CAS 2005/A/918 Kowalczyk v/ FIS

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr John A **Faylor**, Attorney-at-Law, Frankfurt am Main, Germany

Arbitrators: Mrs Maria **Zuchowicz**, Attorney-at-Law, Warsaw, Poland

Mr Olivier **Carrard**, Attorney-at-Law, Geneva, Switzerland

between

JUSTYNA KOWALCZYK, Poland

Represented by Mr Ludwik Zukowski, Attorney-at-Law, Warsaw, Poland

- **Appellant** -

and

INTERNATIONAL SKI FEDERATION, Switzerland

Represented by Mr Jean-Pierre Morand, Attorney-at-Law, Geneva, Switzerland

- **Respondent** -

I. Facts

1. The Parties

1.1 The Appellant, Ms Justyna Kowalcyk, is a member of the national cross-country ski team of the Polish Ski Association. She is 22 years of age, a Polish citizen and a member of the Polish Ski Association which, in turn, is a member of the Respondent.

1.2 The Respondent, the International Ski Federation ("FIS"), is the international federation governing sports related to skiing worldwide. FIS is an association established in accordance with Article 60 of the Swiss Civil Code and has its seat in Oberhofen (Switzerland).

2. Subject Matter of the Appeal

2.1 The Appellant submitted to a doping control immediately following the FIS U23 OPA Intercontinental Cup Competition in Oberstdorf, Germany on 23 January 2005. Following an analysis of the Appellant's A-Sample, the Doping Control Laboratory in Cologne reported an Adverse Analytical Finding to the FIS on 15 February 2005, stating that the sample contained the substance Dexamethason, a Prohibited Substance listed as a glucocorticosteroid in Group S9 on the 2005 Prohibited List (International Standard) of the World Anti-Doping Code.

2.2 In accordance with Article 7.1.2 of the FIS Anti-Doping Rules 2004/2005 (the "FIS-Rules"), inquiries were made by FIS to determine whether the Appellant's use of the substance was covered by a Therapeutic Use Exemption ("TUE") or whether there was any apparent departure from the International Standards for Testing and Laboratory Analysis which might disqualify the Adverse Analytical Finding. In its letter to the Polish Ski Association of 18 February 2005, the FIS's Administration for FIS Anti-Doping Activities pointed out that

> *"the Prohibited Substance Dexamethason may be subject to a Therapeutic Use Exemption (TUE) and therefore the Austrian Ski Association is required to conduct a review to determine if an applicable [sic] has been granted by the National Anti-Doping Organisation for this athlete."*

2.3 The Appellant and her doctor had already completed an Abbreviated Therapeutic Use Exemption ("ATUE") form on 23 December 2004 which she alleges to have submitted to the Polish Ski Association, but neglected to show to the testing authorities at the time of the doping control on 23 January 2005.

2.4 Following the Adverse Analytical Finding, the Appellant submitted on 21/22 February 2005 a request for approval of the use of Dexamethason to the Therapeutic Use Exemption Committee ("TUEC"). This request was denied by the TUEC on 1 March 2005 on the grounds that "the TUE had been submitted too late after the treatment and that no retroactive approval was possible in this case". In addition, the TUEC commented that "the more or less inflammatory condition of the Achilles is instable for the athlete". Chronic Dexamethason treatment was, in the view of the TUEC, "not the solution and will be detrimental to the athlete's health in the long term". The Appellant did not appeal the decision of the TUEC.

2.5 On 1 March 2005, the Secretary General of FIS advised the Polish Ski Association in writing that

> *". . . the presence of the above-mentioned Prohibited Substance constitutes a violation of the FIS Anti-Doping Rules, Article 2.1, the presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily specimen."*

2.6 Upon being instructed by the Secretary General regarding the procedures available under Article 7 of the FIS-Rules, the Appellant chose to waive the analysis of the B-Sample.

2.7 Pursuant to Article 7.4, the Appellant was thereupon provisionally suspended from competition pending a hearing before the FIS Doping Panel. On 20 May 2005, a hearing took place in Munich, Germany.

3. Decision of the FIS Doping Panel

3.1 Based on the Appellant's admission before the Doping Panel that Dexamethason was present in her system and that a doping violation had been committed, the Doping Panel disqualified the Appellant from the individual result in the FIS U23 OPA Intercontinental Cup Competition and imposed a two year period of ineligibility from the date of the A-Sample on 23 January 2005. The Doping Panel's decision was issued on 13 June 2005.

