



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2008/A/1461 Gatlin v/ USADA
CAS 2008/A/1462 IAAF v/ USATF & Gatlin

ARBITRAL AWARD

rendered by

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Prof. Dr. Kaj **Hobér**, Attorney-at-Law in Stockholm, Sweden

Arbitrators: Prof. Richard H. **McLaren**, Barrister-at-Law in London, Canada

Mr. Michele A.R. **Bernasconi**, Attorney-at-Law in Zurich, Switzerland

Ad hoc Clerk: Ms. Erin **McDermid**, Barrister-at-Law in London, Canada

in the arbitration CAS 2008/A/1461 between

MR. JUSTIN GATLIN, Pensacola, Florida, United States of America

Represented by Messrs. Maurice M. Suh, Daniel L. Weiss and Andrew Demko, Attorneys-at-Law
for Gibson, Dunn & Crutcher LLP, Los Angeles, California, United States of America

Appellant

v/

UNITED STATES ANTI-DOPING AGENCY, Colorado Springs, Colorado, United States of
America

Represented by Mr. William Bock, Attorney-at-Law in Colorado Springs, Colorado, United States
of America

Respondent

and the arbitration CAS 2008/A/1462 between

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS, Monaco

Represented by Messrs. Mark Gay and Huw Roberts and Ms. Sally Barnes, Solicitors of DLA Piper
UK LLP, London, United Kingdom

Appellant

v/

USA TRACK AND FIELD, Indianapolis, Indiana
Represented by Mr. Lamont Jones

First Respondent

MR. JUSTIN GATLIN, Pensacola, Florida, United States of America
Represented by Messrs. Maurice M. Suh, Daniel L. Weiss and Andrew Demko, Attorneys-at-Law
for Gibson, Dunn & Crutcher LLP, Los Angeles, California, United States of America

Second Respondent

I PARTIES

Mr. Justin Gatlin is a member of the USA Track & Field ("USATF"). He was the 2005 World and USA Outdoor 100m and 200m champion, as well as the 2004 Olympic 100m gold, 200m bronze, and 4x100m relay silver medallist at the Athens Summer Olympic Games.

The United States Anti-Doping Agency ("USADA") is the independent anti-doping agency for Olympic Sports in the USA. It is responsible for conducting drug testing and adjudication of positive test results pursuant to the USADA Protocol for Olympic Movement Testing ("USADA Protocol").

The International Association of Athletics Federations ("IAAF") is the world governing body for the sport of athletics. The IAAF is established as an association under the laws of Monaco.

USA Track & Field is the American national governing body for track and field, long-distance running and race walking in the USA, and is a member of the IAAF.

II FACTS

Mr. Gatlin was diagnosed with Attention Deficit Disorder ("ADD") at the age of nine, and has been taking prescribed medication to treat this condition ever since. He was prescribed Adderall, which is recognized as an appropriate treatment for this condition. Amphetamine is one of the substances in Adderall.

1. The 2001 Case

At his first USATF-sanctioned event, the USATF Junior National Championships on 16 and 17 June 2001, Mr. Gatlin was tested by USADA for the presence of prohibited substances. The testing resulted in a positive finding for amphetamines, which was a prohibited substance under the 2001 IAAF Rules.

On 24 August 2001, USADA notified Mr. Gatlin that it was recommending a two year sanction be imposed for the offense. Mr. Gatlin contested that recommended sanction, and the case (the "2001 Case") was heard before an American Arbitration Association panel ("the 2001 AAA Panel"). The 2001 AAA Panel stated that it "*will respect the process set forth in the IAAF rules and allow the IAAF Council the opportunity to assess the exceptional circumstances of this case first before they are addressed by this Panel*".¹ The Panel "*conditionally impose[d] the two-year minimum suspension set forth in the IAAF Rules*" and retained full jurisdiction over the 2001 Case. That jurisdiction was relinquished on application of Mr. Gatlin in connection with the present appeal in a decision made by the 2001 AAA Panel on 12 February 2008.²

On 22 May 2002, Mr. Gatlin submitted an application for early reinstatement to the IAAF Council. At its meeting of 3 July 2002, the IAAF Council granted the request on the basis that it believed that Mr. Gatlin had a genuine medical explanation for his positive result. In so doing, both the IAAF Council and the USATF press releases emphasized that he had committed a doping offense and that it would constitute a first offense for the purposes of any subsequent positive result and warned that

¹ The 2001 AAA Panel's decision, section II, para. 4.

