CAS 2004/O/649

AWARD

rendered by

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President : L. Yves **Fortier**, CC, QC, Barrister in Montreal, Canada
Arbitrators : Christopher L. **Campbell**, Esq., Attorney-at-law in Fairfax, United States
Peter **Leaver**, QC, Barrister in London, United Kingdom

Ad hoc Clerk : Stephen L. **Drymer**, Attorney-at-law in Montreal, Canada

In the arbitration between:

UNITED STATES ANTI-DOPING AGENCY

Claimant

Represented by Travis T. Tygart, Esq., Director of Legal Affairs, *United States Anti-Doping Agency*, and by Richard R. Young, Esq. and Matthew S. Barnett, Esq., of the law firm *Holme Roberts & Owen, LLP*

and

CHRYSTE GAINES

Respondent

Represented by Cameron A. Myler, Esq. and Brian Maas, Esq., of the law firm *Frankfurt Kurnit Klein & Selz, PC*

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I. INTRODUCTION

1. This Award is the culmination of an exhaustive process of briefings and hearings, discussions amongst the parties, and numerous interventions by the Panel.

2. At issue is the charge by the United States Anti-Doping Agency ("USADA") that Respondent violated applicable IAAF anti-doping rules, notwithstanding that she has not tested positive in any in-competition or out-of-competition drug test. As such, the issues raised in this case are, if not wholly novel, certainly not in the nature of issues arising in a typical "adverse analytical finding" (or "analytical positive") doping case. However, as explained more fully below, and to quote the Panel in the case of *USADA* v. *Michelle Collins* (another non-analytical positive case that arose in similar circumstances) "the straightforward application of legal principles to essentially undisputed facts leads to a clear resolution of this matter."

3. USADA seeks a four-year sanction of Chryste Gaines for participating in a wide-ranging doping conspiracy allegedly implemented by the Bay Area Laboratory Cooperative ("BALCO"). USADA charges that, for a period of several years, Ms. Gaines used various performance-enhancing drugs provided by BALCO. As noted, Ms. Gaines has never had a single drug test found to be a positive doping violation, but USADA's charges are based, in part, on all of the urine tests at IOC-accredited and non-IOC-accredited laboratories that she has had in recent years. USADA also relies, among other things, on documents seized by the U.S. government from BALCO that have been provided to USADA; statements made by BALCO officials; and other documents.

4. According to USADA, BALCO was involved in a conspiracy the purpose of which was the distribution and use of doping substances and techniques that were either undetectable or difficult to detect in routine drug testing. BALCO is alleged to have distributed several types of banned doping agents to professional athletes in track and field, baseball and football. Among these were tetrahydrogestrinome ("THG"), otherwise known as "the Clear" by BALCO and its users. THG is a designer steroid that could not be identified by routine anti-doping testing until 2003, when a track and field coach provided a sample of it to USADA. It is undisputed that the Clear is a prohibited substance under the IAAF Rules.

5. On 3 September 2003, FBI agents searched BALCO's premises pursuant to search warrants. Approximately twenty-four agents searched BALCO's offices and seized hundreds of documents there and at other locations maintained by BALCO. The agents also seized samples of the Clear and other substances distributed by BALCO. During this raid, agents interviewed the company's President, Victor Conte, and other BALCO officials, who spoke about its activities and its customers. Mr. Conte named fifteen track and field athletes whom he alleged were clients of BALCO, including Ms. Gaines, as well as other athletes from the NFL and Major League Baseball.

6. Following the BALCO raid, government agents obtained other documents, such as emails, through the use of subpoenas and other law enforcement mechanisms. Additional records were produced and created as part of the Grand Jury investigation, which resulted in the indictment of Mr. Conte, along with several alleged co-conspirators.[1] None of the evidence in this case derives from the Grand Jury proceedings. However, the BALCO documents were obtained by the U.S. Senate, which subsequently provided them to USADA.

7. As will be seen, the Panel's determination of the case against Ms. Gaines turns on certain statements made by the Respondent herself which make it unnecessary for the Panel to determine whether the mass of other evidence adduced by USADA and derived in large measure from the BALCO documents, is also conclusive of the doping charges brought against her.

8. This Award is also the culmination of a process which saw two separate cases run essentially in parallel. Although the facts alleged in the present case and in the case of *USADA* v. *Tim Montgomery* differed in their detail, and separate submissions were filed by the parties in each case, both the nature of the charges brought against the two Respondents and the substantive and procedural positions adopted by them throughout the period leading up to their respective hearings were so similar as to be virtually indistinguishable. Among other consequences, this meant that, but for the hearings on the merits, and with the consent of all parties, the two cases proceeded in lockstep. This is immediately apparent from a reading of

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[1] Mr. Conte pleaded guilty to several of the charges against him and, in October 2005, was sentenced to four months in prison plus four months of home confinement.

the two Awards, which are being rendered simultaneously by the Panels (composed of the same arbitrators) in the two cases.

II. THE PARTIES

9. The Claimant, USADA, is the independent Anti-Doping Agency for Olympic sports in the United States and is responsible for managing the testing and adjudication process for doping control in that country. In that capacity, USADA conducts drug testing and results management for participants in the Olympic movement within the United States.[2]

10. The Respondent, Chryste Gaines ("**Ms. Gaines**" or the "**Athlete**"), is an elite and highly successful American track and field athlete. She won Olympic medals at the 1996 Summer Games in Atlanta and the 2000 Summer Games in Sydney, and has in addition won numerous national and world titles.

11. On 17 September 2004, The International Association of Athletics Federations (the "**IAAF**"), the international federation responsible for the sport of athletics worldwide, requested permission to appear in the arbitration as a party (i.e., as an intervener). In its request, the IAAF stated that, under IAAF Rules, should the Panel allow it to appear as a party, the Panel's award "… will be final and binding and no further reference may be made to the CAS" and, further, that "the IAAF is content for this to be the final decision on [the Athlete's] eligibility." The IAAF's request was granted by the Panel on 4 October 2004. On 22 October 2004, the IAAF specified that the sole issue in respect of which it might make submissions in the arbitration concerned "the position that may be adopted by the parties in relation to IAAF Rules and their proper construction." The Panel subsequently declared that "… the IAAF participating in [this case] as described above, the [award] rendered by the Panel shall be final and binding on the IAAF, without possibility of appeal."[3] In the event, after considering the written submissions filed by Claimant and Respondent, the IAAF notified the CAS that it did not intend to make any independent submissions in the arbitration.

