

SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE REGLEMENT DES DIFFERENDS SPORTIFS DU CANADA (CRDSC)

No.: SDRCC DT 19-0310
(Doping Tribunal)

Canadian Centre for Ethics in Sports (“CCES”)
U Sports

AND

Malcom Lee
(Athlete)

AND

Government of Canada
World Anti-Doping Agency (Observers)

Heard: October 22, 2019 and December 16, 2019

Award: December 21, 2019

BEFORE:

Arbitrator: Simon Margolis, Q.C.

APPEARANCES & ATTENDEES

Athlete: Malcom Lee

On behalf of Athlete: Brian Martin (By phone October 22, 2019 &
In person on December 16, 2019)

On behalf of CCES: Kevin Bean, CCES

Counsel: Alex Maltas
Elizabeth Cordonier
Lindsay Peretz, Articled Student

On behalf of U Sports: Tara Hahto (by phone)

On behalf of SDRCC: Alexandra Lojen (Case Manager)

AWARD

Executive Summary

1. Malcom Lee (the “Athlete”), admits an anti-doping rule violation (“ADRV”) by way of a Timely Admission Form. He seeks, however, reduction of the mandated four (4) year period of ineligibility as a result of the ADRV.

2. CCES, responsible for administering the Canadian Anti-Doping program ("CADP") and for ensuring that CADP remains compliant with the World Anti-Doping Code, asserts that the Athlete has failed to establish on the evidence that a reduction in sanction is warranted.
3. For the reasons that follow, I have concluded that the Athlete has not met the burden of proof necessary to warrant a reduction in the four-year period of ineligibility.

Overview

4. On March 22, 2019, the Athlete, a university football player affiliated with U Sports provided a urine sample in accordance with the provisions of the CADP.
5. An adverse analytical finding was received by CCES from the World Anti-Doping Agency ("WADA") accredited laboratory on April 9, 2019 indicating the presence of SARM LGD-4033 metabolite, classified as a prohibited substance (the "prohibited substance") on the 2019 WADA prohibited list.
6. CCES thus asserted that the Athlete had committed an ADRV pursuant to Rule 2.1 of the CADP and proposed a four-year period of ineligibility in accordance with Rule 10.2.1 of the CADP.
7. On September 3, 2019, following the assertion of the ADRV, the Athlete filed a Timely Admission form in accordance with CADP Rule 10.11.2.
8. The parties participated in several prehearing conferences during the course of which the procedure to be followed including the timing for exchange of any expert evidence was discussed. Despite this, no expert evidence on behalf of the Athlete was adduced prior to the start of the hearing on October 22, 2019.
9. During the hearing, the Athlete, who was not represented by counsel, realized that he would not be able to respond to the expert evidence adduced by CCES without consulting his own expert. On a motion by the Athlete, consented to by CCES, the hearing was adjourned and new dates for the Athlete to file expert evidence and for CCES to respond were established.
10. The hearing resumed and concluded on December 16, 2019.

Evidence

11. The Athlete asserts that the ADRV was caused by consuming a supplement called NUEDGE-Extra Fire ("NUEDGE") containing the prohibited substance.
12. The Athlete says that he purchased two bottles of NUEDGE from a teammate of his and that it had been purchased by his teammate over the counter in Bakersfield, California. He says he discussed it with his teammate and understood it was an all-natural supplement.

13. The Athlete asserts that he searched for information about the product on the Global Dro website as well as on the CCES banned substances list but found nothing to indicate that NUEDGE contained a prohibited substance.
14. The Athlete commenced taking NUEDGE on November 25, 2018 and continued doing so until January 5, 2019 when he ceased using it.
15. In written materials, the Athlete claims to have taken 2 pills per day during the first week loading period, followed by two pills on days he worked on his legs and one pill every other day.
16. In his testimony, the Athlete says that he was completely unaware that NUEDGE contained a prohibited substance. He relied solely on his teammate and on the package label.
17. He also claims to have tried to get ahold of the NUEDGE manufacturer but could not find a way of contacting them.
18. In cross examination, the Athlete conceded that he never discussed the product with his coach and that the training staff simply referred to the Global Dro website.
19. The Athlete admits that he was aware that supplements may contain prohibited substances.
20. At the very least, this would have been apparent to him from his review of the Global Dro website which contains Terms and Conditions which one must accept prior to completing a search on the site. The Terms and Conditions specifically note that dietary supplements may contain prohibited substances or may not list all the ingredients. Global Dro warns that "use of any dietary supplement is at your own risk."
21. Similarly, the CCES website which the Athlete also reviewed, provides information on the risks associated with supplement use and cautions athletes that they have personal responsibility to evaluate all the risks associated with the consumption of supplements before using them.
22. CCES filed two reports of Professor Christiane Ayotte, Director, INRS Doping Control Laboratory which has been accredited by the International Olympic Committee, International Federations and WADA since 1976.
23. In her report of October 5, 2019, Professor Ayotte reviewed a test report of August 20, 2019 from Quality Analytical Services (QAS), a laboratory retained by the Athlete, indicating the presence of the prohibited substance in the amount of 1.1 µg per capsule. She concluded that given the Athlete's evidence that he last consumed the supplement on January 5, 2019 – approximately 76 days before the sample collection- "it is highly unlikely that its consumption at the dose reported and under the time span proposed is the source of the adverse analytical finding".