² Exhibit 14 to Mr. Gatlin's Appeal Brief.

a lifetime ban would result from a further infraction of the IAAF Rules. The effect of this reinstatement was that Mr. Gatlin served a provisional suspension of almost one year.

2. The 2006 Case

On 22 April 2006 at the Kansas City Relays, Mr. Gatlin was requested to provide a urine sample for the purposes of doping control. Following analysis at the WADA accredited laboratory of UCLA, the sample was found to contain exogenous testosterone, or its precursors, which is a prohibited substance under the 2006 IAAF Rules.

On the foregoing finding, the case was heard before an American Arbitration Association panel, (the “2006 AAA Panel”). On 31 December 2007, the 2006 AAA Panel issued a decision in which the majority concluded that Mr. Gatlin had committed a doping offense by reason of the use of exogenous testosterone in 2006. It was found that Mr. Gatlin *“failed to sustain his burden of proof to show how the Prohibited Substance entered his body, in order to rely upon a claim of no fault, or no significant fault [...]”*.³

The doping violation was found to be Mr. Gatlin’s second doping violation for which the 2006 AAA Panel concluded that a four year period of ineligibility was appropriate commencing on 26 May 2006 being 30 days following the date on which his urine sample was taken. All competition results and awards occurring after 22 April 2006 (the date the sample was obtained) through to the date of the award of the 2006 AAA Panel were retroactively cancelled.

III Proceedings before the CAS

On 21 January 2008, Mr. Gatlin filed a Notice of Appeal with the CAS against the decision reached by the 2006 AAA Panel (the “Appealed Decision”). USADA is the Respondent to this appeal (CAS 2008/A/1461). At the same time, Mr. Gatlin requested an extension of time to file the appeal brief. Mr. Gatlin also requested that Mr. Michele Bernasconi be appointed as arbitrator.

On 24 January 2008, the IAAF filed a Notice of Appeal against the same decision reached by the 2006 AAA Panel. The Respondents to this appeal (CAS 2008/A/1462) are USATF and Mr. Gatlin. The IAAF requested that Prof. Richard McLaren be appointed as arbitrator.

On 30 January 2008, after having learned that the IAAF had appealed the same award that was the subject of Mr. Gatlin’s appeal, USADA explained that it had no objections to the appointment of Prof. Richard H. McLaren as the other party-appointed arbitrator.

Following a recommendation from the CAS in a letter of 31 January 2008, the parties to the respective appeal agreed to consolidate the two appeals, in accordance with Article R50 of the Code of Sports-related Arbitration (the “CAS Code”).

On 4 February 2008, Mr. Gatlin challenged the appointment of Prof. Richard H. McLaren as arbitrator, on the basis of Prof. Richard H. McLaren allegedly having had contacts with Mr. Gatlin’s previous counsel regarding the potential strategy before the AAA.

³ The 2006 AAA Panel’s decision, p. 2.

On 21 February 2008, after the parties had received information from Prof. Richard H. McLaren concerning his contacts with Mr. Gatlin's previous counsel, Mr. Gatlin withdrew his challenge to the appointment of Prof. Richard H. McLaren as arbitrator.

On 25 February 2008, Mr. Gatlin filed his Appeal Brief, including a witness list.

On 7 and 10 March 2008, the CAS informed the parties that the Panel was constituted as follows: Prof. Dr. Kaj Hobér as president, Prof. Richard H. McLaren as co-arbitrator nominated by the IAAF and USADA, and Mr. Michele Bernasconi as co-arbitrator nominated by Mr. Gatlin.

On 7 April 2008, Mr. Gatlin filed seven witness statements.

On 18 April 2008, the IAAF filed its Answer Brief together with five witness statements. On the same date, USADA informed that a separate submission by USADA would be unlikely to materially aid the Panel, and that USADA therefore adopted paragraphs 2 through 3, and 6 through 78 of the IAAF's Answer Brief.

On 5 May 2008, Mr. Gatlin filed a Reply Brief.

On 16 May 2008, the IAAF filed its Response.

A hearing was held in New York City on 28 and 29 May 2008. Save for USATF, all parties were present at the hearing. At the conclusion of the hearing, the parties confirmed that they had no objections to raise regarding their right to be heard and that they had been treated equally and fairly in the arbitration proceedings. After the hearing, the Panel deliberated and unanimously came to the disposition found in this Award. That disposition was notified to the parties by the CAS on 6 June 2008.