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2 See: United States Anti-Doping Agency Protocol for Olympic Movement Testing (effective 7 October 2002) (the "USADA Protocol"), Mission Statement and para 1, Exhibit A to USADA's Request for Arbitration dated 5 July 2004.

3 All of this is described in detail in the Panel's 9 November 2004 correspondence to the parties, discussed further below.

12. With the consent of Claimant and Respondent and of the Panel, several third parties were also granted permission by CAS to attend the hearings as "observers". These were: a representative of the World Anti-Doping Agency ("**WADA**"); John Ruger, the United States Olympic Committee ("**USOC**") Athlete Ombudsman; and a member of the staff of U.S. Congressman John Conyers, Jr. At the end of the day, Congressman Conyers chose not to send a representative to any of the hearings, WADA attended only the two preliminary hearings held on 15 December 2004 and 21 February 2005, and Mr. Ruger was the sole observer at the hearing on the merits.

III. PROCEDURAL BACKGROUND

A. USADA's "Charging Letter"

13. On 7 June 2004, USADA informed Respondent that it had received evidence which indicated that Ms. Gaines was a participant in a doping conspiracy involving various elite athletes and coaches as well as BALCO. On the same date, USADA submitted the matter to its Anti-Doping Review Board (the "**Review Board**") pursuant to paragraph 9 (a) (i) of the USADA Protocol. In accordance with the provisions of that paragraph, the Athlete also filed submissions on the matter with the Review Board.

14. By letter dated 22 June 2004 (the so-called "**Charging Letter**"), USADA informed Ms. Gaines that, after consideration of the documents submitted to it by her and USADA, the Review Board had determined that there existed "sufficient evidence against you to proceed with the adjudication process as set forth in [the USADA Protocol]."[4] The charges against Respondent were set out in the Charging Letter, and reiterated in USADA's Statement of Claim as follows:

> [A]t this time, and reserving all rights to amend this charge, USADA charges you with violations of the IAAF Anti-Doping Rules. (…) USADA charges that your participation in the Bay Area Laboratory Cooperative ("BALCO") conspiracy, the purpose of which was to trade in doping substances and techniques that were either undetectable or

[4] Para 9 (a) (i) (vi) of the USADA Protocol reads as follows: "The Review Board shall consider the written information submitted to it and shall, by majority vote, make a recommendation to USADA with a copy to the Athlete whether or not there is sufficient evidence of doping to proceed with the adjudication process."

difficult to detect in routine testing, involved your violations of the following IAAF Rules that strictly forbid doping[5]:

- Rule 55.2

  The offence of doping takes place when either:

  (i) a prohibited substance is present within an athlete's body tissues or fluids; or

  (ii) an athlete uses or takes advantage of a prohibited technique; or

  (iii) an athlete admits having used or taken advantage of a prohibited substance or a prohibited technique (See also Rule 56).

- Rule 56.3

  Any person assisting or inciting others, or admitting having incited or assisted others, to use a prohibited substance, or prohibited techniques, shall have committed a doping offence and shall be subject to sanctions in accordance with Rule 60. If that person is not an athlete, then the Council may, at its discretion, impose an appropriate sanction.

- Rule 56.4

  Any person trading, trafficking, distributing or selling any prohibited substance otherwise than in the normal course of a recognised profession or trade shall also have committed a doping offence under these Rules and shall be subject to sanctions in accordance with Rule 60.

- Rule 60.1

  For the purpose of these Rules, the following shall be regarded as "doping offences" (see also Rule 55.2):

  (i) the presence in an athlete's body tissues or fluids of a prohibited substance;

  (ii) the use or taking advantage of forbidden techniques;

  (iii) admitting having taken advantage of, or having used, or having attempted to use, a prohibited substance or a prohibited technique;

  (…)

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[5] The text quoted is from the 2002 IAAF Rules. The version of the rules released in 2000 includes the following variations in language: Rule 60(1)(i) requires 'the finding in an athlete's body' [as opposed to 'the presence in an athlete's body tissues or fluids']; and Rule 60(1)(iii) excludes the phrase 'or having attempted to use.'

> (vi) assisting or inciting others to use a prohibited substance or prohibited technique, or admitting having admitted or incited others;
>
> (vii) trading, trafficking, distributing or selling any prohibited substance.
>
> Specifically, the evidence confirms your involvement with the following prohibited substances and prohibited techniques: one or more substances belonging to the prohibited class of "Anabolic Steroids;" Testosterone/Epitestosterone Cream; EPO; Growth Hormone; and Modafinil.

15. As regards the sanction for these alleged violations USADA stated as follows in its Charging Letter:

> USADA applies the sanctions found in the rules of the relevant International Federations and the USOC Anti-Doping Policies. Therefore, at this time reserving all rights to amend the sanction at a later date, under the Rules of the IAAF, Division III, Rule 60.5, USADA is seeking the following sanction against you for your doping offense:
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> - A lifetime period of ineligibility beginning on the date you accept this sanction or the date of the hearing panel's decision; [6]
>
> - The retroactive cancellation of all awards or additions to your trust fund to which you would have been entitled by virtue of your appearance and/or performance at any athletics meeting occurring between September 1, 2000 and the date your period of ineligibility begins, pursuant to Division III, Rule 60.5 of the IAAF Anti-Doping Rules; and,
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> - A lifetime period of ineligibility beginning on the date you accept this sanction or the date of a hearing panel's decision, from participating in a US Olympic, Pan American Games or Paralympic Games, trials or qualifying events, being a member of any US Olympic, Pan American or Paralympic Games team and having access to the training facilities of the United States Olympic Committee ("USOC") Training Centers or other programs and activities of the USOC including, but not limited to, grants, awards or employment pursuant to the USOC Anti-Doping Policies.

