



Arbitration CAS ad hoc Division (OG Turin) 06/004 Deutscher Skiverband & Evi Sachenbacher-Stehle v. International Ski Federation (FIS), award of 12 February 2006

Panel: Mr Richard H. McLaren (Canada), President; Mr Kaj Hober (Sweden); Mr Akira Kotera (Japan)

Cross-country skiing

Haemoglobin (Hb) value exceeding the threshold under the FIS Rules

Alleged naturally high elevated level of Hb

Application for a dispensation from the FIS Hb Rule

Since 2003 requests have been made each year to issue a dispensation for a naturally elevated high level of Haemoglobin (Hb) for this Athlete. All requests have been unsuccessful in persuading the FIS that this Athlete has a naturally high elevated level of Hb. FIS does agree that this Athlete does have a modestly elevated level of Hb but it is not sufficient to justify issuing a dispensation pursuant to Rule FIS B.4.8. Far be it for the CAS Panel to substitute its views to those of the experts who have declined to grant the dispensation to this Athlete for a naturally high elevated level of Hb over the past 3 years. The Panel is being asked to make a medical expert's judgement through the guise of cancelling a Notification of Start Prohibition. It is not for the Panel to perform an evaluation similar to that contemplated by the FIS B.4.8, which would apply for the duration of the Olympic Games.

Ms Evi Sachenbacher-Stehle, one of the Applicants (the "Athlete") is a cross-country skier representing Germany at the XX Olympic Games hosted in Turin.

The International Ski Federation (FIS), the respondent, is the International Sport Federation representing cross-country, ski jumping, nordic combined, alpine skiing, freestyle skiing and snowboarding events at the Olympic Games. Among its roles, the FIS is responsible for enforcing the FIS Anti-Doping Rules.

On 9 February 2006, the Athlete was subjected to a Blood Screening/Testing as a part of a Full Field testing by the FIS. The Blood Testing Report revealed an "Elevated Haemoglobin Value". As a result a "Notification of Start Prohibition" was issued by the FIS to the Athlete pursuant to the FIS Procedural Guidelines 2005/2006 to the FIS Anti-Doping Rules (the "Guidelines") under Rule FIS B.4.2.

Under this Start Prohibition, the Athlete is prohibited from participating in any events between 9 February 2006 to 13 February 2006 (inclusive). As a result of this prohibition, the Athlete would be forced to miss her first Olympic Games event on 12 February 2006.

In response to the notification of the Start Prohibition, the Applicants filed an application with the Court of Arbitration for Sport ad hoc Division (CAS) on 10 February 2006.

LAW

Legal Aspects

1. These proceedings are governed by the CAS Arbitration Rules for the Olympic Games (the “CAS ad hoc Rules”) enacted by the International Council of Arbitration for Sport (ICAS) on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (the “PIL Act”). The PIL Act applies to this arbitration because the seat of the ad hoc Division and of each Panel is in Lausanne, Switzerland, pursuant to Art. 7 of the CAS ad hoc Rules.
2. The jurisdiction of the CAS ad hoc Division arises out of the entry form signed by each and every participant in the Olympic Games as well as out of Rule 61 of the Olympic Charter.
3. Under art. 17 of the CAS ad hoc Rules, the Panel must decide the dispute “*pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate*”.
4. According to art. 16 of the CAS ad hoc Rules, the Panel has “*full power to establish the facts on which the application is based*”.
5. Neither party disputes the jurisdiction of the Panel to hear the matter and make a final and binding determination. At the time of the hearing both parties confirmed the jurisdiction of CAS.

Relevant Provisions

6. The maximum tolerated values under the guidelines in Rule FIS B.4 “Start Prohibition” are a haemoglobin (Hb) blood reading of less than 17.0 Hb (mg/ml) for men and 16.0 Hb (mg/ml) for ladies.

7. Paragraph FIS.B.4.2 of the Guidelines provides that:
“If an athlete shows a haemoglobin value that is equal to or exceeds the above values after the two consecutive measurements, the athlete will be notified by the representative of the Jury that he/she is not allowed to start any competitions for five consecutive days, including the day on which the test took place: e.g. if the blood test takes place on Monday the Athlete will not be permitted to start again until Saturday (and then only subject to the results of a new blood test, see FIS. B.4.5)”.
8. The Blood Testing of the Athlete specimen on the 9th February test revealed a first Blood Value reading for Hb of 16.5 mg/ml and a second reading of 16.4 mg/ml.
9. Since the Athlete's reading exceeded the 16.0 threshold under the Guidelines, the Athlete was prohibited from participating in an event for five consecutive days.
10. It should be noted that the policy reason for the prohibition is stated in paragraph FIS B.4.3 where it says, *“This prohibition from participating in the competition (s) is not a sanction, but is considered a protection of the health of the Athlete”*.

