her experience, they are never lacking.

A written statement from the SA, Dr. Robles, dated May 31, 2002, was presented to the Panel. The content is not in all parts in conformity with the statements made by Ms Poll. And Ms Poll is contesting the credibility of Dr. Robles. For the benefit of Ms Poll the Panel considered her statements and reports in regard to the sampling procedures as correct and did not take into account the written statement of Dr. Robles. Therefore it was also not necessary to deal with the credibility of Dr. Robles.

In the opinion of Ms Poll the procedures described are not in conformity with FINA's DC Rules, in particular not with Rules DC 8.1.1; 8.1.2; 8.1.4; 8.1.6; 8.2.1; 8.2.3; 8.2.5 and 8.2.6. According to her the infringement of these Rules strongly indicate that the test results cannot be used as evidence for a doping offence.

a) Faulty sampling documentation

According to Rule DC 8.1.1 any irregularities in the procedure of collecting urine samples must be registered on the Doping Control Form. In violation of this Rule the SA did not follow the request of Ms Poll to note in the form that the sampling bottles in the sampling kits, presented to her on February 25, 2002, did not have the usual red security rings used as a preventive against locking.

b) Use of FIFA labelled bottles

Within the scope of the first collection of samples on February 23, 2002, the SA used sampling kits labelled with the emblem of FIFA, the International Football Federation.

c) No choice between sampling kits

Contrary to Rule DC 8.1.4 Ms Poll on February 25, 2002, did not have a choice between several utilisable sampling kits. One of the two kits, presented to her could not be used, because the sampling bottle's cap locked.

d) No presentation of letter of appointment

According to Rule DC 8.2.1 the SA shall present proof of his identity and copy of his letter of appointment from FINA. However, on February 25, 2002, the SA did neither provide nor show copy of his letter of appointment.

e) Exchange of samples of February 23, 2002, with samples of February 25, 2002

After having collected samples from Ms Poll on February 23, 2002, the SA was not entitled to exchange the samples with new samples, taken on February 25, 2002.

3. Further Ms Poll is referring to FINA Rule DC 8.1.6 according to which in case of a prolonged delay between collection and shipment of the sample storage in a cool, secure place is necessary. There is no documentation of proper handling of the samples in the time period between 25 February and 2nd March 2002. For the benefit of Ms Poll the Panel had to assume that the urine samples collected from her were exposed to room temperatures. Considering the concrete prevailing climatic conditions in Costa Rica and Guatemala it was even to be assumed that these temperatures were higher than usual. Ms Poll is alleging that this had a direct impact on her possibilities to uncover evidence in her favour by having the remaining sample material once more analysed, since the original sample substance is no longer available. She thinks that the original urine rather altered or has been tampered with due to the improper handling. Because of the on her side assumed irregular and non conformant storage and transportation of the samples, bacterial activity

inevitably took place in the sample urine, which with a high probability influenced the result of the doping test. The tolerance test of the pH-value has not been properly carried through. The simple pH-testing method using a Litmus test, having an accuracy of but +/- 0,5 pH-units is not reliable enough to exclude a change in pH between the collection of the samples and their arrival at the analysis laboratory.

4. Also due to the irregular and non conformant storage and transportation, which in her opinion lead to an alteration or deterioration of the urine samples Ms Poll is claiming that it is now impossible for her to prove that indeed in this case an endogenic production of the respective substances in the tested concentrations were the sole cause for the test results. It is widely proven that small amounts of nandrolone can be produced in the human body from natural precursor steroids. Intense physical exercise leads to an extreme increase of the urine concentration. And the urine concentrations of substances in the blood (e.g. salt or any medicament) also increase strongly, of course, irrespective of the concentrations of these substances in the blood.

Under normal conditions and circumstances nandrolone concentrations in the urine of a woman less than 5 ng/ml are not considered a doping offence. However, the samples were collected from Ms Poll on February 25, 2002 in the middle of an intense training phase at a time at which she was in a period of maximal antidiuresis and thus had a highly concentrated urine. Therefore a value of around 7,5 ng/ml can be directly attributed to the stress-related antidiuresis which leads to an increase in the concentrations of all excreted substances contained in the urine.

5. Also Ms Poll is drawing attention to the fact, that at the present point in time the question as to whether the allocation of NA has an performance enhancing effect cannot be answered. In so far it is mandatory to conduct further studies on NA in order to bring about more clarity in this regard.

