Important note: *The name of the athlete has been redacted from this decision.*

SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)

DOPING APPEAL TRIBUNAL

IN THE MATTER OF AN ANTI-DOPING RULE VIOLATION ASSERTED BY THE CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)

NO: SDRCC DAT-22-0017

BETWEEN:

[redacted]

(ATHLETE)

AND

CANADIAN CENTRE FOR ETHICS AND SPORT (CCES)

(RESPONDENT)

DECISION

Appearances:

Eileen Church Carson — Counsel for the Athlete

Adam Klevinas — Counsel for the Respondent

Jurisdiction

1. The Sport Dispute Resolution Center of Canada ("SDRCC") was created March 19, 2003 by the *Physical Activity and Sport Act* (S.C. 2003, c.2). Under the *Act*, the SDRCC has exclusive jurisdiction to provide a national alternative dispute resolution service to the sport community. In 2004, the SDRCC assumed responsibility for all doping disputes in Canada.

The Parties

CCES

2. The Canadian Centre for Ethics in Sport (CCES) is an independent, non-profit organization that is responsible for administering the Canadian Anti-Doping Program (CADP), including the provision of anti-doping services to national sport organizations and their members. As Canada's national anti-doping organization, the CCES is in compliance with the World Anti-Doping Code (WADC) and its mandatory International Standards. The CCES has implemented the WADC and its mandatory International Standards through the CADP, the domestic rules that govern this proceeding.

3. The CADP applies to all members of, and participants in the activities of sporting organizations adopting it. The WADC and the CADP are designed to protect the integrity of sport and the rights of clean athletes.

4. According to Rule 8.1.1 of the CADP, the SDRCC has the jurisdiction to constitute and administer a Doping Tribunal, which is obliged to conduct all hearings in accordance with the CADP Rules as informed, where necessary, by the WADC.

WADA

5. The World Anti-Doping Agency (WADA) is the international organization responsible for administering the World Anti-Doping Program, which includes the WADC. WADA did not participate in the hearing.

The Athlete

6. [redacted] He has played for the University's soccer team since the beginning of his studies. [redacted] is bound by the CADP.

7. On April 3, 2022, [redacted] made application to the CCES for a retroactive Therapeutic Use Exemption (TUE). The CCES denied the application.

8. Section 9.3 (n) of the Canadian Sport Dispute Resolution Code (*Code*) provides that a decision of the CCES denying an application for a TUE may be appealed to an Appeal Panel exclusively as provided for in Rule 13.4 of the CADP.

9. On August 2, 2022, the parties agreed to my appointment as a single Arbitrator of the Appeal Panel pursuant to Article 9.7 (a) of the *Code*.

10. The parties submitted an agreed statement of facts and agreed on a procedural schedule for submissions. I held a short oral hearing on September 9, 2022. On September 14, 2022, I issued my decision to deny [redacted]'s appeal. The decision was issued with reasons to follow, in accordance with Article 9.12 (b) of the *Code.*

11. These are my reasons.

Factual Background

12. On October 17, 2021, [redacted] was selected for in-competition testing. He informed the doping control officer that he took Vyvanse (lisdexamfetamine), a medication used to treat Attention Deficit/Hyperactivity Disorder (ADHD), the day before the competition. D-Amphetamine is an ingredient of Vyvanse. On October 17, 2021, [redacted] was tested in-competition and received an adverse analytical finding (AAF) for D-Amphetamine, a substance that is prohibited in-competition by the WADC.

13. At the time of the test, [redacted] had not been diagnosed with ADHD and did not have a prescription for Vyvanse.

14. While at University, [redacted] experienced difficulties focusing on his studies. He was distracted, poorly organized and tended to procrastinate, creating problems with his studies. [redacted] withdrew from two courses in the fall semester of his second year because he had fallen behind and failed two other classes that semester. Around that time, [redacted] spoke with an upper year student who had a prescription for Vyvanse. The other student told [redacted] that the drug helped him stay organized and focused. [redacted] took a reduced course load in the spring semester of his second year in an effort to manage his academic challenges and returned to a full course load in the fall semester of his third year.

