

**BEFORE THE AMERICAN ARBITRATION ASSOCIATION
North American Court of Arbitration for Sport Panel**

**RE: USADA (United States Anti-Doping Agency)
and
Kyoko Ina**

AAA No. 30 190 00814 02

Opinion

WE, THE UNDERSIGNED ARBITRATORS, having been designated by the above-named parties, and having been duly sworn and having duly heard the proofs and allegations of the parties, **FIND AND AWARD** as follows:

The Parties

1. The United States Anti-Doping Agency ("USADA") is an independent legal entity that conducts drug testing and adjudication of positive test results pursuant to the United States Anti-Doping Agency Protocol for Olympic Movement Testing (the "Protocol") and the rules of the various international sports federations.
2. Kyoko Ina ("Ina") is an elite pairs figure skater and a member of the United States Figure Skating Association ("USFSA").

Facts

3. On March 18, 2002, Ms. Ina's name was randomly selected for a No Advance Notice ("NAN") test during USADA's normal quarterly testing draw.
4. There was an attempt to test on June 3, 2002. USADA declared this to be a missed test and advised the athlete by letter of June 14, 2002. The athlete provided a written response of explanation on June 25, 2002. USADA maintained its position that it was declared a "missed test" as indicated in its letter of July 11, 2002.
5. There was a further attempt to test on July 16, 2002. USADA might have declared this to have been a missed test but for the subsequent events discussed herein.
6. From July 15, 2002 Ms. Ina sent a daily fax directly to USADA describing her whereabouts. The final fax of this series stated "tonight I will be dining at Centro's in Greenwich. I should be home around 10:30 p. [m]".
7. A Doping Control Officer ("DCO"), Ms. Donna Koch, was instructed to proceed to the athlete's home on July 18th and to conduct a test at 10:30 p.m. On August 4, 2001 an out of competition test was conducted by the same DCO who made the 18th of July attempt. The 2001 test was conducted at the athlete's apartment and ended at 11:00 p.m. The result was negative.

8. On July 18, 2002, while still an Olympic-eligible member of the USFSA, Ina made no attempt to provide a sample. Instead, she refused to provide a urine sample for testing as required by the Protocol, and constituting a violation under section 5.2 (b) of the International Skating Union ("ISU") Anti-Doping Code.

Procedural History

9 Following receipt of Ina's signed Athlete Refusal Form, USADA submitted the matter to an Anti-Doping Review Board. That Review Board, consists of independent technical, medical and legal experts. The Review Board recommended that the matter proceed. USADA, relying on the rules of the ISU, proposed a four-year suspension to Ina.

10. Ina rejected the recommended sanction, and this arbitration followed.

11. Prior to the expedited hearing in this matter, requested by Ina, which took place on October 16, 2002, USADA complied with Ina's discovery requests and the parties agreed that Ina had been properly selected for and notified of her testing requirement pursuant to the USADA Out of Competition Doping Control Program.

12. At the hearing, Ina, through counsel, was given the opportunity to submit every available argument and substantiation for her position. The panel received and reviewed the various documents, briefs, precedent and testimony provided by Ina and USADA.

13. The hearings were declared closed on October 16, 2002 pursuant to R-37 of the American Arbitration Association Supplementary Procedures for Arbitration initiated by USADA.

Relevant Provisions

14. The key regulation at issue in this dispute is Section 5.2. (b) of the ISU Anti-Doping Code, which establishes a mandatory four-year suspension for refusal to test.

Arguments Presented

15. USADA contends that the language of ISU Code Section 5.2 (b) allows for no discretion in the application of its minimum stated penalty, and that, since the execution of the Athlete Refusal Form is conclusive as to the violation, a four year suspension is the only possible outcome of these proceedings. USADA does not seek to impose the additional sanctions of lifetime disqualification and a \$1,000,000.00 fine specified in this Section.

16. Ina defends on a number of grounds. First, she set forth a host of procedural infirmities, from the Doping Control Officer's ("DCO") unnoticed but expired identification to the alleged fact that, at about 11:00pm, no one at USADA was available to receive a call or answer questions. Of more substance were respondent's arguments as to the propriety of a late night unannounced test request at her home, and the import of certain confused and incorrect statements by the DCO. Ina contends that her privacy was unnecessarily invaded, and that such a severe sanction can only be imposed when refusal and its circumstances are clear and unconditional.

Reasoning and Conclusions of the Panel

17. The panel is mindful of Ina's exemplary prior record, and accepts her assertion that, despite certain apparent disparities in the parties' respective versions of what happened, she did not intend to evade the anti-doping rules. We are, however, persuaded that a violation has occurred.

