

Tribunal Arbitral du Sport  
Court of Arbitration for Sport

## AWARD ON JURISDICTION

rendered by

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: L. Yves Fortier, CC, QC, Montreal, Canada  
Arbitrators: Peter Leaver, QC, London, England  
Christopher Campbell, Esq., San Francisco, U.S.A.  
(hereinafter, 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

Represented by Travis T. Tygart, Esq., Director of Legal Affairs, *United States Anti-Doping Agency*, and by Richard Young, Esq., of the law firm *Holme Roberts & Owen*, 90 South Cascade Ave., #1300, Colorado Springs, CO. 80903, USA

Appellant

— and —

### MR. TIM MONTGOMERY

Represented by Howard L. Jacobs, Esq., of the law firm *Forgey & Hurell, LLP*, 1000 Wilshire Blvd., Suite 1740, Los Angeles, CA. 90017, USA, and by Cristina Arguedas and Julie Salomon, Esq., of the law firm *Arguedas, Cassman & Headley*, 5900 Hollis, Suite N, Emeryville, CA. 94608, USA

Respondent

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

### UNITED STATES ANTI-DOPING AGENCY

Appellant

— and —

### MS. CHRYSTE GAINES

Represented by Cameron A. Myler and Brian Maas, Esq., of the law firm *Frankfurt Kurnit Klein & Selz*, 488 Madison Avenue, New York, NY. 10022, USA

Respondent

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## I. PREFACE

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 hearing, and as set out in the Panel's 9 November Order, a detailed procedural timetable for the conduct of these proceedings was established.

2. Included in that procedural timetable was a procedure for the briefing and hearing, as a preliminary issue, of Respondents' Motions to Dismiss for Lack of Jurisdiction (the "Motions").

3. In accordance with that procedure, Claimant and Respondents (the "parties") filed detailed written submissions related to the Motions. A hearing on the issue was subsequently held in Montréal on 15 December 2004, during which the Panel heard extensive oral submissions from counsel for each Respondent and for Claimant.<sup>1</sup> As requested by the Panel prior to the close of that hearing, the parties subsequently filed supplemental briefs addressing specifically the question of the retroactive application of certain amendments to the USADA Protocol for Olympic Movement Testing (the "USADA Protocol").

4. At the outset of the 15 December 2004 preliminary hearing, a number of procedural matters were discussed and agreed as between the parties and the Panel, notably: that the Respondents' Motions would be heard at the same time and would be decided together, by means of a single award; that the hearing would not be recorded; and that there was no objection to the attendance at the hearing of the Executive Director of the World Anti-Doping Agency ("WADA"), in his capacity as an authorized observer in these proceedings. For his part, and at the request of the Panel, Mr. Howman confirmed that WADA is and will continue to be bound by the confidentiality provisions of Article R 43 of the CAS Code of Sports Related Arbitration (the "CAS Code"). He further undertook to sign a confidentiality agreement should the parties or the Panel request that he do so.

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<sup>1</sup> The hearing was also attended by Mr. David Howman, Executive Director of the World Anti-Doping Agency, in his capacity as an authorized observer in these proceedings. The IAAF, although an intervener in these cases, declined to attend the hearing.

5. On 24 December 2004, the Panel rendered its unanimous decision on Respondents' Motion, with reasons to follow. As stated in its ruling, and for the reasons explained hereinbelow, the Panel unanimously dismissed Respondents' Motions and affirmed the jurisdiction of the CAS in both of the present cases.

## II. THE PARTIES' SUBMISSIONS

### A. The Athletes' Submissions

6. As set out in their respective Motions, and as submitted by counsel for Mr. Montgomery and Ms. Gaines during the 15 December preliminary hearing, Respondents contend that USADA's sole authority to investigate and prosecute instances of alleged doping violations stems from its contract with the United States Olympic Committee ("USOC"). In the Respondents' submission, that contract (the "USOC-USADA Contract") only confers jurisdiction on USADA to investigate and bring charges against athletes in cases related to USADA's "drug testing function"; it does *not* confer any jurisdiction or authority whatsoever in respect of "non-analytical positive" cases such as the present. They contend that the limits of USADA's powers are specified in paragraph 4 of the USOC-USADA Contract, which reads

USADA will be responsible for the review and adjudication of all positive or elevated test results or other alleged doping violations arising out of any sample which it collects or attempts to collect. USADA will also be responsible for adjudicating positive or elevated tests or other alleged doping offences arising out of samples collected after 10/2/00 by International Federations or other sporting bodies which report test results to the International Federations where the rules of such International Federations require the NGB to conduct the initial doping hearing.

and that this limited authority is confirmed in paragraph 1 of the USADA Protocol, which provides

The USOC has contracted with USADA to conduct drug testing and results management for participants in the Olympic movement within the United States.