24. At some point following her report, Professor Ayotte received from counsel for CCES a brown envelope which had been provided to counsel by the Athlete containing capsules purporting to be of the same product tested by QAS.
25. In her follow up report of November 12, 2019, Professor Ayotte noted that three capsules were tested yielding results of 24, 27 and 24 mg respectively, approximately 23,000 times the result noted in the QAS report.
26. According to Professor Ayotte, if the QAS results were accurate, the products sent for testing to each of the labs were not the same and the results too high to be a contaminant.
27. In any event, Professor Ayotte noted that even if the capsules tested by her laboratory were from the NUEDGE product consumed by the Athlete, she remained of the view that it is unlikely that the prohibited substance would remain detectable 76 days after the last dose.
28. No contrary expert evidence was filed. In cross examination, however, Professor Ayotte was challenged on her conclusion that the prohibited substance would not be detectable. She noted that in her experience, she is not aware of a prohibited substance of this nature remaining detectable for more than one month.

Analysis

29. The CADP rules provide in part as follows:
 - 2.1 **Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample**
 - 2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Rule 2.1.
 - 3.1 **Burden of Proof**

Where the Rules place the burden of proof upon the Athlete [...] alleged to have committed an anti-doping violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.
 - 10.2 **Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method**

The period of Ineligibility for a violation of Rules 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Rules 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a Specified Substance and the CCES can establish that the anti-doping rule violation was intentional.

10.2.2 If rule 10.2.1 does not apply, the period of Ineligibility shall be two years.

30. Section 10.2.3 defines the term "intentional":

10.2.3 As used in Rules 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk[...].

10.5 **Reduction of the Period of Ineligibility based on No Significant Fault or Negligence**

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Rule 2.1, 2.2 or 2.6.

10.5.1.1 Specified Substances

Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

10.5.1.2 Contaminated Products

In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at

a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault.

10.5.2 Application of No Significant Fault or Negligence Beyond the Application of Rule 10.5.1

If an Athlete or other Person establishes in an individual case where Rule 10.5.1 is not applicable, that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Rule 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Rule may be no less than eight years.

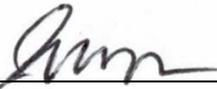
31. The Athlete therefore bears the burden of establishing that the ADRV was unintentional. The Athlete also has the burden of establishing that he bears No Significant Fault or Negligence if he is to have the four-year period of ineligibility reduced in accordance with Rule 10.5.1.
32. In this case, to establish that the four year period of eligibility should be reduced, it is incumbent on the Athlete to first establish on a balance of probability that the ADRV was caused by his consumption of a contaminated product and, if so, that his consumption of the prohibited substance was not intentional.
33. In my opinion, the Athlete has failed to establish that the ADRV was caused by his consumption of the NUEDGE.
34. It is impossible to reconcile the results obtained in the testing by QAS and the results from subsequent testing of the capsules provided by the Athlete and sent to Professor Ayotte. As she noted, if the QAS results were accurate, the products sent to her for testing were not the same. Given Professor Ayotte's opinion that, in either case, it is highly unlikely that the prohibited substance would remain detectable after 76 days, I conclude that the Athlete has failed to establish that the ADRV was caused by his consumption of the NUEDGE.
35. Even if I were to accept that the prohibited substance came from the NUEDGE consumed by the Athlete, I am unable to conclude that the ADRV was unintentional.
36. While I am prepared to accept that the Athlete may not have known that NUEDGE contained a prohibited substance, he understood supplements may contain prohibited substances and clearly ignored posted warnings regarding the risks associated with the use of dietary supplements. He was simply reckless in choosing instead to rely solely on his friend from

whom he purchased the NUEDGE and in making no or little attempt to ensure that the product could safely be consumed.

Conclusion

37. The Athlete has failed to establish that he is entitled to a reduction in the mandated four-year period of ineligibility.
38. Given the signing of a Timely Admission Form, the period of ineligibility shall commence from the date of sample collection.

Dated at Vancouver, British Columbia, this 21st day of December 2019.



Simon B. Margolis, Q.C., Arbitrator