



Arbitration CAS (Oceania registry) A3, A4 / 99; Australian Olympic Committee (AOC) and Australian Handball Federation (AHF)/ A., award of 2 August 1999

Panel: Malcom Holmes (Australia), Sole Arbitrator

Handball

Doping (salbutamol)

Extenuating circumstances

- 1. Any form of medication should be first considered and authorised by a medical practitioner who is familiar with the anti-doping regulations of both the AOC and the particular sport. An elite athlete should be aware of possible risks and must normally bear some responsibility for such an enquiry.**
- 2. In the present case, given the age of the athlete, his history of medical need for a medication containing salbutamol, his prior written advice that he was taking this medication to the State Body of the AHF and the fact that responsible officials within the AHF had assisted him with this medication in the past, the athlete has committed a technical breach of the anti-doping policies but bears no moral responsibility for the breaches and that he was not in any way culpably involved in the breaches.**

On 23 March 1999 the Court of Arbitration for Sport received a written request from the Australian Olympic Committee (AOC) and the Australian Handball Federation (AHF) that the dispute between each of them and A. be referred to arbitration by the CAS. Subsequently the parties accepted the jurisdiction and procedures of CAS to determine the dispute under the terms of the AOC Anti-Doping Policy. The Respondent did not agree that the AHF had a valid anti-doping policy at the relevant time and did not accept that it applied but agreed to accept my decision on whether it applied.

The hearing took place on 21 July 1999 by means of a telephone conference. Mr. Simon Rofe, solicitor, appeared for the Applicants, AHF accompanied by Ms Anne Mousseux, Project Coordinator from the AOC who is responsible for the administration of the AOC Anti-Doping Policies. Mr. Rofe called oral evidence from Mr. Nir Peled, the Acting President of the AHF, Mr. Stephen Harbort, the Secretary General of the AHF and also from Ms Mousseux. A. was represented by Mr. Bill Turner. Mr. Turner called oral evidence from Mr. George Costas and A. Both parties had lodged written materials and documentation outlining their respective positions before the hearing and these were also received in evidence.

Prior to October 1998 the AHF had not adopted an anti-doping policy and appears not to have taken any steps to educate AHF athletes on the subject of anti-doping. Further even though it was a member body of the AOC it appears to have taken no steps to implement and administer any anti-doping policy as is required of it by the terms of the AOC anti-doping policy (see clause 3.2(8)).

In 1998 the AHF employed Craig Gibson as its High Performance Manager. He had also been appointed the AHF anti-doping control officer. Mr. Gibson's role within the AHF included developing an anti-doping policy for the AHF. As a result he had a number of dealings in 1998 with the AOC on anti-doping matters.

Mr. Craig Gibson circulated a draft anti-doping policy in April 1998, which he gave to Ms Mousseux on 13 May 1998 for presentation to the Executive Board of the AOC. The AOC approved the proposed anti-doping policy of the AHF on 15 May 1998 and in June advised the AHF that it was in a form acceptable to the AOC. Mr. Gibson then circulated the proposed policy to the officials of the AHF for their consideration at the next meeting which was due to take place in September. This was delayed until the AHF annual general meeting in Victoria on Saturday, 10 October 1998.

There was a dispute about what happened at this meeting but the evidence clearly establishes that the policy was considered by those present and a resolution was passed adopting the policy. I am satisfied from the terms of the resolution which was passed and after hearing the evidence from some of those who were present that the policy was not subject to any proviso or delay and that it came into effect immediately.

At this stage there was an immediate difficulty for Australian handballers. The women handballers had the supervision or involvement of a medical practitioner in their preparation and training. This doctor was available to them and confirmed whether or not they were asthma sufferers. It seems he was also available to ensure that a written certification that the athletes involved needed to use medication was obtained by the AHF. On the other hand the male handballers in 1998 appear to have been under the supervision of Mr. Craig Gibson and no such medical monitoring or certification occurred. Nevertheless, it was the practice for managers to obtain details of any medication the male handballers were using and any injuries they were carrying for safety purposes.

