

**THE ATP TOUR ANTI-DOPING TRIBUNAL
APPEAL OF ALEJANDRO VARGAS-ABOY**

OPINION

An ATP Tour Anti-Doping Tribunal {"Tribunal"} consisting of Prof. Richard H. McLaren, Esq., Chair, Dr. Arturo Marti, technical scientific member and Dr. Gary Wadler MD, medical member was formed by Richard Ings, the ATP Administrator of Rules, following a Review Board {"RB"} determination that Alejandro Vargas-Aboy {"the Player"} had a case to answer under the Tennis Anti-Doping Program 2005 {"Anti-Doping Rules"}. Those rules are contained within the ATP 2005 Official Rulebook {"Rules"} found at pgs. 143 through 173. The Anti-Doping Rules are designed to maintain the integrity of men's professional tennis and protect the health and rights of all tennis players. The Program includes (i) doping tests in and out of competition, (ii) the imposition of penalties for Doping Offenses, and (iii) support and assistance to players when applicable.

Josep Riba, Esq. assisted by Michael Turner, Esq. represented Alejandro Vargas-Aboy. John MacLennan, Esq. represented the ATP {the "Tour" or the "ATP"}.

Procedural Order No. 1 was issued on 3 June 2005 to prescribe the procedure to be followed in this proceeding. During the course of following that Order, the Player elected under Rule K. 1. c. of the Anti-Doping Rules to admit, through his counsel on 30 June 2005, to the commission of a Doping Offense. The effect of that admission is that the Player accedes to the consequences specified in the notice from the ATP of a case to answer under the Anti-Doping Rules of 13 May 2005. That notice provided for a sanction of two years ineligibility from any ATP (or its related organisations) authorized and organized events or activities together with any other sanctions provided for in the Anti-Doping Rules.

Rule K. 1. c. provides that a hearing before the full Tribunal is not required. A conference call between counsel and the Chairman was held on 29 June 2005 to prescribe the procedure to be followed. Under Procedural Order No.1, written submissions were to have been completed and filed by 30 June 2005. Events overtook that deadline. By agreement the parties filed written submissions, which were completed on 6 July 2005. The Chairman, following consultation with the other members of the Tribunal, issues this decision.

BACKGROUND FACTS

1. The Player is a professional tennis player from Spain. He is currently a member of the ATP Tour.
2. The ATP is a not-for-profit membership organization composed of male professional tennis players and tournament organizations. The ATP sanctions tennis tournaments and provides league governance and support to its member tournaments and players. Pursuant to this role, the ATP has adopted rules for the conduct of both the tournaments and the players.
3. The Player has an ATP ranking for the 2005 season. Under Rule B. 1. the Player *is bound by and shall comply with all of the provisions of this Program including making himself available for Testing both In-Competition and Out-of-Competition*. Therefore, he has agreed to be bound by all the provisions of the Rules and to play by the Rules.
4. The Player took part in the Lugai Pezzoli Tournament in Bergamo, Italy. He was eliminated in the quarterfinals despite his hopes of being a finalist. As a result of his loss and consequent disappointment, the Player was consoled by his girlfriend [redacted]. They spent the night in his hotel room dinking alcoholic cocktails and smoking marijuana.
5. The following morning, 23 April 2005, a properly authorized Doping Control Officer of the Anti-Doping Program Administrator {"APA"} appeared at the Player's hotel door. The Player refused to provide an out-of-competition urine sample pursuant to the Anti-Doping Rules.
6. On 12 May 2005, following a Review Board {"RB"} determination, Mr. Ings, the ATP Administrator of Rules, advised the Player that he had a case to answer under the Anti-Doping Rules. The Player elected to have a hearing before this Tribunal, as is his right by Rule K. 1. b.
7. This Anti-Doping Tribunal {the "Tribunal"} was established pursuant to the Rules. Counsel for the parties confirmed that they had no objection to the Tribunal's composition or its jurisdiction to hear, determine and issue a decision in this appeal by signing Procedural Order No. 1.
8. On 3 June 2005, the Chairman of the Tribunal issued Procedural Order No. 1

detailing the process and procedure the case was to follow and by which it was to be heard.