IV The Positions of the Parties and Relief Sought

The Panel considers it unnecessary to set out the submissions of the parties in detail or to make verbatim quotes. The Tribunal will make references to the parties' submissions by footnote where applicable.

Mr. Gatlin seeks an order:⁴

- (i) that the Appealed Decision be reversed such that the Panel issue a finding that, even if Mr. Gatlin committed an anti-doping rule violation in 2006, it is to be considered a first offense and punishable by, at most, a two-year sanction starting in May 2006;
- (ii) such further relief as the Panel may deem necessary to effect the relief sought above.

In the alternative, Mr. Gatlin seeks an order:

that the Appealed Decision be reversed such that the Panel issue a finding that, even if Mr. Gatlin committed an anti-doping rule violation and it is considered a second offense, but in light of the circumstances of both offenses, a two-year sanction starting in May 2006 be imposed.

⁴ Mr. Gatlin's Appeal Brief, Section B.

The IAAF requests that the Panel decide:⁵

- (i) whether exceptional circumstances exist in Mr. Gatlin's case such that the period of ineligibility imposed may be reduced below eight years;
- (ii) whether, in proper compliance with IAAF Rules, the start date of Mr. Gatlin's ineligibility should be eight years from the date of the CAS Panel's decision, less any period of suspension already served by the athlete.

The IAAF opposes Mr. Gatlin's requests for relief, and submits that Mr. Gatlin has committed a second anti-doping rule violation and must be declared ineligible for life. The IAAF also submits that the sanction must not be reduced below eight years of ineligibility.

As noted in Section III, USADA has adopted the larger part of the IAAF's Answer Brief, which means that USADA's position is the same as that of the IAAF.

V Jurisdiction

Article R47 of the CAS Code states:

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.

The arbitration resulting in the Appealed Decision was held in accordance with, *inter alia*, Article 10 of the USADA Protocol, which also provides that "*the final decision by the AAA [...] arbitrator(s) may be appealed to the Court of Arbitration for Sport*".

The 2006 IAAF Rule 60 provides the following:

9. All decisions subject to appeal under these Rules, whether doping or non-doping related, may be appealed to CAS in accordance with the provisions set out below. All such decisions shall remain in effect while under appeal, unless determined otherwise (see Rules 60.23-24 below).

10. The following are examples of decisions that may be subject to appeal under these Rules:

(a) Where a Member has taken a decision that an athlete, athlete support personnel or other person has committed an Anti-Doping Rule violation.

[...]

(c) Where a Member has taken a decision that an athlete, athlete support personnel or other person has not committed an Anti-Doping Rule violation.

⁵ The IAAF's Statement of Appeal, para. 1.4.

11. In cases involving International-Level athletes (or their athlete support personnel), or involving the sanction of a Member by the Council for a breach of the Rules, whether doping or non-doping related, the decision of the relevant body of the Member or the IAAF (as appropriate) may be appealed exclusively to CAS in accordance with the provisions set out in Rules 60.25-60.30 below.

[...]

13. In any case involving International-Level athletes (or their athlete support personnel), the following parties shall have the right to appeal a decision to CAS:

(a) the athlete or other person who is the subject of the decision being appealed;

(b) the other party to the case in which the decision was rendered;

(c) the IAAF;

The Panel finds that the USADA Protocol, as well as the IAAF Rules, create jurisdiction for the Panel to try the present appeals.

VI Applicable law

Article R58 of the CAS Code provides the following:

The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the Parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

Considering that Mr. Gatlin is a member of USATF, which in turn is a member of the IAAF, the IAAF Rules are the applicable regulations in this case. This is also stipulated by the 2006 IAAF Rule 60.28, which provides:

In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Procedural Guidelines). [...]

The Appealed Decision concerns a doping offense that occurred in 2006, meaning that the IAAF Rules in force in 2006 are applicable to this case. Unless expressly indicated otherwise, the term IAAF Rules in this Award refers to the 2006 IAAF Rules.

In their respective submissions and during the hearing, the parties discussed whether the World Anti-Doping Code (the "WADA Code") is applicable. For the following reasons, the Panel finds that the WADA Code is not applicable to this case.

It is stated in the introduction to Part 1 of the WADA Code, that the WADA Code "*does not replace, or eliminate the need for, comprehensive anti-doping rules adopted by*" organizations such as the IAAF. The WADA Code does not apply as between a signatory organization and its members, unless the signatory organization has expressly incorporated the WADA Code into its own relevant rules. Even though some provisions of the WADA Code have been incorporated into the 2006 IAAF

Rules, the WADA Code as a whole has not been expressly incorporated. Therefore, the WADA Code is not directly applicable to this case.

