

FINA Doping Panel 04/20

FINA Doping Panel

comprised of

Robert Fox (SUI) Chairman

In the proceedings against

the athlete **Volodimir VOITENKO**
affiliated to Ukrainian Swimming Federation
Unrepresented by legal counsel

and

the **Fédération Internationale de Natation (FINA)**
Represented by Mr. Justin Lessard, Legal Counsel

1. THE PARTIES

1.1 FINA is the world governing body for the sport of Aquatics (meaning swimming, open water swimming, diving, high diving, water polo, artistic swimming and Masters programme). FINA has its headquarters in the city of Lausanne, Switzerland. According to FINA Rule C 5, one of the main objectives of FINA is to provide fair and drug free sport. In furtherance of this goal FINA has adopted and implemented, in accordance with FINA's responsibilities under the World Anti-Doping Code, the FINA Doping Control Rules.

1.2. Mr. Volodimir Voitenko (hereinafter the "Athlete" or "Mr. Voitenko"), born on 16 May 1989, is a Water Polo player and is affiliated with the Ukrainian Swimming Federation, a FINA Member Federation.

2. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

2.1 On 12 November 2019, Mr. Voitenko provided a urine sample during a game of the FINA Water Polo World League in Niksic, Montenegro. Assisted by the Doping Control Officer, Mr. Voitenko split the Sample into

two separate bottles, which were given reference numbers A4455133 (the "A Sample") and B4455133 (the "B Sample").

2.2 Both samples were transported to the WADA-accredited Laboratory in Seibersdorf, Austria (the "Laboratory"). The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories. Analysis of the A Sample returned an Adverse Analytical Finding ("AAF") for the substance Hydrochlorothiazide.

2.3 Hydrochlorothiazide is a prohibited substance as per Section S.5 - Diuretics and Masking Agents of the 2019 Prohibited List¹.

2.4 On 4 June 2020, FINA wrote to Mr. Voitenko notifying him about the AAF. Mr. Voitenko was granted the possibility to request the analysis of the B sample. Mr. Voitenko was also provided with the documentation package, received from the Laboratory, related to the aforementioned AAF. In addition, FINA offered Mr. Voitenko the opportunity to accept a provisional suspension voluntarily pending the resolution of the matter. Finally, FINA invited Mr. Voitenko to indicate in writing by 18 June 2020 at the latest if he wanted a hearing in front of the FINA Doping Panel. In addition, FINA also explained the following to Mr. Voitenko:

▪ *if he decides to expressly waive his right to a hearing, he has the possibility, also by 18 June 2020 at the latest, to file a written defense instead. In such a case, FINA will then proceed according to DC 7.10.2, i.e. promptly issue a written decision setting out the full reasons for any period of ineligibility imposed, including (if applicable) a justification for why the maximum potential period of ineligibility was not imposed;*

▪ *if he decides to not request a hearing before the FINA Doping Panel in the deadline set under, i.e. by 18 June 2020 at the latest, it will be deemed that he has implicitly waived his right to a hearing. In such a case, FINA will then also proceed according to DC 7.10.2; and*

▪ if he decides to timely request a hearing, the case shall be referred to the FINA Doping Panel for hearing and adjudication as per DC 8.1.

- 2.5 By email sent on 17 June 2020, Mr. Voitenko alleged that the AAF arose from his intake of a medication called Tritace 10 Plus between 8 and 14 November 2019, upon prescription from a doctor to treat a hypertensive crisis (i.e. high blood pressure). He added that he did not know this medication contained a prohibited substance. He provided the prescription he received on 8 November 2019 for Tritace 10 Plus which mentions that the Athlete suffered from “stage 1 hypertension, stage 2 arterial blood pressure, hypertensive crisis and stage 2 circulatory deficiency” and was prescribed Tritace 10 Plus as a result. He clarified that he accepted the AAF and did not request the B sample analysis. He also sent a completed and signed Voluntary Acceptance of Provisional Suspension Form.
- 2.6 On 7 July 2020, FINA afforded the Athlete until 13 July 2020 to submit a retroactive Therapeutic Use Exemption (Hereinafter “TUE”) request if he wished to.
- 2.7. On 13 July 2020, the Athlete sent a retroactive TUE request.
- 2.8. On 24 July 2020, FINA sent the FINA TUE Committee’s decision to the Athlete. The FINA TUE Committee denied the Athlete’s request on the following grounds:
- 1) The TUEC does not consider that the criteria for retroactive application for Therapeutic Use Exemption have been met.
 - 2) Even had this application been received prospectively, the requirements outlined in Article 4.1, letters a. to d. of the ISTUE would have not been met. It is stressed that in accordance with the WADA Code, all elements of Article 4.1 must be met before a TUE is approved.
 - 3) By way of explanation, and as a minimum, this application is not supported by elements of the clinical examination and

