



Arbitration CAS 2004/O/645 United States Anti-Doping Agency (USADA) v. M. & International Association of Athletics Federation (IAAF), award of 13 December 2005

Panel: L. Yves Fortier QC (Canada), President; Christopher L. Campbell (United States); Peter Leaver QC (United Kingdom)

Athletics

Doping (THG)

Absence of any adverse analytical finding (“non-analytical positive” case)

Burden and standard of proof

Uncontroverted testimony

Adverse inference

Admission of the use of a prohibited substance

Sanction

- 1. USADA bears the burden of proving, by strong evidence commensurate with the serious claims it makes that the athlete committed the doping offences. It makes little, if indeed any difference, whether a ‘beyond reasonable doubt’ or ‘comfortable satisfaction’ standard is applied to determine the claims against the athlete.**
- 2. Doping offences can be proved by a variety of means. In the absence of any adverse analytical finding (“non-analytical positive” cases), other types of evidence can be substantiated. Among these is the uncontroverted testimony of a wholly credible witness, which can be sufficient to establish that the athlete has indeed admitted to have used prohibited substances in violation of applicable anti-doping rules.**
- 3. The admission of the use of prohibited substances merits a period of ineligibility under IAAF Rules of two years. The date of commencement of the sanction takes into consideration the numerous delays in the hearing process which are not attributable to the Athlete. The retroactive cancellation of all the athlete results, rankings, awards and winnings as of the date of admission of the use of prohibited substances has to take place.**

The Claimant, the United States Anti-Doping Agency (USADA), is the independent Anti-Doping Agency for Olympic sports in the United States and is responsible for managing the testing and adjudication process for doping control in that country.

The Respondent (“M.” or the “Athlete”) is an elite and highly successful American track and field athlete. As a sprinter, M. has won numerous track and field titles, including World Championship and Olympic gold medals, as well as a world record.

This Award is the culmination of an exhaustive process of briefings and hearings, discussions amongst the parties, and numerous interventions by the Panel. This Award is also the culmination of a process which saw two separate cases run essentially in parallel. Although the facts alleged in the present case and in the case of *USADA v. G.* differed in their detail, and separate submissions were filed by the parties in each case, both the nature of the charges brought against the Respondents and the substantive and procedural positions adopted by them throughout the period leading up to their respective hearings were so similar as to be virtually indistinguishable. Among other consequences, this meant that, but for the hearings on the merits, and with the consent of all parties, the two cases proceeded in lockstep. This is immediately apparent from a reading of the two Awards, which are being rendered simultaneously by the Panels (composed of the same arbitrators) in the two cases.

At issue in the present case is the charge by USADA that M. violated applicable IAAF anti-doping rules, notwithstanding that M. never tested positive in any in-competition or out-of-competition drug test.

USADA seeks a four-year sanction of M. for participating in a wide-ranging doping conspiracy implemented by the Bay Area Laboratory Cooperative (BALCO). USADA charges that, for a period of several years, M. used various performance-enhancing drugs provided by BALCO. As noted, M. has never had a single drug test found to be a positive doping violation, but USADA’s charges are based, in part, on all of the blood and urine tests at IOC-accredited and non-IOC-accredited laboratories that he has had in recent years. USADA also relies, among other things, on documents seized by the U.S. government from BALCO that have been provided to USADA, statements made by BALCO officials and other documents.

According to USADA, BALCO was involved in a conspiracy the purpose of which was the distribution and use of doping substances and techniques that were either undetectable or difficult to detect in routine drug testing. BALCO is alleged to have distributed several types of banned doping agents to professional athletes in track and field, baseball and football. Among these were tetrahydrogestrinone (“THG”), otherwise known as “the Clear” by BALCO and its users. THG is a designer steroid that could not be identified by routine anti-doping testing until 2003, when a track and field coach provided a sample of it to USADA. It is undisputed that the Clear is a prohibited substance under the IAAF Rules.