18. Ina had not provided sufficient information for her to be located during the daytime, but had given USADA very recent updates as to her evening activities. Accordingly, the DCO's visit at an hour Ina had stated the day before as her expected time of return was by no means an act of harassment or otherwise inappropriate. She had been eleven months earlier tested out of competition by the same DCO at a similar time in the evening. In addition, her correspondence to USADA, as set forth in Section 6 above was an invitation to test at this hour of the night given her personal schedule. All eligible athletes must expect to surrender some degree of personal privacy and convenience; the very nature of unannounced testing, an integral part of the Anti-Doping system, demands no less.

19. A DCO engaged in an out of competition unannounced test must not leave before either obtaining a sample or the athlete has signed a refusal to give a sample form. Ina never attempted to give a sample, but chose to sign the Athlete Refusal Form after having been warned by the DCO that there were potential suspension consequences. Ms. Ina's boyfriend, who was also present, warned her of the possible media implications. Nevertheless, she then proceeded to sign the refusal form.

20. Before doing so, she had expressed doubts about her desire to continue to compete at the ISU, World or US Championships, the Olympic Games or other USFSA -qualifying competitions in the future. She later indicated that this desire extended only to Olympic (and thus testing) eligibility. Her statements directly implicate Section 1.a of the United States Olympic Committee ("USOC") Anti-Doping Policies, and its two year suspension penalty. The USOC sanction for an athlete who has not notified USADA and the USFSA of retirement and refuses a NAN test is two years, not the four years prescribed by the ISU Code. This Panel would have had to reconcile or harmonize those provisions but for the submissions of counsel for Ina that retirement was not an issue.

21. The ISU has not incorporated into its Anti-Doping Code any language that would allow for application of an "extraordinary circumstances" or any other exception to, or escape from, its broad mandate. The athlete's intentions, other conduct and state of mind are therefore not relevant in applying Section 5.2. (b), and the panel has no discretion to alter the minimum sanction called for by the ISU regulation.

22. The DCO should not have discussed the specifics of the sanction (her description of the period involved was wrong), and she should not have been drawn into any mention of another test. These statements, the missing or late reports and Ina's previously declared missed test were nonetheless irrelevant. The central fact is that respondent chose to sign the refusal form rather than to submit to testing.

23. Section 5.2 (b) of the ISU Code is designed to maintain a drug-free competitive environment. Ina, however innocent her motives may have been, violated that provision. We therefore impose the least severe sanction pursuant thereto, a four-year suspension.

24. Each party shall bear its own costs and attorney's fees, and the cost of the transcript shall be evenly split.

25. The administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the arbitrators shall be borne by USADA.

This 25 day of October, 2002

Richard Jeydel, Panel President and Arbitrator

Christopher Campbell, Arbitrator, filing separate dissent


Richard McLaren, Arbitrator

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This 25 day of OCTOBER 2002


Richard Jaydel, Panel President and Arbitrator

Christopher Campbell, Arbitrator, filing separate dissent

Richard McLaren, Arbitrator

KYOKO INA v. UNITED STATES ANTI-DOPING AGENCY
American Arbitration Association No: 30 190 00814 02

Christopher L. Campbell Dissenting

A. The right to compete

1. The right to compete in national and international competition is a human right. *Olympic Charter, Fundamental Principles*, No. 8, p. 9. It is a substantial right protected by federal, state and international laws. 22 U.S.C. §220509(a); *United States Olympic Committee Constitution*, Article IX; *California State University v. National Collegiate Athletic Association* (1975) Cal. App. 3d 533, 121 Cal. Rptr. 85; Olympic Charter, Rule 2, Section 10 and Bylaw to Rule 45. At the highest international level, it is ephemeral, passing too quickly even for those blessed with long and successful careers.
2. The mental focus required to be one of the best in the world, as Ms. Ina has been, is astounding. Ms. Ina must focus all her mental energy on her passion, her job, and her joy--skating. And with this investment of energy, there is a deep emotional bond that grows between her identity and her performance as a world-class athlete. This emotional bond is forged by sweat equity. An athlete at Ms. Ina's level will have endured thousands of hours of hard physical training. In many cases, athletes have worked decades at perfecting their craft. At the top of their game, an athlete will have a tremendous sense of well being and an inestimable sense of perfection.
3. The right to compete belongs to an individual, to Ms. Ina. It should not be taken away, even for a day, except for compelling reasons or by a superior competitor. The fight against those athletes who intentionally use prohibited substances to enhance their athletic performance is indeed a compelling reason. It is compelling because it preserves a level playing field (ensuring that when an athlete wins they are the superior competitor, not some doped up monstrosity). More importantly, it is compelling because the fight against doping surely saves lives!
4. Yet, when any organization, including the United States Anti-Doping Agency ("USADA"), turns this fight against doping on innocent athletes, that behavior is unacceptable. In those instances, the organizations are pursuing their goal with the very same self-destructive motivation of an athlete who intentionally dopes, i.e., win at all cost. As arbitrators, we should not fear being labeled "athlete friendly" if we refuse to tolerate this behavior.
5. The various rules, procedures and CAS legal precedent are written to protect athletes' right to compete. We as arbitrators have a duty to enforce them. As explained more fully below, on the facts of this case, Ms. Ina is an innocent athlete. USADA has presented no compelling evidence to impose a sanction against her.