investigations necessary to confirm the clinical diagnosis, nor has there been evidence of the use of any permitted alternative medication.

2.9. On 19 August 2020, FINA informed the Athlete that his right to proceed to the analysis of the B sample and his right to proceed to a hearing in front of the FINA Doping Panel were considered as waived since he did not request them within the set deadline. FINA also asserted an anti-doping rule violation (hereinafter "ADRV") of DC 2.1 and DC2.2 for the Presence and Use of a prohibited substance against the Athlete. By the same letter, FINA also invited the Athlete to provide the following clarifications before his case was referred to the FINA Doping Panel:

"1) When were you first diagnosed with being hypertensive? Please provide supporting evidence, including regular blood pressure recordings

2) What is the underlying cause of your acute high blood pressure? Please provide supporting evidence

3) What is your usual "day-to-day" treatment for your acute high blood pressure? Please provide supporting evidence

4) The exact date(s) on which you used Tritace 10 plus.

5) The dosage you used each time.

6) Proof of purchase of Tritace 10 plus.

7) What are the precautions you took (if any) before using Tritace 10 plus to ensure it was not prohibited?

8) Had you received anti-doping education before 12 November 2019?"

2.10 On 26 August 2020, the Athlete provided the following clarifications:

1) He had first been diagnosed as being hypertensive on 8 November 2019;

2) The underlying cause for high blood pressure was “hypertonic crisis”;

3) He does not have a day-to-day treatment for high blood pressure because the crisis only happened once (i.e. on 8 November 2019);

4) He started using Tritace 10 plus on November 8, 2019 and took one pill per day during the following seven days (i.e. until 14 November 2019).¹ ;

5) He had never received anti-doping education before the sample collection of 12 November 2019

6) He did not conduct any checks before ingesting the substance because he never thought it could lead to an anti-doping rule violation;

2.11 Considering the above, FINA referred the case of the Athlete to the FINA Doping Panel and requested that in accordance with DC 7.10.2, the Doping Panel promptly issue a written decision without proceeding to a hearing. Pursuant to DC 7.10.2, in cases under DC 7.10.1 where a hearing has been waived or not timely requested, FINA or the Member Federation shall promptly issue a written decision setting out the full reasons for any period of Ineligibility imposed, including (if applicable) a justification for why the maximum potential period of Ineligibility was not imposed. FINA or the Member Federation shall send copies of that decision to other Anti-Doping Organizations with a right to appeal under DC 13.2.3, and shall Publicly Disclose that decision in accordance with DC 14.3.2.

2.12 On 21 October 2020, The FINA Doping Panel Chairman informed the athlete of the charges against him asserted by FINA and gave him a deadline to 5 November 2020 to file his defence and request a hearing.

2.13 On 4 November 2020, the Athlete responded to the FINA Doping Panel Chairman in the following terms:

“I, Voitenko Volodymyr, agree with the sentence and provisional suspension for a period of 8 months during the period since February 17, 2020. I declare that I refuse

¹ Following assessment by FINA scientific expert, such use is considered consistent with the concentration found by the WADA-Accredited Laboratory in the Athlete’s sample

to hear my case. But in case if my suspension period is more than 8 months, I'd like the hearing to be held. "

3. JURISDICTION & APPLICABLE RULES

- 3.1 As per Article 7.1 of the World Anti-Doping Code, results management and hearings shall be the responsibility of, and shall be governed by, the procedural rules of the anti-doping organization that initiated and directed Sample collection. In this case, FINA initiated and directed the collection of sample which returned the AAF. FINA is therefore the competent anti-doping organization to conduct the results management and adjudication of this case.
- 3.2 As per Articles 12.3 and 12.5 of the FINA Constitution, the FINA Doping Panel is the responsible body to adjudicate cases relating to violations of the FINA DC Rules. Considering the above, the FINA Doping Panel has jurisdiction to render a decision in this case.
- 3.3 The provision of the FINA DC Rules, entitled "Scope", stipulates that:

"These Anti-Doping Rules shall apply to and be binding upon FINA and each FINA Member Federation and its members, and each Continental Body or regional organization consisting of FINA Member Federations [...]"
- 3.4 In the present case, the Ukrainian Swimming Federation is a Member of FINA and Mr. Voitenko is an Athlete, affiliated with the Ukrainian Swimming Federation, subject to the FINA DC Rules. As such, the Athlete is bound by the FINA DC Rules.
- 3.5 Pursuant to the FINA Constitution of 22 July 2017, art. C 22.9, *"Whenever necessary the Chair of the Doping Panel shall appoint one or three persons from the Doping Panel to adjudicate all matters before it."* The FINA Doping Panel Chairman chose to decide on this case sitting alone rather than convene a full 3-member Panel.

3.6 The FINA DC Rules in its version in force in 2019 applies to this case.

4. Did FINA successfully establish that the Athlete committed an ADRV within the meaning of Articles 2.1 and/or 2.2 ADR?

- 4.1 The analytical report of the Sample A4455133 provided by the Athlete indicated the presence of the substance Hydrochlorothiazide and the Athlete waived his right to the analysis of the Sample B4455133 by not requesting it by the set deadline. Hydrochlorothiazide is a Prohibited Substance under the Class S.5 as stipulated in the WADA Prohibited List 2019.
- 4.2 It is worth recalling that the Athlete's A Sample was analysed by a WADA-accredited laboratory. Thus, the Laboratory benefits from the presumption in DC 3.2.2 that it has conducted sample analysis and custodial procedures in accordance with the ISL. The Athlete did not rebut such presumption.
- 4.3 Also, the Athlete did not possess a valid Therapeutic Use Exemption for this prohibited substance and his request for a retroactive TUE was denied by the FINA TUE Committee.
- 4.4 Moreover, according to DC 2.1.1, each athlete is responsible for any Prohibited Substance present in his or her sample and it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated to establish an ADRV.
- 4.5 In addition, the Athlete did not challenge the assertion of this ADRV by FINA. To the contrary, the athlete admitted that he committed an ADRV in his response of 17 June 2020, pursuant to the ADRV assertion made on 4 June 2020 by FINA.

- 4.6 Considering the above and in particular the athlete's admission, the Doping Panel is satisfied that FINA successfully established that the Athlete committed an ADRV within the meaning of Articles 2.1 and/or 2.2 ADR.

5. SANCTION AND CONSEQUENCES

Period of Ineligibility

- 5.1 FINA submitted to the FINA Doping Panel a proposal that an ineligibility period of 8 months should apply to the Athlete's ADRV. The FINA Doping Panel may follow this request for the following reasons.
- 5.2 Pursuant to DC 10.2, the base sanction for the presence of the Specified Substance Hydrochlorothiazide is a two-year period of ineligibility, unless FINA can establish that the anti-doping rule violation for the specified substance was caused by the Athlete's intentional conduct.
- 5.3 As per DC 10.2.3, the term "intentional" is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in a conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.
- 5.4 In this case, FINA did not file nor assert any element that would tend to evidence that the Athlete intentionally committed the violation. The base period of ineligibility applicable to the present case shall therefore be of two years pursuant to DC 10.2.2.
- 5.5 Under certain conditions, this two-year period of ineligibility can be either eliminated where there is No Fault or Negligence (DC 10.4), or reduced based on No Significant Fault or Negligence (DC 10.5.1.1).
- 5.6 For adult athletes, both Articles require that the athlete establish how the prohibited substance entered his or her system. The athlete is required to prove his or her allegations on the "balance of probability", which, according to long established CAS jurisprudence, means that the athlete needs to

convince the panel that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence (*cf. for the Panel to be satisfied [...] on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51 % chance of it having occurred. (CAS 2009/A/1926 & CAS 2009/A/1930, ITF v. Richard Gasquet and WADA v. ITF & Richard Gasquet, §5.9; CAS 2011/A/2384, WADA and FINA v. Alberto Contador Velasco & RFEC, §209).*