IV IN LAW

1. Ms Poll is alleging a number of deviations from standard practice, when the SA collected the urine samples from her. According to her statements these deviations lead to the test results being unreliable.

However, FINA Rule DC 1.4 is reading:

"Any departure from the procedures set out in these Rules shall not necessarily invalidate the finding of the presence of a prohibited substance in a sample or the use of a prohibited method, unless such departure was such as to cast genuine doubt on the reliability of such a finding."

The FINA Doping Panel is following the principles established by the CAS Panel (CAS 01/A/337; B. v/ FINA) issued on 22 March 2002 according to which the Panel *"has to consider each deviation individually and to establish whether it was of material influence to the test result."* And examining the deviations, reported by Ms Poll one by one the Panel comes to the conclusion that there is no genuine doubt on the reliability of the test results. It has not really influenced the reliability of the test results that

- the SA did not note in the form, that the sampling bottles did not have the "red security" rings; the "red security rings" are preventing the locking of a bottle they must be removed to ensure locking after a urine sample has been poured into the bottle.
- the SA took urine samples from Ms Poll on 25 February 2002 to replace the samples taken on 23 February 2002; only the samples taken on 25 February 2002 are relevant for this judgement.
- the bottles used on 23 February 2002 were labelled with "FIFA"; only the samples collected on 25 February 2002 are relevant for this judgement
- Ms Poll on 25 February 2002 did not have a choice from a number of sampling kits; there is no hint that remaining kit including the bottles had any lack
- That the SA did not present his letter of appointment from FINA on 25 February 2002; it was only two days ago, that the SA had presented that letter, from which Ms Poll knew the SA being authorised by FINA.

"It cannot be denied that doping control is a complex process susceptible to errors. And it may be that the number of irregularities (even if significant on a stand-alone basis)

reaches a level which may call into question the entire doping control process". (CAS 01/A/337) In the case at hand the number of errors reported by Ms Poll stay below this threshold.

2. Further Ms Poll is contesting irregular storage and transportation of the samples taken from her. According to her it cannot be excluded that the samples were kept only at room temperature in the six days between collection and shipment of the samples. In her opinion bacterial activity took inevitably place in the sample urine, and this influenced the result of the doping test.

According to FINA Rule DC 8.1.7 "storage in a cool secure place may be necessary" if there is a delay between sampling and shipment.

The Panel has no exact information in regard to the storage of the samples in the six days between collection on 25 February 2002 and shipment on 2nd March 2002. In the advantage of Ms Poll the Panel is assuming that the samples were not stored properly in a "cool secure place". However, the pH level between the time of the taking of the sample (6.5) and the beginning of the test (6.6) remained nearly unchanged. And the laboratory did not report detection of any other significant alteration as e.g. change of the steroid profile, change of colour or smell, neither when the A sample was opened nor at the time of opening the B sample.

Ms Poll in turn is contesting the tolerance test of the pH-value not having been properly carried through. She is indicating that the laboratory should have applied further and more detailed testing than the simple pH-testing method using a Litmus test. However, she has not indicated further methods for the determination of increased bacterial activity. She is mainly relying on the fact that every urine sample would degrade after several days at room temperature in view of the climatic conditions in Costa Rica and Guatemala, and, thus, would not provide a valid basis for a testing procedure.

In general the Panel agrees that urine is subject to degradation. But the level of degradation is depending on the level of bacterial activity. Up to date there is no method to establish the level of bacterial activity other than indirectly by examination of the pH, steroid profile, colour and smell. In the case at hand the urine examined did not show any

such signs of degradation. Thus the Panel is satisfied that the urine samples taken from Ms Poll are providing a sufficient basis for the tests carried out by the laboratory.

Even if it would be admitted that an increase in bacterial activity remained undetected or even was undetectable with the current methods, the Panel is convinced that such activity would not have led to an increase in the level of NA. Scientific studies have shown that transformation of steroids is in fact possible if urine is left at room temperatures for several weeks. However, these studies do not indicate any pathways for the transformation into NA. It may be that such a pathway is conceivable. But considering the fact that there is not any scientific evidence to this effect it remains pure speculation on which the Panel is not ready to base this judgement.