On 3 September 2003, FBI agents searched BALCO’s premises pursuant to search warrants. During this raid, agents interviewed the company’s President, Victor Conte, and other BALCO officials, who spoke about its activities and its customers. Mr. Conte named fifteen track and field athletes whom he alleged were clients of BALCO, including M.

Following the BALCO raid, government agents obtained other documents, such as emails, through the use of subpoenas and other law enforcement mechanisms. Additional records were produced

and created as part of the Grand Jury investigation, which resulted in the indictment of Mr. Conte, along with several alleged co-conspirators¹. None of the evidence in this case derives from the Grand Jury proceedings. However, the BALCO documents were obtained by the U.S. Senate, which subsequently provided them to USADA.

On 17 September 2004, The International Association of Athletics Federations (IAAF), the international federation responsible for the sport of athletics worldwide, requested permission to appear in the arbitration as a party (i.e., as an intervener). The IAAF's request was granted by the Panel on 4 October 2004. On 22 October 2004, the IAAF specified that the sole issue in respect of which it might make submissions in the arbitration concerned "the position that may be adopted by the parties in relation to IAAF Rules and their proper construction". The Panel subsequently declared that "... the IAAF participating in [this case] as described above, the [award] rendered by the Panel shall be final and binding on the IAAF, without possibility of appeal".

On 7 June 2004, USADA informed Respondent that it had received evidence which indicated that M. was a participant in a doping conspiracy involving various elite athletes and coaches as well as BALCO. On the same date, USADA submitted the matter to its Anti-Doping Review Board (the "Review Board") pursuant to paragraph 9 (a) (i) of the USADA Protocol. In accordance with the provisions of that paragraph, the Athlete also submitted a lengthy and detailed submission on the matter to the Review Board.

By letter dated 22 June 2004 (the so-called "Charging Letter"), USADA informed M. that, after consideration of the documents submitted to it by USADA and M., and in accordance with paragraph 9 (a) (i) (vi) of the USADA Protocol, the Review Board had determined that there existed "sufficient evidence against you to proceed with the adjudication process as set forth in [the USADA Protocol]". The charges against Respondent were set out in the Charging Letter, and reiterated in USADA's Statement of Claim, as follows:

[A]t this time, and reserving all rights to amend the charge, USADA charges you with violations of the IAAF Anti-Doping Rules. (...) USADA charges that your participation in the Bay Area Laboratory Cooperative ("BALCO") conspiracy, the purpose of which was to trade in doping substances and techniques that were either undetectable or difficult to detect in routine testing, involved your violations of the following IAAF Rules that strictly forbid doping:

- Rule 55.2

The offence of doping takes place when either:

- (i) a prohibited substance is present within an athlete's body tissues or fluids; or
- (ii) an athlete uses or takes advantage of a prohibited technique; or
- (iii) an athlete admits having used or taken advantage of a prohibited substance or a prohibited technique (See also Rule 56).

¹ Mr. Conte pleaded guilty to several of the charges against him and, in October 2005, was sentenced to four months in prison plus four months of home confinement.

- Rule 56.3

Any person assisting or inciting others, or admitting having incited or assisted others, to use a prohibited substance, or prohibited techniques, shall have committed a doping offence and shall be subject to sanctions in accordance with Rule 60. If that person is not an athlete, then the Council may, at its discretion, impose an appropriate sanction.

- Rule 56.4

Any person trading, trafficking, distributing or selling any prohibited substance otherwise than in the normal course of a recognised profession or trade shall also have committed a doping offence under these Rules and shall be subject to sanctions in accordance with Rule 60.

- Rule 60.1

For the purpose of these Rules, the following shall be regarded as “doping offences” (see also Rule 55.2):

- (i) the presence in an athlete’s body tissues or fluids of a prohibited substance;
- (ii) the use or taking advantage of forbidden techniques;
- (iii) admitting having taken advantage of, or having used, or having attempted to use, a prohibited substance or a prohibited technique;
- (...)
- (vi) assisting or inciting others to use a prohibited substance or prohibited technique, or admitting having admitted or incited others;
- (vii) trading, trafficking, distributing or selling any prohibited substance.