VII Merits

None of the parties has contested the finding in the Appealed Decision that Mr. Gatlin's positive test in 2006 constitutes an anti-doping rule violation (the "2006 Violation"). This Panel will therefore not try the merits of the 2006 Violation. Instead, the main issue before this Panel is what ought to be the sanction for the 2006 Violation. The other important issue is what ought to be the start date for the sanction.

1. What is the Appropriate Sanction for the 2006 Violation?

As mentioned above, this case is about the appropriate sanction for the 2006 violation. Answering this question requires analysis of three further issues, viz., (i) is the 2006 violation a second violation?; (ii) does the Americans with Disabilities Act apply, and (iii) are there any grounds for reducing the sanction? These issues, and the sub-issues raised by them, will be discussed in the following.

1.1 Is the 2006 Violation a Second Violation?

1.1.1 The Statutory Language

The 2006 IAAF Rule 40.1(a)(i)-(ii) provides that the sanction for having committed a first violation is ineligibility for a minimum period of two years, and that the sanction for a second violation is ineligibility for life. The first question for this Panel to address in this respect is therefore whether the 2006 Violation is a first or a second violation.

The 2001 IAAF Rule 55, which was applicable to the 2001 Case, provided that:

1. *Doping is strictly forbidden and is an offence under IAAF Rules.*
2. *The offence of doping takes place when either:*
 - (iii) *a prohibited substance is found to be present within an athlete's body tissues or fluids; or*
 - (iv) *an athlete uses or takes advantage of a prohibited technique or*
 - (v) *an athlete admits having used or taken advantage of a prohibited substance or a prohibited technique.*

[...]

It is uncontested that amphetamines were found in the samples provided by Mr. Gatlin on 16 and 17 June 2001, and that amphetamine was a prohibited substance under the 2001 IAAF Rules. It therefore follows from the wording of the 2001 IAAF Rules that the 2001 Case was a doping offense.

Even though the 2006 IAAF Rules speak of anti-doping rule violations, and not of doping offenses, an anti-doping rule violation under the 2006 IAAF Rule 40 a fortiori includes established doping

offenses under previous IAAF Rules. Consequently, the explicit wording of the 2001 and 2006 IAAF Rules, respectively, suggests that the 2006 Violation was a second violation.

1.1.2 The Effect of the Reinstatement

Mr. Gatlin was reinstated by the IAAF after the 2001 AAA Panel's decision was issued. It has been argued by Mr. Gatlin that the reinstatement meant that the 2001 AAA Panel's decision no longer had any effect, such that it in fact became a nullity.

It is clear that the IAAF Council's decision to reinstate Mr. Gatlin was based on its understanding that he had committed a first doping offense. Indeed, Professor Arne Ljungqvist states:

*"My proposal to the Council was to reinstate Mr Gatlin with immediate effect whilst making it clear that, as this was to be considered as a first offence, if he tested positive again, he would be banned for life in accordance with IAAF Rules. Although I recall that some Council Members may have disagreed with me and felt that he should not be reinstated, my advice was followed by the vast majority and the decision was duly taken to reinstate him."*⁶

It follows from Professor Ljungqvist's statement that it was not the intention of the IAAF Council that the early reinstatement of Mr. Gatlin should render the 2001 AAA Panel's decision a nullity. Indeed, the Panel cannot find any ground for reaching such a conclusion.

1.1.3 Was Mr. Gatlin Sanctioned for the 2001 Case?

Mr. Gatlin argues that the 2001 Case cannot be used to enhance any sanction imposed for the 2006 Violation, because Mr. Gatlin was never sanctioned for the 2001 Case. With respect, the Panel is unable to agree with this position.

The absence of a sanction would not necessarily mean that no anti-doping rule violation has occurred in accordance with the 2006 IAAF Rule 40. A sanction is not a prerequisite for a violation; it is rather the other way round.

The Panel finds that Mr. Gatlin was in fact sanctioned for the 2001 Case. As stated in the 2001 AAA Panel's decision, *"the Panel determines that Mr. Gatlin has served a period of suspension prior to this Panel's declaration of ineligibility"*.⁷ It is therefore clear that the 2001 AAA Panel decided that Mr. Gatlin had committed a doping offense and that he was sanctioned for it.