3.2 The Doping Panel based its decision on Article 10.2 of the FIS-Rules, stating explicitly in paragraph 43 of the Decision that the following:

> *"The lesser sanctions provided in Article 10.3 of the Rules are not applicable in this case as the Prohibited Substance, Dexamethason, is not a Specified Substance."*

3.3 In the view of the Doping Panel, the Appellant had failed to discharge her "onus of proof" to justify a reduction of the sanction in that she

> *". . . has not demonstrated on a balance of probabilities that she did everything that could be reasonably expected of her to avoid the use of or administration of the Prohibited Substance Dexamethason, nor has she established that her negligence can be considered as not being significant."*

3.4 The Doping Panel cited the negligence of the Appellant in relying upon the treatment and medication prescribed by her doctor.

> *"All Athletes have position and proactive responsibility and duty of care to ensure that all treatments and medications used by them do not violate the FIS Rules. Ultimate responsibility for what an Athlete puts into his or her body belongs to the Athlete. It is not acceptable, nor is it a defence, to delegate this responsibility to any third party including a physician, coach or trainer."*

3.5. The Doping Panel disallowed the Appellant's pleading of ignorance of the FIS-Rules and, without diminishing her responsibility for using the substance, criticized the "conduct" of the Polish Ski Association:

"The unsatisfactory (or even inconsistent and contradictory) explanations provided in the context of this case seem to indicate that the Polish Ski Association neither understands nor properly addresses the issue of anti-doping nor is it providing the proper information and support it should in this respect to the athletes and other persons under its responsibility."

4. Appellant's Statement of Appeal

4.1 On 30 June 2005, the Appellant filed a Statement of Appeal followed by an Appeal Brief dated 13 July 2005 which confirmed that the facts forming the basis of the Doping Panel's decision of June 13th, 2005 were "correctly established". Citing the language of Article 10.3 of the FIS-Rules, the Appellant pointed out that FIS erred in not recognizing the Prohibited Substance Dexamethason as a Specified Substance within the meaning of that provision. The Appellant stated as follows:

"With all the respect to the FIS interpretation of the rules and the WADA 2005 Prohibited List, International Standard provisions, I would like to put the CAS arbitrators attention [to] the fact that according to the said List, Specified Substances are:

Ephedrine, L-methylamphetamine, methylephedryne
Cannabinoids
All inhaled B2 agonists, except clenbuterol
Probenecid

All Glucucorticosteroids (including Dexamethason)
all Beta Blockers
Alcohol"

[Bold lettering and underlining is the Appellant's]

4.2 Citing the above error in the classification of Dexamethason, the Appellant asserted that the two year period of ineligibility imposed upon her is "not proportional and even outrageous" compared with the measure of the Appellant's fault.

"In view of all the circumstances of the case, there may be no doubt that the Appellant's use of Dexamethason was not intended to enhance her sport performance (could not have been used as [a] doping factor), but only for the purpose of her Achilles tendon treatment. Therefore, the said use may be treated only as unintentional".

[underlining is the Appellant's]

4.3. With regard to the Appellant's delayed submission of the TUEC, the Appellant cites her own lack of knowledge and the lack of support of the Polish Ski Federation, stating that

"While there is no justified reason to impose on the Appellant the sanction at its maximum, the FIS should have considered as the appropriate sanction for the

Appellant's first violation "a warning and reprimand and no period of ineligibility from future events" (the Article 10.3)."

[underlining is the Appellant's]

5. The FIS's Unilateral Reduction of the Ineligibility Sanction

5.1 On the date following receipt of the Appellant's Appeal Brief, the Secretary General of FIS sent the CAS a letter dated 14 July 2005 stating as follows:

"Dear Mr. Casserly,

We acknowledge receipt on 13th July 2005 of the statement of appeal, filed by Ms. Justyna Kowalczyk on 30th June 2005 with regard to the decision of the International Ski Federation (FIS) Doping Panel taken on 13th June 2005.

Our legal counsel for this case Jean-Pierre Morand is currently on holiday, however we would like to inform you immediately that the FIS Doping Panel issued a new decision in this case on 12th July 2005. The Decision was communicated to the Polish Ski Association on behalf of the Athlete forthwith and a corresponding press release and an item in the FIS Newsflash were both published on 13th July. The respective documents are enclosed for information.

Since the sanction has now been reduced from a two-year to a one year suspension, the Appellant may wish to reconsider as to whether she still wishes to pursue an appeal against the new and valid decision of the International Ski Federation.

We await your further news on this subject.

Kind regards,
INTERNATIONAL SKI FEDERATION

Sarah Lewis
Secretary General"

5.2 In the press releases referenced in the above letter, FIS announced as follows:

"Subsequent to the decision of the FIS Doping Panel it was brought to the attention of the International Ski Federation (FIS) by the World Anti-Doping Agency (WADA) that since the substance Dexamethason is a Glucocorticosteroid, it is classified as a Specified Substance on the WADA List of Prohibited Substances and Methods and therefore the period of Ineligibility for the first violation shall be at a minimum, a warning and reprimand and no period of Ineligibility from future Events, and at a maximum, one (1) year's Ineligibility.

