

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

Re: 77 190 E 00042 12 JENF
United States Anti-Doping Agency (“USADA”)
and
Lenroy “Cam” Thompson (“Respondent” or “Thompson”)

FINAL ARBITRATION AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated by the above-named parties, having duly heard the proofs and allegations of the parties, and having issued an Interim Final Award after a hearing which concluded on February 25, 2012, does hereby issue this Final Award, as follows:

I. INTRODUCTION

- 1.1 USADA is the independent anti-doping agency for Olympic Movement sports in the United States and is responsible for conducting drug testing, including sample collection, and the adjudication of test results and potential anti-doping rule violations pursuant to the USADA Protocol for Olympic Movement Testing (“USADA Protocol”).
- 1.2 Respondent, a 23-year old USA Boxing registered super heavyweight division boxer, was first included in the USADA Registered Testing Pool (“USADA RTP”) in the first quarter of 2009 and continuously since the third quarter of 2010.
- 1.3 In accordance with the requirements of the USADA’s Whereabouts Policy (“Whereabouts Policy” or “Policy”), effective January 1, 2011, athletes in the USADA RTP, including Thompson, are obligated to provide accurate and timely whereabouts information to facilitate and enable out-of-competition athlete testing. Failure to do so on

three occasions within an eighteen-month period results in an anti-doping rule violation under the Policy.

- 1.4 USADA declared that Respondent failed on three separate occasions within the period from July 1 and November 2011 to provide the requisite whereabouts information for out-of-competition testing and charged Respondent with a first anti-doping rule violation.
- 1.5 Respondent's principal contention was that the Policy, pursuant to which USADA determined that Thompson had committed three filing failures, was non-compliant with Article 2.4 of the World Anti-Doping Code ("Code") and the World Anti-Doping Agency International Standard for Testing ("IST").
- 1.6 Because Thompson intended to compete in a protected competition scheduled to commence on February 25, 2012, an expedited hearing pursuant to the USADA Protocol was agreed by the parties to be heard and decided by a sole arbitrator.
- 1.7 An evidentiary hearing took place in Colorado Springs, Colorado, commencing on February 23, 2012, and concluding by teleconference on February 25, 2012, during which the parties provided testimony, several written exhibits, and oral argument in addition to pre-hearing briefing. The parties were ably represented by counsel. Claimant was represented by William Bock, III and Onye Ikuwaukor, respectively USADA's General Counsel and Legal Affairs Director. Respondent was represented by Stephen Hess, a lawyer from Colorado Springs, Colorado.
- 1.8 At the hearing Molly Tomlonovic, USADA's Doping Control manager, testified for Claimant and Thompson testified on his own behalf. Richard Young, a member of the

WADA Legal Committee and co-author and editor of the Code, testified as an expert witness on behalf of USADA.

- 1.9 The parties agreed that in view of the imminent competition the Arbitrator would issue an Interim Award by February 25, 2012, to be followed by a full, reasoned award.
- 1.10 The Arbitrator issued an Interim Final Award on February 25, 2012, concluding that USADA had met its burden of proving that Thompson had violated the Policy by his negligent commission of three whereabouts failures within an eighteen month period.

II. FACTS AND ISSUES

- 2.1 Respondent contends that USADA failed to satisfy the elements of proof required under its Policy to establish each of the three filing failures it alleged that Thompson committed because he was not properly notified of the consequences of his alleged whereabouts failures.
- 2.2 As to the first alleged whereabouts failure, USADA claims it resulted from Respondent's failure to make his third quarter whereabouts filing by the June 30, 2011 deadline in contravention of Clause 5(a)(i)(2)(a) of the Policy, which indicates that a filing failure for a national testing pool ("NTP") athlete, such as Thompson, comprises the "[F]ailure to submit a completed *Whereabouts Filing* **and** the *Athlete* is drawn for out of competition testing by USADA."
- 2.3 Respondent's failure to meet the aforesaid deadline was confirmed by Molly Tomlonovic, USADA's Doping Control Manager, and by USADA's July 8, 2011 and August 10, 2011 emails. (See Cl. Exhs. 7H and 7I).