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B. USADA's burden of proof.

6. The precious nature of the right to compete is why USADA has the burden to prove by clear and convincing evidence that Ms. Ina refused to take a drug test. *Arbitration CAS 2001/A/343 UCI v. Hamburger*(2002) p. 13 ("because of the drastic consequences of a doping suspension on the athlete's exercise of his/her trade . . . it is appropriate to apply a higher standard than the general standard required in civil procedure"); *See* AAA Rule 33 (e); *See also* USADA Protocol § 9 (b)(v). The only USADA witness with knowledge of what took place on July 18, 2002, the date of the alleged refusal, was USADA's Doping Control Officer ("DCO"). At the hearing, the DCO testified that she wrote and sent a very neat, hand-written note to USADA in July ("DCO Letter"). The DCO Letter explained what took place on July 18, 2002. The DCO Letter was provided to the panel as part of USADA's Exhibit 7. It was undated and there were no strike outs or mistakes. On cross examination, when asked whether she had written and sent the DCO Letter to USADA in July, the DCO affirmed her testimony with an emphatic, "yes." At that juncture, Ms. Ina's counsel (Mr. Williams) presented their Exhibit 29, which was the DCO Letter with a few noteworthy exceptions.

C. Failure to provide key evidence.

7. The first difference was that the top of the page was not redacted like the USADA version. That led to the identification of the second difference. There was a facsimile heading on the page which showed the date it was sent (August 20, 2002) and the place it was sent from (the DCO's office). That was more than a bit suspicious.
8. The fact that USADA was not sent the DCO Letter in July was corroborated by the testimony of Mr. Terrence Madden (Executive Director of USADA). On cross examination, Mr. Madden testified that on August 13, 2002 he sent a packet of materials to USADA's Anti-Doping Review Board Panel ("Review Panel"). The DCO Letter was not included in that packet. He continued, if USADA had the DCO Letter on August 13, 2002 it would have been included in that packet. On August 22, 2002, Mr. Madden testified he did, in fact, send the DCO Letter to the Review Panel. His August 22, 2002 letter to the Review Panel states, "We have since [referring to the DCO Letter] received additional information. . . from the DCO regarding the refusal to test."
9. The problem with the date of the DCO Letter crystalizes when you consider the DCO is required to fill out an Out-of-Competition Testing-After Action Report ("AA Report") for all contacts made with athletes. It is part of the USADA protocol. The DCO testified she filled out an AA Report for the July 18, 2002 meeting with Ms. Ina and sent it to USADA. USADA never produced the AA Report to the Review Panel and, despite Mr. Williams' timely request, did not produce the AA Report to him or this panel. The failure of USADA to provide the AA Report is very troubling because the DCO Letter appeared to be written with the assistance of someone who understood the key phrases to obtain a conviction of

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Ms. Ina, whereas the AA Report was a document written contemporaneous with the DCO's visit on July 18, 2001 and, as such, more trustworthy regarding what took place on July 18, 2002.

10. Ms. Ina should have had the AA Report to prove that the DCO misled her. As noted above, USADA never produced that document. Under U.S. law, this panel is allowed to draw inferences from USADA's failure to produce that document. Namely, as explained more fully below, the DCO did in fact mislead Ms. Ina about taking the test the next day. With that evidence, Ms. Ina's innocence would be assured. The following facts compel this panel to view the AA Report in the light most favorable to Ms. Ina: (1) USADA redacted the dates on the DCO Letter; (2) the DCO falsely testified concerning the DCO Letter; and (3) USADA failed to provide the AA Report. Indeed, this panel's decision against Ms. Ina is deeply disturbing because it demonstrates an acceptance of USADA's misconduct in this case.

