Tribunal Arbitral du Sport
Court of Arbitration for Sport

**CAS 2006/A/1133 WADA v/Michel Stauber & Swiss Olympic**

**ARBITRAL AWARD**

delivered by the

**COURT OF ARBITRATION FOR SPORT**

sitting in the following composition

President: Mr Luc **Argand**, Attorney-at-Law, Geneva, Switzerland

Arbitrators: Mr Jean-Pierre **Morand**, Attorney-at-Law, Geneva, Switzerland
Mrs Corinne **Schmidhauser**, Attorney-at-Law, Bern, Switzerland

between

**World Anti-Doping Agency (WADA)**, Tour de la Bourse, 800 Place Victoria, Suite 1700, Post Office Box 120, Montreal, Quebec, H4Z 1B7, Canada, represented by Mr Francois Kaiser, Attorney-at-Law, Lausanne, Switzerland

Appellant

and

**Mr Michel Stauber**, Birmensdorfstrasse 337, 8055 Zurich,

Respondent 1

**Swiss Olympic**, Haus des Sportes, Laubeggstrasse 70, Post Office Box 606, 3000 Bern 22, represented by Mr Bernard Welten, Thunstrasse 82, 3000 Bern 6

Respondent 2

## FACTUAL BACKGROUND

### A. THE PARTIES

1. **The World Anti-Doping Agency** ("WADA") is a Swiss private law Foundation. Its registered office is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. It was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all of its forms.

2. **Swiss Olympic Association** ("Swiss Olympic") is an association under Swiss law with its registered office in Bern. Created on 1 January 1997, it is the supreme organization of the Swiss sporting federations and represents the Olympic and non-Olympic sport disciplines.

3. **Mr Michel Stauber** ("Mr Stauber" or "the Athlete") is a former Swiss amateur Handball Player who currently works in an investment bank.

### B. STATEMENT OF FACTS

4. On 28 April 2006, at the conclusion of a Handball match between St Otmar St. Gall and Grasshoppers, Mr Stauber has been subject to an anti-doping test which showed positive for hydrocholorothiazid. The subsequent analysis of the B sample has not been requested by Mr Stauber, who has not contested the result.

5. On 10 May 2006, Mr Stauber has requested from Swiss Olympic an "authorization for therapeutic purposes" ("TUE") to take Co-Diovan©, a medicine in which one of the principle components is hydrochlorothiazid. The "TUE" certificate authorizing Mr Stauber to use said medicine was delivered to him on 12 May 2006, that is following the antidoping test.

6. On 31 May 2006, Mr Stauber ended his sporting career.

7. In a decision of 6 July 2006, the Disciplinary Chamber of Swiss Olympic ("the Disciplinary Chamber") found that Mr Stauber had objectively breached Article 12.1 of the Statute concerning doping issued by Swiss Olympic and valid since 12 May 2004 ("Statute") by taking the said medicine, this notwithstanding the fact that the doctor had

not informed him that Co-Diovan© contained hydrocholorothiazid. However, the Disciplinary Chamber found that only Article 17.4.2 of the Statute was applicable for a potential reduction of the suspension of 2 years provided by Article 17.1 of the Statute, but nevertheless considered that it was justified to go under the minimum period of one year provided for in Article 17.4.2 of the Statute, the fault of Mr Stauber being very slight. The Disciplinary Chamber thus pronounced a warning and reprimand without any period of suspension against Mr Stauber, and ordered the latter to pay the costs of the analysis "A" (CHF 333.50) as well as the costs of the proceeding (CHF 500.--).

## C. PROCEEDINGS BEFORE CAS

8. WADA filed a statement of appeal in French on 28 July 2006 before CAS. On 11 August 2006, WADA filed a complete brief in French and enclosed various exhibits.