- 2.4 Although Respondent does not deny he was in the NTP, he claims that he was never actually notified that he was in the NTP as he alleges is required under the Policy or the IST. By contrast, USADA cites several factors establishing that Thompson in fact did receive proper notification of his inclusion in the RTP thereby satisfying the requirements of Article 11.3.5 of the IST. These included the fact that Thompson had made whereabouts filings in the second quarter, had received numerous emails from USADA in the month from May 27 to June 29, 2011 (see C. Exhs 7A-7F) and had received on-line education in 2011.
- 2.5 Finally, and most importantly, Respondent claims he was never given notice through the Policy or otherwise of the sanctions set forth in the in § 2.4 of the Code that might result from the alleged whereabouts' filing violations.
- 2.6 On this point Claimant contends that Clause 11.3.5 of the IST requires only that an athlete at some time during the failures' period of time be notified of the consequences or sanctions that might result from an anti-doping rule violation, and it cites several instances during the time frame at issue when Thompson was so notified thereby satisfying the legal requirements of the Code and the IST.
- 2.7 As to the second alleged whereabouts failure, USADA contends that it resulted from Thompson's failure to be available for testing on September 6, 2011 at the location he specified on his third quarter 2011 filing in contravention of clause 5(a)(i)(2)(b) of the Policy. That Clause provides that for NTP athletes such as Respondent a filing failure also exists when the "*Athlete* is unavailable for testing due to the *Athlete* providing inaccurate information on his *Whereabouts Policy*." Indeed, the Policy requires the

athlete to keep USADA current by updating his whereabouts information. Policy, § 2(a)(2).

- 2.8 Respondent's filing indicated that on September 6, 2011 he would be in Lenexa, Kansas. Cl. Exh. 7D. On that day a USADA representative went to Lenexa in an attempt to test him, but he was in Colorado Springs.
- 2.9 In a letter of apology to USADA Thompson confirmed his failure to update his whereabouts notification. Cl. Exh. 8E.
- 2.10 Thompson was then advised by letter on September 21, 2011 that his second filing failure had been upheld and that a third failure within an eighteen month might result in sanctions consisting of up to two years of ineligibility. Cl. 8F.
- 2.11 As to the third alleged whereabouts failure, USADA claims that Respondent was unavailable for testing on November 11, 2011 at the location he had specified on his fourth quarter filing, namely, Lenexa, Kansas, when an attempt was made by a USADA Doping Control Officer ("DCO") to test him. Cl. Exh. 9. Instead, as Respondent confirmed, he was in Dallas, Texas, and he conceded that he only updated his whereabouts filing after a DCO had come to his house in an unsuccessful attempt to test him. Cl. Exh. 9(c).

III. DISCUSSION

- 3.1 The facts surrounding Thompson's three whereabouts filing failures asserted by USADA are virtually undisputed in that they have been confirmed through the testimony of Ms. Tomlonovic, by contemporaneous documentation by USADA and testimonial and written acknowledgment by Respondent.
- 3.2 Thompson was apprised by USADA's July 8, 2011 and August 10, 2011 letters that he failed to submit his third quarter whereabouts filing by the June 30, 2011 deadline and that he had been drawn for testing prior thereto. Cl. Exhs. 7H and 7I. Moreover, USADA clearly established that he had been notified of his designation for inclusion in the RTP as required by IST's Clause 11.3.5¹ and warned through several written communications in advance of the filing dateline that failure to meet the deadline will subject Thompson to a Filing Failure, and that a Filing Failure can also result from an unsuccessful attempt by a DCO to complete a test due to inaccurate or incomplete whereabouts information. Cl. Exhs. 7A-7F.
- 3.3 Similarly, the facts surrounding Thompson's second failure resulting from his unavailability for testing on September 6, 2011 in Lenexa, Kansas and his failure to update his whereabouts information causing an unsuccessful attempt by USADA's DCO to test him, are well documented and uncontested by Thompson² as is the evidence that

¹ See also Cl. Exhs. 7A-7F. Additional evidence supporting his notification by USADA included the fact that he had made whereabouts filings in the second quarter of 2011 when he was still in the RTP and taken USADA's Online Education in 2011.

² See, e.g., Cl. Exhs. 7D, 8E and 9C.

he received notice of his inclusion in the RTP for the third quarter of 2011 and warnings of the consequences of a further filing failure.

3.4 Respondent, even following his second whereabouts failure, neglected to update his whereabouts filing to advise USADA of the change in his address from Lenexa, Kansas, resulting in an unsuccessful attempt by the DCO to test him.³ This resulted in his third whereabouts failure when he was unavailable on November 11, 2011 for testing at the location he had designated on his fourth quarter 2011 filing. Cl. Exh. 9.

