



Tribunal Arbitral du Sport
Court of Arbitration for Sport

DECISION ON EVIDENTIARY AND PROCEDURAL ISSUES

rendered by

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: **L. Yves Fortier, CC, QC, Montréal, Canada**
Arbitrators: **Peter Leaver, QC, London, England**
Christopher L. Campbell, Esq., San Francisco, U.S.A.
(the "Panel")
Ad hoc Clerk: **Stephen L. Drymer, Esq., Montréal, Canada**

In the Arbitration Proceeding No. CAS 2004/0/645 Between:

UNITED STATES ANTI-DOPING AGENCY ("USADA")

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

Claimant

– and –

TIM MONTGOMERY

Represented by Howard L. Jacobs, Esq. and Jill A. Benjamin, Esq. of the law firm *Forgey & Hurrell, LLP*, and by Christina Arguedas, Esq. and Julie Salamon, Esq. of the law firm *Arguedas, Cassman & Headley,*

Respondent

And in the Arbitration Proceeding No. CAS 2004/0/649 Between:

UNITED STATES ANTI-DOPING AGENCY

Claimant

– and –

CHRYSTE GAINES

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

Respondent

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I. THE RESPONDENTS' MOTIONS

1. On 9 November 2004, the Panel confirmed in writing various procedural orders rendered orally during a procedural hearing that took place in San Francisco on 1 November 2004. As agreed during the 1 November 2004 hearing and as set out in the Panel's 9 November 2004 Order, a detailed procedural timetable for the conduct of these proceedings was established.

2. On 24 December 2004, the Panel issued an Award on Jurisdiction, without reasons, in which it affirmed both USADA's authority to bring these cases against Respondents and its own jurisdiction to hear the cases. The Panel's reasons in support of that award were issued on 9 February 2005.

3. Included in the procedural timetable confirmed on 9 November 2004 was a procedure for the briefing and hearing, as preliminary issues, of Respondents' motions concerning certain evidentiary matters as well as concerning the dismissal of certain of the claims brought against them by USADA. By letter dated 17 January 2005, the Panel granted Respondents' request that "all of the evidentiary objections" and related motions in the arbitration be heard at the same time, and directed that all evidentiary and procedural objections be set out in the written submissions to be filed by Claimant and Respondents (the "parties") prior to a hearing to be held in Montréal on 21 to 22 February 2005.

4. As directed by the Panel, the following written submissions were filed by the parties:

- On 25 January 2005, Ms. Gaines filed a Motion on Evidentiary and Procedural Issues;
- On the same date, Mr. Montgomery filed the following three submissions: Motion for Exclusion of Evidence Proffered by USADA; Combined Motion Regarding Evidence Required to Prove Conspiracy Claim and To Dismiss Specified Claims; and Motion Regarding Burden of Proof;

- On 9 February 2005, USADA filed a Response Brief to Respondents' Motions on Evidentiary and Procedural Issues;¹
- On 15 February 2005, Ms. Gaines filed a Reply in Support of her Motion on Evidentiary and Procedural Issues;
- On the same date, Mr. Montgomery filed Reply Memoranda in support of his three motions dated 25 January 2005.

5. As agreed by the parties and the Panel on 1 November 2004, and as set out in the procedural timetable confirmed on 9 November 2004, a hearing on the parties' evidentiary and procedural motions was held at the office of the President of the Panel, in Montréal, on 21 and 22 February 2005.²

6. The Panel does not consider it necessary to review, here, the positions taken by the parties with respect to the various motions filed by the Respondents or to summarise the parties' extensive written and oral submissions related to these motions. It suffices to note that the Panel was fully, indeed exhaustively, briefed with respect to the relevant facts and law, and that nearly two very full hearing days were devoted to a thorough discussion of the evidentiary and procedural issues raised by the parties.

7. The unanimous decision of the Panel in respect of those issues, based on its consideration of the parties' written and oral submissions, and after deliberation, is set out below.

¹ By letter dated 8 February 2005 addressed to Mr. Montgomery's counsel, USADA withdrew its allegations that "Respondent Montgomery used Trenbolone" and also withdrew its claim that "Montgomery used T/E Cream provided by BALCO". Similarly, USADA advised Ms. Gaines' counsel on 9 February 2005 that it withdrew its allegations that "Respondent Gaines used Trenbolone".

² As was the case at the 15 December 2004 preliminary hearing on jurisdiction, the 21-22 February 2005 hearing was attended by a representative of the World Anti-Doping Agency ("WADA") – in this instance, Mr. Julien Sieveking – as observer. None of the other observers or the intervener in the cases chose to attend. As well, similar to the 15 December 2004 hearing, at the outset of the 21-22 February 2005 hearing the parties confirmed that their motions would be heard and decided together, and that the hearing would not be recorded; and Mr. Sieveking reconfirmed that WADA continues to be bound by the confidentiality provisions of Article R 43 of the CAS Code of Sports-related Arbitration (the "CAS Code").