3. Ms Poll is claiming that in her case an endogenic production of the NA in the concentrations, reported by the laboratory, were the sole cause for the test results. Intense physical exercise in general leads to an increase of NA in the human body. It also has the effect the urine to be extremely concentrated.

Regarding the excretion of nandrolone metabolites during the menstrual cycle, it is known that the maximum is attained at mid cycle (close to the ovulation). However researches with females show that even an increased quantitation of NA at mid cycle of the menstrual period will remain well below 5 ng/ml. (Hemmersbach et.al.)

The Panel agrees that small amounts of nandrolone can be produced in the human body from natural precursor steroids. It is also known that intense physical exercise, such as it is practised in competitive sports including speed swimming increase slightly the excretion of nandrolone metabolites. However, all scientific studies, which were brought to the attention of the Panel, including the studies which Ms Poll is referring to, are clearly showing, that the endogenic production of nandrolone in a human body and/or the slight increase of nandrolone metabolites caused by intense physical exercise never lead to a value of 2 ng/ml with men or 5 ng/ml with women. *"The results from this study seems to indicate that the current IOC threshold level for norandrosterone in females is sufficiently high to avoid false positive cases"* (Ven Eenoo et.al., 2001).

The Panel also agrees that urine becomes concentrated under strenuous exercise. The IOC accredited laboratories are instructed to correct the threshold when specific gravity of the

urine is higher than 1.020. However, the specific gravity of the urine collected from Ms Poll is reported to be 1.012 at the time of collection and 1.008 at the beginning of the analysis in the laboratory. This value is to be considered as relatively diluted. The specific gravity of the urine taken from Ms Poll therefore can be considered as concentrated but it does not give any reason to assume that it leads to a test result not reliable.

4. As far as Ms Poll is raising the question whether NA is really performance enhancing, the Panel refers to FINA Rule DC 2.3 according to which the success or failure of a prohibited substance or prohibited method is not material. It is sufficient that the said substance was made use of.

V STRICT LIABILITY

FINA Rules DC 1.1 and DC 2.1 state that the "finding" of a prohibited substance in an athlete's body tissue or fluids (doping) is strictly forbidden and considered a doping offence. Appendix A and B attached to FINA's DC Rules are classifying NA as an anabolic agent. And FINA Rule DC 9.1.7 states that an athlete testing positive on anabolic agents can contest only

- a) whether the correct body tissue or fluid has been analysed,
- b) whether the body tissue or fluid has deteriorated or been contaminated,
- c) whether the laboratory analysis was correctly conducted,
- d) whether the minimum suspension for a first offence should be exceeded, and
- e) whether a minimum sanction can be lessened in accordance with DC 9.10.

At first sight these Rules contain a description of objective elements. They do not provide for any appreciation of subjective elements. However, some CAS Panels have expressed the view that according to Swiss law a federation is not entitled to impose a suspension for a doping offence against an athlete without any appreciation of the subjective elements of each case. These Panels were satisfied with the distribution of the burden of proof for the objective and subjective elements, which according to their judgements are assuring a just and equitable result. (CAS 2000/A/317, A v/ FILA; CAS 2000/A/310, L v/ FILA, CAS 2000/A/312 L v/ FILA).

The FINA Doping Panel has decided to follow these CAS Panels. In fact it seems to be only a question of terminology and thus of minor importance if the interpretation is to follow the principles of an equitable distribution of the burden of proof:

- a) "The burden of proof with respect to the objective elements of the doping offence, i.e. the presence of a forbidden substance in the body of the athlete, lay with the federation. The successful proof of the objective elements then creates a presumption that the doping offence has been committed either intentionally or negligently. This presumption has to be considered in assessing the appropriateness of disciplinary matters. The athlete may rebut this presumption by adducing clear evidence that he/she acted neither intentionally nor negligently.
- b) To meet this burden of proof the federation will allege the existence of a forbidden substance in the urine of the athlete. In this respect it may rely on a positive test result issued by a laboratory. The athlete in turn may contest these results. However, it would not be sufficient to advance a number of unspecific allegations. The athlete has to provide specific facts that are likely to call into question the reliability of the test result. It is then again up to the federation to show that these circumstances were not material in a way that they would have altered the test result.
- c) In this concept there is no room to apply concepts of criminal law such as the "presumption of innocence" or the standard of proof to be "beyond reasonable doubt". The proceedings are entirely governed by civil law principles."

