



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2005/A/908 WADA v/Wium

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Michael Geistlinger, Professor, Salzburg, Austria

Arbitrators: Mr Hans Nater, Attorney-at-Law, Zurich, Switzerland

Mr Conny Jörneklint, Enforcement Director, Kalmar, Sweden

in the arbitration between

WORLD ANTI-DOPING AGENCY (WADA), Montreal, Canada

Represented by Mr Olivier Niggli, Director of Legal Affairs, Montreal, Canada

-Appellant-

and

COETZEE WIUM, Groenvlei, South Africa

Represented by Mr Antoine Eigenmann, Attorney-at-Law, Lausanne, Switzerland

-Respondent-

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1. The Parties to the Proceedings

- 1.1 The Appellant is the World Anti-Doping Organisation (WADA), which is a Swiss private law Foundation, seated in Lausanne, Switzerland and has its Headquarters in Montreal, Canada. Pursuant to art. 4.1 of its Statutes, as of 11 April 2005, WADA shall promote and coordinate at international level the fight against doping in sport in all its forms including through in and out-of-competition control. According to art. 4.4 of these Statutes, WADA shall *"encourage, support, coordinate and, when necessary, undertake in full cooperation with the public and private bodies concerned, in particular the IOC, IFs and NOCs, the organization of unannounced out-of-competition testing."*
- 1.2 The Respondent is Mr Coetzee Wium, a South African paralympic powerlifter. He did not win any medals at the 2004 Paralympic Games.

2. The Facts and Submissions of the Parties

- 2.1 On 13 December 2004, the Respondent underwent a WADA out-of-competition doping control at his place of work, the Faure Wine Farm, Faure, Paarl, South Africa. The DCO of the South African Institute for Drug-Free Sport, who executed the control, explained by letter dated 28 February 2005 attached to the Doping Control Incident Report, that the control took place in a small office attached to the reception building of the farm. The Respondent was notified of the test at 9.39 on that day. The Respondent passed the urine in a toilet next to the office. As the Respondent was using crutches he asked the DCO to carry the sample collection vessel back to the office, which happened in view of the Respondent. The further procedure of sampling did not deviate from WADA International Standard, which was recorded and confirmed by the Respondent as well as by the DCO by signing the doping control form. The test was concluded at 9.54.
- 2.2 The DCO then cleaned up and packed his things and left. On the way on the N2, just after the R310, which leads to ██████, the DCO realized that he had forgotten the Respondent's samples in his bag in the premises of the Respondent. According to the DCO's memory he had inadvertently left the samples on the desk in the office where the test had been conducted. The DCO stopped the car and called the Respondent immediately, according to the phone operator's bill at 10.19. The athlete, as can be seen from a letter sent by the General Manager of the Disability Sport South Africa (DISSA) who acted on behalf of the Respondent when appealing the first instance decision on 23 March 2005, held that the DCO had phoned him only an hour after the DCO having left the premises. Such statement of the athlete has not been maintained in the Respondent's answer in the current procedure before the CAS. The General Manager of DISSA in the letter mentioned above had also argued that, when the DCO and the Respondent had returned, they could not find the samples immediately as they had been removed by the cleaning lady and that the athlete had not been given a further chance to highlight this unhappy event on the doping control form in the section reserved for comments.