15. [redacted] took Vyvanse from a friend's prescription intermittently for approximately eighteen months leading up to the AAF. He found that the drug helped him focus and complete his schoolwork. [redacted] took 20mg of Vyvanse on October 16, 2021 to study for a midterm exam.

16. After testing positive for D-Amphetamine, [redacted] met with a psychiatrist on February 11, 2022 and following an independent medical examination on February 23, 2022, [redacted]

was diagnosed with ADHD. On March 30, 2022, [redacted]'s primary care physician prescribed Vyvanse to be taken by [redacted] according to an agreement between them. The agreement provided, among other things, that [redacted] was responsible for the secure storage of the medication, and that while the prescribed dosage was safe for him, it could cause serious overdose and possibly death in another person.

17. Where an athlete is required to use substances that are included in the WADA Prohibited list for illnesses or medical conditions, they may apply for a *Therapeutic Use Exemption (TUE)* under the *International Standard for Therapeutic Use Exemption (ISTUE):*

"4.0 Obtaining a TUE

4.1 An Athlete who needs to Use a Prohibited Substance… for Therapeutic reasons must apply for and obtain a TUE under Article 4.2 prior to Using or Possessing the substance … in question.

However, an Athlete may apply retroactively for a TUE (but must still meet the conditions in Article 4.2) if one of any of the following exceptions applies:

…

e) the Athlete used Out-of-Competition, for Therapeutic reasons, a Prohibited Substance that is only prohibited In-Competition

…

[Comment to Article 4.1(c), (d) and (e): Such Athletes are strongly advised to have a medical file prepared and ready to demonstrate their satisfaction of the TUE conditions set out at Article 4.2, in case an application for a retroactive TUE is necessary following Sample collection.]

4.2 An Athlete may be granted a TUE if (and only if) he/she can show, on the balance of probabilities, that each of the following conditions is met:

a) The Prohibited Substance… in question is needed to treat a diagnosed medical condition supported by relevant clinical evidence.

b) The Therapeutic Use of the Prohibited Substance… will not, on the balance of probabilities, produce any additional enhancement of performance beyond what might be anticipated by a return to the Athlete's normal state of health following the treatment of the medical condition.

c) The Prohibited Substance… is an indicated treatment of the medical condition, and there is no reasonable permitted Therapeutic alternative.

d) The necessity for the Use of the Prohibited Substance … is not a consequence, wholly or in part, of the prior Use (without a TUE) of a substance or method which was prohibited at the time of such Use."

18. The ISTUE defines "Therapeutic" as: *of or relating to the treatment of a medical condition by remedial agents or methods; or providing or assisting in a cure*. (WADC, International Standards Results Management, Article 3.4)

19. [redacted] applied to the CCES for a retroactive *TUE* on April 3, 2022.

20. On July 13, 2022, CCES denied the application on the basis that [redacted] did not meet the conditions of the ISTUE because at the time of the AAF, he was not receiving "medical treatment out-of-competition."

21. Further information, including an updated independent medical examination, was provided to the CCES on August 12, 2022 to reconsider [redacted]'s application. The June 13, 2022 updated examination confirmed [redacted]'s diagnosis of ADHD, with significant severity levels for inattentive, hyperactive and impulsive symptoms.

22. On August 17, 2022, the CCES again denied [redacted]'s application.

23. The CCES accepted that [redacted] had satisfied the requirements of Article 4.1 (e) given that he used Vyvanse on October 16, 2021, the day before his soccer game, and that the prohibited substance D-Amphetamine is only prohibited in-competition. The CCES determined that the language of the ISTUE did not require that an athlete's medical condition be diagnosed at the time the prohibited substance was taken. Consequently, the CCES accepted that because [redacted] used Vyvanse to treat a medical condition, even though he had not been diagnosed with that medical condition at the time of its use, he satisfied the ISTUE definition of "Therapeutic".

