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AMERICAN ARBITRATION ASSOCIATION
Commercial Tribunal

UNITED STATES ANTI DOPING AGENCY
("USADA"),

Claimant,

vs.

BARBARA GICQUEL,

Respondent.

Case No. 01-20-0004-9764

FINAL AWARD

I the undersigned arbitrator, having been designated in accordance with USADA Protocol for Olympic and Paralympic Movement Testing (USADA Protocol), and operating under the American Arbitration Association ("AAA") Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes ("Supplementary Procedures"), and having been duly sworn, and having duly heard the proofs and allegations of the parties, hereby AWARDS as follows:

Claimant was represented by William Bock, Jeffrey Cook and Ted Koehler from the United States Anti-Doping Agency. Respondent was represented by Howard Jacobs and Lindsay Brandon from Law Offices of Howard L. Jacobs.

This matter involves Barbara Gicquel, an 80 year-old cyclist who tested positive in 2019 for methyltestosterone after winning a race and setting a world record in the time trials for the Masters 75-79 age group at the USA Cycling Masters Track Nationals. The facts of her use of methyltestosterone and the reasons for the use will be discussed later in this Award. After a series

1 of communications, the United States Anti-Doping Agency ("USADA) and Ms. Gicquel entered
2 into a Sanction Agreement on April 15, 2020 under which Ms. Gicquel agreed to the
3 disqualification of her results from the August 29, 2019 event and a one-year sanction under the
4 World Anti-Doping Code. The parties could not agree on the extent to which the disqualification
5 should be applied retroactively or whether previous results, prizes, medals and records should be
6 forfeited. That is the issue presented to the Sole Arbitrator in this matter. USADA contends that
7 the disqualification should commence on November 19, 2009 (10 years from when Ms. Gicquel
8 was formally notified that USADA intended to proceed with sanctions). Ms. Gicquel contends
9 that Anti-Doping Code Rule 10.8 does not permit additional disqualifications and that, even if
10 additional disqualifications were permitted, the Sole Arbitrator should conclude that fairness
11 requires that no additional disqualifications be ordered.

12 Ms. Gicquel began taking a medication called Estratest in 2005 under the supervision of
13 her doctor, Aleksandra Frey, who she consulted with to deal with bronchitis and the effects of
14 menopause. Previous to this time Ms. Gicquel had competed in cycling events since 1997 without
15 the use of Estratest. She was prescribed a dosage of 1/2 tablet every other day and continued that
16 dosage until her failed drug test in 2019. The parties agree that Estratest contains
17 methyltestosterone and that methyltestosterone is a Prohibited Substance on the World Anti-
18 Doping Agency Prohibited List.

19 In 2012, Ms. Gicquel began competing in the Masters Track and Velodrome events and
20 between 2016 and 2019 won many events and set national and world records in her age
21 categories. Although she was tested following some of those events, she did not fail a drug test
22 until the meet on August 29, 2019. At that event, she set a new world record, breaking her old
23 world record. In the doping control form associated with the August 29, 2019 event, she listed
24 many medications and supplements that she had taken in the previous seven days but did not
25 include Estratest on that form. The following day, she supplemented her list of supplements and
26 medications she had taken, but again did not include Estratest in that list.

27 In late September 2019 she was notified that she had tested positive for methyltestosterone
28 and was told she could apply for a Therapeutic Use Exemption ("TUE") which, if successful,

1 would have permitted the retroactive use of Estratest. Ms. Gicquel made a TUE submission the
2 following month which was denied by USADA on November 13, 2019 on the grounds that the
3 materials submitted by Ms. Gicquel did not establish a medical condition that required the use of
4 methyltestosterone and further concluded that methyltestosterone "on a balance of probabilities, is
5 likely to produce performance enhancement beyond what would be considered a return to a
6 normal state of health."