9. On 30 June 2005 counsel on behalf of the Player admitted that he had refused without compelling justification to submit to a sample collection after receiving notification of testing as authorized under the Anti-Doping Rules. That admission means that the Player has committed a Doping Offense under Rule C. 3.
10. The letter dated 12 May 2005 from the ATP Administrator of Rules indicated that under Rule M. 4. a. and M. 2. the Player will be ineligible for two years and will be required to forfeit all Race/Entry System Points and all prize money earned from the date of the test refusal.

Written Submissions on behalf of the Player

11. It was submitted in the Preliminary Statement of the Case that the Player refused to subject himself to the test because he had been ill and injured and desired to speak with his doctor before submitting to the test. He was also concerned about his family's reaction to discovering that he had consumed considerable amounts of alcohol and marijuana the previous night. It was also alleged that the Player was unaware of having taken any specified or prohibited substance. Rules M5b and M5c were raised as justifying a one-year suspension.
12. The Player in his Reply to the Answer to the Case contended that he did not understand that the consequences of his failure to provide a sample included a possible two-year suspension. Furthermore, language difficulties prevented him from being properly warned of those consequences.
13. The Player explained that part of the reason for making the admission that he refused the doping test without compelling justification was due to recent revelations *that in the weeks leading up to the tournament the player was given a doping substance for various physical problems suffered*. A further reason for the test refusal was directly linked to this state of affairs. The admission document sets out that the Player's present intention is to collaborate with the ATP in exchange for consideration in reducing the sanction under rule M. 5. c. It was also submitted that the player is without

the guiding supervision of a father and that his own immaturity and unstable family background make him a target for the unscrupulous.

14. The Player's written submission following the admission provided the following information. *It should be noted moreover that in the weeks leading up to the tournament Dr [redacted by the Chairman]¹ personally supplied him with a compound named TESTOVIRON, principal component of which is Testosterone. The administration of this substance was carried out via intramuscular injection and took place in the surgery of Dr. [redacted by the Chairman] Spain. As such therefore, the fear of detection of these substances can be added to the reasons given in previous statements for refusal to take the test.* The Player by this procedure is trying to set an example for future players who may be considering collaborating with the ATP by providing relevant information to the organization. He seeks the consideration of the Tribunal under M. 5. c. to reduce the period of ineligibility. The submission suggests that the Player may have been aware that he was taking doping substances but not conscious of the consequences of such an action.

Written Submissions on behalf of the ATP

15. The ATP in its answer to the player's preliminary statement of the case submitted that there had been a refusal to submit to sample collection after proper notification of authorized out of competition testing. The player's initial brief advising of the circumstances does not alleviate him of responsibility for that test refusal. Therefore, a breach of Rule C. 3 arose and a Doping Offense had occurred. It was submitted that there is no basis for the application of Rule M. 5. a. or b.
16. In its final submission following the admission and subsequent submission of the Player, the ATP submitted that the Player has now acknowledged that he was receiving the prohibited substance testosterone, and that was his reason for refusing the test in order to avoid detection. The Player is guilty of substantial fault or negligence of intentional misconduct by refusing a test in order to avoid detection of a prohibited substance. Thus, exceptional circumstances are not present and the two-year period of ineligibility is mandatory.

¹ The details of who the doctor is and his municipal address were provided to me in the submissions. The allegations are unsubstantiated at this time. Therefore, I elected to redact the information and retain it in my confidential file.

17. The ATP has committed itself to investigating any information that may be provided by the Player that may bring into play the provisions of Rule M. 5. c. To that effect the parties entered into an agreement dated 30 June 2005 wherein they agreed that the Chairman of the Tribunal may reserve jurisdiction for the full Tribunal to reconvene at a later date to consider the application of Rule M. 5. c.
18. Pursuant to Procedural Order No. 1 the following agreed upon stipulations were filed with the Tribunal.
 1. *The player was not in-competition on the date of the attempted sample collection.*
 2. *The player had lost the previous day and was out of the tournament.*
 3. *The player was served with documents authorizing the out of competition test.*
19. **THE RELEVANT ANTI-DOPING RULES**

B. Covered Players and Events

1. Any player who enters or participates in a Competition, Event or activity organized, sanctioned or recognized by the ATP, or who is an ATP member or who has an ATP ranking (a “**Player**”) shall be bound by and shall comply with all of the provisions of this Program ... Further, for each calendar year all such players shall, as a condition of entering or participating in any event organized or sanctioned by the ATP, deliver to the ATP a signed consent in the form set out in Appendix 2.

...