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- 2.3 According to the DCO's statement, the DCO drove back to [REDACTED] and received the samples from the Respondent. He then drove back to Cape Town. In his view, the time that could have elapsed between the conclusion of the test and getting back to the Respondent was 45 minutes. Throughout this period the samples were sealed in a tamper proof "Berlinger Test Kit". The Respondent does not contest this.
- 2.4 By statement attached to the answer of the Respondent, Mrs [REDACTED] declared on 13 September 2005 that she was supposed to clean the above-mentioned office at [REDACTED] on the day in question and that she had seen the Respondent and another man who had a big blue bag with him when he left the office, before she started to clean it. Mrs [REDACTED] stated that, when cleaning, she moved everything back to its place. She saw a small white box on the table in front of the window and did not look into it. She put the box on the floor next to the table, as she had to wipe the table. Having finished she left the room. Mrs [REDACTED] added that she could not say if there was anyone else that went into the office after she had been there. According to the statement of the DCO he had not seen anybody else on the premises besides the Respondent and the receptionist of [REDACTED]. When he returned to the premises the Respondent met him outside the office where the test had been conducted, and was on his quad bike. The Respondent gave him the sample, which he had in his possession.
- 2.5 The date of the sample collection by DHL as indicated in the documentation package for the samples of the Respondent, which had been coded under number 865 637, was 14 December 2004, whereas the waybill showed 15 December 2004. The DCO explained this difference by stating that after he had completed the waybill he believed that the bag was to be collected by the couriers DHL on 14 December 2004. He had scheduled a pick-up via the Internet at 07.45 on 14 December 2004 and informed the courier that the package would be ready at 08.30 and that he would be at the collection point until 14.00. At 11.00 the DCO checked his emails, but there was no reference from DHL. After intervention by phone, a reference number (S96) was assigned to him. Nevertheless, no collection of the samples took place before 17.00. As no collection at all took place on this day, the DCO took the bag into the DHL depot on 15 December 2004 at 10.00, after having phoned DHL, who expressed surprise that the samples had not been collected on the day before. There the clerk who accepted the bag altered the date on the waybill to 15 December 2004, but the chain of custody still showed 14 December 2004. The General Manager of DISSA in her letter dated 23 March 2005 on behalf of the athlete drew the conclusion that the forgetting of the samples as well as the change of the date on the waybill effectively caused a break in the chain of custody, which should render the decision of the International Paralympic Committee's (IPC's) Management Committee of 14 March 2005 invalid. This Committee was presented with an Adverse Analytical Finding of the urine provided by the Respondent for testosterone or testosterone prohormones by the South African Doping Control Laboratory on 5 January 2005 and confirmed by IRMS analysis of the Doping Control Laboratory of the Deutsche Sporthochschule Cologne/Germany on 27 January 2005 and reported to WADA and IPC on 3 February 2005. The T/E ratio was 43.2 for screen and, therefore, well above the WADA threshold of 4.
- 2.6 Whereas the Respondent did not raise any objections with regard to the conditions of transport of the samples to the laboratories in the procedures before the IPC bodies, he argues in his answer before the CAS that the samples were collected on 13

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December 2004 and arrived at the South African laboratory on 17 December 2004 without being frozen. The Respondent holds that a sample *"kept for 4 days at the high ambient temperature could be the origin of such an important T/E ratio and therefore impair the accuracy of the test result."* In the Respondent's opinion such delay could alter the urine contained in the sample left at high ambient temperature. Such opinion stands against the statement of the WADA Science Director Dr. Olivier Rabin who by statement dated 29 June 2005 declares that he can affirm *"that under normal conditions the fact that an urine sample was kept 24 hours at the ambient temperature cannot be the origin of such an important T/E ratio."*