7 This decision was confirmed by the Anti-Doping Review Board on December 19, 2019,
8 but a stipulation was entered into so that Ms. Gicquel could submit a revised TUE application for
9 methyltestosterone. The revised TUE application was submitted on March 17, 2020 and contained
10 substantial new information from her treating physician, her pulmonologist, medical journals and
11 letters from Ms. Gicquel and her attorney. The contents of those materials will be analyzed later
12 in connection with the appropriate disqualification for the use of methyltestosterone. Again, the
13 TUE application was denied and the parties ultimately entered into the Sanction Agreement
14 mentioned above.

15 Ms. Gicquel has raised the issue of whether Article 10.8 of the UCI Anti-Doping Code
16 permits disqualifications prior to August 29, 2019. That Article provides:

17 "In addition to the automatic Disqualification of the results
18 in the Competition which produced the positive Sample
19 under Article 9, all other competitive results of the Rider
20 obtained from the date a positive Sample was collected
21 (whether In-Competition or Out-of-Competition), or other
22 anti-doping rule violation occurred, through the
23 commencement of any Provisional Suspension or
24 Ineligibility period, shall, unless fairness requires
25 otherwise, be Disqualified with all of the resulting
26 Consequences including forfeiture of any medals, points
27 and prizes."

23 The key language in this Article is "all other competitive results of the Rider obtained from
24 the date...(an) other anti-doping rule violation occurred...shall...be disqualified." Ms. Gicquel
25 dismisses this language without citation to any previous cases interpreting this Article and without
26 a coherent argument as to why the language should be ignored. USADA, on the other hand, cites
27 several cases including Ganeeva, Trofimov and Ulrich in which disqualification was applied
28 retroactively from the date of the failing test if it could be established that earlier violations

1 occurred. Those cases are consistent with the language of the Article. This interpretation does not
2 eliminate the fact that there must be earlier anti-doping rule violation(s) and must also take into
3 consideration the "fairness" doctrine incorporated in the Article.

4 As in many sports, the UCI Anti-Doping Code provides that "it is each Rider's personal
5 duty to ensure that no Prohibited Substance enters his or her body." The Code furthermore
6 provides that "it is not necessary that intent, Fault, Negligence or knowing Use on the Rider's part
7 be demonstrated in order to establish an anti-doping violation...." The facts presented by the
8 parties and the Sanction Agreement establish that an anti-doping violation occurred on August 29,
9 2019 through the use of Estratest. The letter from Ms. Gicquel attached to USADA's Exhibit 20
10 establishes that she had taken the low dosage amount of Estratest for 15 years prior to the failed
11 August, 2019 test. Since Estratest contains a Prohibited Substance, and was not listed on any anti-
12 doping control form over those 15 years, anti-doping violations had occurred for more than a
13 decade.

14 The appropriate sanction for this decade-plus violation turns on what would be "fair" under
15 the circumstances of this case. As noted by the parties, this determination varies with the facts of
16 each situation. While the disqualifications ordered in other cases provide some guidance, each
17 case turns on its own facts. The ARAF, Zaripova & RUSADA case cited by USADA
18 demonstrates the fact-specific nature of cases looking at the fairness of the disqualifications. As
19 that Panel stated:

20 (F)airness is a broad concept, covering a number of
21 elements that the deciding body can take into account in its
22 decision not to disqualify some results...The Panel
underlines that no single element is decisive alone: an
overall evaluation of them is necessary."

23 That doctrine is applicable in this matter.

24 Any analysis of "fairness" begins with the Athlete's intent to comply with or evade the
25 anti-doping rules of the relevant organization. In many cases, such as this one, the underlying
26 facts are not in dispute: the test results are not in question and the fact that the athlete voluntarily
27 consumed the supplement or medication are not in dispute. A key element in determining intent
28 is, therefore, often the testimony of the athlete and his or her demeanor in explaining the

1 circumstances of the ingestion of the supplement or medication. Because this matter was
2 submitted on briefs and written documents, the Sole Arbitrator did not have the opportunity to see
3 Ms. Gicquel testify on direct questioning or cross-examination.