7. Respondents further argue that their agreements with USA Track & Field ("USATF") and with USOC do not include any agreement to arbitrate claims or disputes in non-analytical positive cases. As Ms. Gaines states succinctly in her Motion (at page 2): "Either way, this case must be dismissed."

8. It is important to note that the Respondents do not claim that *no* authority exists by which non-analytical positive cases can be investigated and prosecuted. In this regard, Mr. Montgomery's counsel stated clearly during the 15 December hearing that "it is not our position that nobody could bring this case." Respondents contend only that such authority does not reside in USADA, since its jurisdiction in doping control and adjudication matters is restricted to its so-called drug testing function. The proper claimant, or "prosecutor" in cases such as those brought against Mr. Montgomery and Ms. Gaines, say Respondents, is not USADA, but *USATF*, which retains authority over doping matters unrelated to drug testing or analytical positive drug tests.

#### **B. USADA's Submissions**

9. USADA contends that Respondents' arguments based on the purported limitations to USADA's authority in the USOC-USADA Contract amount in effect to a "smoke screen." As stated in USADA's Brief in Opposition to Respondents' Motions (at page 12): "The Panel must answer only two questions to determine whether the Panel has jurisdiction in this matter: whether Respondents agreed to arbitrate under the USADA Protocol, and, if so, whether the alleged doping offences in these cases fall within the substantive scope of the USADA Protocol." In USADA's view, both questions must be answered in the affirmative.

10. For the reasons explained below, the Panel agrees with USADA's conclusions.

### **III. DETERMINATION**

#### **A. Waiver of Respondents' Right to Claim Lack of Jurisdiction**

11. The Panel addresses, first, arguments made by USADA both in writing and orally to the effect that in the circumstances of these proceedings the Respondents are estopped or otherwise barred from raising, or have waived their right to raise, a defence of lack of jurisdiction.

12. Much was made by USADA of the correspondence between the parties evidencing the circumstances and terms of the Respondents' election to "bypass" the hearing described in paragraph 9(b)(i) of the USADA Protocol in favour of a single, final hearing before the CAS to determine the charges brought against them, and of the parties' eventual agreement that the cases would proceed under the provisions of the CAS Code applicable to ordinary (rather than appeal) arbitration proceedings. According to Claimant, in choosing to proceed before the CAS the athletes exercised a right that exists only under the USADA Protocol; and in their correspondence with USADA, the Respondents explicitly confirmed that the proceedings against them would be governed by the USADA Protocol as the parties' arbitration agreement.

13. USADA further contends that Respondents' Motions are barred by operation of Article R.39 of the CAS Code, which provides that "the answer [to the request for arbitration] shall contain ... any defence of lack of jurisdiction", since the athletes' Motions were not brought until well *after* the Respondents' answers had been filed.

14. Respondents contend that their correspondence and submissions reveal that they consistently reserved their right to raise a jurisdictional objection. They further assert – and the Panel is not indifferent to this claim – that it would be highly unfair to bar the Respondents from raising the issue of jurisdiction when the document on which they primarily ground their objection, namely the USOC-USADA Contract, was effectively withheld from them by USADA over the course of many months.

15. The Panel is reluctant to allow the determination of the important issue raised in Respondents' Motions to turn on a technicality or on the application of a doctrine of law (estoppel) that must have been far from the parties' minds at the time that they agreed on the structure and format of these proceedings. Fortunately, it need not do so. As explained below, the Panel finds that Respondents' Motions fail on their merits. Accordingly, it does not pronounce on the correctness or otherwise of their claims in respect of Respondents' right to raise, or the timeliness of their raising, their jurisdictional objections.

**B. The Merits of Respondents' Motions: USADA's Authority**

16. The allegations against the Respondents are both extremely serious and extremely broad. They concern not only the use of prohibited substances, but also allegations of trafficking and purported admissions by the athletes related to the charges against them.