II. DISCUSSION

A. Procedural Directions

8. As discussed and agreed by the parties and the Panel during the 21-22 February 2005 hearing, the following procedural directions intended to facilitate the fair and efficient conduct of the hearings on the merits of the Respondents' cases are hereby confirmed. Specifically:

(1) No later than 15 April 2005, USADA shall

- Re-order the exhibits filed by it to date (including exhibits contained in the "common bundle" prepared and submitted by the parties for the 21-22 February 2005 hearing) so that, in respect of each claim against Mr Montgomery, all of the documents relied upon can be found³;
- File what USADA's counsel referred to during the hearing as a "detailed fact brief" that describes "how the dots are connected" as between the exhibits filed by USADA and the testimony of its witnesses (including an indication of which exhibit is to be offered by which witness) in respect of USADA's claims against Mr. Montgomery;
- File a description of the testimony to be offered by each of the fact witnesses whom USADA intends to call to testify at Mr. Montgomery's hearing;

(2) No later than 16 May 2005, Respondent Montgomery shall

- File a Response to USADA's detailed fact brief, including, as appropriate, his position concerning why the exhibits and testimony to be offered by USADA do not prove what USADA contends that they do; and why (if that is the case) in the light of USADA's detailed fact brief, certain of the exhibits filed by USADA should not be admitted as evidence;
- File descriptions of the testimony of the fact witnesses whom Mr. Montgomery intends to call to provide evidence at his hearing;

(3) No later than 13 May 2005, USADA shall

- Re-file its exhibits related specifically to Ms. Gaines' case, organised and grouped according to its various claims against Ms. Gaines (as discussed above with respect to USADA's documents in support of its claims against Mr. Montgomery);
- File a detailed fact brief related to its case against Ms. Gaines (similar to the fact brief to be prepared in respect of its case against Mr. Montgomery);

(4) No later than 13 June 2005, Respondent Gaines shall

- File a response to USADA's fact brief (similar to the response to be provided by Mr. Montgomery, as described above);
- File descriptions of the testimony of fact witnesses whom Ms. Gaines intends to call to provide evidence at her hearing.

9. The purpose of the fact briefs to be filed by USADA is to clarify and summarise how USADA intends to demonstrate that Respondents are guilty of the various offences with which they have been charged. Those charges were originally set out in USADA's Statements of Claim dated 1 October 2004, and have been further particularised by USADA, both orally and in writing, since then, including in its submissions prior to and during the 21-22 February 2005 hearing. Accordingly, and as directed during the 21-22 February 2005 hearing, the fact briefs to be filed by USADA shall not contain any allegations, claims or charges related to doping or other offences other than those offences with which the Respondents have already been charged by USADA.

B. Respondents' Motions to Exclude Certain Exhibits

10. In view of the procedural directions agreed by the parties and set out above, and until such time as USADA has furnished its fact briefs, it would clearly be premature for the Panel to rule on Respondents' requests to exclude from evidence (or preclude from being introduced as evidence) any of the exhibits or testimony on which USADA intends to rely in support of

³ Where a particular document is considered relevant to more than one claim, that document shall be reproduced and filed as a separate exhibit in support of each such claim.

its claims. As indicated above, the Respondents shall have the opportunity in effect to re-submit their requests for such exclusion, in whole or in part, when they file their responses to USADA's fact briefs.

11. In respect of one category of documents filed by USADA, namely, the media materials (articles, interviews, etc.) identified as "Media Articles" in Exhibit A to Mr. Montgomery's 25 January 2005 Motion for Exclusion of Evidence (Ms. Gaines' Motion on Evidentiary and Procedural Issues refers briefly to "news articles" among the "other documents" to be excluded from evidence) the Panel nonetheless considers it appropriate to place on record that it has grave reservations as to the admissibility of such materials in these proceedings. Nonetheless, as with the rest of the exhibits that have been filed by USADA to date, the Panel will reserve judgement in this regard until such time as Respondents have the opportunity to consider and respond to USADA's fact briefs.

C. Respondents' Motions to Dismiss Certain Claims and Charges

12. As set out in USADA's Statements of Claim, the charges brought against the Respondents concern alleged offences under the following IAAF Rules⁴:

- 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.)

8 An admission may be really made either orally in a verifiable manner or in writing. For the purpose of these Rules, a statement is not to be regarded as an admission where it was made more than six years after the facts to which it relates.

- Rule 56.3

⁴ According to USADA (p. 3 of its Statements of Claim): "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.'"