B. The Decision to Proceed Directly to CAS

16. Further to an exchange of correspondence between the parties, Ms. Gaines notified USADA on 6 July 2004 of her agreement "that the arbitration in this matter will proceed under

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[6] At the final hearing, by which time certain of the charges (in particular the charge of "trafficking ") against the Respondent had been dropped, USADA requested that the Panel impose a *four-year* period of ineligibility on Ms. Gaines.

the Court of Arbitration for Sport ("CAS") Ordinary Arbitration Procedures … [and] … that USADA will file a request for arbitration with CAS."[7]

17. Indeed, paragraph 9 (b) (iv) of the USADA Protocol entitles an athlete to "elect to bypass" the domestic hearing process described in paragraph 9 (b) (ii) of the USADA Protocol and "proceed directly to a single final hearing before CAS conducted in the United States." The Panel considers it significant to note that paragraph 9 (b) (iv) of the USADA Protocol also provides that upon an athlete making such an election, "[t]he CAS decision shall be final and binding on all parties and shall not be subject to further review or appeal."

C. Commencement of the Arbitration and Constitution of the Panel (July 2004)

18. On 6 July 2004, Claimant submitted its Request for Arbitration to the CAS. The Request for Arbitration substantially reprised the allegations set out in USADA's Charging Letter, and identified Peter Leaver, QC, barrister, of London, England, as USADA's party-appointed arbitrator.

19. The Request for Arbitration also noted the parties' agreement that the arbitration be expedited "in order to resolve Ms. Gaines' eligibility for the upcoming 2004 Olympic Games" in Athens the following month, but that there would be no need to expedite the proceeding in the event that Respondent did not qualify for the U.S. Olympic team.[8]

20. Ms. Gaines submitted her Answer to USADA's Request for Arbitration on 14 July 2004. In her Answer, the Athlete provided a brief statement of her defence and named Christopher L. Campbell, Esq., attorney-at-law, of San Francisco, U.S.A, as her party-appointed arbitrator.

21. The two party-appointed arbitrators subsequently selected L. Yves Fortier, CC, QC, barrister and solicitor, of Montréal, Canada, to serve as President of the Panel.[9]

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7 Ms Gaines' letter of 6 July 2004 is filed as Exhibit B to USADA's Request for Arbitration.

8 In the event, Ms. Gaines did not qualify for the US Olympic team.

9 The constitution of the Panel was formally notified to the parties by means of an "Order of Procedure" issued by the CAS on 8 September 2004. See below.

22. In due course, the CAS appointed Stephen L. Drymer, barrister and solicitor, of Montréal, Canada, to assist the Panel in the capacity of *ad hoc* clerk.

D. Initial Stage of the Proceedings and the CAS Order of Procedure (August - October 2004)

23. Far from "expediting" matters, as might originally have been their intention, the parties instead proved unable, during the initial stage of the arbitration, to collaborate with each other and the Panel as required to speed matters along. Having observed as much, the Panel acknowledges the unique and complex nature of the issues raised in this case, which no doubt meant that additional time was required for the parties to elucidate (let alone for the Tribunal to determine) the numerous substantive and procedural issues which arose in the course of the proceedings.

24. On 8 September 2004, the CAS issued its standard "Order of Procedure" addressing such matters as the jurisdiction of the CAS, the composition of the Panel, provisions regarding the costs of the arbitration and a statement concerning the confidentiality of the proceedings. The Order of Procedure also established a timetable for the filing of written submissions by the parties in accordance with article R44.1 of the CAS Code of Sports-related Arbitration (the "**CAS Code**"), leading to a hearing on the merits in San Francisco during the week of 1-5 November 2004. (As discussed below, that timetable quickly proved to be unfeasible and was in due course modified.)

25. The 8 September 2004 Order of Procedure further confirmed that the conduct of the arbitration was governed by articles R38 and following of the CAS Code, that is, by the CAS rules applicable to "Ordinary" (first instance) arbitrations as opposed to "Appeal" arbitrations.

26. The parties subsequently filed their respective written submissions – a Statement of Claim and a Response, together with supporting evidence – as required by the Order of Procedure.

27. As indicated above, the period leading to the planned 1 November 2004 hearing was characterized by an acrimonious flurry of correspondence, requests, objections, accusations and counter-accusations, motions and applications, the overall effect of which ultimately led both parties to request that the November 2004 hearing dates be vacated.

28. Among the procedural decisions and orders that the Panel was called upon to render during this period, several deserve mention.

- On 20 September 2004, the Panel denied two motions brought by USADA, one to compel the giving of consent by Ms. Gaines for USADA to access certain medical records, and the second to compel Ms. Gaines to answer certain "requests for admissions". The Panel also addressed a motion by USADA to issue subpoenas to various individuals. In this latter regard, the Panel agreed with USADA's submission that it has the power to issue subpoenas enforceable by United States courts; however, it requested the parties to provide additional briefing concerning the form of such subpoenas taking into account the provisions of article R44.3 of the CAS Code as well as Article 7 of the U.S. *Federal Arbitration Act* and Rule 45 of the U.S. *Federal Rules of Civil Procedure*.

- On 29 September 2004, the Panel signed and issued a "Stipulated Protective Order" negotiated by the parties governing the disclosure of confidential information by USADA to Respondent.

- On 7 October 2004, having considered the parties' submissions on the matter of the subpoenas requested by USADA, the Panel issued subpoenas to various individuals compelling their attendance (and in certain cases requiring the production of specified documents by them) at the 1 November hearing.[10]

- On 19 October 2004, the Panel denied the parties' request (originally formulated by Respondent and consented to by Claimant), that the hearing on the merits be postponed from 1 November to a date "to be determined." The Panel instead reconfirmed that the hearing would commence on 1 November 2004. The Panel informed the parties that the first issue to be addressed at that hearing would be the determination of an appropriate and detailed schedule for the presentation of the parties' evidence; subsequently, the Panel would receive documents from those witnesses to whom subpoenas will have been issued and thereafter, and subject to any

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[10] The Panel denied USADA's requests for subpoenas to be issued to various reporters as well as to the Respondent herself.

determinations made with respect to a detailed hearing schedule, the evidentiary phase of the hearing would commence, it is being understood that additional hearing days would also be scheduled.