3.5 As was the case for the prior whereabouts filing failures, Respondent had received notice of his inclusion in the RTP and warnings about the consequences of receiving a third failure.

3.6 Having concluded that USADA has established the facts necessary to demonstrate to my comfortable satisfaction that Respondent negligently failed on three occasions to comply with the filing requirements under the Policy by the deadlines notified to him, I turn to the legal issue asserted by Respondent, which in essence is his contention that the Policy must be compliant with the IST and the Code and that it was not.

3.7 Article 2.4 of the World Anti-Doping Code (“Code”) provides:

“2.4 Violation of applicable requirements regarding *Athlete* availability for *Out-of-Competition Testing*, including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the *International Standard for Testing*. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by *Anti-Doping Organizations* with jurisdiction over the *Athlete* shall constitute an anti-doping rule violation.”

³ See Cl. Exhs. 9A. Thomson in fact acknowledged that it was only after the USADA DCO had gone to his house to test him that he updated his whereabouts information. Cl. Exh. 9(c).

- 3.8 Accordingly, it is clear that athletes in the USADA RTP are required to comply with out-of-competition testing, including the whereabouts filing obligations set forth in the Policy or risk any anti-doping rule violation.
- 3.9 The failure on the part of the athlete to complete the whereabouts filings on three occasions within an eighteen-month period will thus result in a sanction for an anti-doping rule violation. See Policy, § 4; Code, Art. 2.4.
- 3.10 Article 11.3 of the World Anti-Doping Code International Standard for Testing (“IST”) contains in detail the “Whereabouts Filing Requirements.” See IST, § 11.3, pp. 48-53.
- 3.11 By reason of being in the USADA RTP, to which he admitted, Thompson was required under Article 11.3 of the IST to submit a Quarterly Whereabouts Filing with USADA that “provides accurate and complete information about [his] whereabouts during the forthcoming quarter ... so that he can be located for Testing at any time during that quarter.”
- 3.12 USADA may declare an athlete to have committed a filing failure only when it can establish:
- “a. that the Athlete was duly notified (i) that he/she was designated for inclusion in a Registered Testing Pool, (ii) of the consequent requirement to make Whereabouts Filings; and (iii) of the consequences of any failure to comply with that requirement;
 - b. that the Athlete failed to comply with that requirement by the applicable deadline;
 - c. (In the case of a second or third Filing Failure in the same quarter) that he/she was given notice of the previous Filing Failure in accordance with Clause 11.6.2(a) and failed to rectify that Filing Failure by the deadline specified in that notice; and
 - d. that the Athlete's failure to comply was at least negligent. For these purposes, the Athlete will be presumed to have committed the failure negligently upon proof

that he/she was notified of the requirement yet failed to comply with it. That presumption may only be rebutted by the Athlete establishing that no negligent behavior on his/her part causes or contributed to the failure.”

IST, Article 11.3.5.

- 3.13 The Code provides that violations of Article 2.4 mandate that “the period of ineligibility shall be at a minimum one (1) year and at a maximum two (2) years based on the Athlete's degree of fault.” Code, Art. 10.3.3.
- 3.14 Since, as noted in 3.12 above, under IST, Art.11.3.5(d) Thompson is presumed to have committed a whereabouts failure “negligently” where it can be established by USADA that it notified him of the filing requirement, as Thompson admitted it did, and Thompson failed to comply, it remained for Respondent under the applicable rules, in order to preclude or limit a sanction, to prove that he was not negligent by his failure to comply with the whereabouts filing obligation. The standard of proof for Respondent to rebut the presumption of negligence shall be “by a balance of probability.” See Code, Art. 3.1.
- 3.15 The Policy states that all athletes in the RTP “must comply with the whereabouts requirements in this Policy, which is consistent with the World Anti-Doping Agency (“WADA”) *International Standard for Testing* (“IST”).”
- 3.16 The Policy further recites the ways in which athletes in the NTP (such as Thompson) may under the IST be subject to a Filing Failure, namely:
- “2. For NTP Athletes:
- a) “Failure to submit a completed *Whereabouts Filing* **and** the Athlete is drawn for out of competition testing by USADA;
 - b) The Athlete is unavailable for testing due to the Athlete providing inaccurate information on his Whereabout Filing.”

Policy, § 5(a)(2)(b).