4 In looking at the facts presented in the written materials, there are many that assist in
5 determining what would be a fair length of any disqualifications. For the first decade, or more,
6 that Ms. Gicquel took Estratest, there is no evidence that she had any information that it contained
7 a Prohibited Substance. She took it under a doctor's prescription in small doses to treat issues
8 common to women as they enter menopause. Because there are so few athletes actively
9 competing at her age, the evidence presented to demonstrate that Estratest gave her a competitive
10 advantage is thin and derives from the assumption that methyltestosterone helps the performance
11 of all athletes, regardless of their age. Ms. Gicquel took several anti-doping tests while using
12 Estratest and passed all those until 2019, again demonstrating that she did not know that Estratest
13 contained a Prohibited Substance for many years. The fact that she passed the anti-doping tests
14 while taking Estratest offers some credence to the idea that it was in such small amounts that it did
15 not provide a competitive advantage. Finally, because of her age there were few other competitors
16 in many of her events and the use of Estratest may not have changed the results of any of those
17 competitions.

18 On the other hand, Ms. Gicquel admitted that sometime in 2015 she learned that Estratest
19 contained methyltestosterone and that she knew it was a Prohibited Substance at that time. The
20 record does not show how she learned that or what she did to determine what steps she should take
21 to either get approval for the use of Estratest or find a substitute that did not contain a Prohibited
22 Substance. Ms. Gicquel's letter explaining why she did not stop taking Estratest or get approval to
23 use it was unsatisfactory and, because there was no live testimony to explain her actions,
24 disturbing. She wrote:

25 "At some point during the first year (of Masters Track
26 racing) I discovered that my prescribed medication,
27 Estratest, was on your prohibited list, but it was easy to
28 justify that since the list was written with young elite
female athletes in mind, it really wasn't meant for older
women like myself, so I continued to take it as prescribed,
fearful that if I didn't, the COPD might well get worse and

1 I might lose my health and even my life earlier than
2 necessary.”
3 There is, of course, nothing in the record to show that the anti-doping rules were meant only for
4 “young elite” athletes. The letter does not explain why Ms. Gicquel did not include the Estratest
5 on any anti-doping control forms during the next 4 years with a note explaining that she did not
6 believe the rules applied to Master athletes. The letter does not explain why she did not seek a
7 different medication in consultation with her physicians and, if none could be found, why she did
8 not apply for a TUE. The letter, without additional testimony by her addressing the questions in
9 the previous sentences, seems to take a cavalier approach to the comprehensive anti-drug rules that
10 govern her sport and nearly all others.

11 No one can know if any competitor would have beaten her if she had ceased taking
12 Estratest after she learned that it contained methyltestosterone or whether she might have won
13 competitions and even broken world records without taking Estratest. The reason we will never
14 know is that she did not include the medication on any anti-doping control form. She also could
15 have advised the authorities that she was using Estratest before a race, as Mary Verrando-Higgins
16 did, and if she still chose to compete might have had the same level of disqualification that Ms.
17 Verrando-Higgins did (disqualification of the results of that race and only a one year sanction).
18 However, she chose to make a unilateral decision that the anti-doping rules ceased to apply after
19 the athlete achieved a certain age. This lack of transparency regarding the medications she was
20 taking tips the balance of fairness in this matter.

21 The Sole Arbitrator concludes that the “fair” sanction under Article 10.8 is to disqualify
22 results from when Ms. Gicquel learned that Estratest contained a Prohibited Substance through
23 August 29, 2019. The Sole Arbitrator also concludes that it would be “unfair” to disqualify results
24 prior to date she learned that Estratest contained a Prohibited Substance. The record does not
25 precisely identify that date and the Sole Arbitrator believes it is appropriate to use the date August
26 29, 2015 to define when the disqualification applies.


27 The Administrative fees of the AAA totaling \$1,000.00 are to be borne as incurred. The
28 compensation and expenses of the Arbitrator totaling \$3,197.64 are to be borne as incurred.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not

1 expressly granted herein are hereby denied.

2 **IT IS HEREBY ORDERED.**

3 Dated: August 11, 2020

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5 By: 
6 ALAN E. HARRIS
7 ARBITRATOR

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