

**BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND**

ST 07/09

BETWEEN **DRUG FREE SPORT NEW ZEALAND**
Applicant

AND **LIZA HUNTER-GALVAN**
Respondent

AND **ATHLETICS NEW ZEALAND**
Interested Party

DECISION OF TRIBUNAL
Dated 28th August 2009

Hearing: By Conference Call on 27th August 2009 (NZ time)

Attendances: P David (Counsel), G Steel and J Kernohan
for Applicant
H Jacobs (USA Counsel) and L Hunter-Galvan
for Respondent
S Newman for Interested Party

Panel: B J Paterson, QC (Chairman)
NRW Davidson, QC
A Greenwood

Registrar: B Ellis

INTRODUCTION and BACKGROUND

1. This is an application by Drug Free Sport (DFS) alleging that the respondent, Ms Hunter-Galvan, has committed an anti-doping rule violation. The prohibited substance is recombinant human erythropoietin (EPO).
2. Ms Hunter-Galvan underwent an out-of-competition test in San Antonio, USA on 23 March 2009. The UCLA Olympic Analytical Laboratory of Los Angeles reported, on 21 May 2009:

The urine specimen contains recombinant human erythropoietin.
3. On 26 May 2009, the Tribunal received an application by Athletics NZ for consideration of provisional suspension under r.12.1 of the Sports Anti-Doping Rules 2009 (the Rules). A hearing by telephone conference took place on 29 May 2009 in which Ms Hunter-Galvan participated. The Tribunal provisionally suspended Ms Hunter-Galvan on 29 May 2009.
4. Ms Hunter-Galvan's right to have the B sample analysed did not expire until 3 June 2009. During the hearing on 29 May, she indicated that she had not at that stage exercised her right to have the sample analysed but may wish to do so.
5. Ms Hunter-Galvan exercised her right to have the B sample analysed and this was done on 23 June 2009 in Ms Hunter-Galvan's presence. That analysis produced the same result as the analysis of the A sample.
6. The present application was received by the Tribunal on 2 July 2009 but notice of service of it on Ms Hunter-Galvan on 20 July 2009 was not received until 31 July 2009. Ms Hunter-Galvan, for personal reasons, applied for an extension of the time to file her notice of response.

7. Ms Hunter-Galvan's response was received by the Tribunal on 11 August 2009. She admitted the violation and advised she did not wish to participate in the hearing and acknowledged that the Tribunal may impose a penalty on her without holding a hearing. However, a letter from her attorney requested that the starting date of any period of ineligibility be 23 March 2009, the date of the sample collection, as opposed to 29 May 2009, the date on which the provisional suspension order was made.
8. The attorney also advised that Ms Hunter-Galvan wished to provide the Tribunal with an explanation of the circumstances surrounding her possible test, for possible inclusion in any written decision or public announcement that may be issued in this case.
9. As the purpose of the proposed statement was "*for possible inclusion in any written decision*", the Tribunal held a conference call hearing with the parties on 27 August 2009. It took the view that if Ms Hunter-Galvan was to make a statement which she wished to have considered for inclusion in a written decision, the other parties were entitled to hear this explanation and make any submissions they wished.

THE STARTING DATE

10. Under r.14.2 of the Rules, there is a mandatory sanction of two years ineligibility if the violation is the presence of a prohibited substance in the athlete's body, and that substance is EPO. The only issue is the starting date. Rule 14.9 requires that any period of provisional suspension be credited against the total period of ineligibility. The two year period can, therefore, not commence after 29 May 2009.
11. Ms Hunter-Galvan applies pursuant to the provisions of r.14.9.2 to have the period of ineligibility commence on 23 March 2009. The relevant portion of the rule states:

Where the *Athlete*... promptly (which, in all events, for an *Athlete* means before the *Athlete* competes again) admits the *Anti-Doping Rule Violation* after being confronted with the *Anti-Doping Rule Violation* by the *Anti-Doping Organisation*, the period of *Ineligibility* may start as early as the date of *Sample* collection...