- 3.17 As indicated, supra, USADA has established violations by Respondent of both Clauses 5(a)(i)(2)(a) and (b).
- 3.18 To ascertain whether the Policy is “consistent” with the IST in respect of the principal issue raised by Respondent, we turn to IST § 11.3.
- 3.19 IST § 11.3 recites in detail the Whereabouts Filing Requirements. Pursuant to § 11.3.5, USADA may only declare an athlete to have committed a filing failure if it can establish inter alia that the athlete was duly notified of (a) his designation for inclusion in an RTP, (b) the requirement thereby to make whereabouts filings and (c) “the consequences of any failure to comply with that requirement.” First § 11.3.5(a). (emphasis added)
- 3.20 Respondent takes the position that the foregoing quoted phrase requires that before a filing failure is declared by USADA it must notify the athlete in advance of the sanctions that might ensue if an anti-doping rule violation is found, that is, when there have been three whereabouts failures within a rolling 18 month period.
- 3.21 Claimant argues, however, that there is no specific requirement that it provide notification of the sanctions that might arise from three whereabouts filing failures. It contends that the “consequences” of a failure on the part of an RTP athlete to make a whereabouts filing is that it might result in a “Filing Failure”.
- 3.22 As Clause 4 of the Policy expressly indicates, it is only after there have been three whereabouts failures within a rolling 18 month period that an anti-doping rules violation pursuant to the Code and the IST will result.

- 3.23 Accordingly, it is not necessary for USADA in every whereabouts notification that it makes to an NTP athlete, such as Thompson, to inform him of the “sanctions” that might ensue if an anti-doping violation is found. Rather, USADA can, and indeed did, satisfy the IST requirement to notify Thompson of the “consequences of any failure” when it repeatedly and consistently sent notices that Thompson could be assessed a filing failure if he failed to timely make his third quarter whereabouts filing and that any combination of those declared failures within any rolling 18 month period would result in an anti-doping violation. See Ch. 7A-7F.
- 3.24 Furthermore, after his first whereabouts failure and subsequent thereto, Respondent was in fact specifically notified of the sanctions that would result from three whereabouts failures declared within the 18 month period. See, e.g., Cl. Exhs. 8D and 8F.
- 3.25 As indicated, an athlete’s negligence is presumed under Clause 11.3.5 of the IST if a failure to file or update a whereabouts filing has been established, whereupon the burden of proving the absence of negligence shifts to the athlete. Claimant demonstrated beyond dispute that Respondent received timely notifications of all his third quarter of 2011 filing failures at issue as well as his inclusion in the USADA’s RTP. Moreover, Claimant established that its notifications to Thompson of the consequences of whereabouts filing failures or missed tests were timely and sufficient under the Policy and the Code and fully compliant with the requirements of the IST.
- 3.26 Respondent was unable to establish by a balance of probability that he was without negligence in failing to timely make his third quarter whereabouts filings and to be available for testing at the location specified by him. Indeed, completion by Thompson

of the USADA's on-line education module demonstrated that he knew how his whereabouts filing could be updated, the importance of doing so and the consequences of non-compliance. Respondent's awareness of the requirements is fully acknowledged by him in his September 21, 2011 letter of apology to USADA (Cl. Exh. 8E) and in his testimony admitting that in 2009 (when he received two whereabouts failures) he received notices of the consequences of whereabouts rule violations. Cl. 17A-D.


IV. CONCLUSION AND SANCTION

- 4.1 Article 10.3.3 of the Code provides that there be a sanction ranging from a minimum ineligibility of one year to a maximum of two years for a violation of an anti-doping rule under Article 2.4 of the Code, the exact length of time being based on the Athlete's degree of fault.
- 4.2 Claimant sought a one-year period of ineligibility for Respondent's whereabouts violation, a first anti-doping rules' violation on his part.
- 4.3 The Interim Final Award is hereby confirmed, and Respondent is hereby sanctioned for a one-year period of ineligibility commencing as of February 25, 2012, the date of the Interim Final Award, and ending at midnight on February 24, 2013.
- 4.4 Consequently, all competitive results, medals, points and prizes obtained by Respondent on or subsequent to November 11, 2012, the date of his third whereabouts failure, are hereby cancelled with retroactive effect.
- 4.5 The administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the Arbitrator shall be borne by Claimant.

4.6 The parties shall bear their own costs and attorneys' fees.

4.7 This Final Award is in full settlement of all claims asserted in this arbitration. All claims not expressly granted herein are hereby, denied.

Dated: May 2, 2012



Walter G. Gans, Arbitrator