Specifically, the evidence confirms your involvement with the following prohibited substances and prohibited techniques: one or more substances belonging to the prohibited class of “Anabolic Steroids”; Testosterone/Epitestosterone Cream; EPO; Growth Hormone; and Insulin.

As regards the sanction for these alleged violations USADA stated as follows in its Charging Letter:

USADA applies the sanctions found in the rules of the relevant International Federations and the USOC Anti-Doping Policies. Therefore, at this time reserving all rights to amend the sanction at a later date, under the Rules of the IAAF, Division III, Rule 60, USADA is seeking the following sanction against you for your doping offense:

- A lifetime period of ineligibility beginning on the date you accept this sanction or the date of the hearing panel’s decision²;

² At the final hearing, by which time certain of the charges (in particular the charge of “trafficking”) against the Respondent had been dropped, USADA requested that the Panel impose a *four-year* period of ineligibility on M.

- The retroactive cancellation of all awards or additions to your trust fund to which you would have been entitled by virtue of your appearance and/or performance at any athletics meeting occurring between February 1, 2000 and the date your period of ineligibility begins, pursuant to Division III, Rule 60.5 of the IAAF Anti-Doping Rules; and,
- A lifetime period of ineligibility beginning on the date you accept this sanction or the date of a hearing panel's decision, from participating in a US Olympic, Pan American Games or Paralympic Games, trials or qualifying events, being a member of any US Olympic, Pan American Games or Paralympic Games team and having access to the training facilities of the USOC Training Centers or other programs and activities of the USOC including, but not limited to, grants, awards or employment pursuant to the USOC Anti-Doping Policies.

In response to the Charging Letter, M. notified USADA on 28 June 2004 that, in conformity with paragraph 9 (b) (iv) of the USADA Protocol, he elected to “bypass the domestic hearing process” described in paragraph 9 (b) (ii) of the USADA Protocol and “proceed directly to a single final hearing before the Court of Arbitration for Sport”.

Paragraph 9 (b) (iv) of the USADA Protocol provides that upon an athlete making such an election, “[t]he CAS decision shall be final and binding on all parties and shall not be subject to further review or appeal”.

On 5 July 2004, Claimant submitted its Request for Arbitration to the CAS.

M. submitted his Answer to USADA's Request for Arbitration on 6 July 2004.

On 8 September 2004, the CAS issued its standard “Order of Procedure” addressing such matters as the jurisdiction of the CAS, the composition of the Panel, provisions regarding the costs of the arbitration and a statement concerning the confidentiality of the proceedings.

The 8 September 2004 Order of Procedure further confirmed that the conduct of the arbitration was governed by articles R38 and following of the CAS Code, that is, by the CAS rules applicable to “Ordinary” (first instance) arbitrations as opposed to “Appeal” arbitrations.

Three preliminary hearings took place respectively on 1 November 2004, 15 December 2004 and 21 February 2005 in connection with procedural orders (1 November 2004), jurisdiction of the Panel – the Panel dismissed Respondent's Motion and affirmed its jurisdiction in this matter (15 December 2004) and evidentiary issues and objections (21 February 2005).

With the Panel's 4 March 2005 Decision, the nature of the allegations against the Respondent was clarified, certain additional submissions were requested of the parties and, in short, the path toward the hearing on the merits was cleared.

The Panel's Decision on Evidentiary and Procedural Issues also addressed the question of the standard of proof applicable in the present case, which had been in dispute as between the parties. In view of the importance of the issue the Panel considers it apposite to reproduce the relevant passages of its 4 March 2005 Decision, which are as follows:

Standard of Proof

(...)

As set out in its Statements of Claim, USADA's claims against the athletes for violations of IAAF Rules concern allegations that Respondents engaged in systematic doping "commencing in February 2000" (in M.'s case) (...); and, as noted above, USADA refers specifically to alleged violations of the 2002 IAAF Rules. As of 1 March 2004, the IAAF implemented the provisions of the World Anti-Doping Code in new IAAF Anti-Doping Rules, including the provision (Article 3.1 of the World Anti-Doping Code: "Burdens and Standards of Proof") that "[t]he standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing body, bearing mind the seriousness of the allegation which is made" (Emphasis added).