1.1.4 Was the 2001 Case Properly Adjudicated?

According to Mr. Gatlin, the 2001 Case was never adjudicated by an independent, impartial, and fair review body, and therefore cannot be considered to be the equivalent of an anti-doping rule violation subjected to the complete result management process.

The Panel does not agree with Mr. Gatlin's argument. It does not follow that merely because the hearing may not have taken the usual form of an oral hearing with opening and closing arguments, and witness testimony, there was no final adjudication on the merits. The 2001 AAA Panel was constituted in the same manner and under the same rules, as amended, as was the 2006 AAA Panel. After having reviewed the evidence presented to it, the 2001 AAA Panel came to the conclusion that

⁶ Witness Statement of Professor Arne Ljungqvist, p. 9, para. 24.

⁷ The 2001 AAA Panel's decision at section II, para. 8.

a doping offense had been committed. It then proceeded to act in accordance with the applicable rules of the IAAF as they were at that time. Also, it may be noted that Mr. Gatlin at no time until now has questioned that the 2001 Case was properly adjudicated.

Mr. Gatlin also argues that the decision of the 2001 AAA Panel was provisional in nature and therefore it was never a final and binding decision. The Panel is unable to accept this position. Mr. Gatlin admitted by virtue of the Agreed Stipulation that the 2001 AAA Panel imposed a sanction in accordance with the 2001 IAAF Rules. The fact that the 2001 AAA Panel imposed it on a "conditional" basis does not make it provisional. It was binding and it was final. This was the basis on which Mr. Gatlin was able to apply to the IAAF for an early reinstatement.

1.1.5 Was Mr. Gatlin at Fault in the 2001 Case?

Mr. Gatlin argues that by failing to address fault, the 2001 Case cannot be used to enhance the sanction for the 2006 Violation. The Panel must disagree with this argument. The 2001 IAAF Rules did not require an investigation or finding of fault on the part of the athlete. Rather, a doping offense under the 2001 IAAF Rules, including Rule 55, was a strict liability offense. Fault is therefore not a part of determining whether or not an offense was committed.

Mr. Gatlin also argues that this Panel should find that he was not at fault for the doping offense in the 2001 Case, and determine whether or not there was general negligence on Mr. Gatlin's part. The Panel recognizes that there are circumstances in the 2001 Case that would potentially have a bearing on the issue of fault, if that issue were to be determined. The Panel finds, however, that it has no jurisdiction to make an assessment of fault with respect to the 2001 Case. As noted above, the 2001 Case was properly adjudicated and resulted in a binding and final decision, which was never appealed. Accordingly, there are no grounds for this Panel to review and assess the merits of the 2001 Case.

1.1.6 Conclusion with regard to the Second Violation Issue

As noted above, the explicit wording of the applicable rules shows that the 2001 Case must be regarded as a first anti-doping rule violation for the purposes of the 2006 IAAF Rule 40. The 2001 Case was properly adjudicated and it was found that a doping offense had been committed, as a result of which Mr. Gatlin was sanctioned.

Furthermore, it is clear that Mr. Gatlin was well aware that his first violation constituted a doping offense. Firstly, the Agreed Stipulation entered into on 22 April 2002 between Mr. Gatlin and USADA, states in relevant part at paragraph 7: *"The parties agree that Mr. Gatlin's positive test result is technically a doping violation under the IAAF Rules."* Secondly, the IAAF press release dated 3 July 2002, states in relevant part: *"However, Council stressed that Gatlin HAD committed a doping offence and issued a warning that any repetition of his positive result would result in a life ban."* [Emphasis in original] Thirdly, in 2003, Mr. Gatlin stated that *"I accepted the suspension. I just broke the rules which were the rules."*⁸

Consequently, this Panel concludes that the 2006 Violation was Mr. Gatlin's second violation.

⁸ Mr. Gatlin confirmed this statement in cross-examination before the 2006 AAA Panel (Exhibit 30 to the IAAF's Answer Brief, p. 479 of the transcript), as well as in cross-examination before this Panel.

1.2 Does the Americans with Disabilities Act Apply?

Mr. Gatlin argues that to use the 2001 offense to enhance the sanction for the 2006 Violation would have the effect of forcing USATF to violate the Americans with Disability Act ("ADA"). Although Mr. Gatlin concedes that the CAS is not bound by the ADA, he argues that, nevertheless, the CAS cannot impose a sanction that would have the effect of forcing an American entity to violate American law.