- On 20 October 2004, the Panel issued subpoenas to several individuals, as requested by Respondent, compelling their attendance and requiring the production of documents by them at the hearing set to commence on 1 November 2004.

29. One further occurrence during this period deserves mention. On 26 October 2004, the parties entered into a "joint stipulation" in which they noted the existence of numerous disagreements regarding "threshold procedural and evidentiary issues, the resolution of which are fundamental to determining the most efficient presentation of [this case]" and acknowledged their inability "to reach any agreement on these procedural and evidentiary issues that would facilitate the orderly and efficient presentation of [this case]." The stipulation further recorded the parties' agreement to vacate the hearing dates during the week of 1 November as well as their agreement regarding a (partial) procedural timetable leading to a hearing to be scheduled at an undetermined date in 2005. The Panel responded to this development by a letter dated 28 October 2004. The Panel expressed its "surprise at this last minute development." It informed the parties that, in the circumstances, the hearing on the merits clearly could not commence on 1 November, yet it nonetheless ordered the parties' legal representatives to meet with the Panel in San Francisco on 1 November "in order to discuss fully all outstanding procedural and evidentiary issues and seek to determine a reasonable calendar for the future conduct of [this arbitration]."

E. First Preliminary Hearing: Procedural Timetable and Related Issues (1 November 2004)

30. A preliminary hearing was accordingly held in San Francisco on 1 November 2004. The outcome of that hearing is described in detail in a letter to the parties dated 9 November

2004, in which the Panel confirmed a series of procedural orders issued orally during the hearing itself. [11]

31. As noted in the Panel's 9 November letter, the hearing "was considered necessary by the Panel in view of what it believed to be insufficient progress made by the parties themselves – as illustrated, for example, in their Joint Stipulation of 26 October 2004 – in establishing a clear timetable for the fair and efficient determination of [this case]." The procedural orders issued on 1 November, and confirmed in writing on 9 November, addressed a suite of issues ranging from the re-issuance of subpoenas previously issued at the request of the parties,[12] the identity of the individuals authorized to participate in the arbitration as observers or intervener, as well as, most importantly, a list of outstanding procedural and evidentiary issues raised by the parties and a detailed timetable for the briefing and hearing of those issues.

F. Second Preliminary Hearing: Jurisdiction of the Panel (15 December 2004)

32. In accordance with the timetable established on 1 November 2004 and confirmed in writing on 9 November, a preliminary hearing was held, in Montreal, on 15 December 2004 on the matter of a Motion brought by the Athlete to dismiss the case on the ground that the CAS lacked jurisdiction.

33. The nature of the parties' submissions and the positions taken by them both in writing and at the hearing are described in the Panel's Award on Jurisdiction dated 9 February 2005. For present purposes it suffices to note that, for the reasons set out in that Award, the Panel dismissed Respondent's Motion and affirmed its jurisdiction in this matter.

G. Third Preliminary Hearing: Evidentiary Issues and Objections (21 February 2005).

34. A further, and final, preliminary hearing was held, in Montreal, on 21 February 2005 for the purpose of hearing the parties' submissions on a variety of evidentiary issues and objections raised by Respondent. Once again, reference is made to the detailed Decision on

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[11] It is noted that a court reporter was engaged to record the proceedings of the 1 November 2004 hearing, and that a transcript of those proceedings was provided to the parties and to the CAS.

[12] None of the individuals to whom subpoenas had been issued in fact appeared at the 1 November hearing and neither party produced any of the documents requested of these individuals.

Evidentiary and Procedural Issues rendered by the Panel on 4 March 2005 in respect of the matters addressed at that hearing.

35. With the Panel's 4 March 2005 Decision, the nature of the allegations against the Respondent were clarified, certain additional submissions were requested of the parties and, in short, the path toward the hearing on the merits was cleared.

36. The Panel's Decision on Evidentiary and Procedural Issues also addressed the question of the standard of proof applicable in the present case, which had been in dispute as between the parties. In view of the importance of the issue the Panel considers it apposite to reproduce the relevant passages of its 4 March 2005 Decision, which are as follows:

> **Standard of Proof**
>
> There is no dispute as to which of the parties, whether Claimant or Respondents, bears the onus of establishing the charges that have been levelled against Mr. Montgomery and Ms. Gaines in these cases. All parties accept that USADA bears the burden of proof in respect of its claims.
>
> There is no such common understanding, however, in respect of the standard of the proof to be made by USADA in order for it to succeed – that is, whether USADA must prove its claims beyond reasonable doubt, as advocated by Respondents, or whether it need only make proof on the balance of probability.
>
> The athletes' submissions are based on the argument (to quote from Mr. Montgomery's Motion on Burden of Proof, at p. 2) that "the U.S. Supreme Court has held that the burden of proof is a substantive rule [that cannot be applied retroactively]," and on the fact that "[p]rior to March 2004, IAAF Rule 59.6 provided that in all doping hearings, 'the Member shall have the burden of proving, beyond reasonable doubt, that a doping offense has been committed'." As further summarised by the athletes' counsel during the 21-22 February 2005 hearing, given that "that is what the new Rules say, you don't even have to consider the substantive/procedural issue."
>
> As set out in its Statements of Claim, USADA's claims against the athletes for violations of IAAF Rules concern allegations that Respondents engaged in systematic doping "commencing in February 2000" (in Mr. Montgomery's case) and "commencing in September 2000" (as regards Ms. Gaines); and, as noted above, USADA refers specifically to alleged violations of the 2002 IAAF Rules. As of 1 March 2004, the IAAF implemented the provisions of the World Anti-Doping Code in new IAAF Anti-Doping Rules, including the provision (Article 3.1 of the World Anti-Doping Code: "Burdens and Standards of Proof") that "[t]he standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation *to the comfortable satisfaction of the hearing body, bearing mind the seriousness of the allegation which is made*." (Emphasis added)

USADA, not surprisingly, sees things differently than the Respondents. It acknowledges (at p. 42 of its 9 February 2005 Response Brief) that what it calls "[t]he old 'beyond reasonable doubt' standard" was replaced by the IAAF as of 1 March 2004. The crux of USADA's argument is that "[t]he introduction to the new IAAF Rules state that the new rules 'shall not be applied retrospectively to doping matters pending at 1 March 2004'; *by negative implication, this introductory statement suggests that the new rules may be applied to doping charges* initiated *after March 1, 2004.*" (Emphasis added) USADA goes on to challenge the Respondents' view that the standard of proof is a substantive, as opposed to a procedural, rule; and it refers to U.S. case law as well as CAS precedent in support of the principle that the criminal law standard of proof is inapplicable to these proceedings.