USADA, not surprisingly, sees things differently than the Respondents. It acknowledges (at p. 42 of its 9 February 2005 Response Brief) that what it calls "[t]he old 'beyond reasonable doubt' standard" was replaced by the IAAF as of 1 March 2004. The crux of USADA's argument is that "[t]he introduction to the new IAAF Rules state that the new rules 'shall not be applied retrospectively to doping matters pending at 1 March 2004'; by negative implication, this introductory statement suggests that the new rules may be applied to doping charges initiated after March 1, 2004" (Emphasis added). USADA goes on to challenge the Respondents' view that the standard of proof is a substantive, as opposed to a procedural, rule; and it refers to U.S. case law as well as CAS precedent in support of the principle that the criminal law standard of proof is inapplicable to these proceedings.

(...)

Without deciding the matter, the Panel notes that it appears that this is the very sort of approach contemplated by Article 3.1 of the World Anti-Doping Code, which refers to a standard of proof "bearing in mind the seriousness of the allegation which is made" and which further states that "[t]his standard of proof in all cases is greater than a mere balance of probability ..." (Emphasis added).

From this perspective, and in view of the nature and gravity of the allegations at issue in these proceedings, there is no practical distinction between the standards of proof advocated by USADA and the Respondents. It makes little, if indeed any, difference whether a "beyond reasonable doubt" or "comfortable satisfaction" standard is applied to determine the claims against the Respondents. This will become all the more manifest in due course, when the Panel renders its awards on the merits of USADA's claims. Either way, USADA bears the burden of proving, by strong evidence commensurate with the serious claims it makes, that the Respondents committed the doping offences in question.

The hearing on the merits in this case took place in San Francisco during the 5-day period from 6-10 June 2005.

LAW

1. As set out in USADA's Charging Letter and Statement of Claim, the charges brought against the Respondent concern alleged offences under IAAF Rules 55.2, 56.3, 56.4, and 60.1

(reproduced above). As noted, these charges are brought under the 2002 edition of the IAAF Rules (IAAF Official Handbook 2002-2003), which are applicable.

2. Notwithstanding the breadth of the charges brought against M. – comprising the *presence, use* and *admission* of use of prohibited substances or techniques (Rules 55.2 and 60.1), *assisting* and *inciting* others to do so (Rules 56.3 and 60.1), and *trafficking* in prohibited substances (Rules 56.4 and 60.1) – it became increasingly apparent in the course of the proceedings, that the thrust of USADA’s case concerns allegations of the use of prohibited substances and techniques (including alleged admissions of use and evidence of the presence of prohibited substances in the Athlete’s body) as opposed to the “assisting or inciting” and “trafficking” charges. Ultimately, these charges were dropped by USADA.
3. As presented by USADA at the hearing, the evidence of doping by M. consisted of what Claimant referred to as 7 types of evidence:
 - (1) Blood test results from a Mexican laboratory in February 2000 which allegedly show M.’s testosterone level doubling in the course of one day;
 - (2) Documents extracted from the files seized from BALCO which, according to USADA, “individually or when linked together established M.’s doping”;
 - (3) Evidence of the suppression and rebound of endogenous steroids in Respondent’s urine, as shown in a table depicting test results reported by IOC-accredited and BALCO Laboratories on 56 occasions between March 1999 and September 2004;
 - (4) Alleged abnormal blood test results on 5 occasions between November 2000 and July 2001;
 - (5) Respondent’s alleged admission to W. that he had used a prohibited substance known colloquially as the “Clear”;
 - (6) So-called admissions against interest, which implicated M., made by the President of BALCO, Victor Conte, in interviews with investigative authorities as well as the media; and
 - (7) Reports in the San Francisco Chronicle supposedly based on secret grand jury testimony by M. in which he admits to using various prohibited substances.
4. The Panel is unanimously of the view that M. in fact admitted his use of prohibited substances to W., as discussed in more detail below, on which basis alone the Panel can and does find him guilty of a doping offence. The Panel does not consider it necessary in the circumstances to analyse and comment on the mass of other evidence against the Athlete. Nevertheless, the Panel does not consider that such other evidence could not demonstrate that the Respondent is guilty of doping. Doping offences can be proved by a variety of means; and this is nowhere more true than in “non-analytical positive” cases such as the present.
5. As mentioned, W. has admitted to doping and has accepted a two-year sanction as a result. Having seen W. and heard her testimony, including in response to questions put to her by counsel and the Panel, the members of the Panel do not doubt the veracity of her evidence.