- 5.7 In this respect, it has been expressly held and repeated by the CAS that mere assertions are not sufficient to establish the source of a Prohibited Substance, including: "*suggest[ing] that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question. Necessary are for example details about the date of the intake, the location and route of intake or any other details of the ingestion.*".
- 5.8 In sum, the Athlete shall provide actual evidence as opposed to mere speculation (CAS 2014/A/3820).
- 5.9 In this case, given the prescription for Tritace 10 Plus provided by the Athlete as well as FINA's scientific expert's confirmation that the use and dosage declared by the Athlete such use is consistent with the concentration found by the WADA-Accredited Laboratory in the Athlete's sample, FINA Doping Panel is satisfied that the Athlete established by balance of probability that Hydrochlorothiazide entered his system through his use of the medication Tritace 10 Plus from 8 November 2019 until 14 November 2019 to treat an hypertensive crisis.
- 5.10 However, the FINA Doping Panel accepts that there is no room for the application of DC 10.4 in the present case. The threshold for "No Fault or Negligence" is high. The term is defined in the Appendix 1 to FINA DC Rules as follows : "*The Athlete or other Person's establishing that he or she*

did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule." This notion of "utmost caution" is incompatible with the present case where the Athlete ingested the substance without reading the label, cross-checking the ingredient with the prohibited list and running a prior internet search of the medication.

5.11 The FINA Doping Panel can accept the argument of FINA and consider that there is room for the application of DC 10.5.1.1 in the present case. In determining Athlete's "degree of fault" pursuant to DC 10.5.1.1, the Doping Panel adopted the Robert Lea's and Cilic's guidelines for determining the appropriate period of ineligibility based on the following three categories of fault and sanction ranges (*CAS 2016/A/4371 Robert Lea v. USADA*; *CAS 2013/A/3327 Marin Cilic v. International Tennis Federation (ITF)* & *CAS 2013/A/3335 International Tennis Federation (ITF) v. Marin Cilic*):

a. "considerable degree of fault": 16 - 24 months, with a "standard" considerable degree of fault leading to a suspension of 20 months.

b. "moderate degree of fault": 8 - 16 months, with a "standard" moderate degree of fault leading to a suspension of 12 months.

c. "light degree of fault": 0 - 8 months, with a "standard" light degree of fault leading to a suspension of 4 months.

5.12 According to Cilic, an objective element ("*what standard of care could have been expected from a reasonable person in the athlete's situation*") "should be foremost in determining into which of the three relevant categories a particular case falls". (Applying this standard, FINA characterizes the Athlete's level of fault for not taking objectively reasonable action such as cross-checking the ingredients of the medication with the Prohibited List and informing the doctor that he was subject to anti-doping rules and running an internet search of the product as "moderate fault." At least, the Athlete made sure to obtain the medication from a reliable source.

In the "moderate fault" category, the range of the period of ineligibility under Robert Lea is "8-16 months, with a 'standard' considerable degree of fault leading to a suspension of 12 months. According to Cilic, after determination of the relevant category based on application of the objective element, the subjective element is "used to move a particular athlete up or down within that category."

5.13 All issues considered, the FINA Doping Panel considers that application of the following subjective mitigating factors justifies moving the Athlete to the lower extremity of the "moderate degree of fault" category and imposing an eight-month period of ineligibility:

1. He was never provided with anti-doping education before the sample collection of 12 November 2019;

2. His level of care might have been diminished by the fact that the medication which caused the AAF was not advertised as performance enhancing and therefore does not raise as much suspicions of containing a prohibited substance as other medications;

3. His level of care might have been diminished by the fact that he was suffering from a serious medical condition which can understandably have shifted his focus from his anti-doping obligations towards his health;

4. According to ADAMS, the Sample Collection of 12 November 2019 was the first anti-doping control of his career;

5.14 Finally, provisions related to Substantial Assistance (DC 10.6.1), Admission of an anti-doping rule violation in the absence of other evidence (DC 10.6.2) or Prompt Admission (DC 10.6.3) cannot be envisaged in the present matter. In particular, it is noted that the provision related to prompt admission may only be envisaged when the athlete is potentially subject to a four-year sanction under DC 10.2.1 or 10.3.1.