As often becomes evident when the question of standard of proof is debated, the debate looms larger in theory than practice. Counsel for all parties concurred with the views expressed by the members of the Panel during the 21-22 February 2005 hearing to the effect that even if the so-called "lesser", "civil" standard were to apply – namely, proof on the balance of probability, or, in the specific context in which these cases arise, proof to the *comfortable satisfaction* of the Panel *bearing mind the seriousness of the allegation which is made* (what might be called the "comfortable satisfaction" standard) – an extremely high level of proof would be required to "comfortably satisfy" the Panel that Respondents were guilty of the serious conduct of which they stand accused.

Even under the traditional civil model, there is no absolute standard of proof. Built into the balance of probability standard is a generous degree of flexibility that relates to the seriousness of the allegations to be determined. In all cases the degree of probability must be commensurate with and proportionate to those allegations; the more serious the allegation the higher the degree of probability, or "comfort", required. That is because, in general, the more serious the allegation the less likely it is that the alleged event occurred and, hence, the stronger the evidence required before the occurrence of the event is demonstrated to be more probable than not. Nor is there necessarily a great gulf between proof in civil and criminal matters. In matters of proof the law looks for probability, not certainty. In some criminal cases, liberty may be involved; in some it may not. In some civil cases – as here – the issues may involve questions of character and reputation and the ability to pursue one's chosen career that can approach, if not transcend in importance even questions of personal liberty. The gravity of the allegations and the related probability or improbability of their occurrence become in effect part and parcel of the circumstances which must be weighed in deciding whether, on balance, they are true.

Without deciding the matter, the Panel notes that it appears that this is the very sort of approach contemplated by Article 3.1 of the World Anti-Doping Code, which refers to a standard of proof "bearing in mind the seriousness of the allegation which is made" and which further states that "[t]his standard of proof in all cases is greater than a *mere* balance of probability …" (Emphasis added)

From this perspective, and in view of the nature and gravity of the allegations at issue in these proceedings, there is no practical distinction between the standards of proof advocated by USADA and the Respondents. It makes little, if indeed any, difference whether a "beyond reasonable doubt" or "comfortable satisfaction" standard is applied to determine the claims against the Respondents. This will become all the more manifest in due course, when the Panel renders its awards on the merits of USADA's claims. Either way, USADA bears the burden of proving, by strong evidence

commensurate with the serious claims it makes, that the Respondents committed the doping offences in question.

H. The Hearing on the Merits (11 - 14 July 2005)

37. On 28 April 2005, Claimant filed a motion to postpone her hearing until after the conclusion of the BALCO criminal trial so as to ensure, to the extent possible, that Victor Conte (who refused to testify in these proceedings prior to the completion of the BALCO trial) and IRS Agent Jeff Novitzky (whose testimony in these proceedings prior to the BALCO trial was "uncertain") would be available to testify before the Panel. Claimant's motion was denied, as much for the fact that USADA had long been aware of the possibility that Messrs. Conte and Novitzky might not be available to testify in the arbitration as for the patent unfairness to Respondent that would be caused by any additional delay in the resolution of the charges brought against her.

38. As previously agreed and set out in the Panel's Orders of 1 and 9 November 2004, the hearing on the merits in this case took place in New York commencing on 11 July 2005. The hearing concluded on 14 July 2005.

39. At the hearing, the Panel heard oral argument from counsel for both parties. It also heard the evidence of the following witnesses:

For USADA

- Dr Larry Bowers, USADA's Senior Manager Director, who testified regarding the evidence discovered during the BALCO investigation as well as regarding Ms. Gaines's blood and urine testing;

- Ms. Kelli White, a former elite American athlete who has admitted to doping with the assistance of BALCO, who testified regarding an alleged admission made to her by Ms. Gaines;

- Dr Hans Geyer, an expert who testified with respect to Respondent's urine test results;

- Dr Richard Clark, an expert called to analyze Ms. Gaines's urine test results submitted by USADA; and

- Dr Michael Sawka, an expert called by USADA to give evidence regarding Ms. Gaines's blood test results.

For Respondent

- Dr. David Black, President and Laboratory Director of Aegis Sciences Corp. and Aegis Analytical Laboratories, who provided expert evidence regarding the analytical laboratory data (blood and urine tests) produced by USADA; and

- Dr. James Stray-Gundersen, an expert who testified regarding the blood testing results for Ms. Gaines produced by USADA.

40. Although Ms. Gaines's counsel cross-examined each of the witnesses produced by USADA, the Athlete called no fact witnesses of her own nor did she herself give evidence.

IV. THE CASE AGAINST MS. GAINES

A. Applicable IAAF Rules

41. As set out in USADA's Charging Letter and Statement of Claim, the charges brought against the Respondent concern alleged offences under IAAF Rules 55.2, 56.3, 56.4, and 60.1 (reproduced in full in paragraph 14 above). As noted, these charges are brought under the 2002 edition of the IAAF Rules (IAAF Official Handbook 2002-2003), which are applicable.

42. Notwithstanding the breadth of the charges brought against Ms. Gaines – comprising the *presence*, *use* and *admission* of use of prohibited substances or techniques (Rules 55.2 and 60.1), *assisting* and *inciting* others to do so (Rules 56.3 and 60.1), and *trafficking* in prohibited substances (Rules 56.4 and 60.1) – it became increasingly apparent in the course of the proceedings, that the thrust of USADA's case concerns allegations of the use of prohibited substances and techniques (including alleged admissions of use and evidence of the presence of prohibited substances in the Athlete's body) as opposed to the "assisting or inciting" and

"trafficking" charges. Ultimately, these charges were either dismissed or were dropped by USADA.