17. That said, the crux of the issue to be determined by the Panel at this stage of the proceedings is whether USADA or some other body has the authority to make such allegations, and whether the CAS has jurisdiction over cases involving such allegations made by USADA.

18. According to Respondents, USADA has not been granted that authority; its powers extend only to "drug testing" and the adjudication of disputes involving "analytical positives"; authority over cases involving allegations of non-analytical positive doping violations rests with USATF. According to Claimant, such a division of responsibilities has no basis in reality; USADA has always possessed authority over all cases of doping control and alleged doping violations.

19. The Panel has considered carefully the many documents submitted by the parties which describe and define the rights and responsibilities of the various bodies involved in doping control and adjudication in the United States, and which establish the framework for the exercise of those rights and responsibilities, including the arbitration of disputes. The Panel has also reviewed the legal authorities filed by the parties and drawn to the Panel's attention during the 15 December 2004 hearing. In those undertakings, the Panel has been greatly assisted by the cogent, albeit conflicting, submissions made by the parties' counsel in writing and orally.

20. Having considered those documents, authorities and submissions, and after deliberation, the Panel is unanimously of the opinion that both the letter and spirit of the various understandings, agreements and protocols binding on the relevant sport bodies and their members and athletes, support the conclusion that the authority and responsibility to prosecute the present cases resides in USADA. In particular, the Panel rejects the Respondents' claim that non-analytical positive doping cases could only be prosecuted, in the circumstances of these cases, by USATF.

21. The Tribunal agrees with USADA's reasoning and finds as follows:

- As members of USATF, Respondents are bound by the USADA Protocol. The athletes' claim that the USADA Protocol is merely "referred to" or "attached to", but not sufficiently "incorporated into" either the USOC-USADA Contract or the various USATF by-laws and regulations binding on the Respondents, is rejected.
- The USADA Protocol is clearly and unmistakably referenced in such instruments as the USOC-USADA Contract and in USATF Regulation 10 binding on Respondents. The meaning and intent is clear: the USADA Protocol forms part and parcel of those instruments. Similarly, section 17.2(G) of the USOC By-Laws provides that USATF and its members are bound by the doping control and adjudication procedures established by USADA.
- Respondents themselves concede that they are bound by the procedures of the USADA Protocol in situations involving positive drug tests. That is, they acknowledge both USADA's authority as well as a binding agreement to arbitrate in respect of certain alleged doping offences.
- What remains, then, is the question whether the scope of the USADA Protocol extends to the type of cases at issue here. To answer that question, one need look no further than the USADA Protocol itself, including the amendments to it that the parties drew to the attention of the Panel during the 15 December 2004 hearing.
- The Panel notes, by way of introduction to the question, that the term "protocol" as currently defined and used typically refers to such things as: "the rules, formalities, etc. of any procedure, group, etc." (Concise Oxford Dictionary of Current English, 9<sup>th</sup> ed.); or "a code prescribing strict adherence to correct etiquette [i.e., rules and formalities] ..." (Merriam-Webster's Collegiate Dictionary, 10<sup>th</sup> ed.); or "the etiquette of diplomacy ..." (Black's Law Dictionary, 5<sup>th</sup> ed.). In other words, the term is commonly understood to refer to procedure, rather than substantive obligations.
- Turning now to a consideration of the actual USADA Protocol, the Panel is of the opinion that any differences in the wording of successive versions of the USADA



Protocol during the period 2000 to the present are, at best (insofar as Respondents' position is concerned), immaterial for purposes of determining Respondents' Motions and, at worst, of no assistance to Respondents. Even if it were true (which the Panel does not find) that, as Respondents argue, the 7 October 2002 amendments to the USADA Protocol – which provide in no uncertain terms for USADA's authority over non-analytical positive doping cases – represent a change in the rules binding on the Respondents, the object and purpose of those changes are manifestly *procedural* rather than *substantive* in nature. They do not create, nor can it reasonably be said that they did create, any new doping offences or other substantive obligations binding on Respondents. In particular, they did not render unacceptable or illegal conduct that was previously considered acceptable under applicable rules.