While the Panel accepts that ADD is a disability for the purposes of the ADA, it cannot find that imposing a sanction against Mr. Gatlin in the circumstances of this case constitutes a violation of the ADA.

The Panel agrees with the IAAF's argument that there was no discrimination on the basis of a disability in this instance. The Panel is of the view that in order to constitute a violation, Mr. Gatlin must have been prevented from competing by virtue of his disability. He was not prohibited from competition by virtue of his disability, nor is his disability in any way related to his ability to compete. The Panel notes from Mr. Gatlin's own submissions that "[h]is ADD affected his ability to focus in the classroom and frustrated his attempts to study and complete other assignments out of the classroom" [Panel's emphasis].⁹ While Mr. Gatlin's disability admittedly put him at a disadvantage in the classroom, it in no way put him at a disadvantage on the track. Indeed, until recently, he was the reigning 100m Olympic champion.

Furthermore, the Panel finds that Mr. Gatlin has failed to demonstrate what conduct on the part of either the IAAF or the USATF would be prohibited by the ADA. At no time prior to the 2001 positive test did Mr. Gatlin notify USATF of his learning disability nor did he at any time make a request of either USATF or the IAAF for accommodation of his disability. It is therefore difficult to understand how Mr. Gatlin was in any way discriminated against by the IAAF or the USATF on the basis of his disability.

It is the view of this Panel that there was no duty for the IAAF, or for the USATF, to accommodate Mr. Gatlin's disability. The IAAF and the USATF cannot be required to modify their doping rules to accommodate a learning disability that has no effect whatsoever on an athlete's ability to compete. However, even in the event that a duty to accommodate arose, the Panel finds that this duty was met. Mr. Gatlin was never prevented from taking his medication out of competition. In this case Mr. Gatlin failed to discontinue the use of his medicine in time for it to clear his system so as not to test positive.

It follows from the above that the ADA does not prevent this Panel, and did not prevent the 2001 and 2006 AAA Panels, from imposing a sanction on Mr. Gatlin.

1.3 Are there any grounds for reducing the sanction?

The Panel has concluded above that the 2001 Case was a first violation. Consequently, the 2006 Violation was a second violation. The Panel has also concluded that the ADA does not prevent it from imposing a sanction on Mr. Gatlin which takes account of the first violation. The task before this Panel is now to decide what sanction is to be imposed on Mr. Gatlin for his anti-doping rule violation in 2006. When assessing the sanction, the Panel must apply the IAAF Rules in force at the time of the offense, in this case the 2006 IAAF Rules. Pursuant to the 2006 IAAF Rule 40, the sanction for a second violation is ineligibility for life. Accordingly, the starting point for this Panel

⁹ Mr. Gatlin's Appeal Brief, p. 35.

when assessing the sanction to be imposed is ineligibility for life. It is to be noted that, for the purposes of these proceedings, the IAAF has accepted that an eight-year period of ineligibility is the equivalent of ineligibility for life.

It is the position of Mr. Gatlin that in the event the 2001 Case is considered a first violation, the four-year sanction imposed by the 2006 AAA Panel should be reduced to two years. The IAAF requests that the four-year sanction be increased to eight years, being the equivalent of ineligibility for life.

1.3.1 Did the 2001 Case Involve a Specified Substance?

Mr. Gatlin argues that Adderall, an amphetamine, should be regarded as a specified substance under articles 10.3 and 10.6.3 of the WADA Code which are mirrored in the 2006 IAAF Rules 40.5 and 40.8. If Adderall is to be regarded as a specified substance, then, pursuant to the mentioned rules, the period of ineligibility for Mr. Gatlin's violation would be a minimum of two years and a maximum of three years.

The Panel is unable to accept Mr. Gatlin's argument for two reasons. Firstly, Mr. Gatlin's first offense, *i.e.* the offense connected to the use of Adderall, was under the 2001 IAAF Rules, which did not provide for specified substances. Consequently, at the time of Mr. Gatlin's offense, the 2001 IAAF Rules contained no such qualification. The proper approach is to examine the 2001 IAAF Rules as they existed at the time of the offense. Amphetamines were considered to be of a serious nature and attracted the most serious of consequences for use.

Secondly, it follows from the 2006 IAAF Rule 40.5, that in order to be characterized as a specified substance, the substance in question must be identified as such in the prohibited list. Neither amphetamines, nor the medicine Adderall, are characterized as a specified substance under the 2006 IAAF Rules. The role of this Panel is as adjudicator and not legislator. The Panel cannot read into the IAAF Rules, or the WADA Code for that matter, something, which is not there. Furthermore, this Panel is of the view that the drafters purposely kept amphetamines off the specified substances list. The Panel can see no legitimate reason why it should read amphetamines in. Accordingly, the argument relating to specified substances cannot be used to justify a reduced sanction.