C. Doping Offenses

Doping is defined as the occurrence of one or more of the following (each, a “Doping Offense”):

3. *Refusing or failing, without compelling justification, to submit to Sample collection after notification of Testing as authorized in this Program, or otherwise evading Sample collection.*

...

G. Out-of-Competition Testing

1. Ambit of Out-of- Competition Testing

a) *All players shall be subject to Out-of Competition Testing under this Program, including No Advance Notice Out-of-Competition Testing, at any time and place.*

b) *Any notice provided to a Player regarding his selection for Testing other than that provided pursuant to Article F shall be considered notice that the **Player** has been selected for Out-of-Competition Testing.*

c) *Samples collected during Out-of-Competition Testing shall only be analyzed to detect the Prohibited Substances and Prohibited Methods specified on the Prohibited List as prohibited out of competition.*

d) *A reasonable effort will be made to avoid inconvenience to a Player who is subjected to Out-of-Competition Testing. However, the ATP shall not be liable for any inconvenience or loss caused to the Player as a result of the Out-of-Competition Testing.*

2. Selection of Players to be Tested Out-of-Competition.

The timing of Out-of-Competition Testing and the selection of Players to be tested shall be at the discretion of the APA, subject to the approval of the ATP Administrator of Rules, and acting by reference to the International Standard for Testing. For the avoidance of doubt, the APA may select Players for Target Testing so long as such Target Testing is not used for any purpose other than legitimate Doping Control purposes. Decisions relating to timing and selection of Players for Out-of-Competition Testing shall remain confidential except to those with a reasonable need to know of them in order to facilitate the Testing procedures.

...

- 4) *If a player fails or refuses to submit to Out-of-Competition Testing when selected, then the matter shall be referred to the Review Board to determine whether the Player has a case to answer under Article C.3 of the Program.*

K. Due Process

1. Commencing proceedings before the Anti-Doping Tribunal

...

c. The Participant shall be entitled at any stage to admit that he has committed the Doping Offense(s) specified in the Notice and to accede to the Consequences specified in the Notice. In such circumstances, a hearing before the Anti-Doping Tribunal shall not be required. Instead, the Chairman of the Anti-Doping Tribunal shall promptly issue a decision confirming the commission of the Doping Offense(s) specified in the Notice, and ordering the imposition of such Consequences (including, where this Program specifies a range of possible Consequences, specifying what the Consequences should be in that particular case). Where a range of possible Consequences is specified in the Program, written submissions may be made by or on behalf of the Participant in mitigation at the time of admission of the Doping Offense, and the Chairman of the Anti-Doping Tribunal shall be entitled to take those submissions, as well as any rebuttal submitted by the ATP, into account in determining what Consequences should apply.

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M. Sanctions on Individuals

2. Imposition of Ineligibility for Prohibited Substances and Prohibited Methods

Except where the substance at issue is one of the specified substances identified in Article M.3, the period of Ineligibility imposed for a violation of Article C.1 (presence of Prohibited Substance or its Metabolites or Markers), Article C.2 (Use or attempted Use of Prohibited Substance or Prohibited Method) or Article C.6 (Possession of Prohibited Substances and/or Prohibited Methods(s) shall be:

First Offence: Two (2) years' Ineligibility.

Second Offence: Lifetime Ineligibility.

However, the Participant shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article M.5

...

4. Ineligibility for Other Doping Offenses.

The Period of Ineligibility for other Doping Offenses shall be as follows:

a) For Doping Offenses under Article C.3 (refusing or failing to submit to Sample collection), Article C.5 (Tampering with Doping Control), or Article C.9 (refusing or failing to abide by any other provision of this Program), the Ineligibility periods set out in Article M.2 shall apply.

...

5. Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances.

...

c) The Anti-Doping Tribunal may also reduce the period of Ineligibility in an individual case, wither at the time of its original decision or subsequently (by reconvening) where the Participant has provided

substantial assistance to the ATP that results in the ATP discovering or establishing a Doping Offense by another Person involving Possession under Article C.6.b. (Possession by Player Support Personnel), Article C.7 (Trafficking), or Article C.8 (administration to a Player). The period of Ineligibility after such reduction may not, however, be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight years.

...