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;
- ...
- (vi) assisting or inciting others to use a prohibited substance or prohibited technique, or admitting having admitted or incited others (Rule 56.3); and
- (vii) trading, trafficking, distributing or selling any prohibited substance.

13. In its written and oral submissions, USADA has argued for an admittedly very broad definition of the term "trafficking", one inspired by the definition found in the Olympic Movement Anti-Doping Code ("OMADC"), which defines trafficking as occurring when a person "manufactures, extracts, transforms, prepares, stores, expedites, transports transits, offers subject to payment or free of charge, distributes, sells, exchanges, undertakes the brokerage of, obtains in any form, prescribes, commercializes, makes over, accepts, possesses, holds, buys or acquires in any manner" a prohibited substance. In the light of the width of that definition, it may be thought remarkable that USADA has not (yet) charged Respondents with "thinking about" prohibited substances.

14. Respondents, for their part, submit that the word "trafficking" means something closer to the classic, and far more narrow, definition derived from the criminal law and found as well, by way of example, in the World Anti-Doping Code (Appendix I, *Definitions*)⁵: "To sell, give, administer, transport, send, deliver or distribute a Prohibited Substance or Prohibited Method to an Athlete either directly or through one or more third parties ..."

15. The Panel agrees with the views of the Respondents in this regard. The OMADC definition, if read literally, could be construed so broadly as to sweep into its ambit much of the very conduct that USADA claims constitutes offences under other IAAF Rules, including Rule 56.3 concerning "assisting or inciting". Moreover, and perhaps most importantly, the Panel considers that IAAF Rule 56.4 is clear and that the meaning of "trafficking" is plain enough when read in the context of the entire rule, which outlaws the "*trading, trafficking, distributing or selling*" of prohibited substances. Clearly, trafficking under Rule 56.4 means something akin to trading, distributing and selling. Just like "assisting or inciting", "trading, trafficking, distributing or selling" are but several sides of the same coin.

16. With the preceding concepts in mind, the Panel has no hesitation in granting Ms. Gaines' request for the dismissal of USADA's claims against her for alleged violations of IAAF Rule 56.4. USADA itself stated, during the second day of the 21-22 February 2005 hearing, that the trafficking and trading charges against Respondent Montgomery are based on the allegation that Mr. Montgomery "was given a prohibited substance to take with him to a meet in Qatar for himself and other athletes". Counsel for USADA also acknowledged that USADA "does not know about any distribution by Chryste Gaines at this time" (although it hopes to know more as it continues to speak with Mr. Victor Conte). On this basis alone, Ms. Gaines' request must be maintained.

17. USADA went on to declare, on 22 February 2005, that if it fails to turn up any evidence of distribution on the part of Ms. Gaines by the time that it files its detailed fact brief related to her case, it will "limit the claims against her to trafficking and assisting". However, in the opinion of the Panel this is entirely unsatisfactory, to say the least. First, as directed above, no additional charges can be laid against either Respondent at this stage, lest their right to fairness be denied. Second, for the reasons mentioned above, the Panel finds that not only

⁵ This definition was also incorporated, in almost identical terms, into the 2004 IAAF Rules.

the “distribution” but also the “trafficking” charge against Ms. Gaines (to the extent that they are different) must be dismissed for lack of evidence.

18. As regards the Respondents’ other requests for dismissal of claims, these are rejected without prejudice. To be clear: other than USADA’s claims against Respondent Gaines for alleged violations of IAAF Rule 56.4, which are hereby dismissed, the Panel remains seized of all the claims and charges brought against both Respondents by USADA to date.

D. Standard of Proof

19. 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.

20. 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.

21. 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.”

22. 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)

23. 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.

24. 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.

25. 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.

26. 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 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)

27. 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.

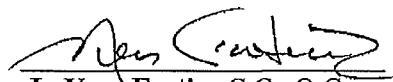
III. DECISION

For all of the foregoing reasons, the Panel hereby:

1. Confirms the procedural directions set out above in Part II.A (paragraphs 8 *et seq.*) of the present Decision;
2. Remains seized and reserves judgement in respect of Respondents' Motions to Exclude Certain Exhibits;
3. Grants Respondent Gaines' request for the dismissal of USADA's claims against her for alleged violations of IAAF Rule 56.4;
4. Dismisses without prejudice all other elements of Respondents' Motions to Dismiss Certain Claims and Charges; and
5. Declares that the costs associated with Respondents' Motions that are the subject of the present Decision will be taken into account in the final award to rendered by the Panel in each of their cases.

Lausanne, 4 March 2005

THE COURT OF ARBITRATION FOR SPORT


L. Yves Fortier C.C., Q.C.
President of the Panel