1.3.2 Are there any Exceptional Circumstances Justifying a Reduction of the Sanction?

Mr. Gatlin argues that any sanction should be reduced on the basis that there are exceptional circumstances justifying such a reduction. Mr. Gatlin argues that he qualifies for a reduction since he has provided substantial assistance to relevant authorities in the fight against doping, and that the circumstances surrounding the 2001 Case are such that a reduction is warranted.

The 2006 IAAF Rule 38.11-12 provides the following:

11. If the relevant tribunal of the Member considers that an anti-doping rule violation has been committed, prior to the imposition of any period of ineligibility, the athlete shall have the opportunity to establish that there are exceptional circumstances in his case justifying a reduction of the sanction otherwise applicable under Rule 40.1 below.

Exceptional Circumstances

12. All decisions taken under these Anti-Doping Rules regarding exceptional circumstances must be harmonised so that the same legal conditions can be guaranteed for all athletes, regardless of their nationality, domicile, level or experience.

Consequently, in considering the question of exceptional circumstances, the following principles shall be applied:

- (i) it is each athlete's personal duty to ensure that no prohibited substance enters his body tissues or fluids. Athletes are warned that they shall be held responsible for any prohibited substance found to be present in their bodies (see Rule 32.2(a)(i) above).*
- (ii) Exceptional circumstances will exist only in cases where the circumstances are truly exceptional and not in the vast majority of cases.*
- (iii) Taking into consideration the athlete's personal duty in Rule 38.12(i) above, the following will not be regarded as cases which are truly exceptional: an allegation that the prohibited substance or prohibited method was given to an athlete by another person without his knowledge, an allegation that the prohibited substance was taken by mistake, an allegation that the prohibited substance was due to the taking of contaminated food supplements or an allegation that medication was prescribed by athletes support personnel in ignorance of the fact that it contained a prohibited substance.*
- (iv) Exceptional circumstances may however exist where an athlete has provided substantial evidence or assistance to the IAAF, his National Federation or other relevant body which has resulted in the IAAF, his National Federation or other relevant body discovering or establishing an anti-doping rule violation by another person including possession (under Rule 32.2(f),) trafficking (under Rule 32.2(g)) or administration to an athlete (under Rule 32.2(h)).*

First, the Panel turns to the issue of substantial assistance. While the Panel finds that Mr. Gatlin did provide assistance to authorities and offered himself up readily, the Panel is unable to equate his level of assistance to that of being "substantial."

Also, the 2006 IAAF Rule 38 is clear in that in order to avail oneself of a reduction as a result of substantial assistance, the athlete's assistance must lead to the discovery or establishment of an anti-doping rule violation by another person. This is not what happened in the present case. While Mr. Gatlin may have offered as much assistance as he reasonably could have under the circumstances, this assistance did not lead to the discovery or establishing of any anti-doping rule violation by any person.

Secondly, the Panel turns to the issue of whether there exist other exceptional circumstances in this case. The Panel recognizes the importance of harmonization, and expressly agrees with the principle of not acknowledging exceptional circumstances in a vast majority of cases. Also recognizing, however, the huge impact that the sanctions imposed under the IAAF Rules may have on the life of an athlete, the Panel finds that the IAAF Rules leave room for discretion and must not be applied mechanically and rigidly. For the reasons set out below, the Panel finds that the totality of the circumstances surrounding the 2001 Case are such that they constitute exceptional circumstances for the purposes of determining the period of ineligibility. The Panel therefore decides that Mr. Gatlin's period of ineligibility is to be four years.

As established above, the 2001 Case was properly adjudicated and resulted in a finding of a first violation. This Panel cannot, and does not reopen or retry the 2001 Case. However, since the sanction to be imposed is based on the existence of two violations, one of which is the result of the

2001 Case, the circumstances surrounding both violations must be taken into account when determining whether there are exceptional circumstances.

It is uncontested that the positive test in the 2001 Case was caused by Mr. Gatlin taking his prescribed medication, Adderall. The Panel has no doubt that Mr. Gatlin took Adderall with the sole intention to treat his ADD condition and improve his academic performance, and not with the intention to improve his athletic performance. Indeed, it is questionable whether Mr. Gatlin's athletic performance was at all improved by the medication.