- 2.7 The Respondent explains in part F of his answer that because urine samples are not collected under sterile conditions, bacteria have the chance to grow. They even have the chance to grow when samples are stored at ambient temperature. Based on scientific articles, the Respondent holds that in order to minimize bacterial contamination, urine samples should be stored at -20° C. As a result of bacterial activity, free form steroids are released, a result which has led to findings of an increased T/E determined in a combined fraction of conjugated and non-conjugated steroids. Furthermore, in the opinion of the Respondent an increased T/E ratio due to bad sample storing can not be excluded. Also *"erratic, not interpretable T/E ratios"* can be the consequence.
- 2.8 The Respondent added the further argument that a deviation from WADA International Standard for Laboratories, in particular from WADA Identification Criteria for Qualitative Assays (WADA Technical Document – TD2003IDCR) and from WADA Reporting and Evaluation Guidance for Testosterone, Epitestosterone, T/E Ratio and other Endogenous Steroids (WADA Technical Document – TD2004EAAS) took place with regard to the concentration of free testosterone and/or epitestosterone in the specimen. The Respondent holds:
- "No information on the measure of the free fractions of steroids in the urine sample appears in Chapter 3.1, prior to the addition of beta-glucuronidase enzyme and the glucuroconjugates hydrolysisation ..."*
- 2.9 The Respondent emphasizes in this context that *"the interpretation of the T/E ratio is impossible in this case and is not representative, nor consistent with any exogenous intake of any of illicit substances."*
- 2.10 The Appellant reacted to both arguments by Supplementary Brief and attached as an exhibit, a supplementary statement of Dr. Olivier Rabin, dated 27 September 2005. WADA held that the sample was transferred from the South African laboratory to the Cologne laboratory to be analysed for the presence of exogenous anabolic steroids by IRMS. Bacterial activity, if occurred as argued by the Respondent, would not change the exogenous or endogenous origin of the substance in the sample. The results of IRMS show the exogenous origin of the substance as required by the WADA Technical Document TD2004EAAS. As a consequence, whether bacterial activity occurred or not is considered by WADA and Dr. Rabin as irrelevant. Scientifically there is no possibility that bacterial contamination could transform the origin of a substance from endogenous to exogenous.
- 2.11 Finally the Respondent raises concerns with regard to the screening of the test results. The T/E ratio should not have been calculated manually which resulted in an

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unexplained difference in between two different T/E ratios in the complete doping control file. The Respondent regards this as a further deviation with regard to the WADA Identification Criteria for Qualitative Assays.

- 2.12 The Appellant holds against that under WADA Technical Document TD2004EAAS, results will be reported as consistent with the administration of the exogenous steroid
- “when the values measured for the metabolite(s) in the athlete’s sample differs by 3 delta units or more from the urinary reference steroid.”*
- 2.13 In the present case the difference was more than 7 delta units. In addition WADA referred to the 2004 WADA Prohibited List, which was in legal effect at the date of the doping control. On page 3 of this list it reads as follows:
- “In all cases, and at any concentration, the laboratory will report an adverse finding, if, based on any reliable analytical method, it can show that the Prohibited Substance is of exogenous origin.”*
- 2.14 As IRMS is such a recognized method, and given that the exogenous origin is established, the T/E ratio value found in the Respondent’s sample is of no relevance for WADA and
- “whatever this level is, the Respondent is deemed to have committed a doping violation.”*
- 2.15 By Supplementary Brief, dated 17 October 2005, the Respondent upholds its concerns without offering new arguments and summarizes them as follows:
- “Given the departures from standards in the transportation, the collection and the testing of the samples, one has to admit that this case has been conducted far away f(ro)m standards.”*
- 2.16 On 14 March 2005 following an expedited hearing, which took place on 7 March 2005, and on the recommendation of the IPC Anti-Doping Committee, the IPC Management Committee decided to impose a two (2) years ineligibility period on the Respondent, based on art. 12.2 IPC Anti-Doping Code. In addition and based on art. 12.7 IPC Anti-Doping Code, all competitive results obtained by the Respondent from 13 December 2004 were disqualified including forfeiture of any medals, points and prizes. The IPC Management Committee considered the facts and held that there was a minor departure from the WADA International Standard for Testing. But there was no evidence that the sample had been tampered with in any way and the seal on the sample was wholly intact. Therefore, the Committee found that this departure did not invalidate the result.
- 2.17 On 16 and 23 March 2005 the General Manager of DISSA filed two Notices of Appeal on behalf of the Respondent under art. 9.9 IPC Anti-Doping Code. Following the internal appeal hearing and the recommendation of the IPC Legal Committee according to art 9.17 IPC Anti-Doping Code, the IPC Management Committee decided on 2 May 2005 as follows:

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"The sanction imposed on 14 March 2005 was not in accordance with the IPC Anti-Doping Code as a significant departure from the International Standard had occurred. In addition, the IPC Anti-Doping Subcommittee did not establish that this departure did not cause the adverse analytical finding.

Therefore, the Appeal is upheld and the Athlete reinstated to sport immediately."