D. Ambiguity analysis.

11. Ms. Ina's (whom the panel determined gave credible testimony) testified that she did not refuse to take the test. She asked the DCO if she could take the test the next morning, and was informed that may be a possibility. She fully expected the DCO to show up the next morning to administer the test. Ms. Ina noted the confusion on the issue of when the test could be taken on the refusal form. This request was not quite as unreasonable as in the typical drug testing context. USADA testified that *they had never* attempted to take a test as late as 10:30 p.m. In addition, all the previous tests that Ms. Ina had taken¹ demonstrated it took a long time for her to provide a sample. In short, the DCO with her boyfriend in tow, were looking at sitting in Ms. Ina's living room very late into the evening or early morning the next day, and that angered Ms. Ina.
12. Further, the DCO (whom the panel determined was not credible) testified that she discussed taking the test the next morning and said she would talk with her supervisor. My analysis would be different had the DCO testified she never told Ms. Ina that taking the test the next day was a possibility. On a dispute over that issue, the panel must believe even the credibility challenged DCO in this case. However, Ms. Ina's belief that the DCO would take her test the next day and the DCO's testimony that she informed Ms. Ina that could happen appears to be a close approximation to what occurred that night.
13. This situation was further aggravated because USADA's hotline was not working that evening. This hotline was suppose to be available to help Ms. Ina in determining whether taking the test the next morning was acceptable. Both Ms. Ina and the DCO affirmed the

¹ She has never failed a drug test. There was not even a hint that Ms. Ina was attempting to avoid the test. It was late at night and Ms. Ina was frustrated because someone from USADA was in her home late at night just after she had gone to the bathroom. She was in for a long night.

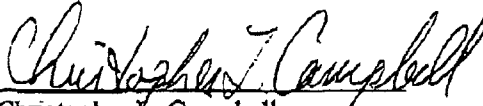
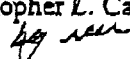
hotline was not working and that was also noted on the refusal form. Given the DCO's statements about testing the next morning and the defective hotline, at a minimum the DCO's conduct created an ambiguity regarding taking the test the next day.

14. Regarding this ambiguity, the facts of this case should be decided under the laws of the United States. CAS Rule 58. Under U.S. law, ambiguities are to be decided in favor of the person not responsible for creating the ambiguity, in this case Ms. Ina. CAS legal precedent is consistent with this legal principle. See *Arbitration CAS 99/A/241, USA Triathlon v. Smith* (1999), ¶70 ("where doubt has been created with regard to the test procedure, such doubt must go to the benefit of the athlete"); See also *Arbitration CAS 94/129, USA Shooting & Q. v. International Shooting Union* (1995) ("regulations that may affect the careers of dedicated athletes must be predictable").
15. The DCO should not have implied that Ms. Ina may be able to take the test the next day given the draconian consequences this panel has chosen to impose. The DCO has been trained in doping control procedures and should have known better. Ms. Ina, the athlete, has never had the benefit of that training. Had the DCO done her job, or had the hotline been working, Ms. Ina would have been informed that taking the test the next day was not acceptable and she was facing horrible consequences. USADA bears the burden of failing to provide Ms. Ina this information, either through the DCO or the hotline. *Arbitration CAS 98/184 Cooke v. FEI* (1998), ¶11.20 ("respondent was under a duty to supply all relevant material to the appellant in order to enable her to make an informed choice"); See also *Quigley, Supra*, at ¶30 (any legal regime should seek to enable its subjects to assess the consequences of their action). Had she been given the proper instruction, I am convinced she would have waited until midnight or thereafter to provide a sample. Indeed, she states as much in her letter to Mr. Madden on August 20, 2002:

"If the [DCO] and I had been able to reach either her supervisor or someone at the after-hours number for clarification as to what was the required procedure, this situation would never have arisen. Either I would have had her stay with me overnight, or would have been tested the next morning at [the] Ice house." USADA Exhibit 28.

16. In concluding, the only way to justify the majorities opinion is to turn USADA's burden of proof and the ambiguity analysis on its head. It would appear that Ms. Ina is required to prove her innocence beyond a reasonable doubt and all ambiguities are to be determined in favor of USADA, even when their conduct is highly questionable. In accordance with clear legal precedent, athletes and their attorneys should be forewarned of the standards of proof they face in AAA doping cases. *Quigley, Supra*, at ¶30.

Dated: October 25, 2002


Christopher L. Campbell
by 

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