According to the World Anti-Doping Code and article 10.3 of the FIS Anti-Doping rules, the Prohibited List may identify specified substances which are particularly susceptible to unintentional anti-doping rules violations because of their general

availability in medicinal products or which are less likely to be successfully abused as doping agents.

The FIS Doping Panel decided that based on the facts submitted and the testimony of the athlete and Polish Ski Association at the hearing on 21st May 2005, the sanction for the doping offence will be one (1) year beginning from 13th June 2005. The athlete is disqualified as from (and including) the U23 OPA Intercontinental Cup competition held on 23rd January 2005. The period from 23rd January 2005 – 13th June 2005 shall be calculated within the period of ineligibility, meaning that she is ineligible to participate until 22nd January 2006.

6. Amendment of Appellant's Appeal Brief

6.1 On 16 August 2005, the Appellant filed an amendment to her Appeal Brief which stated that her pleadings concerning an erroneous application of Article 10.2 had now been confirmed by WADA. Accordingly, the Appellant asserted that she was "wrongfully adjudicated" by the FIS Doping Panel in its decision of 13 June 2005.

6.2 The Appellant further asserted that the FIS imposed the reduced sanction "automatically, without a word of justification". The said Articles 10.2 and 10.3, are based in the view of the Appellant, on "significantly different sanctioning systems". Article 10.2 embodies a "fixed sanction system" (first violation - 2 years ineligibility; second violation – lifetime ineligibility) and is governed by a "strict liability regime". According thereto, the FIS needs not to establish the guilt of the athlete, but must prove only the presence of the Prohibited Substance in his/her sample. Only in exceptional cases can the athlete establish a basis for eliminating or reducing the sanction imposed in accordance with the sanctioning rules laid down in Article 10.5.

6.3 In contrast to the "strict liability regime" set out in Article 10.2, the Appellant proceeds to describe Article 10.3 as being based on a "flexible sanction system", one which provides the possibility of measuring the sanction (from its minimum to maximum – depending on the various circumstances creating the background for the violation), thus providing a basis for the sanction to reflect "the significance, or 'size' of the Athlete's guilt".

6.4 Once the use of a Specified Substance is proved, the Athlete, in the view of the Appellant

". . . bears the burden of proof that the use was not intentional in terms of enhancing sport performance."

6.5 Furthermore, the Appellant takes the position that the FIS Doping Panel erred in its application of Article 10.2 by not taking into consideration the Panel's criticism of the conduct of the Polish Ski Association in its decision of 13 June 2005, citing the Association's "unsatisfactory (or even inconsistent or contradictory) explanations provided in the context of this case." The Association neither understood nor properly addressed the issue of anti-doping nor did it provide the proper information and support it should have provided to the athletes and other persons under its responsibility.

6.6 Neither this criticism of the FIS nor the Panel's acknowledgement that the Specified Substance had been taken by the Appellant in the course of medical treatment were properly applied in the FIS's subsequent re-evaluation of the sanction under Article 10.2. Whereas these

circumstances were irrelevant under the "strict liability regime" of Article 10.2, the FIS was remiss in not having taken them into consideration under the more "flexible sanction system" under Article 10.3.

"Whereas it may be discussed whether the said circumstances could have affected the fixed sanction regime under the Article 10.2 there may be no doubt that they should have been taken into consideration by the FIS while issuing its new decision on the basis of the Article 10.3 and measuring the size of the sanction. Unfortunately, they were completely ignored and sanction was imposed automatically at its maximum."

[underlining is the Appellant's]

6.7 In the view of the Appellant, in order to justify the maximum sanction under Article 10.3, the FIS, contrary to all of the said circumstances, should have proved that the Appellant committed the doping violation with "significant fault". The FIS failed to do this and by "cutting the corner automatically" imposed the maximum sanction as if it had been adjudicating the case within the framework of Article 10.2.

6.8. The Appellant closes her Amended Appeal Brief with the plea that the proper sanction for the Appellant

"is nullification of all results obtained in the U23 OPA Intercontinental Cup competition held on January 23, 2005, warning and reprimand and no period of ineligibility (factual suspension was executed during the period of the present proceeding).

7. Respondent's Answer of 5 September 2005

7.1 The Respondent does not contest the application of Article 10.3 in the case at hand, but challenges the Appellant's plea that the FIS Doping Panel erred in applying the maximum sanction without giving consideration to the circumstances which, in the opinion of the Appellant, should have led to a warning or reprimand without any period of ineligibility.