- 2.18 The IPC Management Committee's decision dated 15 May 2005 focussed on the fact that the samples were left unattended for 45 minutes, during which time they had been moved around by a cleaning lady. The Committee found:

"The chain of custody was clearly broken and there is no clear record of exactly what happened to the Samples during this period. Accordingly, the IPC Legal Committee felt that it could not establish, on the balance of probabilities, that these events had not caused the Adverse Analytical Finding.

In light of this finding, the IPC Legal Committee did not consider the second question of whether the sanction applied by the IPC Anti-Doping Committee was the correct one."

- 2.19 With regard to the latter issue the Respondent and the General Manager of DISSA had argued that art 12.5.2 of the Code -*"no significant fault or negligence"*- should have been taken into consideration for defining the sanction to be imposed if it was found that no significant deviation from the International Standard occurred. As a consequence a reduction of the sanction of 2 years had been requested.

- 2.20 In its Statement of Appeal to the CAS, dated 21 June 2005, WADA asked

"to amend the decision rendered on May 2, 2005 by the IPC Management Committee in order to impose a 2-year ineligibility period on Mr Coetzee Wium."

- 2.21 In its Appeal Brief, dated 30 June 2005, WADA asked the CAS to:

*"1. Uphold the appeal lodged by WADA;
2. Pronounce a 2-year suspension against Coetzee Wium;
3. Grant to WADA a portion of its costs."*

- 2.22 In his answer, dated 16 September 2005 and in his Supplementary Brief, dated 17 October 2005, the Respondent asked the CAS Panel to:

*"1. Reject the appeal lodged by WADA;
2. Confirm the IPC decision of 2.05.2005;
3. Grant to Coetzee Wium its costs."*

3. The Proceedings

- 3.1 By letter dated 27 September 2005 the Respondent agreed to not hold a hearing and consented to the rendering of a decision based solely upon the written submissions. WADA did the same by letter dated 27 September 2005, but sought the Panel's consent to file a supplementary brief with one additional appendix, as the Respondent

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in his answer had raised an argument regarding the validity of the result of the test that was not raised previously, neither in first instance, nor in the appeal procedure before the IPC. Provided that WADA's Supplementary Brief was accepted, and that no new arguments were raised by the Respondent, WADA was willing to accept the Panel's decision without hearing, but offered to have their expert Dr. Olivier Rabin heard by the Panel. The Panel felt satisfied by the arguments provided in writing and decided not to hold a hearing, but to allow WADA to file a Supplementary Brief, which was submitted on 27 September 2005. The Respondent was given a deadline of 17 October 2005 to file a response to the Supplementary Brief, which he met.

3.2 On 12 October 2005 WADA requested that the Panel consider evidence of an unrelated infraction by the Respondent as evidence of his credibility. By letter dated 13 October 2005 the Respondent strongly objected to the inclusion of the evidence as the two cases were completely separate and distinct. The Panel decided based on art. R56 not to admit the Appellant's additional evidence.

3.3 Art. R56 reads as follows:

"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 rely after the submission of the grounds for the appeal and of the answer."

3.4 Given the Panel's decision that the parties be allowed a further exchange of arguments in writing in replacement of a hearing, and taking into consideration that there was no agreement between the parties to admit further evidence, no exceptional circumstances existed which would authorise the Appellant to submit this further evidence.

3.5 The Order of Procedure, dated 2 November 2005, was signed by both parties.

4. The Jurisdiction of the CAS

4.1 The Appellant filed its appeal pursuant to art 14.4 IPC Anti-Doping Code, which must be read in connection with art. 14.2, and in particular 14.2.1 as well as with art. 14.2.3 d) IPC Anti-Doping Code.

Art. 14.2 and art. 14.2.1 read as follows:

"14.2 External Appeals from Decisions Regarding Anti-Doping Rules Violations, Consequences, and Provisional Suspensions

A decision that an anti-doping rule violation was committed, a decision imposing Consequences for an anti-doping rule violation, a decision that no anti-doping rule violation was committed, a decision that the IPC (or applicable ADO) lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences, may be appealed exclusively as provided in this Article 14.2.

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14.2.1 In cases arising from Competition in an International Competition or in cases involving International Level Athletes, the decision may be appealed exclusively to the Court of Arbitration for Sport (CAS) in accordance with the provisions applicable before such court."