9. On 14 August 2005, Mr Stauber formally requested to be able to put forward his position in English. On 15 August 2006, Swiss Olympic gave its consent to have the proceeding take place in English and suggested that the National Federation of Handball ("Schweizerisches Handball Verband") be made a party to the proceeding. On 21 August 2006, WADA indicated that it was not opposed to having the proceeding take place in English, but wished to be relieved of having to translate the documents produced to that time in French. On 23 August 2006, Swiss Olympic gave its consent that the documents produced in French would not be translated and indicated moreover that its consent extended to the exhibits produced in German before the Disciplinary Chamber.

10. On 30 August 2006, Mr Stauber filed his response brief in English accompanied by exhibits. Swiss Olympic did the same on 4 September 2006.

11. On 6 September 2006, TAS invited the parties to indicate - no later than 13 September 2006 - if they wished to have a hearing. On 11 September 2006, Swiss Olympic and Mr Stauber agreed that the Panel would rule uniquely on the basis of the written documents without holding a hearing.

12. On 13 September 2006, WADA completed its arguments, modified its prayers and also gave its consent that the Panel ruled without a hearing. On 21 September 2006, Mr Stauber expressed his position on the last arguments raised by WADA.

13. On 22 September 2006, the President of the Panel issued a Procedural Order which was subsequently accepted and countersigned by all three parties.

## D. POSITION OF THE PARTIES

14. In its appeal brief of 11 August 2006 **WADA** initially pleaded that the Panel must find that the Player "*bears no **significant** fault or negligence*" in the sense of Article 17.4.2 of the Statutes[1] and should therefore sanction him with a suspension of at least one year. Later - after reading the report of Dr Büsser produced by Mr Stauber as an exhibit to his reply brief of 30 August 2006 - WADA modified its prayers by letter of 13 September 2006 and considered that the Panel could also conclude that the Player "*bears no fault or negligence*" in the sense of Article 17.4.1 of the Statutes.[2]

However, WADA insisted that CAS be coherent in its decision:

- Thus, if the Panel finds that the Player "*bears no fault or negligence,*" then the Player must neither be suspended nor condemned to the payment of costs.
- However, if the Panel finds that the Player "*bears no **significant** fault or negligence,*" then the Player must be condemned to a suspension of one year at the minimum and to the payment of costs.

Finally, WADA requested CAS to confirm that a "TUE" can not have any retroactive effect.

15. **Mr Stauber** maintains having never sought to influence his performances and having never committed any fault since it is exclusively for health reasons (high blood pressure) that Dr. Büsser prescribed him Co-Diovan©. Mr Stauber was unaware that such medicine contained a forbidden substance, that all the more since he had undertaken many negative tests while he was under treatment of Diovan. Moreover, he asserts that he consulted the list of forbidden substances and had not found on such list Co-Diovan©. In support, Dr Büsser expressly recognized having committed an error[3] and

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[1] Article 17.4.2 of the Statutes states: demonstration brought by the sportsperson that he was unaware of, or did not himself doubt or should have doubted, even with the greatest vigilance, to know or to presume that he had made use of was seen to administer a substance.

[2] Article 17.4.1 of the Statutes states: demonstration brought by the sportsperson that considering all of the circumstances and taking account of the criteria inherent in the absence of fault or of negligence, his fault or negligence was not significant with respect to the infraction committed.

[3] Extract from the letter written by Dr Büsser of 18 August 2006: *"(...) 11/13/03 Control 24 hour blood pressure profile: This examination showed despite an increased dose of Diovan (...) even higher blood pressure data, so that the examinator Mrs Dr. Med D. Hopkirk recommended a progression of medical treatment by a*

that Dr Cathomas then Kubli having succeeded Dr Büsser had only renewed the prescription of Co-Diovan© without making any controls of its conformity.

Mr Stauber considers that the arguments raised by WADA in its appeal brief of 11 August 2006 are only a "strict" application of the antidoping rules which do not take into account the context; even though he accepts the holding of the decision of Swiss Olympic, he is convinced that the arguments made are wrong. Consequently, the Athlete seeks the dismissal of the appeal of WADA of 28 July 2006; the confirmation of the decision of Swiss Olympic of 6 July 2006 and that WADA be ordered to pay all the costs of the proceeding. Given his banking activity, he has in addition sought the strictest confidentiality concerning his identity.