7.2 The Respondent takes the position that it is the task of the CAS to establish whether the facts in the given dispute have been correctly established and whether the FIS-Rules have been correctly applied. The Respondent states further:

"When, however, it comes to consider the effective result of a decision which is factually correct and formally within the rules but which depends upon what is finally an appreciation of the deciding body involving necessarily subjective elements, i.e. typically a decision on a quantum of sanction, the Respondent holds that CAS panels should not simply disregard the previous decision and apply their own appreciation, instead of the appreciation of the body having rendered the appealed decision."

7.3 In the view of the Respondent, Article 10.5 sets down general criteria which apply to the issue of whether a sanction should be eliminated or reduced when a doping violation (establishing the presence of a Prohibited Substance) has been established. With regard specifically to Article 10.3, the Respondent maintains that the language of the provision is clear in stating that before a period of ineligibility is imposed, the Athlete shall have the opportunity to establish the basis for eliminating or reducing (in the case of a second or third violation) the ineligibility

sanction as provided in Article 10.5. As a consequence, if an ineligibility sanction is applied for a first violation under Article 10.3, the same criteria, in the analysis of the Respondent, will apply for elimination or reduction of the sanction laid out in Article 10.5.

7.4 Having said the above, the Respondent takes the position that the Appellant failed to show that she used the Prohibited Substance for legitimate medical treatment purposes**.** The Respondent asserts that the TUEC, upon examination of the Appellant's medical certifications, held that the treatment prescribed was not an acceptable treatment. Moreover, if the Appellant testifies that she had no idea that specific authorization to use the substance was required, the abbreviated TUE ("ATUE") must have been issued to her on the initiative of her doctor. If the Appellant's claim to ignorance of the TUE system is credible, it remains to be explained why her doctor was aware of the system and, in particular, of the conditions under which an ATUE can be used. Oral ingestion does not fall under "non-systemic" use. The Respondent raises the question

> *". . .if the doctor of the Appellant was aware of TUE requirements and consequently issued an ATUE (even if a blatant mistake), how can it be explained that no ATUE was issued when the substance was first prescribed back in October 2004?"*

7.5 Having said the above, the Respondent concludes that the Appellant "has not established the circumstances justifying her use of the Prohibited Substance in a manner which satisfies the requirements set forth in Article 10.3". The FIS Doping Panel legitimately exercised its judicial discretion in applying Article 10.3 by referring to Article 10.5. If no reduction was warranted under Article 10.5 (2), there can be no grounds which argue against imposing the maximum sanction under Article 10.3 which is one year of ineligibility.

8. The Contestants' Supplemental Briefs and Final Petitions for Relief

8.1 The Appellant

8.1.1 On 15 September 2005, counsel for the Appellant requested the CAS Panel to permit a rebuttal to the Respondent's Answer of 5 September 2005. In making this request, the Appellant underlined

> *". . . my client's difficult procedural position - since the FIS did not provide a justification to the said decision - at the time of issuing we were forced to prepare the Appeal Brief without knowing the FIS reasoning now presented in your [the Respondent's] answer."*

8.1.2 In her supplemental brief dated 3 October 2005, the Appellant cites the fact that the amended FIS decision of 13 June 2005 did not show the reasoning for the reduced sanction imposed on the Appellant. This reasoning was first provided, in the view of the Appellant, in the Respondent's Answer. The Appellant further cites the FIS Doping Panel's erroneous application of Article 10.3 of the FIS-Rules, which does not allow, in the view of the Appellant, an automatic imposition of the maximum sanction of one year (in the case of a first violation).

8.1.3 In making this argument, the Appellant challenges the Respondent's position that Article 10.3 permits, with regard to first violations, an analogous application of Article 10.5. In the view of the Applicant, if it had been the primary intention of the FIS/WADA rule-makers to allow use of Article 10.5 in cases of first violation under the Specified Substances cases

under Article 10.3, then "for certain", the rule makers would have stated this analogous application "expressly and directly in the said regulation".

8.1.4 The Appellant takes the position that Article 10.3 clearly differentiates between 1st violation cases in which the adjudicating body must decide the measure of the sanction (from maximum to minimum), depending upon the circumstances of the case and the subjective fault or negligence of the accused athlete, and 2nd and 3rd violations in which the sanction is fixed at two years and lifetime ineligibility. According to the Appellant, only in cases involving 2nd and 3rd violations, in which an eligibility penalty is prescribed, is the accused athlete bound by the rules laid down in Article 10.5 in setting out his/her case for requesting the elimination or reduction of the ineligibility sanction before it is imposed.