Art. 14.2.3 d) IPC Anti-Doping Code gives WADA the right to appeal to CAS under art. 14.2.1.

Art. 14.4 IPC Anti-Doping Code reads as follows:

"Time for Filing Appeals

The time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party. The above notwithstanding, the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings having lead to the decision subject to appeal:

14.4.1 Within ten (10) days from notice of the decision, such party/ies shall have the right to request from the body having issued the decision a copy of the file on which such body relied;

14.4.2 If such a request is made within the ten (10) day period, then the party making such request shall have twenty-one (21) days from receipt of the file to file an appeal to CAS."

- 4.2 The decision that has been appealed by WADA, was received by WADA on 2 May 2005. On 9 May 2005 WADA requested the full case file from IPC. On 1 June 2005 WADA was provided by IPC with the full case file. The Statement of Appeal was filed to CAS on 21 June 2005. This was within the deadline of art. 14.4.2 IPC Anti-Doping Code. Furthermore, the Respondent did not object to the jurisdiction of the CAS.

5. The Applicable Law

- 5.1 Pursuant to art. R58, the Panel shall decide the dispute according to the applicable regulations. The applicable regulation is art. 14.2.1 IPC Anti-Doping Code which refers to *"the provisions applicable before such court"*. Thus art. R58 of the Code applies, which reads as follows:

"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 the reasons for its decision."

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6. The Merits

- 6.1 The Respondent summarizes his arguments by stating in his Supplementary Brief that departures from standards occurred with regard to transportation, collection and testing. In summary, the case was conducted far away from standards. The Applicant admits that a departure from standards did occur, but holds that this was of minor significance and that, by no means, did this departure have any impact on the result of the IPC establishing an Adverse Analytical Finding for testosterone in the Respondent's sample.
- 6.2 The Panel adheres to the test standard consistently applied by CAS Panels in comparable cases. This standard has been defined as follows: "*Ingredients must be established to the comfortable satisfaction of the Court having in mind the seriousness of allegation which is made.*" (See e.g. CAS Award 98/211, n° 26 with further references; CAS 2000/A/310, L. v/FILA, p. 27; CAS 2001/A/337, Bray v. FINA, p. 21). Art. 7.4 IPC Anti-Doping Code requires that testing conducted by the IPC or an applicable ADO shall be in substantial conformity with the WADC International Standard for Testing in force at the time of Testing.
- 6.3 Art. A.3.1 a) WADC International Standard for Testing, version 3.0, June 2003, declares an ADO responsible for ensuring that any "*matters with the potential to compromise an Athlete's test are assessed to determine if a possible failure to comply has occurred*".
- 6.4 This obligation must be seen in the context of art. 4.1 and 4.2 IPC Anti-Doping Code which correspond to art. 3.1 and 3.2 WADC. These provisions read as follows:

"Art. 4.1 Burden and Standards of Proof

The IPC (or applicable ADO) shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the IPC (or applicable ADO) has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation, which is made. The standard of proof in all cases is greater than a mere balance of probability, but less than proof beyond a reasonable doubt. Where these rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

Art. 4.2 Methods of Establishing Facts and Presumptions

Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases.

4.2.1 WADA-accredited laboratories are presumed to have conducted Sample Analysis and custodial procedures in accordance with the WADC International Standard for Laboratories. The Athlete may rebut this presumption by establishing that a departure from the International Standard, undermining the validity of the Adverse Analytical Finding, occurred.

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If the Athlete rebuts the preceding presumption by showing that a departure from the International Standard occurred, then the IPC (or applicable ADO) shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

4.2.2 Departures from the WADC International Standard for Testing which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such Results. If the Athlete establishes that departures from the WADC International Standard occurred during Testing then the IPC (or applicable ADO) shall have the burden to establish that such departures did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation."