Discussion

11. The essence of the submission on behalf of the Athlete is that she should receive a dispensation from the FIS Hb rule (upper limit of less than 16.0 for ladies) for the duration of the Olympic Games. It is claimed that she has a naturally high elevated level of Hb.
12. The Athlete in 2003, 2004 and 2005 applied for a dispensation under FIS.B.4.8 of the FIS Guidelines. No dispensation has been granted to date. Although, one other German cross-country skiing athlete on an application to the FIS has been given a dispensation.
13. The Athlete seeks from this Panel a declaration that the Report of 6 September 2005 from the University Hospital in Tübingen by Dr Sökler, a specialist in Haematology, should be recognised as establishing that she had an Hb value of 14.9 g/100ml with no indication of a haematological disease. This evaluation was done at the request of the German Ski Association pursuant to the FIS Guideline B.4.8.
14. Following the initial review of Dr. Sökler's report of September 6th in which the information was not accepted by the FIS as forming the basis for a dispensation, FIS agreed to undertake a further review at a later date. That was done in Copenhagen on 9 January 2006 with representatives' present from the German Ski Association, the German National Anti-Doping Agency and the FIS. Dr. Ernst Jakob was a representative for the German Ski Association. He also presented the case before this Panel. Also present was Professor Bengt Saltin who is the Chairman of the FIS Medical Committee for doping. He was also present before the Panel.
15. The FIS has put in place a blood-profiling program that stores Hb in blood data for FIS athletes. As a consequence they have considerable data on the Athlete's Hb. Testing under the program has been conducted during the last four ski seasons.

16. Dr Jakob provided his chart of Hb readings for the Athlete, in support of his submission of a naturally high elevated level of Hb. In the second look and reconsideration process undertaken by the FIS, Dr Jakob's data was not accepted as establishing his proposition. The Panel relies upon the data collected by the FIS as being more reliable and comprehensive than the more selective data of Dr Jakob.
17. Professor Saltin indicates that the pattern, which he presented in graph format of the tests, indicates that the Athlete's Hb concentration varies during the year and between competitions. Such variability is uncommon among the skiers participating in FIS World Cup and other international events. The Hb readings up to the time of the meeting on the 9th of January had never exceeded 15.7, and that particular reading was back in December 2001. The December 2005 readings before the 9th of January meeting were 14.8 and 14.5. The mean of that four-year accumulation of data was 14.8 with a maximum value of 15.7 and a minimum value of 14.1. This data according to Professor Saltin represents a modestly elevated Hb when the mean is considered in comparison to the general female population.
18. In 2006 there were two further Hb tests of 15.0 on 13th of January and 15.6 on the 4/5th of February. Professor Saltin suggested those numbers matched the historical profile for the Athlete. These post Copenhagen meeting readings were both taken at high altitude resorts in Italy and Switzerland. Altitude is known to have a modest elevating impact on the Hb readings. Then there is the test at the Olympic Games that brought about this Appeal.
19. On 9 February 2006 the Athlete was tested in the evening at the Olympic Village. The two readings at that time were 16.5 and 16.4. They are the highest readings in the more than 4-year historical profile. They have also risen sharply compared to the readings at the time of the Copenhagen meeting and even over the altitude readings after that meeting. The Olympic Games readings are taken at middle altitude at the Games location and are remarkably inconsistent with the historical and the recent readings leading up to the Games.
20. The purpose of reciting the historical facts is to give background to the present readings, which we are asked to nullify by cancelling the Notification of Start Prohibition. The effect of that Prohibition is to preclude the Athlete from competing in an event on the 12th of February. Therefore, she seeks to cancel the Notification and that we issue such an order to the FIS.
21. The relief requested presupposes that we find the Athlete to have a high naturally elevated level of Hb. Since 2003 requests have been made each year to issue a dispensation for a naturally elevated high level of Hb for this Athlete. All requests, including a second look in January of this year, have been unsuccessful in persuading the FIS that the Athlete has a naturally high elevated level of Hb. FIS does agree that this Athlete does have a modestly elevated level of Hb but it is not sufficient to justify issuing a dispensation pursuant to Rule FIS B.4.8. Far be it for this Panel to substitute its views to those of the experts who have declined to grant the dispensation to this Athlete for a naturally high elevated level of Hb over the past 3 years. We are being asked to make a medical expert's judgement through the guise

of cancelling a Notification of Start Prohibition. It is not for this Panel to perform an evaluation similar to that contemplated by the FIS B.4.8, which would apply for the duration of the Olympic Games.

22. Dr. Jakob has several objections to the FIS Start Prohibition Rules. It is submitted that the Hb limits are not health rules as described by FIS but are arbitrary. In any event the limit should not be applied to an athlete who has a naturally high elevated level of Hb because it does not represent a health risk for such an athlete. This Panel has already declined to undertake a review of experts similar to that required by FIS rule B.4.8. Therefore, the Panel finds no reason to deviate from the conclusion of the FIS that the athlete does not have a naturally high level of HB. Nor does this Panel find that the limits established by the FIS are arbitrary when they are, as explained by Professor Saltin, established in co-operation with WADA.
23. Dr. Jakob further submits that to the extent the test is a health test the Athlete is not unhealthy and is fit to participate. That submission like the prior one is predicated on the assumption that the Athlete has a naturally elevated high level of Hb. In these reasons we have already found that this is not to be the case. Therefore, this submission must also fail.
24. In closing the Panel notes, that while it has rejected the construction arguments in regard to the Rules put forward by Dr. Jakob, the Rules could be drafted with greater precision. We also note that it came to light during the hearing that the blood test followed by a urine sample contemplated by the Rules is a bifurcated procedure at the Olympic Games. The FIS has responsibility for obtaining a blood sample and the IOC must obtain the urine sample. Better co-ordination of this procedure is required to ensure that the urine sample is taken, when required, immediately after the blood sample and not the next day as occurred in this case. However, beyond noting those points we find no basis for determining that there is evidence, or a role for the Panel nor medical justification to do what the Applicant has requested.
25. For all the foregoing reasons the Application is denied.

On the basis of the foregoing facts and legal aspects, the ad hoc Division of the Court of Arbitration for Sport renders the following decision:

1. The application filed by Ms Evi Sachenbacher-Stehle and Deutscher Skiverband against the International Ski Federation is denied.
2. (...).