8.1.5 In the present case, the Appellant bases her plea for nullification or reduction of the sanction on the following facts: (1) this is a first violation case; (2) the Appellant was misguided by the Polish Ski Association (as established in the FIS Doping Panel decision of 13 June 2005); (3) the Appellant's inability to choose a physician under the Polish health care system who understood the applicable rules; and (4) the fact that the Specified Substance could not have enhanced her athletic performance.

8.2 The Respondent

8.2.1 The Respondent filed a supplemental brief on 12 October 2005 in which it stated that the FIS Doping Panel never stated that the Appellant was "misled" by the Polish Ski Association. It merely stated that the national association "had not behaved appropriately during the proceedings and had thus demonstrated that it had not the correct understanding of its duties in connection with anti-doping".

8.2.2 Lastly, the Respondent challenges the claim that Dexamethason cannot be used as a doping substance in endurance sports. This substance was, as reported by the Respondent, "one of the banned substances found in possession of a cycle racer who kept a very impressive collection of typical doping substances".

8.2.3 The Respondent requests the CAS Panel to confirm the decision of the FIS Doping Panel as issued in the FIS press releases.

II. In Law

9. Jurisdiction

9.1 The jurisdiction of the CAS is derived from Article R27 of the Code of Sports-related Arbitration (the "Code"). This rule applies to an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies refer the appeal to the CAS. In the case at hand, Article 13.2.1 of the FIS-Rules provides that in cases arising from decisions made by the FIS based on violations of the FIS Anti-Doping Rules, the decision may be appealed exclusively to the Court of Arbitration for Sport in accordance with the provisions applicable before such court.

9.2 Pursuant to Article R57 of the Code, the Panel has "full power" to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.

10. Admissibility of the Appeal

10.1 The Appellant's Statement of Appeal was filed with the CAS on 30 June 2005, followed by the submission of her Appeal Brief on 13 July 2005. The filing of the Statement of Appeal was within the 21-day deadline following the date of receipt of the decision by the Appellant (Article 13.5 FIS-Rules) and the Appeal Brief was submitted within the 10-day period commencing with the expiry of the time limit for filing the appeal.

11. Applicable Law

11.1 Pursuant to Article R58 of the Code, the Panel is required to decide this 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."

11.2 In the case at hand, the Panel applies the law of Switzerland, as the law of the country in which the FIS maintains its domicile. The Panel also notes that the FIS-Rules to be applied are based on and are in conformity with the World Anti-Doping Code.

11.3 The Chief FIS Rules which find application in this Arbitration are the following:

*"**10.2 Imposition of Ineligibility for Prohibited Substances and Prohibited Methods**. Except for the specified substances identified in Article 10.3, the period of Ineligibility imposed for a violation of Article 2.1 (presence of a Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and Article 2.6 (Possession of Prohibited Substances and Methods) shall be:*

First violation: Two (2) years' Ineligibility.

Second violation: Lifetime Ineligibility.

However, the Athlete or Other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article 10.5.

***10.3 Specified Substances:** The Prohibited List may identify specified substances which are particularly*

susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents. Where an Athlete can establish that the Use of such a specified substance was not intended to enhance sport performance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: *At a minimum, a warning and reprimand and no period on Ineligibility from future Events, and at a maximum, one (1) year's Ineligibility.*

Second violation: *Two (2) years' Ineligibility.*

Third violation: *Lifetime Ineligibility*

However, the Athlete or Other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing (in the case of a second or third violation) this sanction as provided in Article 10.5.

For the validity of the "IOC/WADA List of Prohibited Classes of Substances and Prohibited Methods" until and including 31st December 2003, the Prohibited Class of Substance, 1.1 Stimulants is treated as described above for specified substances on the Prohibited List.

10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances.

10.5.1 *If the Athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited Substance or Prohibited method under Article 2.2 that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the antidoping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.2, 10.3 and 10.6.*

10.5.2 *This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers), Use of a Prohibited Substance or Prohibited Method under Article 2.2, failing to submit to Sample collection under Article 2.3, or administration of a Prohibited Substance or Prohibited Method under Article 2.8. If an Athlete establishes in an individual case involving such violations that he or she bears no significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less then one-half of the minimum period of Ineligibility otherwise applicable. … When a prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.*

11.4 In the case at hand, the FIS Doping Panel's decision of 13 June 2005 and the FIS-Rules applied both in that decision and in the amendment of that decision per press release of 13 July 2005 form the subject matter of this dispute. Because the Respondent maintains its domicile in Switzerland, the laws of Switzerland will apply only in a subordinate capacity.

12. The Merits of the Dispute

12.1 The Erroneous Decision of the FIS Doping Panel of 13 June 2005

12.1.1 The core of this dispute lies in the erroneous application of Article 10.2 FIS-Rules. The cause of this error need not be addressed by the Panel. The Respondent has stated merely that WADA brought the error to the attention of the Respondent which must have been either immediately prior to or in conjunction with the Appellant's submission of its Appeal Brief on 13 July 2005.