She answered all questions, including in relation to her own record of doping, in a forthright, honest and reasonable manner. She neither exaggerated nor sought to play down any aspect of her evidence. Clearly an intelligent woman, she impressed the Panel with her candour as well as her dispassionate approach to the issues raised in her testimony and regarding which she was questioned by counsel and members of the Panel. In sum, the Panel finds W.'s testimony to be wholly credible.

6. According W.'s evidence, in March 2001, while at an international meet in Portugal (no exact date was provided by the witness) she and M. had "a small discussion about whether or not the Clear made our calves tight". M. asked W., "Does it make your calves tight?" W. responded in the affirmative. M., still in her presence, then placed a telephone call to someone who may or may not have been Mr. Conte (W. believes that it was Mr. Conte) to whom he relayed the information that "she said that it makes her calves tight too". According to W., there was not the slightest doubt as to the substance about which she and M. were speaking and which they both acknowledged had the effect of making their calves tight: they were talking about the Clear.
7. It is essential to note that this evidence of what USADA claims constitutes a direct admission of M.'s guilt, is uncontroverted.
8. It might indeed have affected the Panel's appreciation of W.'s evidence had Respondent chosen to provide the Panel with a different explanation of their March 2001 conversation or had he denied that the conversation took place as described by the witness. The fact remains that he did not.
9. It is common ground that M. was fully within his rights to testify in his own defence, or not, as he saw fit. Where the parties differ, however, is with respect to the question (on which extensive pre-hearing submissions and authorities were filed and arguments were made during the hearing) whether the Panel has the authority to draw an adverse inference from M.'s decision not to testify in the arbitration; and, if it does have the power to do so, whether such an inference should be drawn in this case.
10. On 17 September 2005, the Panel advised the parties that, having considered their written and oral arguments and the legal authorities filed by them for and against the drawing of an adverse inference, and after deliberation, it found that "it does have the right and power to draw an adverse inference from M.'s refusal to testify. More particularly, it may draw adverse inferences in respect of allegations regarding which USADA has presented evidence that would normally call for a Response from the Respondent himself, and nor merely from his experts or counsel". The Panel further informed the parties that it had not yet determined whether it would draw any such inferences and that its deliberations had been suspended so as to allow Respondent the opportunity to reconsider, in the circumstances, his decision not to testify³.

³ As explained in the Panel's 17 September letter, this somewhat unusual procedure was considered necessary and appropriate in the circumstances, so as to preserve the procedural harmony as between M.'s and G.'s cases. As the