The evidence revealed that A. has been an asthmatic sufferer since he was very young and has always needed anti-asthmatic medication. At all times he was open in his use of this medication which was generally in the form of a puffer spray. A., as an elite handballer, participated in a number of team camps organised by the AHF including camps at the Australian Institute of Sport (AIS) in Canberra, the AIS in Thredbo and also in Sydney. He had used the medication whilst at these camps. Mr. Harbort confirmed that he had seen A. using a puffer during training and whilst playing. A. confirmed that the physiotherapist or team manager or coaches have from time to time held his puffer whilst he participated in the various events in case he needed it during a game.

There was placed in evidence a written notification by A.'s parents in 1994 and 1996 of his asthmatic condition and medication when authorising his participation in some handball events in that year. The AOC and the AHF did not dispute that A.'s use of his puffer had been at all times open and

that he used it as a matter of medical necessity and that he did not obtain any competitive advantage through its use.

The alleged breach of the AHF anti-doping policy occurred on the day following the adoption by the AHF of its anti-doping policy. On Sunday 11 October 1998 A. was participating in an event in Victoria. Even though it was the day after the AHF had adopted its anti-doping policy and Mr. Craig Gibson was present, neither Mr. Gibson nor any other team official told A. or any other member of the team or participant that the AHF had adopted an anti-doping policy. A. was not told that the AHF's anti-doping policy prohibited the use of most anti-asthmatic medications except where it was taken "by inhaler only" and when its use had been previously "*certified in writing by a respiratory or team physician to the relevant medical authority*".

On Sunday, 11 October 1998 the Australian Sports Drug Agency (ASDA) selected A. for a drug test. A. freely advised ASDA that he had used medication in the last week prior to the test when he was required to fill out the drug testing form. He stated that he had taken Ventolin, "2 puffs" and that it had been last taken on 11 October 1998.

It appears not to have occurred to anyone in the AHF that the ingestion or use of the anti-asthmatic medication was prohibited at the time under both the AOC and the AHF anti-doping policies unless it was taken by inhaler and where its use had been previously "*certified in writing by a respiratory or team physician to the relevant medical authority*".

Subsequently, on 28 October 1998 Mr. Gibson wrote a letter to A. which inexplicably said:

"There have been changes in the Australian Sports and Drug Agency Policy on Asthma for all OAP athletes. If you are currently taking any Asthma medication or have taken medication for Asthma in the last 6 months, could you please contact me urgently and mail or fax a copy of a medical or doctor's certificate listing your prescribed medication."

No changes in ASDA's policy on asthma had taken place and no mention was made in the letter of the recently adopted AHF anti-doping policy or its terms.

At about this time A. became aware that his drug test was positive. He then obtained a certificate from his doctor, Dr. Brian Stevenson, dated 10 November 1998 confirming that A. had suffered from asthma "for over ten years". In November 1998, A. went overseas with the Australian team to Japan and since that time has played handball with a first division professional club in Norway.

In late 1998, there were some discussions between Mr. Costas on behalf of the AHF and the AOC about certain interpretations to be placed on the AHF anti-doping policy but there were no changes to the terms of the anti-doping policy. Mr. Gibson ceased to be the AHF High Performance Manager in late 1998.