12.1.2 With regard to the error, the Panel wishes merely to note that the classification of glucocorticosteroids as a Prohibited Substance listed under Group S9 of the 2005 Prohibited List ("all glucocorticosteroids") when used in competition and also included under the list of Specified Substances ("all glucocorticosteroids") can indeed occasion a degree of confusion in applying Article 10.2 and 10.3 sanctions under FIS-Rules. In order to qualify as a "Prohibited Substance" in competition, the glucocorticosteroid under which the substance Dexamethason falls, must be administered orally, rectally, intravenously or intramuscularly. The substance can be used in these forms of administration, even in competition, but the athlete then requires a TUEC approval. Any other "route of administration" requires only an abbreviated TUE. Dermatological preparations are not prohibited.

12.1.3 Because "all glucocorticosteroids" are also classified as Specified Substances, a doping violation involving such substances may result in a reduced sanction, for example, only a "warning and reprimand", provided that the

" . . . athlete can establish that the use of such a Specified Substance was not intended to enhance sport performance . . . "

The differentiation between a Group S9 Prohibited Substance and a Specified Substance is not clear when the athlete uses the substance in any of the listed "routes of administration" without a TUEC approval. The clear categorization of the violation resulting from an unapproved administration of a glucocorticosteroid to either an Article 10.2 Prohibited Substance or Method or to an Article 10.3 Specified Substance is lacking without further explanation from WADA. Based on the submissions filed in this procedure, WADA apparently failed to comment on this obvious lack of clarity when they advised the FIS of their misapplication of the WADA Code.

12.1.4 In the instant case, the Panel is not required to rule on the classification of the substance, Dexamethason, as either a Prohibited Substance or a Specified Substance. WADA has instructed the Respondent that Dexamethason is a glucocorticosteroid and, although taken orally by the Appellant and without TUEC approval, is to be treated as a Specified Substance on the WADA List of Prohibited Substances. As a consequence of these instructions, the FIS Doping Panel decided to reconsider the doping offence as falling within the range of sanctions set out in Article 10.3 FIS-Rules.

12.1.5 In addition to the erroneous classification of Dexamethason as requiring an Article 10.2 sanction, the FIS Doping Panel subsequently erred in its unilateral and procedurally incorrect attempt to remedy the error. The Panel finds no support for the Respondent's contention that

". . . if no reduction was warranted under Article 10.5.2 [FIS-Rules], there is no reason not to apply the maximum available sanction under 10.3."

If the Respondent's view were to prevail, i.e., if the Article 10.5.2 criteria are to apply in the case of a first violation of Article 10.3, the offender would be deprived of his/her additional penalty abatement possibility, namely the avoidance of the ineligibility penalty in its entirety, by receiving just a "warning and reprimand" or the further reduction of the ineligibility penalty below the limits set out in Article 10.5 as the minimum sanction. In the view of the Panel, if an ineligibility sanction is to be considered in an Article 10.3,

"first violation" case, the penalty reduction possibility set forth in Article 10.5 cannot supersede, exclude or otherwise diminish the right also granted the athlete under Article 10.3 to plead against its imposition.

12.1.6 The grounds stated in the FIS-Doping Panel's decision of 13 June 2005 excluded any consideration of the Appellant's defence that she did not use the substance to enhance her sport performance. This error could not be cured by Respondent's Counsel addressing this issue (for the first time) in his answer to the CAS dated 5 September 2005. The Appellant was thus deprived of any consideration of the minimum sanction of "warning and reprimand". Paragraph 43 of that decision unequivocally states that

". . . the lesser sanctions provided in Article 10.3 of the Rules are not applicable in this case."

12.2 The Procedurally-Flawed Amended Decision

12.2.1 The FIS Doping Panel incorrectly denied the classification of Dexamethason as a Specified Substance in paragraph 43 of its 13 June 2005 decision. By amending the measure of the sanction and by expressly retracting the grounds supporting its decision under Article 10.2 FIS-Rules, the FIS Doping Panel deprived the Appellant of her fundamental right to raise her "non-enhancement" defence under Article 10.3 FIS-Rules in a new hearing. This was a case of first violation under that Rule.

12.2.2 Using the Respondent's own terms, neither the 13 June 2005 decision of the FIS Doping Panel nor its amended decision of 13 July 2005 are "factually correct and formally within the rules". There exists no element of "discretion" (the Respondent uses the term "appreciation") when an adjudicating body applies the wrong law because it erred in its evaluation of the facts. The decision cannot be permitted to stand. Article R57 of the Code grants the Panel "full power" to review the facts and the law; it may issue (1) a new decision which replaces the decision challenged or (2) it may annul the decision and refer the case back to the previous instance.