16. **Swiss Olympic** states that it is not easy for a layman to ascertain if a medicine contains a prohibited substance or not. In addition, the site www.dopinginfo.ch was not yet active at the time of control. Thus, Mr Stauber should be able to place confidence in the information he received from Dr Büsser as the team doctor. It must thus be admitted that he has not committed any fault or negligence. The dispute must therefore be resolved by application of Article 17.4.1 of the Statutes ("*bears no fault or negligence*").

Consequently, Swiss Olympic seeks the dismissal of the appeal by WADA, the confirmation of its decision of 6 July 2006 and that WADA be condemned to pay all of the costs of the proceeding. Finally, Swiss Olympic states that this matter demonstrates that the current system applicable to "TUE" is not satisfactory and must be changed in the sense that an athlete should also be able to request a "TUE" after having been tested positively.

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*combination (ATII-blocker + low diuretic) named Co-Diovan (c) (valsartan 160 mg + hydrocholorothiazid 12.5 mg). And that's the big mistake I made: I gave you an accordant prescription to take from then on this medical treatment. As this is a common way for a progressive medical treatment against high blood pressure, I did not realize that it could be noted as prohibited on the doping list, even in this small dosage. The diuretic substance hydrochlorothiazide as a synergetic effect with the AT-II-blockers, so that the combination of both ingredients are usually used and not the maximal increase of each as a monotherapy. Now, of course, it's completely clear to me, that we should have done an ATZ [TUE] first using this new medicine. At that time I did neglect the coherence to a doping manipulation."*

## II. IN LAW

### A. ADMISSIBILITY OF THE APPEAL; ADMISSIBILITY OF THE WRITTEN SUBMISSIONS RECEIVED AFTER THE APPEAL AND RESPONSES (R 56 CODE); CONFIDENTIALITY (R 59 CODE):

17. Under the terms of Article R49 of the Code, "*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be 21 days from the receipt of the decision appealed against.*" In the present case, the appeal deadline is governed by Article 20.2.1 of the Statutes which also establishes a 21 day deadline following the notification of the decision of the Disciplinary Chamber.

Consequently, the notice of appeal of WADA, filed on 28 July 2006, that is 7 days after the notification of the decision dated 21 July 2006 has been filed within the proper time. It is moreover in accordance with the prescriptions of Articles R 48 and R 62.5 of the Code and thus admissible.

18. Questioned on the opportunity of holding a hearing, WADA has taken advantage of this opportunity to complete its arguments (see letter of 13 September 2006). Mr Stauber has for his part replied to the said letter on 23 September 2006.

Under the terms of Article R 56 Code, "*Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to reply after the submission of the grounds for the appeal and of the answer.*"

In the present case, the complementary statements made by WADA and Mr Stauber are exceptional since they deal with the explanation of the doctor having prescribed Co-Diovan©. These complementary positions have been made jointly with the agreement of the parties not to hold a hearing.

Insofar as the arguments raised by the parties in their complementary exchange of correspondence could have been developed orally by the latter if a hearing had been held and that no party is opposed to these productions, there is no ground to refuse them. In application of R 56 Code, the President of the Panel therefore decides to accept said complementary written submissions.

19. Invoking his professional activity (banking activity), Mr Stauber has sought the strictest confidentiality with respect to the present matter.

According to the terms of Article R 59 § 6, "*The award, a summary and/or a press release setting forth the results of the proceeds shall be made public by CAS unless both parties agree that they should remain confidential.*"

In the present case, Swiss Olympic and WADA have not given their agreement that this arbitration remains confidential. It therefore results that the Panel is not able to prohibit a publication of the present award.

## B. JURISDICTION AND SCOPE OF THE PANEL'S REVIEW:

20. The jurisdiction of CAS, which is not disputed, derives from Articles 20.2.1 of the Statutes and R 47 of the Code. Moreover, the CAS jurisdiction is explicitly recognized by the parties in their respective briefs. It follows that CAS has jurisdiction to decide the present dispute.