A) Alleged Departures from WADC International Standard for Testing

- 6.5 The Respondent's arguments with regard to departures from testing standard refer to the fact that the samples were left unattended at his premises for about 45 minutes and that they had been transported to the laboratory after a delay of one day and in an unfrozen condition. Regarding the breach of the chain of custody by having forgotten the samples in a room close to the reception area in the [REDACTED], the DCO and the Respondent, taken together, mention two persons besides themselves who have been present in this area: a lady at the reception and the cleaning lady. The latter touched the bag with the samples. Both sides further agree in their description of the facts that the samples had been sealed in a tamper proof "Berlinger Test Kit", before they were forgotten. The seal had remained intact until its opening at the laboratory. The Respondent submitted a witness statement from the cleaning lady stating that she did nothing else with the bag other than displace it during the cleaning of the room. According to her statement she neither opened the bag, nor did she break the seal. Thus, only the receptionist or the athlete himself could have exchanged or manipulated the bag during the period in question, because even the Respondent did not make any particular submission with regard to the possibility of the appearance of an unknown third person with an interest to take the bag, open it and exchange or manipulate the samples, and then return it.
- 6.6 The Panel sees no reason to deviate from established practice of CAS in comparable cases. It therefore has to answer the following question, in a case where the Respondent is able to establish any departure from the WADC International Standard for Testing: "*Do these deviations cast sufficient doubt on the reliability of the test results to an extent that the finding ...*" of a Prohibited Substance "*in the Appellant's urine was not sufficient to establish to the comfortable satisfaction of the Panel a doping offence*" by the Respondent (See e.g. CAS 2001/A/337, Bray v/FINA, p. 22). In the case CAS 2004/A/607, Galabin Bocvski v/IWF, another CAS Panel dealt extensively with the reliability of the Berlinger kits and were convinced having heard experts that a Berlinger bottle cannot be opened without leaving a trace of it having been tampered (see p. 22, n° 7.8.8). The same Panel, referring to earlier CAS awards, found that a legal regime with regard to the required standard of proof which is set out in art. 3.1 WADC, is in line with Swiss law and the jurisprudence of the Swiss Supreme Court (p. 24, n° 7.9.4). The standard of proof required by CAS in all such cases is greater than mere balance of probability but less than proof beyond a reasonable doubt (e.g. CAS 2000/A/270, David Meca-Medina and Igor Majcen v/FINA, p. 11 f, n° 4.2).

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- 6.7 Arts 4.1 and 4.2 IPC Anti-Doping Code correspond exactly to arts. 3.1 and 3.2 WADC. The standard of proof to be applied is therefore the same for both codes. The Panel, when evaluating the arguments and evidence produced by the parties cannot imagine any hypothesis under the given circumstances that would indicate that any other person, whether identified or not, might have used the period during which the samples were unattended, for any act of sabotage with a possible impact on the result of the laboratory analysis. The Panel finds that WADA established to the Panel's comfortable satisfaction, that the deviation from the testing standard by having the samples left unattended for 45 minutes did not cast any doubt on the reliability of the test results. The practical impossibility to destroy a Berlinger bottle and the fact that the seal was intact at the samples' arrival at the laboratory also excludes any probability that a negligent mishandling of the samples by the cleaning lady might have occurred involving any impact on the Adverse Analytical Finding.
- 6.8 The Panel, applying the same principles, arrives at the same conclusion with regard to the Respondent's argument concerning the prolonged stay of the samples with the DCO due to a delayed pick-up by DHL and the resultant non-correspondence of the date in the documentation package and on the waybill. Irrespective of whether there was or was not a departure from the International Standard in this regard, the Panel finds the explanation given by the DCO to be fully satisfactory. Given the finding of another CAS Panel in the CAS case 2001/A/337, Bray v/FINA, p. 24, that even a delay of two weeks could not influence an Adverse Analytical Finding, this Panel can exclude any probability that the delay of one day could cast any doubt on the reliability of the test results under the given circumstances.
- 6.9 The last argument of the Respondent with regard to a departure from the WADC International Standard for Testing, i.e. the storage and transport for 4 days in unfrozen condition at the ambient temperature, could be discussed in connection with arts. 8.3.1 and 9.3.1 of this Standard which advises the IPC to ensure that any sealed sample will be stored and transported in a manner that protects its integrity, identity and security. But, since the Respondent draws significant conclusions from this argument with regard to the analysis of his sample, the argument will be discussed below.