B. USADA's Evidence

43. USADA's evidence of doping by Ms. Gaines consisted of various categories. These included: documents extracted from the files seized from BALCO which, according to USADA, individually and collectively established Respondent's pattern of doping; alleged evidence of the suppression and rebound of endogenous steroids in Respondent's urine, as shown in a table depicting test results reported by IOC-accredited and BALCO laboratories on numerous occasions over several years; Respondent's alleged admission to Kelli White that she had used the prohibited substance known colloquially as "the Clear"; so-called admissions against interest that implicated Ms. Gaines, made by Victor Conte in interviews with investigative authorities as well as the media; and reports in the San Francisco Chronicle supposedly based on secret Grand Jury testimony implicating Ms. Gaines.

44. All of the foregoing evidence was challenged by the Respondent. This includes the reliability and veracity of statements regarding Ms. Gaines contained both in statements that may have been made by Victor Conte and in documents found in his files, the propriety of the Panel considering newspaper reports allegedly derived from secret Grand Jury testimony, the credibility of Ms. White's testimony and, significantly, the authenticity, reliability, interpretation and weight of test results reported by non-IOC-accredited labs, as well as the overall interpretation of the numerous test results relied upon by USADA.

45. The Panel has wrestled with the question whether, in the circumstances, it should address each element of USADA's case against Ms. Gaines, including each category of evidence relied upon by Claimant. On balance, the Panel has determined not to do so for the simple reason that it is unnecessary. This is because the Panel is unanimously of the view that Ms. Gaines in fact admitted her use of prohibited substances to Ms. White, as discussed in more detail below, on which basis alone the Panel can and does find her guilty of a doping offence. The fact that the Panel does not consider it necessary in the circumstances to analyse and comment on the mass of other evidence against the Athlete, however, is not to be taken as an indication that it considers that such other evidence could not demonstrate that the

Respondent is guilty of doping. Doping offences can be proved by a variety of means; and this is nowhere more true than in "non-analytical positive" cases such as the present.

C. Kelli White's Testimony

46. As mentioned, Ms. White has admitted to doping and has accepted a two-year sanction as a result. Having seen Ms. White and heard her testimony, including in response to questions put to her by counsel and the Panel, the members of the Panel do not doubt the veracity of her evidence. She answered all questions, including in relation to her own record of doping, in a forthright, honest and reasonable manner. She neither exaggerated nor sought to play down any aspect of her testimony. Clearly an intelligent woman, she impressed the Panel with her candour as well as her dispassionate approach to the issues raised in her testimony and regarding which she was questioned by counsel and members of the Panel, In sum, the Panel finds Ms. White's testimony to be wholly credible.

47. According to Ms. White's evidence, she and Ms. Gaines were training partners during the period 2000-2003. Commencing in 2002, while they were training together the women would have conversations "maybe once or twice a month" about BALCO, Victor Conte and certain drugs, in particular the Clear and another substance known as "the Cream", which were "always being referred to" by Mr. Conte.[13] The two friends frequently joked about Mr. Conte and mimicked his way of "always referring to" those substances; "every conversation had to do with the Clear and the Cream, always."[14]

48. Ms. White further testified that she called Ms. Gaines the day before she (Ms. White) was scheduled to appear before the Grand Jury investigating BALCO, in November 2003, to discuss "everything that I talked about with the investigators the night before," including all of the documents she had seen, and what it meant to be called as a witness before the Grand Jury.[15] Ms. White also called the Respondent after appearing before the Grand Jury, to discuss "how it went in there."[16]

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13 Transcript, 11 July 2005, pp. 186 *et seq*.

14 Ibid., p. 192.

15 Ibid., pp, 194-195.

16 Ibid., p. 270.

49. Finally, Ms. White testified that Ms. Gaines called her "not long after"[17] her own (Ms. Gaines') appearance before the Grand Jury (the exact date of this conversation was not provided). The evidence is that during that conversation, Ms. Gaines said that "they asked her whether or not she used it. And she said, Yeah but it made me gain weight so I stopped using it."[18] In response to questioning by the Panel, Ms. White reiterated: "She [Ms. Gaines] said that she'd been asked whether or not she used it. (…) She said that – she admitted that she used it, but it made her gain weight, so she stopped using it – stopped taking it."[19] As regards what "it" meant, Ms. White was unequivocal: it meant "the Clear". [20]

50. It is essential to note that this evidence of what USADA claims constitutes a direct admission of Ms. Gaines's use of the Clear, is uncontroverted.

51. Counsel for Respondent may have questioned Ms. White's motives in offering her testimony concerning Ms. Gaines's use of the Clear and, more generally, her relationship with BALCO. They may have sought (without success) to impugn her honesty and to draw attention to the witness' own history of involvement with BALCO and her efforts to conceal that involvement. However, the Panel has already declared its finding with respect to Ms. White's credibility as a witness in these proceedings and its view that she is telling the truth.

52. What counsel for Ms. Gaines did not do was in any way undermine Ms. White's evidence regarding her conversations with Ms. Gaines in 2002 and 2003. The evidence of those conversations, most especially the conversation during which Ms. Gaines admitted her use of the Clear, which the Panel considers to be clear and compelling, thus stands uncontroverted. It is also, as indicated above, sufficient in and of itself to find Respondent guilty of doping.

53. As Ms. Gaines' counsel stated (entirely correctly and without conceding anything, in the Panel's opinion) in closing argument at the hearing: "Certainly, if the three of you … decide that any one type of evidence here makes you comfortable that Chryste Gaines

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17 Ibid., p. 196.