12.2.3 After due consideration by the Panel and in view of the unique circumstances of this case, the Panel has decided not to annul the decision and to refer the case back to the FIS Doping Panel, but rather to replace the decision of the FIS Doping Panel of 13 June 2005 as amended on 13 July 2005 in accordance with Article R57 of the Code. The Panel takes the view that an annulment of the 13 June 2005 decision and a remand of the case to the FIS Doping Panel is neither desired by the parties, as evidenced in their respective pleadings, nor does it lie in the interests of the parties at this time.

12.3 Application of the Sanctioning Rules in Article 10.2 and 10.3 FIS-Rules

12.3.1 With regard to the dispute in question, the Panel shares the view expressed by the Appellant that Articles 10.2 and 10.3 are based on "significantly different sanctioning systems". There can be no question that an Article 10.2 offence which is based upon the presence of a Prohibited Substance in an athlete's bodily specimen (Article 2.1 FIS-Rules) or the use or attempted use of a Prohibited Substance or Prohibited Method (Article 2.2 FIS-Rules) impose a far more restricted and rigid sanctioning regime upon the offender than the regime contained in Article 10.3. Under Article 10.2, only if the

athlete can establish in the individual case pursuant to Article 10.5.1 that he or she bears "No Fault or Negligence for the violation", can the applicable period of ineligibility be completely excluded. This provision will apply only in exceptional cases where the athlete can establish that he/she made every conceivable effort to avoid taking the Prohibited Substance. Alternatively, in individual cases in which the athlete can establish that he or she bears "No Significant Fault or Negligence", the period of ineligibility can be reduced to not less than one-half of the minimum period of ineligibility otherwise applicable under Article 10.5.2. Reduction below this minimum period is not permissible.

12.3.2 Article 10.3 FIS-Rules, on the other hand, provides the athlete with a significantly broader and more flexible range of penalty reduction possibilities in the event of an offence involving a Specified Substance. Under this Article, where the athlete can establish that the use of the substance was not intended to enhance sport performance, he or she has additional latitude to request a reduction of the penalty from a maximum one year term of ineligibility to a minimum of a "warning and reprimand".

12.3.3 With regard to the issue of whether an athlete, parallel to his or her Article 10.3 defence of "no enhancement of sport performance" may also plead "no Fault or Negligence" and/or "no significant Fault or Negligence" under Articles 10.5.1 and 10.5.2, it would appear to the Panel that the Article 10.5.1 defence of "no Fault or Negligence" must always be available to the accused athlete, regardless of whether an Article 10.2 or an Article 10.3 sanction is applicable. With regard to the Article 10.5.2 defence of "no significant Fault or Negligence", however, it would, in the view of the Panel, contradict the *ratio legis* of the "no enhancement" defence under Article 10.3, if the reduction limit under Article 10.5.2 FIS-Rules ("not less than one half of the minimum period") were to apply in parallel to the minimum "warning and reprimand" penalty for the first violation involving a Specified Substance.

12.4 The Appellant's Article 10.3 Defence

12.4.1 The fact that a doping violation has been committed, has not been contested by the Appellant. Being a member of the glucocorticosteroid family, oral use of Dexamethason without a TUE constitutes a violation of FIS Anti-Doping Rules which, in turn, are almost identical to the WADA Anti-Doping Rules.

12.4.2 To state, as the Respondent has done, that the Appellant has not established the circumstances justifying her use of Dexamethason in a manner which provides this right to a reduction of the penalty under Article 10.3 overlooks the fact that the Appellant has indeed disclosed and substantiated her defence that the substance was not intended to enhance performance. She submitted corresponding medical certifications to the FIS and in the hearing on 20 May 2005. These were submitted both to the TUEC and to the FIS Doping Panel as proof of use in alleviating an Achilles Tendon condition. Neither of these bodies, including the Respondent, have contested the authenticity or content of these certifications.

12.4.3 Moreover, neither the FIS Doping Panel nor the Respondent in its subsequent pleadings before the CAS have persuasively challenged the intent of the Appellant to use the substance to relieve pain and improve the Achilles' tendon condition. The TUEC

challenged merely the suitability of the substance as a "medical solution" and warned that continued use may be "detrimental to the athlete's long-term health." The Respondent's challenge to the Appellant's statement that Dexamethason cannot be used as a doping substance in endurance sports and Respondent's citing of "a cycle racer who kept a very impressive collection of typical doping substances", among them Dexomethason [sic], does not, in a substantiated manner, address the fact situation of this case.