B) Alleged Departures from WADA Technical Documents for Laboratory Analysis

- 6.10 According to the Respondent, the storage, particularly if prolonged, and the transport at ambient temperature of the Respondent's urine has led to bacterial activities in the urine with the consequence of significant changes in measured steroid profiles. The Respondent argues that the possibility cannot be excluded that from this ensued an increased or an erratic, uninterpretable T/E ratio. The Respondent holds that the doping control laboratory departed from WADA Technical Document TD2003IDCR by not giving any information on the measure of the free fractions of steroids in the urine, prior to the addition of beta-glucuronidase enzyme and the glucuroconjugates hydrolysis. In addition, the indication of the endogenous steroid profile of the Respondent resulted in a T/E ratio well below the cut-off value of WADA, as defined by WADA Technical Document TD2004EAAS, p. 2. Furthermore, the T/E ratio should not have been calculated manually after further correction, because there was no shift in retention value.

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6.11 Due to the fact that the parties agreed to replace the oral hearing with a second exchange of submissions and as the Respondent explicitly refers to the statements of Dr. Rabin, the Panel feels free to consider Dr. Rabin's statements as expert opinion duly submitted for the Panel's evaluation by the Applicant in order to establish that the alleged departure from the International Standards did not cause the Adverse Analytical Finding or the factual basis for an anti-doping rule violation. The Panel places specific emphasis on paragraphs 4 and 6 of the Supplementary statement of Dr. Rabin, dated 27 September 2005. Dr. Rabin holds that the question of whether there was bacterial activity and whether it could have had any influence on the T/E ratio – Dr. Rabin does not see any scientific support for such assumption – is irrelevant, as the Cologne laboratory, when analysing the sample through IRMS, clearly demonstrated the exogenous origin of the substance contained in the Respondent's sample. Dr. Rabin adds that scientifically, there is no possibility that bacterial contamination and activity could transform the endogenous to exogenous origin of a substance. The Respondent in his Supplementary Brief, dated 17 October 2005, did not raise any counter argument to such reasoning of Dr. Rabin.

6.12 The Panel, although prepared to assume in favour of the Respondent that there was a departure from the International Standards in this regard, nevertheless feels comfortably satisfied that the Applicant has established that such assumed departure did not raise any doubt regarding the reliability of the test results.

6.13 Given the exogenous origin of the Prohibited Substance found in the sample of the Respondent the Panel finds that the WADA 2004 Prohibited List must be applied, which states on page 3 regarding anabolic androgenic steroids, including testosterone:

"In all cases, and at any concentration, the laboratory will report an adverse analytical finding, if, based on any reliable analytical method, it can show that the Prohibited Substance is of exogenous origin."

6.14 The Respondent did not raise any doubts regarding IMRS being such a reliable method. Therefore, the Panel does not find that the athlete could rebut the presumption that a WADA-accredited laboratory conducted Sample Analysis and custodial procedures in accordance with the WADC International Standard for Laboratories. No departure from the International Standard, which would undermine the validity of the Adverse Analytical Finding, was established, once the exogenous origin of the Prohibited Substance had become clear.

C) Sanctions

6.15 As a result of the forgoing deliberations the Panel finds an Adverse Analytical Finding for testosterone or testosterone prohormones in the Respondent's samples established. Testosterone is a prohibited anabolic steroid included on the WADA 2004 Prohibited List. The Respondent therefore committed an anti-doping rule violation. The IPC Anti-Doping Code provides for such behaviour in arts. 12.2, 12.5, 12.7, 12.8 and 12.10 as follows:

"Art. 12.2 Imposition of Ineligibility for Prohibited Substances and Prohibited Methods

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Except for the specified substances identified in Article 12.3, the period of ineligibility imposed for a violation of Article 3.1 (presence of Prohibited Substance or its Metabolites or Markers) shall be:

First violation: Two (2) years ineligibility

...

However, the Athlete or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article 12.5.