21. With respect to its power of examination, the Panel observes that the present appeal proceeding is governed by the provisions of Articles R 47 and following of the Code. In particular, Article R 57 of the Code grants a wide power of examination, as well as a full power to review the facts and the law. CAS may thus render a new decision in substitution for the challenged decision, either annulling the latter or sending the case back to the previous authority.

## C. APPLICABLE LAW

22. Rule 58 of the Code provides the following: "*The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*"

23. In the present matter, the parties have not agreed on the application of any particular law. Therefore, the rules of Swiss Olympic, and more specifically the Statutes and their regulations of enforcement shall apply primarily. Secondly, pursuant to Article R 58 of the Code, the Panel may apply the law of the country in which Swiss Olympic is domiciled. Since Swiss Olympic is domiciled in Bern, Switzerland, Swiss law is applicable.

## D. MERITS

### D.1 ESTABLISHMENT OF THE VIOLATION OF THE ANTIDOPING RULES

24. By virtue of Article 12.1 of the Statutes, the presence of a *substance forbidden* by WADA (according to the published list), of its *metabolics* or of its *markers*, in the samples taken during a sporting event constitutes a violation of the antidoping rules. Article 3.2 of the Statutes provides that the list published by WADA has a compelling character.

25. Hydrochlorothiazid is a forbidden substance which is found on the 2006 list of prohibitions under class S5 "*Diuretics and other masking agents.*" The use of this substance is forbidden for all sporting events, whether in or out of competition. It is not classified as one of the "*specified substances.*"

26. The analysis of the sample A of the urine test made on Mr Stauber on 28 April 2006 at the end of the handball match between St Otmar St Gall and Grasshoppers was positive (presence of hydrochlorothiazid). Mr Stauber has not contested the result.

27. On 10 May 2005, Mr Stauber submitted a "TUE" request to Swiss Olympic and a decision authorizing the use of the medicine Co-Diovan© for therapeutic purposes was issued on 12 May 2006, that is after the date of the positive test result. A "TUE" certificate is the only means by which an Athlete can obtain an individual derogation,[4] which is the right to use a prohibited substance for strictly medical purposes. In accordance with clause 4.7 of the International Standard for "TUE", it cannot have a retroactive effect on a positive test result made prior to the obtaining of said certificate.

[4] see CAS 2004/A/769 (Bouyer)

28. Therefore, the "TUE" issued on May 10, 2005 has no effect in relation with the issue of the existence of a doping violation resulting from the presence of prohibited substance found in Mr Stauber's urine on April 28, 2005.

29. Thus, insofar as the Athlete was not benefiting from any "TUE" during the positive urine testing the Panel holds that the Athlete has committed a violation of the antidoping rules (Article 12.1 of the Statutes).

## D.2 PENALTY

30. As far as the application of sanctions is concerned, the system instituted by the Statutes, which implements the World Anti-Doping Code, is not a system of strict liability but a system based on presumed fault (intent or negligence) on the part of the athlete found to have a prohibited substance in his sample.

31. Except for the specific substances mentioned in Article 17.2 of the Statutes, as to which no question is raised in the present case, the duration of the suspension for violation of Article 12.1 of the Statutes is two years for the first violation.

The sanction may however be (a) annulled in case of "no fault or negligence" (Article 17.4.1 of the Statutes) or (b) reduced to one half (1 year) at the maximum in case of "no *significant* fault or negligence" (Article 17.4.2 of the Statutes).

32. "Negligence" in the context of the application of the anti-doping rules is to be qualified in relation to the personal duty of the athletes not to let any prohibited substance enter their body (see Article 12.1.1 of the Statutes).

### (a) No fault or negligence

33. The elimination of the period of suspension is possible only in the case where the Athlete establishes that he was unaware, that he did not doubt or could not have reasonably known or presumed, even with the greatest vigilance or utmost caution, that he was being given a forbidden substance or a forbidden method. The Athlete must therefore establish that he has done all that is possible, within his medical treatment, to avoid a positive testing result.