(CAS 2001/A/337 B v/ FINA, Award of 22 March 2002)

These principles are providing a reasonable and well balanced solution. On the one hand it allows the federations to ensure an efficient fight against doping and, on the other hand, it takes into account the rights of each athlete, especially his/her right to personality and the essential "human rights".

VI CONCLUSION

Ms Poll has committed a doping offence.

FINA has produced laboratory reports to prove that the A sample and the B sample of Ms Polls urine, taken on 25 February 2002 in an out-of-competition test indicated that she ingested a prohibited substance. Her urine was reported to contain a certain concentration of NA which allows to conclude that she ingested nandrolone or one of its precursors which are substances prohibited under FINA Rule DC 3.1, 3.3 and Chapter I.A.1 Appendix B thereto. In addition, the introductory note to Appendix B clearly states that metabolites of prohibited substances are also considered as prohibited.

In turn Ms Poll alleged a number of irregularities in regard to taking the samples, storage and transportation, which according to her lead to the test results being unreliable. However, all her allegations are not affecting the satisfaction of the Panel that the urine samples provided a sufficient basis for the tests carried out by the laboratory.

It can also be excluded that the delay between the taking of the sample and its analysis in the laboratory was the cause for the finding of a concentration of NA in the athlete's urine samples above the threshold of 5 ng/ml. Likewise it can be excluded that an endogenic production of NA in the body of Ms Poll, which may have occurred, was the cause for the detected concentration of NA of more than 5 ng/ml in her body.

Ms Poll has not provided the Panel with any piece of evidence which may suggest that the level of NA found in her urine was due to circumstances beyond her control. None of the statements she has put forward is sufficient to rebut the presumption of fault.

VII SANCTION

The sanction provided for in FINA DC Rules for the first doping offence involving anabolic agents is a minimum of four (4) years' suspension (FINA Rule DC 9.1.1).

Ms Poll tested positive for nandrolone metabolites falling in the class of anabolic agents. As it is the first doping offence committed by her the minimum suspension to be imposed on her is a four (4) years suspension.

The minimum sanction of a four (4) years' suspension provided for in FINA's DC Rules has repeatedly been challenged by athletes concerned to be unjust, inappropriate and violating human rights. Some CAS Panels have confirmed a four years suspension decided by the FINA Doping Panel. Some other CAS Panels on appeal of the athlete concerned reduced the sanction below the minimum provided for in FINA Rule DC 9.1.1. Also the FINA Doping

Panel in some of the judgements made in the past expressed concern about a minimum suspension of four years for a first doping offence. However, the FINA Congress, the only body entitled to amend FINA's DC Rules decided repeatedly to maintain the sanction of a minimum suspension of four years. Even challenged by one or the other Award issued by CAS in the recent past nobody within FINA so far approached the FINA Congress and submitted a proposal to amend Rule DC 9.1.1. The FINA Doping Panel therefore feels to be bound by the Rules.

On the other hand the Panel does not see any reason to lessen the minimum sanction according to FINA Rule DC 9.10. Ms Poll was not able to clearly establish how the prohibited substance got into her body and that it did not get there as a direct or an indirect result of any negligence by her.

The time period in which Ms Poll was provisionally suspended shall be included in the four (4) years suspension.

In addition a retroactive sanction involving cancellation of all results achieved in competitions by Ms Poll during the period prior to the date the suspension takes effect and extending back to six (6) months before the collection of the positive samples was to be imposed on her.

(FINA Rule DC 9.1.1)

On these grounds:

Ms Poll shall be

suspended for a duration of four (4) years

beginning on 26 March 2002.

All results achieved by Ms Poll in competitions in the time period between 25 August 2001 and 16 March 2002 shall be cancelled.

VIII THE COSTS

All costs related to this case are to be paid by Ms Poll, as she has committed a doping offence. However, according to a decision by the FINA Executive the costs of the FINA Doping Panel including the expenses of the Members of the Panel will be covered by FINA.

Harm Beyer

Ben Belkacem Farid

Jean Lob

signed on behalf of all three Panel Members

Harm Beyer

Appeal Instruction

An appeal may be submitted against this judgement at the Court of Arbitration for Sport, Lausanne, Switzerland within one (1) month after receipt of this judgement (FINA Rule C 10.8.3 (Old version) and FINA Rule C 12.8.3 (New version)).