- In his supplemental brief of 20 December concerning the applicability of certain amendments to the USADA Protocol, Mr. Montgomery relies (at pages 3-5) on the case of *Stone v. Hamilton*, 308 F.3d 751 (7<sup>th</sup> Cir. 2002), which he claims is “very similar” to the cases at issue here, for the proposition that the law disfavors the application of a statute or set of rules that “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or consideration already past”. The Panel disagrees that the issue before it is similar to that in *Stone*. Unlike in that case, it is simply not the case here that, to quote the *Stone* decision, “prior to the amendments, for all intents and purposes, there were no legal consequences to the [conduct in question]” or that “viewing the effect of the amendment in a commonsense and functional manner, since the enactment of the amendment the [Respondents] face increased legal consequences”. The Respondents acknowledge as much when they assert that the cases against them could have and should have been brought, not by USADA, but by USATF. As USADA argues in its own supplemental brief (at pages 5 *et seq.*), the thrust of the case law is to the effect that “the prohibition against *ex post facto* laws is designed to [protect] individuals from criminal sanction for participating in conduct that was *lawful at the time but is later made unlawful*”, which is not the case here.

- According to the athletes' own submissions, it was at all times open to USATF to bring the present cases against them, based on the very same facts (including the anti-doping rules that Respondents are accused of violating) as are currently alleged by USADA. As such, the amendments to the USADA Protocol, to the extent that they may have changed anything, would have changed only the identity of the "prosecutor" in non-analytical positive cases; henceforth USADA, and not USATF, would have had prosecutorial authority in such cases, to go along with its authority over all other doping cases.
- In her supplemental memorandum of 20 December 2004 (at page 3), Ms Gaines refers, among other authorities, to *Kresock v. Bankers Trust Co.*, 21 F.3d 176 (7<sup>th</sup> Cir. 1994), in which the court refused to apply amendments to an arbitration agreement that "sweep into the realm of arbitration a whole new class of disputes". However, that case is not overly instructive. *Kresock* concerns the retroactive application of amendments to an arbitration agreement that "sweep into the realm of arbitration" disputes which a party would otherwise have a right to have heard by the courts of the land. The same observation applies to the other decisions cited by Ms. Gaines. In contrast, the Panel is dealing here with an acknowledgement by the Respondents that they are bound to arbitrate the claims against them, but that USADA is not the proper claimant. Nor is Ms. Gaines' submission (at page 4 of her supplemental memorandum) that "[t]he Supreme Court has never held that an intent to arbitrate can be found from the absence of contractual language evincing an intent to arbitrate a particular kind of dispute" persuasive. Unlike in the cases cited by her, the "default" situation in the event that Respondents' arguments were accepted by the Panel (which they are not), would not be that the parties' disputes are not arbitrable, merely that they are to be referred to arbitration by USATF as opposed to USADA.
- It is common ground between the parties, and the Panel agrees, that although amendments to the USADA Protocol of a substantive nature could not be applied retroactively, amendments of a purely procedural nature may be so applied.
- As a consequence, there is no doubt, and the Tribunal so finds, that the amendments in question to the USADA Protocol may be applied so as to ground USADA's authority

to bring these cases against Respondents and to require that any disputes be arbitrated under the USADA Protocol.

- On these grounds, Respondents' Motions fail.

22. The notional division of anti-doping responsibilities that Respondents postulate, as between USATF and USADA, does not accord with the facts. USADA was established as an independent entity with responsibility over doping control and adjudication. That responsibility extends beyond "drug testing" and covers all cases of alleged doping violations. It possessed, and possesses, full authority to prosecute these cases.

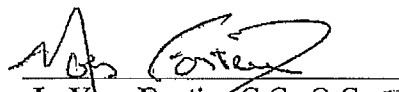
#### IV. AWARD

23. For all of the foregoing reasons, **the Court of Arbitration for Sport hereby rules:**<sup>2</sup>

1. The Respondents' Motions to Dismiss for Lack of Jurisdiction filed respectively by Mr. Montgomery on 12 November 2004 and Ms. Gaines on 15 November 2004 are dismissed;
2. The jurisdiction of the CAS in cases no. 2004/O/645 and 2004/O/649 is affirmed.

Lausanne, 9 February 2005

#### THE COURT OF ARBITRATION FOR SPORT

  
L. Yves Fortier C.C., Q.C.  
President

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<sup>2</sup> As noted above, the following award, without reasons, was notified to the parties by the CAS on 24 December 2004.