12.4.4 In the view of the Panel, upon the Appellant's *prima facie* showing (by submitting medical certifications) that her use of the substance was intended to relieve an Achilles tendon condition, the burden of proof shifted to the Respondent to prove the contrary, namely that the Appellant used this substance as a doping agent. In order to provide this rebuttal, the FIS Doping Panel should have revoked its decision and called for a new hearing of the merits of the dispute on the basis of Article 10.3 FIS-Rules. By so doing, both the Appellant and the Respondent would have achieved a fair hearing of their positions.

12.5 The Appellant's Negligence

12.5.1 In reviewing the facts of this case, the Panel holds that the Appellant acted negligently in not inquiring whether the Dexamethason prescribed by her doctor fell within the category of "all glucocorticosteroids" either under Group S9 of the WADA Prohibited List, meaning that use of the substance, when administered orally and used in competition was prohibited unless approved by the TUEC or whether it qualified as a Specified Substance, on the Specified Substance list. The Appellant raises a defence of "no knowledge" with regard to the classification of Dexamethason and the procedures advised to obtain TUEC approval. The Appellant obviously had knowledge that the use of certain medications could cause problems; otherwise she would not have obtained the ATUE on 23 December 2004 from her physician. Her negligence lies in her failure to obtain the correct information on the requirements for exemption and the procedures to be followed. In this regard, the complicity of the Polish Ski Association has been correctly noted in the FIS Doping Panel Decision of 13 June 2005.

12.5.2 The duty of care resting upon any 22 year old athlete engaged in world-class competition requires, at the very least, that she provide her treating physician a copy of the 2005 Prohibited List and that she inquire with the doctor whether any of the medications and treatments which he/she prescribes contain substances contained on the list. The Appellant might well have done this, because the prescribing physician clearly declared "Dexamethason" as a "Prohibited Substance" on the abbreviated TUE form bearing a date of 23 December 2004. Had the Appellant and her doctor correctly read the "form of use" qualification regarding glucocorticosteroids under Group S9, they would have determined that an abbreviated TUE would not satisfy WADA and FIS anti-doping requirements, because the substance was ingested orally.

12.5.3 The negligence of the Appellant is also apparent in her neglecting to show the ATUE to FIS officials during the U23 OPA Intercontinental Cup Competition on 23 January 2005. If she indeed had the ATUE on her person upon completion of the event, the disclosure of that document, although not constituting TUEC approval as required for a Group S9 prohibited

substance, would have been another factor in favour of the Appellant in evaluating the level of her negligence.

12.5.4 Although the Panel makes no further comment with regard to the conduct of the Polish Ski Association in this matter, it wishes to underscore the statement of the FIS Doping Panel in its 13 June 2005 decision that the actions of the Polish Ski Association do not diminish the responsibility of the Appellant. Instructions with regard to TUE procedures were available to cross-country athletes as evidenced by the uncontested fact that three such Polish athletes had submitted three TUE applications to the FIS during the period in question.

12.5.5 After all of the above, the Panel holds that the one year period of ineligibility unilaterally imposed by the FIS Doping Panel has not only deprived the Appellant of her fundamental right to a fair hearing, but it also does not stand in fair and just proportion to the measure of her negligence. The Appellant was denied her right to defend herself against the charge of an Article 10.3 violation. Had she been granted a right to a hearing upon a reinstitution of the proceedings following receipt of WADA's instructions on or before 13 July 2005, she would have been able, in the view of the Panel, to lay out persuasive evidence that she had no intent to enhance her sport performance by taking the Dexamethason which her doctor had prescribed for her Achilles tendon condition. Her negligence derives not from any ignorance of the prohibited nature of the substance – she obtained an ATUE already on 23 December 2004; her negligence lies rather in her lack of knowledge and application of the proper TUE procedures for the Specified Substance in question. The measure of this negligence does not, in the view of the Panel, justify a one year term of ineligibility. The Panel holds that a period of ineligibility ending 8 December 2005 provides the fair and proportionate measure of sanction.

13. Costs

(…)

ON THESE GROUNDS

The Court of Arbitration for Sport rules that

1. The decision rendered by FIS Doping Panel on 13 June 2005 and amended by its announcement of 13 July 2005 shall be replaced by a *de novo* decision on the merits of this case.

2. The Appellant is disqualified from all individual results obtained in the U23 OPA Intercontinental Cup Competition held on 23 January 2005. The period of ineligibility to be imposed upon the Appellant shall commence on 23 January 2005 and shall end on 8 December 2005.

3. (…)

Lausanne, 8 December 2005

THE COURT OF ARBITRATION FOR SPORT

President of the Panel

John A. **Faylor**

Arbitrators

Olivier **Carrard** Maria **Zuchowicz**