LAW

1. I accept that as at 11 October 1998 A. was an athlete as defined in the AOC anti-doping policy and that the drug test carried out on 11 October 1998 revealed the presence of Salbutamol and that there was a breach of the AOC anti-doping policy, i.e. the presence in a persons body tissues or fluids of substances prohibited by the AOC Medical Code which prohibited Salbutamol except by inhaler only *“when... (its) use (had been) previously certified in writing by a respiratory or team physician to the relevant medical authority”*.
2. In the light of the evidence before me I am satisfied that the AHF policy was adopted on 10 October 1998 and that it came immediately into effect and that there was also a breach of the AHF policy which relevantly was in similar terms.
3. Prior to the infraction on 11 October 1998 A.’s use of the medication was well known by the AHF and in particular by the AHF anti-doping control officer but through ignorance or negligence the AHF failed to advise him that its use was only permitted where there had been prior certification in writing in accordance with the AOC Anti-Doping Code which then applied or on 11 October 1998 (i.e. the date of the test) in accordance with the AHF Anti-Doping Policy which then also applied. The written advices in 1994 and 1996 from A. and his parents that he was an asthmatic and that he “required” medication in the form of Ventolin and Becotide are not sufficient to satisfy the requirements of the AOC or the AHF anti-doping policies. These documents merely confirm that open and innocent use of asthmatic medication which was being taken as a matter of medical necessity. Unfortunately the advice did not take the particular form of certification required by the terms of the anti-doping policies.
4. In these circumstances I am satisfied there has been an infraction of the AOC and AHF Anti-Doping Policies. At the hearing it was agreed that under the AOC policy the appropriate sanction would be “for a period of up to three months” pursuant to clause 8.1(2) of the AOC Policy and that the appropriate sanction in respect of an infraction of the AHF Policy was for a first infraction “suspension for up to two years”. Under the policies if extenuating circumstances existed it could be reduced to nil.
5. The circumstances of this case repeat the lesson which all elite athletes must learn namely that any form of medication should be first considered and authorised by a medical practitioner who is familiar with the anti-doping regulations of both the AOC and the particular sport. An elite athlete should be aware of possible risks and must normally bear some responsibility for such an enquiry. Nevertheless, given the age of A., his history of medical need for this medication, his prior written advice that he was taking this medication to the State Body of the AHF and the fact that responsible officials within the AHF had assisted him with this medication in the past, I am satisfied that this is a technical breach of the anti-doping policies and that A. bears no moral responsibility for the breaches and that he was not in any way culpably involved in the breaches.

6. In these circumstances I am satisfied that extenuating circumstances do exist within the meaning of both anti-doping policies and that no sanction should be imposed on A. The evidence establishes that A. did not know or suspect that the relevant substance was prohibited and had no reasonable grounds to know or suspect that the substance was prohibited.
7. Furthermore, I am satisfied that had the officials of the AHF acted responsibly and with appropriate care towards the athletes within their control, the breaches would never have occurred in the first place. The AHF, as a member of the AOC, had for some time prior to 11 October 1998 been obliged to cooperate with the AOC and with the Australian Sports Drug Administration Authority (ASDA) to ensure that AHF athletes would take part in drug testing under the AOC policy. It was obliged to implement and administer its own anti-doping policy. I agree with the submission by Mr. Bill Turner on behalf of A. that the breaches arose out of the negligence on behalf of the AHF team management and a lack of activity on behalf of the AHF to implement appropriate procedures and processes to ensure that AHF athletes were aware of their obligations under the AOC Policy and the AHF Policy.
8. As a result of my finding that the AHF policy applies in this case, this hearing and the award are regulated by the terms of clause 9.7 of that policy which provides that:
“9.7 In any hearing by CAS:
 - (a) CAS will decide according to the laws applicable in New South Wales;*
 - (b) AHF will bear the costs of CAS but each party will bear their own costs of the hearing;*
 - (c) the provisions of R43 of the Code of Sports-Related Arbitration will not apply; and*
 - (d) the CAS award be made public.”*

The Court of Arbitration for Sport hereby rules that:

1. On 11 October 1998, the Respondent A. committed a breach of the AOC Anti-Doping Policy and the AHF Anti-Doping Policy in that there was present in his body tissues or fluids substances belonging to classes of pharmacological agents which were prohibited, namely the substance Salbutamol which was present as a result of his inhalation of an anti-asthmatic medication Ventolin.
2. On the balance of probabilities extenuating circumstances do exist and that as a result of those extenuating circumstances there should be no sanction imposed on A.