12. The issue is, therefore, whether Ms Hunter-Galvan is, in the circumstances of this case, able to persuade the Tribunal to exercise its discretion and commence the period of ineligibility on 23 March 2009 (the date the sample was taken).
13. The grounds upon which the application is made are:
 - (a) Ms Hunter-Galvan has, for the purposes of the Rules, "*promptly*" admitted the offence without the need for a hearing and prior to the date of the deadline given to provide a written explanation; and
 - (b) Ms Hunter-Galvan has not competed at all since being notified of her positive test result.

The request was initially made pursuant to IAAF Rule 40.10(a). The Tribunal's jurisdiction is to consider the matter in accordance with r.14.9.2 of the Rules which appears to be in slightly different terms from the IAAF rule.

14. At the hearing, Mr Jacobs (counsel for Ms Hunter-Galvan), suggested that the IAAF rule should be used as a guide because it indicates that a factor in considering whether there has been a timely admission is whether it was made prior to the date of the deadline given to provide a written explanation. He also placed some emphasis on a letter written by DFS to Ms Hunter-Galvan on 23 July 2009, the relevant contents of which will be considered later.
15. Mr David, counsel for DFS, submitted that the Tribunal should not exercise its discretion to backdate the commencement date

because Ms Hunter-Galvan had not, on the facts of this case, “promptly” admitted the offence. He relied upon steps taken by Ms Hunter-Galvan which may be summarised as follows:

- Ms Hunter-Galvan was advised of the positive test of the A sample on 22 May 2009;
 - she was provisionally suspended by this Tribunal on 29 May 2009;
 - she then requested the A sample package which was provided at some cost by DFS;
 - she then confirmed she wanted the B sample analysed;
 - she requested the DFS extend the time for analysing the B sample. DFS agreed to extend the time to 23 June 2009 but not to the time requested by Ms Hunter-Galvan;
 - Ms Hunter-Galvan herself attended the testing of the B sample;
 - she was advised of the result of the B sample shortly after the certificate was issued by the laboratory on 29 June 2009;
 - Ms Hunter-Galvan then requested the B sample package;
 - Ms Hunter-Galvan received the letter from DFS dated 23 July but did not make an admission at that stage;
 - the admission was made in Ms Hunter-Galvan’s response which was dated 10 August 2009 and was received by the Tribunal on 11 August 2009.
16. Rule 14.9.2 mirrors Article 10.9.2 of the WADA Code 2009 which came into effect this year. **The note to r.14.9 states that the rule was revised to make clear that delays not attributable**

to the Athlete, timely admissions by the Athlete and Provisional Suspension are the only justifications for starting the period of ineligibility earlier than the date of the hearing decision.

17. In her statement to the Tribunal, Ms Hunter-Galvan acknowledged taking EPO on 26 February, 13 March and 20 March 2009. She then stopped using the EPO because of its side effects, namely stomach pains, chest pains, headaches, etc. This was not a case of an athlete when confronted with the result of the test of the A sample, being in any genuine doubt as to whether she had taken EPO. Indeed, she frankly acknowledged that she knowingly used EPO on these three occasions.
18. The usual ordinary meaning of "*promptly*" is that the act is done immediately or punctually. There is a sense of immediacy about the provisions of r.14.9.2.
19. It is the Tribunal's view that an *Athlete* who has knowingly taken EPO does not promptly admit the *Anti-Doping Rule Violation* by requesting that the B sample be analysed. It is not as if she was in any doubt about her actions having knowingly used what she understood was EPO and returning a positive result from the A sample.
20. Further, in this case, Ms Hunter-Galvan did far more than have the B sample analysed. As she was entitled to do, she obtained the packaging of both samples and attended the analysis of the B sample. The inference to be drawn is that she was checking to see whether there may have been a procedural challenge to the testing process. While she cannot be criticised for taking these steps, she can not, in the Tribunal's view, be held to have promptly admitted the *Anti-Doping Rule Violation*.
21. It is only necessary to refer briefly to the DFS letter of 23 July 2009 to Ms Hunter-Galvan. By that date, she had failed to