34. Mr Stauber maintains that he never sought to influence his performances and that it was exclusively for health reasons (high blood pressure) that Dr Büsser, the team doctor, had prescribed Diovan and then Co-Diovan© to him. He was unaware that this second medicine contained a forbidden substance, even more so since he had been submitted to many negative test result while he was under treatment with Diovan. Moreover, Dr Büsser has expressly acknowledged having committed an error in failing to ascertain if said medicine contained forbidden substances.

35. All Athletes being responsible for that what they ingest (Article 12.1.1 of the Statutes) - whether within a medical treatment or not - the elimination of a period of suspension must not be found except in exceptional cases. In accordance with the constant jurisprudence of CAS, the Athlete cannot hide behind the potential misunderstanding of the antidoping rules by his doctor to escape any sanction. The prescription of a medicine by a doctor does not relieve the Athlete from checking if the medicine in question contains forbidden substances or not[5]. Indeed, the personal, strict and proactive duty imposed on the athletes by the antidoping rules requires that an athlete who relies on third party advice (medically trained or trustworthy person), effectively raises the question whether a prohibited substance is contained or not.

36. In the present case - notwithstanding the fact that (a) the list of prohibited substance is published annually and therefore changed several times since 2003 and that (b) Mr Stauber changed twice doctors - he never made any such check in connection with the original prescription or with the renewed prescription, either by himself or by asking questions to either one of the Doctors who prescribed the medicine.

37. Therefore, he has not exercised "the greatest vigilance" or "the utmost caution" and committed a fault. In addition, as a sporting elite, Mr Stauber has expressly undertaken in his declaration of submission to keep himself informed of the evolution of the rules and of the lists relating to the prohibited substances and methods. He should thus have known that the consummation of hydrocholothiazid was forbidden. As the Disciplinary Chamber has correctly stated, the suspension cannot thus be annulled on the basis of the provisions of Article 17.4.1 of the Statutes.

[5] see CAS ad hoc Division (OG Athens) 2004/003 (Edwards)

**(b) No significant fault or negligence:**

38. The reduction of the period of suspension (to one half at the maximum) is possible only if the Athlete demonstrates, considering all of the circumstances and taking account of the criteria inherent in the absence of fault or of negligence, that his fault or negligence is not significant with respect to the violation of the antidoping rules.

39. In the present case, the Panel finds that the following elements plead in favor of Mr Stauber:

a. Mr Stauber has exclusively consumed Co-Diovan©, medicine containing a forbidden substance, for medical reasons.

On 13 November 2003, Dr Büsser decided to prescribe Co-Diovan© since it had been observed that notwithstanding the taking of Diovan, the blood pressure of Mr Stauber was still too high. There was indeed a continuity in the taking of a medicine containing no prohibited substance (Diovan) to the taking of another one bearing a very close name (Co-Diovan©) containing a prohibited substance.

b. The Athlete has never had the desire to improve his performance. Moreover, hydrochlorothiazid is a "masking" substance which involves no improvement in performance (no "doping intent").

c. Dr Büsser, a trustworthy person, presents himself as a specialist in sport medicine and was at the time of the prescription of Co-Diovan© the official doctor of Mr Stauber's team.

In his letter of 18 August 2006, Dr. Büsser expressly recognized having committed an error in not making any check concerning said medicine, in not requesting immediately a "TUE", as well as in failing to inform his patient of the potential risks being run.

d. Even though the request to use Co-Diovan© for therapeutic purposes ("TUE") occurred only after the Athlete had been tested positive and it can not have a retroactive effect, it remains nonetheless that said authorization has been granted and thus that it fulfills the requirements for it.

40. In light of these elements, the Panel will find that Mr Stauber has not committed any significant fault with respect to the violation of the antidoping rules and will order a reduction of the ordinary sanction of two years by one half of its terms, that is to one year. Given the circumstances, the Panel will use the discretion allowed by article 17.1 of the Statute and fix the starting date of the ineligibility on May 31, 2006.

41. The Panel observes that the result of the present award is the necessary consequence of the application of the current system concerning sanctions - which has already been discussed by CAS [6].