8. Commencement of Consequences.

Any Consequences set out in the decision of an Anti-Doping Tribunal shall come into force and effect on the date that the decision is issued, save that:

c) The period of Ineligibility shall start on the date that the decision is issued, provided that:

i any period during which the Player demonstrates he has voluntarily foregone participation in Competitions shall be credited against the total period of Ineligibility to be served; and

ii were required by fairness, such as in the case of delays in the hearing process or other aspects of Doping Control not attributable to the Player, The Anti-Doping Tribunal may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection.

REASONS

20. A Doping Offense has occurred under Rule C. 3. because of the Player's admission.
21. The period of Ineligibility for refusing or failing, without compelling justification to submit to Sample collection after valid, authorized and proper notification for testing is by Rule M. 4. a. and its reference to M. 2. a period of two years.
22. Under Rule M. 8. c.ii the period of Ineligibility may be commenced in the interests of fairness caused by other aspects of Doping Control not attributable to the Player as of a date earlier than the date of this decision which is the normal commencement date under Rule M. 8. c. In the appeal to the Court of Arbitration for Sport {CAS} of the case of *Hipperdinger v/ ATP 2004/A/690* the Panel comments upon the interpretation of Rule M. 8. c. ii in paragraphs 91 to 101. I respectfully disagree with that Panel's interpretation of the Rule when they concluded that a suspension should begin from the time of the sample collection. In the system run by the ATP through the APA the athlete does not know of the positive laboratory analytical result until the letter from the ATP Administrator of Rules is sent out advising that there is a case to answer. It is only at that point that the athlete could become aware of the possibility of a positive analytical result. Therefore, it is only then that they could reform themselves and cease taking whatever it may be that they have been taking. To commence a suspension from the time of the giving of the urine sample in the circumstances is to unduly shorten the period of suspension from its primary commencement point the date of the decision by Rule M. 8. c.
23. In this case, the Player is indicating his intention to co-operate with the ATP in providing substantial assistance to them in identifying an individual who may be involved in a Doping Offense as referred to in the provisions of Rule M. 5. c. As a consequence, in an effort to encourage the full and unqualified assistance of the Player, I have exercised the discretion given to me under the Anti-Doping Rules in M. 8. c.ii. to commence the period of Ineligibility as of the notification to the Player of a case to answer which was 12 May 2005.
24. Under Rule M. 7. all competitive results obtained from when the sample

collection on 23 April 2005 should have occurred until the commencement of the period of Ineligibility on 12 May 2005 shall be disqualified with all of the resulting Consequences, including forfeiture of any medals titles, computer ranking point and prize money (without deduction for tax).

25. The Player's admission was predicated upon his desire to trigger the jurisdiction of Rule M. 5. c in the future. Pursuant to that Rule, the full Tribunal, not just the Chairman, may reconvene for the purpose of deciding if the period of Ineligibility might be adjusted because the Player has provided substantial assistance to the ATP that results in the ATP discovering or establishing a Doping Offense by another Person. The parties to this proceeding have specifically made and entered into an agreement executed on 30 June 2005 and filed with the Chairman conferring and preserving the jurisdiction of the Tribunal to act under Rule M. 5. c. at some future date should it be appropriate. The Tribunal also specifically reserves by this Opinion and Decision its jurisdiction under Rule M. 5. c. to reconvene at a future date if appropriate to do so and following the completion of the full and substantial assistance of the Player to the ATP as discussed in this Opinion. It is so ordered in the Decision.

DECISION

The Tribunal makes the following orders based upon the foregoing grounds and discussion in the above opinion.

1. The Player under Rule K. 1. c. admitted a First Doping Offense thereby establishing the Doping Offense defined in Rule C 3
2. Under Rule M. 4. a. and M. 2 the period of Ineligibility for a first offense is a two {2}-year period. Under Rule M. 8. c.ii this suspension shall commence retroactively to 12 May 2005 when the Player was notified of the possible infraction.
3. Under Rule M. 7. all competitive results from 23 April 2005 until commencement of the period of Ineligibility on 12 May 2005 are Disqualified with all of the resulting consequences, including forfeiture of any medals, titles, computer ranking points and prize money (without deduction of tax).
4. The jurisdiction of the full Tribunal under Rule M. 5. c. is specifically reserved and retained by the parties' agreement of 30 June 2005 and by this order of the Tribunal Chairman.

DATED THIS 12th DAY of JULY 2005

Prof. Richard H. McLaren, C.Arb
Chairman
ATP Tour Anti-Doping Tribunal
Barrister

SIGNED AT: London, Ontario, CANADA