24. However, the CCES relied on the decision of its Therapeutic Use Exemption Committee (TUEC) in deciding that [redacted] did not satisfy the conditions of Article 4.2 (a). The TUEC determined that [redacted]'s application should be denied because his use of Vyvanse was not in association with the treatment of a "diagnosed medical condition supported by relevant clinical evidence". The TUEC noted that at the time [redacted] took Vyvanse, "no diagnosis of ADD/ADHD had been made and no prescription for the use of the medication as treatment had ever been provided". The TUEC also decided that although [redacted] was eligible to apply for a retroactive TUE, any application had to meet all the criteria of Article 4.2.

25. The CCES also decided the circumstances of [redacted]'s taking of the substance did not render it manifestly unfair not to grant him a retroactive TUE under Article 4.3 of the ISTUE. The decision taken under Article 4.3 cannot be, and is not, subject to appeal.

Arguments

26. [redacted] appeals the CCES's decision, contending that, while his use of Vyvanse without a prescription was inappropriate in hindsight, such use should not subject him to an Anti-Doping Rule Violation (ADRV). [redacted] argues that his use of the medication helped him cope with a genuine medical condition, he has since been prescribed that medication,

confirming that he correctly self-diagnosed his condition, and that his use of the medication was entirely unrelated to sport.

27. [redacted] contends that the circumstances in which a retroactive TUE could be granted for situations such as which he finds himself are admittedly limited and rare, but that he falls within those exceptional circumstances.

28. [redacted] argues that, once he satisfies the criteria in Article 4.1 (that is, he has found to be eligible to apply for a retroactive TUE), his application should be evaluated against the criteria of Article 4.2 in a forward-looking manner; that is, at the time the application is made. He argues that there is nothing in the ISTUE that requires an application to be interpreted in a retroactive manner, and that to take such an approach would lead to perverse and unfair results in a strict liability anti-doping system. [redacted] further argues that, even in emergency situations where athletes take medication without a TUE, such as the taking of cold medication which contains a prohibited substance, their applications for a retroactive TUE are assessed in a forward-looking manner.

29. [redacted] contends that he meets the condition to apply retroactively for a TUE under Article 4.1(e), and that he meets the conditions under Article 4.2 to be granted a TUE for the use of Vyvanse for medical treatment of ADHD out-of-competition. [redacted] asks that I exercise my discretion and grant him a retroactive TUE.

30. The CCES contends that [redacted] does not meet the requirements to be granted a retroactive TUE, as he had not been diagnosed with ADHD at the time of the test, nor had he even suspected that he had ADHD. The CCES argues that Article 4.1 of the ISTUE must be interpreted so that the conditions of 4.1 must be satisfied contemporaneously with the use of the prohibited substance that is the subject of the retroactive TUE application. Any other interpretation, it contends, would be contrary to the intent of the ISTUE drafters and fail to take into account the purposes of the retroactive TUE; that is, to examine the circumstances that were present at the time of the use of the prohibited substance.

31. Further, the CCES argues that this Panel does not have the qualifications to assess whether [redacted] meets the conditions prescribed in Article 4.2 of the ISTUE. The CCES argues that if I agree that the CCES TUEC failed to interpret Article 4.2 correctly, the proper remedy is to refer the matter back to the TUEC with guidance on how to properly apply it, and for the TUEC to reconsider the matter.

ISSUE

32. The issue on appeal is whether [redacted] should be granted a retroactive TUE under Article 4.1(e) and 4.2 of the ISTUE. More specifically, the issue is whether, for the purpose of granting a retroactive TUE, an athlete must have a diagnosed medical condition at the time the athlete used the prohibited substance that is the subject of the retroactive TUE

application; or whether the athlete can be diagnosed with the medical condition after such use.

33. Articles 4.1 and 4.2, unlike the other provisions, do not require that an athlete have a diagnosed medical condition prior to applying for a retroactive TUE. Nevertheless, I am of the view that, given the spirit and intent of the ISTUE, they must be interpreted contemporaneously; that is, the Athlete must have a diagnosed medical condition proximate in time they used the prohibited substance that is the subject of the retroactive TUE application.

34. The WADC establishes a strict liability anti-doping regime - all athletes have a personal duty to ensure that no prohibited substances enter their systems. Although the ISTUE provides for exceptions to the strict liability provisions, those exceptions must be narrowly interpreted.