The 2001 AAA Panel concluded that there were “*unique circumstances*” in Mr. Gatlin's case, and that Mr. Gatlin “*certainly [was] not a doper*”. It also concluded that “*the seriousness of Mr. Gatlin's conduct and his personal culpability are open to dispute and are certainly proportionately very much less than other athletes who would receive a two-year suspension under the same IAAF rules*”.¹⁰

On the basis of the above, the 2001 AAA Panel decided on a two-year sanction primarily, it would seem, because this would enable the IAAF to reinstate Mr. Gatlin. To this Panel's understanding, it was the intention of the involved parties in 2001 to get Mr. Gatlin “back on track” as soon as possible, and a two-year sanction followed by a reinstatement would be the quickest and smoothest way to do that. Indeed, shortly after the decision in the 2001 Case, Mr. Gatlin was reinstated by the IAAF.

The Panel agrees with the 2001 AAA Panel that Mr. Gatlin's conduct and personal culpability in 2001 can hardly be said to be equal to that of an athlete who has intentionally used performance-enhancing substances to improve his or hers athletic performance. To impose the same two-year sanction on Mr. Gatlin as on other athletes, without knowing that Mr. Gatlin was to be reinstated, would have been disproportionate in the view of the 2001 AAA Panel. In very much the same way, a lifetime ban – even if understood as an eight-year ban – for the 2006 Violation would in our view be disproportionate.

2. What is the Correct Date for Commencement of the Sanction?

The 2006 IAAF Rule 40.9 provides:

In any case where a period of ineligibility is to be imposed under this Rule, the period of ineligibility shall start on the date of the hearing decision providing for ineligibility or, if the hearing is waived, on the date the ineligibility is accepted or otherwise imposed. When an athlete has served a period of provisional suspension prior to being declared ineligible (whether imposed or voluntarily accepted), such a period shall be credited against the total period of ineligibility to be served.

The 2006 AAA Panel ruled without reference to any IAAF Rule that the sanction was to commence 30 days after the sample collection on 25 May 2006. This Panel does not agree.

The 2006 IAAF Rule quoted above provides for two possible commencement dates for a period of ineligibility. The sanction is to commence on the date of the hearing decision. However, where a period of provisional suspension has been served prior to the athlete being declared ineligible, then such period shall be credited against the total period of ineligibility. Mr. Gatlin accepted a

¹⁰ The 2001 AAA Panel's decision, section II, para. 1-2.

provisional suspension on 25 July 2006, which is prior to him being declared ineligible. The commencement date for Mr. Gatlin's period of ineligibility is thus 25 July 2006.

VIII Costs

Article R65 of the CAS Code provides:

Disciplinary cases of an international nature ruled in appeal

R65.1 Subject to Articles R65.2 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 the CAS.

R65.2 Upon submission of the statement of appeal, the Appellant shall pay a minimum Court Office fee of Swiss francs 500.— without which the CAS shall not proceed and the appeal shall be deemed withdrawn. The CAS shall in any event keep this fee.

R65.3 The costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

The Panel finds that each party shall bear its own costs.

ON THESE GROUNDS

The Court of Arbitration for Sport hereby rules:

1. The appeal filed by Mr Justin Gatlin on 21 January 2008 is rejected.
2. The appeal filed by the IAAF on 23 January 2008 is upheld in part.
3. The decision of the American Arbitration Association {"the AAA Panel"} dated 31 December 2007 is amended by altering the commencement date of the period of ineligibility from 26 May 2006 to 25 July 2006 when Mr Justin Gatlin voluntarily accepted a provisional suspension.
4. The decision of the AAA Panel is further amended by cancelling all of Mr. Gatlin's competition results from the date of the sample collection on 22 April 2006 until the commencement of the period of ineligibility set out in paragraph 3 above.
5. The balance of the decision of the AAA Panel will remain unaltered and the period of ineligibility of four years is confirmed.
6. The award is pronounced without costs, except for the Court Office fees already paid by the Appellants and to be retained by the CAS.
7. Each party shall bear its own costs.

Done in Lausanne, 10 September 2008

The operative part of the award was notified on 6 June 2008

THE COURT OF ARBITRATION FOR SPORT

Prof. Dr. Kaj **Hobér**
President of the Panel

Prof. Richard H. **McLaren**
Arbitrator

Mr. Michele **Bernasconi**
Arbitrator