5.15. In conclusion, FINA Doping Panel considers that a period of ineligibility of eight months should apply in this case.

Commencement of the Period of Ineligibility and Credit for Provisional Suspension

- 5.16 As to the commencement date of the period of ineligibility, FINA notes that DC 10.11 provides that, as a general rule, the period of ineligibility shall start on the date of the Doping Panel's decision.
- 5.17 However, in accordance with DC 10.11.2, where the athlete promptly (which, in all events, means for an athlete before the athlete competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by FINA, the period of Ineligibility may start as early as the date of sample collection. In each case, however, where this rule is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person was provisionally suspended, or accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed. In the present case, FINA considers that Mr. Voitenko promptly admitted his violation on 17 June 2020. As he accepted a provisional suspension on 17 June 2020 and must serve at least half of the period of ineligibility going forward from this date, FINA considers that the Athlete's period of ineligibility should start on 17 February 2020.
- 5.18 Moreover, DC 10.11.4 provides for credit for provisional suspensions. In this case, the Athlete has been provisionally suspended since 17 June 2020. However, because the period of ineligibility is to start on 17 February 2020, then no credit shall be given for the time served under provisional suspension because the time served is already comprised within the period of ineligibility.

Disqualification

- 5.19 As per DC 9, a violation of these Anti-Doping Rules in Individual Sports in connection with an in-Competition test automatically leads to Disqualification of the result obtained in that Event with all resulting Consequences, including forfeiture of any medals, points and prizes. The results obtained by the Athlete during the Event in connection with the anti-doping test shall thus be disqualified.

- 5.20 Moreover, in accordance with DC 10.8, all competitive results of the Athlete obtained from the date an anti-doping rule violation occurred, through the commencement of any provisional suspension or ineligibility period, shall, unless fairness requires otherwise, be disqualified with all resulting consequences including forfeiture of any medals, points and prizes. In this case, given that the athlete stopped using the prohibited substance on 14 November 2019, FINA Doping Panel is willing to follow the reasoning of FINA and consider that the fairness exception may be applied to limit the disqualification under DC 10.8 to the period of time between 8 November 2019 to 14 November.
- 5.21 As the FINA Doping Panel has decided to start the period of ineligibility on 17 February 2020 (as requested by FINA), it has no other choice but to disqualify all results obtained from the Athlete since 17 February 2020 as he was ineligible from this date and thus could not compete in any Competition.
- 5.22 Therefore, all competitive results obtained by Mr. Voitenko between 8 November 2019 and 14 November 2019 and all results obtained since 17 February 2020 shall be disqualified with all resulting consequences including forfeiture of any medals, points and prizes.

Costs

- 5.23. According to C 12.3, Member Federations shall be obliged to reimburse FINA or the designated organization for all costs (including but not limited to laboratory fees, interpretation and hearing expenses and travel) related to an anti-doping rule violation committed by a Person affiliated with that Member Federation.
- 5.24 The Ukrainian Swimming Federation shall be ordered to reimburse FINA for all costs related to the AAF in relation to the test conducted on the Athlete. In this case, the costs to reimburse are the costs of the Documentation Package (1000 EUR).

6. RULING

In the light of the above, the FINA Doping Panel decides as follows:

- 6.1 **Mr. Volodimir Voitenko** is found to have committed an anti-doping rule violation under FINA DC 2.1 (Presence OF A Prohibited Substance) and FINA DC 2.2 (Use of a Prohibited Substance);
- 6.2 **Mr. Volodimir Voitenko** is sanctioned with an 8 (eight) month period of ineligibility;
- 6.3 The ineligibility period imposed on **Mr. Volodimir Voitenko** is served from the 17 February 2020;
- 6.4 All results achieved by **Mr. Volodimir Voitenko** from 8 November 2019 until 14 November 2019 and since 7 February 2020 are disqualified and any medals, points and prizes forfeited;
- 6.5 The **Ukrainian Swimming Federation** is obliged to reimburse FINA for all costs related to the present proceedings (EUR 1000-.).

Lausanne , 28.01.2021



FINA Doping Panel Chairman
Robert Fox