18 Id.

19 Ibid., p. 197.

20 Ibid., p. 198.

committed a doping violation, that's game over."[21] And further: "[C]ertainly, if you believe Kelli White – if you believe Kelli White that the admission that Chryste Gaines supposedly made to her … was (a) said, and (b) when it was said it was about [the] Clear, then that's an admission … That's an admission if you believe those two pieces."[22] And finally: "If you decide that the conversation happened, and then you're willing to infer along with Kelli White that "it" meant [the] Clear, and that those two steps is proof beyond a reasonable doubt, then it's proof beyond a reasonable doubt."[23]

D. Ms. Gaines's Decision Not to Testify

54. Of course, it might indeed have affected the Panel's appreciation of the evidence had Respondent chosen to provide the Panel with a different explanation of her various conversations with her training partner in 2002 and 2003 – in particular her admission that she used the Clear for a time but stopped taking it because it made her gain weight – or had she even denied altogether that those conversations took place as described by the witness. The fact remains that she did not.

55. The Respondent's decision not to testify at her hearing did not come as a surprise. Indeed, the decision had been communicated to USADA and the Panel by Ms. Gaines's counsel early in the proceedings. Nor is there any dispute as to Respondent's right to decide not to testify. It is common ground that Ms. Gaines was fully within her rights to testify in her own defence, or not, as she saw fit. Where the parties differ, however, is with respect to the question (on which extensive pre-hearing submissions and authorities were filed and arguments were made during the hearing) whether the Panel has the authority to draw an adverse inference from Ms. Gaines's decision not to testify in the arbitration; and, if it does have the power to do so, whether such an inference should be drawn in this case.

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21 Transcript, 14 July 2005, p. 1232.

22 Ibid., p. 1233.

23 ibid., p. 1238.

56. In this regard, it is noted that Ms. Gaines' counsel was asked at the outset of the hearing whether, if the Panel were to be of the view after hearing the evidence that "this looks really bad for Ms. Gaines, [we] wish she'd come in and testify," the Respondent would like to receive an explicit "early warning" from the Panel so as to be able to re-consider her decision to no testify. The answer was "no". [24] As her counsel put it: "If you're at comfortable satisfaction [having heard the evidence against Ms. Gaines], and we've chosen not to testify and we could have alleviated comfortable satisfaction, shame on us."[25]

57. It is noted that in the case of *USADA* v. *Michelle Collins* the Arbitral Tribunal found that it "*may* draw certain adverse inferences" from the Respondent's refusal to testify, though "there is no rule obligating a Tribunal to draw an adverse inference." Indeed, the Tribunal went on to hold that "no adverse inference is necessary" given that the weight of the evidence "is already adverse to Collins so no further adverse inference need be drawn".

58. The situation is similar in the present case. Ms. Gaines has been provided every conceivable opportunity to provide an exculpatory explanation of her own statements evidencing her guilt. She has had ample opportunity to deny ever making such statements. She has had the benefit (not often afforded a Respondent) of an offer from the Panel, which she declined, of an "early warning" so as to able to reconsider her position in the event that the Panel were to be inclined to draw an adverse inference from her refusal to testify. But because she has not offered any evidence of her own concerning her conversations with Ms. White and in particular her admission regarding her use of the Clear, the Panel can only rely on the testimony of Ms. White. That testimony is more than merely adverse to Ms. Gaines; it is fatal

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[24] On 17 September 2005, the Panel advised the parties in the Montgomery case that, having considered their written and oral arguments (including the legal authorities filed by them) for and against the drawing of an adverse inference, and after deliberation, it found that "it does have the right and power to draw an adverse inference from Mr. Montgomery's refusal to testify. More particularly, it may draw adverse inferences in respect of allegations regarding which USADA has presented evidence that would normally call for a Response from the Respondent himself, and nor merely from his experts or counsel." The Panel further informed the parties that it had not yet determined whether it would draw any such inferences and that its deliberations had been suspended so as to allow Respondent the opportunity to reconsider, in the circumstances, his decision not to testify. As explained in the Panel's 17 September letter, a copy of which was also sent to Ms. Gaines, this somewhat unusual procedure was considered necessary and appropriate in the circumstances, so as to preserve the procedural harmony as between Mr .Montgomery's and Ms. Gaines' cases. As the Panel explained to the parties (and as the parties in the Gaines case were well aware), because of the different manner in which events at her hearing unfolded Ms. Gaines had had the opportunity, as described above, to address the question whether, in the event that the Panel were to find that it may draw adverse inferences from her refusal to testify, she would wish to be so informed in order to be able to reconsider her decision not to testify. The same opportunity for Mr. Montgomery to address this question had not arisen during his hearing the month before.

[25] Transcript, 11 July 2005, p. 129.

to her case. In the circumstances, faced with uncontroverted evidence of such a direct and compelling nature, there is simply no need for any additional inference to be drawn from the Respondent's refusal to testify. The evidence alone is sufficient to convict.

V. DECISION

A. The Doping Offence

59. In its 4 March 2005 Decision on Evidentiary and Procedural Issues, the Panel observed that "it makes little, if indeed any difference, whether a 'beyond reasonable doubt' or 'comfortable satisfaction' standard is applied to determine the claims against the [Respondent] … Either way, USADA bears the burden of proving, by strong evidence commensurate with the serious claims it makes that the [Respondent] committed the doping offences in question."

60. USADA has met this standard. The Panel has no doubt in this case, and is more than comfortably satisfied, that Ms. Gaines committed a doping offence. It has been presented with strong, indeed uncontroverted, evidence of doping by Ms. Gaines, in the form of an admission contained in her statements made to Ms. White. On this basis, the Tribunal finds Respondent guilty of a doping offence. In particular, the Panel finds Ms. Gaines guilty of the offence of admitting having used a prohibited substance under IAAF Rules 55.2(iii) and 60.1(iii).

B. The Sanction

61. By way of sanction, USADA commenced this case by informing Ms. Gaines that it intended to request, and indeed it requested from the Panel, "a lifetime period of ineligibility beginning on the date you accept this sanction or the date of the hearing panel's decision."[26] It subsequently amended this request (including as a consequence of the dismissal of the "trafficking" allegations against Respondent) and, at the close of the hearing, requested a four-year period of ineligibility.