42. When one must, as in the present case, accept that the Athlete has committed a fault, the authority applying the penalty has no choice other than to condemn the Athlete to a period of suspension of one year at a minimum. The Panel is aware that the result is severe and may appear disproportionate for Mr Stauber, an athlete having manifestly committed a fault of little gravity.

However, a decision to deviate from the rules should only be issued if it represents the only way to avoid an unjustified violation of the athlete's important and prevailing interests.

Insofar as the present award does not modify the sporting situation of an Athlete having already ended his career, there is no such necessity.

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43. The very specific circumstances of this case justify that the Panel qualifies its decision to maintain the application of the minimum sanction of one year with some additional observations.

44. The discussion on whether or not the application of the fixed sanction set forth by the rules based on the World Anti-Doping Code in its present form is compatible in each and possible case with the principle of proportionality has been ongoing ever since the World Anti-Doping Code has begun to be implemented (the Statute are an implementation of the Code). Further, the World Anti-Doping Code is presently under review and it is known that one of the issues which is under discussion is precisely the

[6] cf. CAS 2002/A376 (Baxter), in Digest of CAS Awards III, p. 303; CAS ad hoc Division (OG Sidney) 2000/011 (Raducan), in Digest of CAS Awards II, p. 665; CAS 2005/A/830 Squizzato vs. FINA

introduction of greater flexibility in sanctions (N.B. to better take into account circumstances both ways: more flexibility to reduce but also to increase sanctions).

45. By definition, proportionality is an issue which arises in confronting and balancing the measures meant to be necessary with the consequences they effectively have in concrete cases. A rigid system can confront deciding bodies with very difficult situations when exercising their responsibility to apply this balance. The fact that it pushed the Disciplinary Chamber, a normally serious and strict entity not to apply its own rule, is a striking sign that the present system does at least raise serious questions from the point of view of proportionality is specific cases.

46. In the present case, the sanction at stake will never be effective as the award does not modify the sporting situation of an Athlete having already ended his career.

47. Therefore, the Panel did not need to further examine whether the principle of proportionality could effectively require applying a sanction of less than the minimum provided for in application of article 17.4.2 of the Statute.

However, the Panel feels that there could arise some serious doubts how to judge such a case had the Athlete not ended his career.

## E. Costs

48. Pursuant to Article R65.1 of the Code, subject to Article R65.2 and R65.4 of the Code, the proceedings shall be free; Article R65.3 of the Code provides that the costs of the parties, witnesses, experts and interpreters shall be advanced by the parties; and that in the award, the Panel shall decide which party bear them, or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

In the present case, the Respondents have failed in all of their prayers. Formally, WADA has won the case. However, as explained above, the present matter demonstrates the limits of the current system. Notwithstanding the slight fault committed by Mr Stauber, the Panel is not authorized - under penalty of derogating from the established rules - to inflict on him a suspension of less than one year.

For these reasons, the Panel considers that, in light of the particular circumstances of this case, of the resources of the parties, no costs others than the filing fee of CHF 500.- shall apply.

49. Moreover, as a general rule, the award grants the prevailing party a contribution toward its legal fees and other expenses incurred in connection with the proceedings. In the present matter, when granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the Parties.

For the same reasons as set forth above, the Panel considers that each of the Parties must bear its own costs in the present proceedings and decides to thus offset the costs.

**ON THESE GROUNDS**

The Court of Arbitration for Sport pronounces:

1. The appeal filed by WADA is admissible;

2. The decision rendered on 6 July 2006 by the Disciplinary Chamber for doping cases of Swiss Olympic is set aside;

3. Mr Stauber is suspended for a period of one year, i.e. the minimum period of ineligibility provided for by the Statute. The period of ineligibility shall start retroactively from May 31, 2006;

4. Each party shall bear all of its own legal and other costs incurred in connection with this arbitration.

Lausanne, 18 December, 2006

**THE COURT OF ARBITRATION FOR SPORT**

President of the Panel

Luc Argand