promptly admit the violation. The letter advised Ms Hunter-Galvan of DFS's broader interest in finding out the circumstances in which a violation may have occurred and whether any other individuals may have committed anti-doping violations. DFS referred Ms Hunter-Galvan to r.14.5.3 which allows the Tribunal to make reductions to the standard period of ineligibility if substantial assistance is given by the athlete. The letter also referred to r.14.9.2 which provided that a prompt admission may lead to an earlier date for the starting of the period of ineligibility. DFS was within its rights in writing the letter and was endeavouring to ascertain information which may have helped it in combating doping in sport. The letter can not be taken as any indication that, if Ms Hunter-Galvan admitted the offence after that date, the sanction would be backdated. The Tribunal's view is that the circumstances of this case do not justify it in holding that there had been a prompt admission of the violation.

22. For these reasons, the period of ineligibility will commence from the date of the provisional suspension, namely 29 May 2009.

PUBLICITY

23. There has been media publicity and speculation on this case and there has been criticism that none of DFS, Athletics NZ or the Tribunal have been prepared to confirm that the case has been pending. This is because of the provisions of the Rules. Rule 17.1 provides that DFS will "*Operate under the Rules on a confidential basis*". That rule also provides that *DFS, National Sporting Organisations* (in this case, Athletics NZ), *Participants* and *Persons* shall not *Publicly Disclose or Publicly Report* the identity of Athletes whose *Samples* have resulted in *Adverse Analytical Findings*, or of *Persons* who are alleged to have committed a *Violation* under the Rules, nor *Publicly Disclose or Publicly Report* any information concerning *Adverse Analytical Findings*, until such time as a final decision that an *Anti-Doping*

Rule Violation has been committed has been given by this Tribunal and the final decision has been *Publicly Reported* or *Publicly Disclosed* by this Tribunal.

24. There is obviously a sound reason behind this rule. If the B sample had tested negative, the Athlete would have been cleared and the Rules provide that in such circumstances there be no publicity or disclosure of the Athlete's name.
25. Rule 12.7 applies to provisional suspensions. It requires a provisional suspension decision to remain confidential until publication of the final decision on the *Anti-Doping Rule Violation* unless this Tribunal considers that it is in the interests of the *National Sporting Organisation* and its members that the decision in relation to the *Provisional Suspension* be *Publicly Reported*.
26. The question of *Publicly Reporting* the *Provisional Suspension* was raised at the hearing on 29 May 2009. Athletics NZ was about to announce its team for the World Championships in Berlin and Ms Hunter-Galvan, if available, would have been selected in that team. Ms Hunter-Galvan indicated during the hearing that she was likely to withdraw from consideration for that team and, in the circumstances, the Tribunal saw no reason to *Publicly Report* the *Provisional Suspension* if she, in fact, took that course.
27. Later that day, Ms Hunter-Galvan publicly withdrew from the team and, in the Tribunal's view, as reported in the *Provisional Suspension* decision, the provisions of r.12.7 applied and the Tribunal ordered that the *Provisional Suspension* decision remain confidential. It indicated in that decision that it would review this position if Athletics NZ advised that it believed that it was in its interest or those of its members that the decision be *Publicly Reported*. No such advice was received.

SANCTION

28. It is ordered that a period of two years Ineligibility status be imposed on Ms Hunter-Galvan commencing from 29 May 2009. The provisions of r.14.10 of the Rules, which include provisions generally preventing athletes participating in sport in any capacity and provisions concerning the withholding of sports-related financial support will apply during that period.

Dated the 28th day of August 2009



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B J Paterson QC
Chairman
on behalf of the Tribunal