35. The ISTUE general rule (4.1) requires an athlete to obtain a TUE prior to taking what would otherwise be a prohibited substance. While an athlete may apply for a TUE after taking a prohibited substance, the ISTUE scheme specifies the limited circumstances under which a retroactive TUE would be granted.

36. The Guidelines for the ISTUE are "intended to provide clarity and additional guidance to the Code and the ISTUE" and cannot override the ISTUE or the WADC in the event of any conflict between provisions. Nevertheless, the Guidelines set out the intention of the ISTUE drafters.

37. The Guidelines provide that if an athlete has a medical condition requiring treatment containing a prohibited substance, they must initiate the process of applying for a TUE as soon as possible. (p. 13, 15) For substances prohibited in-competition only, the Guidelines provide that athletes should apply for a TUE at least 30 days before their next competition, unless it is an emergency or exceptional situation. The Guidelines also suggest that "if athletes know they will be taking a prohibited substance on a long-term basis, even if it is only prohibited in-competition, they should still apply as soon as possible to the appropriate ADO." (p. 15)

38. Further, Article 4.0 of the Guidelines states that athletes who use a prohibited substance prior to receiving a TUE, do so at their own risk. Article 4.0 continues:

> "However, in situations of a medical emergency or need for urgent treatment, an athlete should not jeopardize or risk their health and should be aware that they will, in such circumstances, be able to apply retroactively for a TUE. Such a TUE request is still subject to the criteria listed in ISTUE Article 4.2 (unless ISTUE Article 4.3 applies)."

39. Even though the commentary to Articles 4.1(c) (d) and (e) of the ISTUE are not binding provisions, it demonstrates, in my view, that the intention of the drafters was not to have a forward-looking interpretation. The commentary "strongly suggests athletes have a medical file prepared and ready to demonstrate to the satisfaction of the ISTUE Article 4.2 conditions are met in case an application for retroactive TUE is necessary following sample collection."

40. While it is true that athletes who use a prohibited substance without a diagnosed medical condition in emergency situations will have their applications for a retroactive TUE assessed in a forward-looking manner, those situations fall within the exception of Article 4.1(a), or 4.1 (b), there was insufficient time or opportunity that prevented the athlete from submitting an application for a TUE – in other words, circumstances beyond an athlete's control. However, in my view, the exceptions are not intended to enable an athlete to obtain a TUE for a substance that they had been taking for well over one year without a medical diagnosis or prescription.

41. Furthermore, Article 4.1 states "where an athlete <u>needs</u> to use a prohibited substance…" On October 16, 2021, [redacted] did not have either a diagnosis of ADHD nor a prescription for Vyvanse. There is also no evidence he believed he had ADHD or that Vyvanse would assist him in treating any "self-diagnosed" conditions. That [redacted] was subsequently diagnosed with ADHD and prescribed Vyvanse some 18 months after he began taking it is simply fortuitous.

42. I conclude that Article 4.1 requires that, in order for a retroactive TUE to be granted, one or more of the conditions of Article 4.1 as well as all of those in Article 4.2 must be satisfied proximate in time with the use of the prohibited substance that is the subject of the retroactive TUE application.

CONCLUSION

43. The appeal is denied.

COSTS

44. While each Party is responsible for its own expenses (including legal fees), the Doping Panel may grant a reimbursement of expenses under Section 7.10 of the *Code* and 8.2.4.8 of the CADP Rules.

45. CADP Rule 8.2.4.8 provides that I shall not make an order that one party pay a portion of the expenses of another party unless the conduct or course of conduct of the party throughout a proceeding has been demonstrably unreasonable, or where a party has acted in bad faith.

46. Neither party was unreasonable nor acted in bad faith. Indeed, I wish to thank the parties for their collaboration in developing an agreed statement of facts and procedural schedule in this matter and for their helpful submissions.

47. I make no order for reimbursement of expenses.

DATED: September 26, 2022 Vancouver, British Columbia

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Carol Roberts, Arbitrator