Art. 12.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances

12.5.1 No Fault or Negligence. If the Athlete establishes in an individual case involving an anti-doping rule violation under Article 3.1 (presence of Prohibited Substance or its Metabolites or Markers) ... that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 3.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. ...

12.5.2 No Significant Fault or Negligence. This Article 12.5.2 applies to anti-doping rule violations involving Article 3.1 (presence of Prohibited Substance or its Metabolites or Markers), If an Athlete establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 3.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

12.5.3 The IPC Management Committee, on recommendations from the IPC Anti-Doping Subcommittee, may also reduce the period of Ineligibility in an individual case where the Athlete has provided substantial assistance to the IPC, which results in the IPC discovering or establishing an anti-doping rule violation by another Person involving Possession under Article 3.6.2 (Possession by Athlete Support Personnel), Article 3.7 (Trafficking), or Article 3.8 (administration to an Athlete). ...

Art. 12.7 Disqualification of Results in Events Subsequent to Sample Collection

In addition to the automatic Disqualification of the results in the Event which produced the positive Sample under Article 11 (Automatic Disqualification of Individual Results), all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other doping violation occurred, through the commencement of any Provisional Suspension

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or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.

Art. 12.8 Commencement of Ineligibility Period

The period of Ineligibility shall start on the date on which the final decision for such period is imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility to be served. Where required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the Athlete, the IPC may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection.

Art. 12.10 The applicable NPC is responsible for enforcing any sanction imposed by the IPC."

6.16 The Panel feels bound by art. 12.2 IPC Anti-Doping Code to impose a two (2) years ineligibility period on the Respondent. In addition and based on art. 12.7 IPC Anti-Doping Code, all competitive results obtained by the Respondent from 13 December 2004 are disqualified including forfeiture of any medals, points and prizes. The Respondent did not offer any arguments for the Panel to make use of art. 12.5 IPC Anti-Doping Code.

6.17 The Panel finds that the period of ineligibility shall start on the date of this decision, as provided for by art. 12.8 IPC Anti-Doping Code. The period of suspension from 13 December 2004 – 2 May 2005 shall be credited against the total period of ineligibility to be served. The Panel does not see fit to invoke its authority under art. 12.8 IPC Anti-Doping Code, to start the period of ineligibility at an earlier date.

7. **Costs**

7.1 According to art. R65 of the Code, as this is a dispute of an international nature ruled in appeal, these proceedings shall be free, except for the minimum CAS Court Office fee of CHF 500, which was paid by the Appellant and is retained by the CAS.

7.2 Pursuant to art. R65.3, the costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall 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. The Panel has considered these factors, including the legal aid granted to the Respondent by Order of the ICAS President, when considering the parties' applications for costs. The Panel rules that both parties shall bear their own costs.

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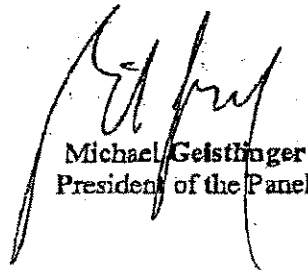
ON THESE GROUNDS

The Court of Arbitration for Sport hereby rules:

1. The appeal filed by WADA on 21 June 2005 is upheld.
2. The decision of the IPC Management Committee of 2 May 2005 is annulled.
3. Mr Wium is sanctioned under art. 12.2 IPC Anti-Doping Code by a two (2) years ineligibility period, which starts on the date of this decision. The period of suspension from 13 December 2004 – 2 May 2005 shall be credited against the total period of ineligibility to be served.
4. Mr Wium is sanctioned under art. 12.7 IPC Anti-Doping Code by the disqualification of all competitive results obtained by Mr Wium from 13 December 2004. This includes forfeiture of any medals, points and prizes.
5. The award is rendered without costs except for the Court Office fee of CHF 500.- (five hundred Swiss Francs), which is retained by the CAS.
6. Each side shall bear its own costs.

Done in Lausanne, 25 November 2005

THE COURT OF ARBITRATION FOR SPORT



Michael Geistlinger
President of the Panel