62. USADA's request is based on IAAF Rule 60.2 (a) (i), which provides that for a first offence under Rule 60.1(iii) (which includes the offence of admitting having used a prohibited

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[26] Quoted from USADA's Charging Letter : see above.

substance) an athlete shall be ineligible "for a minimum of two years from the date of the hearing at which it is decided that a Doping Offence has taken place."

63. In the circumstances, the Panel finds that Ms. Gaines' admission of her use of prohibited substances merits a period of ineligibility under IAAF Rules of two years.

64. This period of ineligibility shall commence to run as of 6 June 2005, being the first day of the hearing on the merits in *Mr. Montgomery's* case. The Panel is of the view that this date of commencement of the sanction is fair and appropriate in the particular circumstances of this case in view of the numerous delays in the hearing process unattributable to the Athlete, including as a result of the agreement of all parties that Ms. Gaines' and Mr. Montgomery's cases should be run in tandem. Although this agreement entailed significant efficiencies overall, and doubtless permitted the two cases to be heard and decided (by the same Panel) more quickly than if they had been conducted sequentially, it inevitably meant that there would be some additional delay before either case could be heard. Similarly, the fact that Ms. Gaines' case was heard after Ms. Montgomery's should not inure to her disadvantage; the parties' agreement to maintain what the Panel has had occasion to refer to as the "procedural harmony" between the two arbitrations, including their selection of the same arbitrators to decide both cases, meant that one of the Athletes, through no fault of his or her own, would be heard later than the other.[27]

65. In addition to the two-year sanction already discussed, the Panel orders the retroactive cancellation of all of Ms. Gaines's results, rankings, awards and winnings as of 30 November 2003 (as noted above, Ms. White did not testify as to the exact date during the month of November, 2003 on which Ms. Gaines' admission was made, and the Panel thus considers it reasonable that the last day of the month in question be selected for this purpose). In this regard, IAAF Rule 60.5 provides: "Where an athlete has been declared ineligible he shall not be entitled to any award or addition to his trust fund to which he would have been entitled by virtue of his appearance and/or performance at the athletics meeting at which the doping offence took place, or at any subsequent meetings."

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[27] The agreement also meant that the awards in both cases would be issued at the same time, which likely entailed slightly more time than if the Panel had been seized of only one case.

VI. CONCLUSION

66. In its introduction to the present Award, the Panel described the relative novelty of this case, in which USADA sought to prove a doping offence in the absence of any "adverse analytical finding". It must also be noted that this case can be distinguished from those of other elite track athletes involved with BALCO, such as Ms. White, Alvin Harrison and Regina Jacobs, who admitted their guilt to USADA in the context of anti-doping proceedings.

67. The Panel would add, in conclusion, that there is no reason to believe that the world of sport has seen the last of this sort of "no adverse analytical finding" or “non-analytical positive” case. It must constantly be borne in mind that doping offences can be proved by a variety of means. In this regard, the Panel concurs with the observation expressed in the Comitato Olympico Nazionale Italiano ("CONI") matter, that "in anti-doping proceedings other than those deriving from positive testing, sports authorities do not have an easy task in discharging the burden of proving that an anti-doping rule violation has occurred, as no presumption applies." However, the Panel also concurs wholeheartedly with the exhortation of the CONI Panel, which wrote as follows in the concluding passage of its Award, a declaration that this Panel adopts as its own:

> In any event, the undeniable circumstance that the conviction for doping offences is more difficult when the evidence is other than positive testing must not prevent the sports authorities from prosecuting such offences, as already remarked, with the outmost earnestness and eagerness, using any available method of investigation. In the end, it will be up to the adjudicating body having jurisdiction over the matter – which, according Article 8 of the WADC, must always be a "fair and impartial hearing body" – to determine case by case whether the standard of proof of Article 3.1 of the WADC has been met and the burden of proof has been discharged, or not, by the prosecuting sports authority.

VII. COSTS

68. The issue of costs is dealt with in paragraph 12 of the 8 September 2004 CAS Order of Procedure as follows, in terms that neither party has asked the Panel to disturb:

> 12.1 In accordance with art. 64 of the Code and with art. 9 b (iv) of the USADA Protocol, the costs of this arbitration will be borne by USADA.
>
> 12.2 Each party is responsible for the fees and costs of its lawyer and such costs as arise from the appearance of witnesses whose hearing has been requested.

VIII. PUBLICATION OF THE AWARD

69. In accordance with clause 13 of the Order of Procedure dated 8 September 2004, the award and a press release setting forth the outcome of the proceedings shall be made public by the CAS.

ON THESE GROUNDS

The Panel unanimously finds and orders as follows:

1. Respondent is guilty of the offence of admitting having used a prohibited substance under IAAF Rules 55.2(iii) and 60.1(iii);

2. The following sanctions shall be imposed on Respondent:

   a. A period of ineligibility under the IAAF Rules for two years commencing as of 6 June 2005, including her ineligibility from participating in U.S. Olympic, Pan American or Paralympic Games, trials or qualifying events, being a member of any U.S. Olympic, Pan American or Paralympic Games team and having access to the training facilities of the United States Olympic Committee ("USOC") Training Centers or other programs and activities of the USOC including, but not limited to, grants, awards, or employment pursuant to the USOC Anti-Doping Policies;

   b. The retroactive cancellation of all awards or additions to Respondent's trust fund to which she would have been entitled by virtue of her appearance and/or performance at any athletics meeting occurring between 30 November 2003 and the date of this Award;

3. The costs of the arbitration, to be determined and notified to the parties by the Secretary General of the CAS in accordance with article R 64.4 of the CAS Code, shall be borne by USADA;

4. Each party shall bear all of its own costs, including the fees and expenses of its lawyers and witnesses;

5. This Award deals definitively with all charges brought against Respondent by Claimant in this arbitration. All charges not expressly dealt with herein are dismissed.

Lausanne, 13 December 2005

THE COURT OF ARBITRATION FOR SPORT

L. Yves **Fortier**, CC, QC
President of the Panel

Christopher **Campbell**
Arbitrator

Peter **Leaver** QC
Arbitrator

Stephen **Drymer**
Ad hoc Clerk