11. It is noted that in the case of *USADA v. C.* the Arbitral Tribunal found that it “may draw certain adverse inferences” from the Respondent’s refusal to testify, though “there is no rule obligating a Tribunal to draw an adverse inference”. Indeed, the Tribunal went on to hold that “no adverse inference is necessary” given that the weight of the evidence “is already adverse to C. so no further adverse inference need be drawn”.
9. The situation is similar in the present case. M. has been provided every conceivable opportunity to provide an exculpatory explanation of his own statements evidencing his guilt. He has had ample opportunity to deny ever making such statements. But because he has not offered any evidence of his own concerning his admission to W. of his use of the Clear, the Panel can only rely on the testimony of W. That testimony is more than merely adverse to M.; it is fatal to his case. In the circumstances, faced with uncontroverted evidence of such a direct and compelling nature, there is simply no need for any additional inference to be drawn from the Respondent’s refusal to testify. The evidence alone is sufficient to convict.
10. In its 4 March 2005 Decision on Evidentiary and Procedural Issues, the Panel observed that “it makes little, if indeed any difference, whether a ‘beyond reasonable doubt’ or ‘comfortable satisfaction’ standard is applied to determine the claims against the [Respondent] (...). Either way, USADA bears the burden of proving, by strong evidence commensurate with the serious claims it makes that the [Respondent] committed the doping offences in question”.
11. USADA has met this standard. The Panel has no doubt in this case, and is more than comfortably satisfied, that M. committed the doping offence in question. It has been presented with strong, indeed uncontroverted, evidence of doping by M., in the form of an admission contained in his statements made to W. and to others while in her presence. On this basis, the Tribunal finds Respondent guilty of a doping offence. In particular, the Panel finds M. guilty of the offence of admitting having used a prohibited substance under IAAF Rules 55.2(iii) and 60.1(iii).
12. In the circumstances, the Panel finds that M.’s admission of his use of prohibited substances merits a period of ineligibility under IAAF Rules of two years.
13. This period of ineligibility shall commence to run as of 6 June 2005, being the first day of M.’s hearing. The Panel is of the view that this date of commencement of the sanction is fair and appropriate in the particular circumstances of this case in view of the numerous delays in the hearing process unattributable to the Athlete, including as a result of the agreement of all parties that M.’s and G.’ cases should be run in tandem. Although this agreement entailed significant efficiencies overall, and doubtless permitted the two cases to be heard and decided

Panel explained to the parties (and as USADA was well aware, in its capacity as the Claimant in the G. arbitration), because of the different manner in which events at her hearing unfolded, G. had had the opportunity to address the question whether, in the event that the Panel were to find that it may draw adverse inferences from her refusal to testify, she would wish to be so informed in order to be able to reconsider her decision. G.’s answer was “No”. The same opportunity for M. to address this question had not arisen during his hearing the month before.

(by the same Panel) more quickly than if they had been conducted sequentially, it inevitably meant that there would be some additional delay before either case could be heard.

14. In addition to the two-year sanction already discussed, the Panel orders the retroactive cancellation of all of M.'s results, rankings, awards and winnings as of 31 March 2001 (as noted above, W. did testify as to the exact date during the month of March, 2001 on which M. admitted his use of the Clear, and the Panel thus considers it reasonable that the last day of the month in question be selected for this purpose). In this regard, IAAF Rule 60.5 provides: "Where an athlete has been declared ineligible he shall not be entitled to any award or addition to his trust fund to which he would have been entitled by virtue of his appearance and/or performance at the athletics meeting at which the doping offence took place, or at any subsequent meetings".

The Panel unanimously finds and orders as follows:

1. Respondent is guilty of the offence of admitting having used a prohibited substance under IAAF Rules 55.2(iii) and 60.1(iii).
2. The following sanctions shall be imposed on Respondent:
 - a) A period of ineligibility under IAAF Rules for two years commencing as of 6 June 2005, including his ineligibility from participating in U.S. Olympic, Pan American or Paralympic Games, trials or qualifying events, being a member of any U.S. Olympic, Pan American or Paralympic Games team and having access to the training facilities of the United States Olympic Committee ("USOC") Training Centers or other programs and activities of the USOC including, but not limited to, grants, awards, or employment pursuant to the USOC Anti-Doping Policies;
 - b) The retroactive cancellation of all awards or additions to Respondent's trust fund to which he would have been entitled by virtue of his appearance and/or performance at any athletics meeting occurring between 31 March 2001 and the date of this Award.
3. (...).
4. (...).
5. This Award deals definitively with all charges brought against Respondent by Claimant in this arbitration. All charges not expressly dealt with herein are dismissed.