



Arbitration CAS 98/184 P. / International Equestrian Federation (FEI), award of 25 September 1998

Panel: Michael Beloff QC (England), President; Mr. Richard Young (USA); Mr. Hans Nater (Switzerland)

Equestrian

Doping (phenylbutazone)

Medical treatment of the horse with a prohibited substance

Obligation to disclose such a treatment

Confirmatory analysis

- 1. Pursuant to the FEI Regulations, the person responsible is obliged to inform the competition veterinary of the treatment administered to his horse. This obligation is the prerogative of the person responsible, even in the case of legitimate treatment of the horse.**
- 2. Pursuant to the FEI Regulations, the person responsible of the horse is entitled to ask for a confirmatory analysis. If such an analysis does not confirm the presence of a prohibited substance, the case must be dropped and no further action taken.**
- 3. Although the co-existence of a negative blood test with a positive urine test does not by itself cast doubt on the validity of the urine test, had the person responsible been informed of the existence of the negative blood test, more likely than not he/she would have asked for a confirmatory analysis. The person responsible cannot be held to have waived his/her right to an analysis of the 'B' sample by failing to request one when, because of the omission of the federation, he/she was not given the material on which to exercise an informed choice.**

This is an appeal against a decision (“the decision”) of the Judicial Committee of the Fédération Equestre Internationale (“FEI”) (“the Respondent”) dated 17 December 1997 that the horse W. should be disqualified from the entire event CVI-Aachen 1996 (“the event”) on the basis that the horse had proved positive to a prohibited substance, Phenylbutazone (“Bute”) and that P. as the person responsible (“the Appellant”) be fined CHF 2'500 together with CHF 5'000 costs.

The jurisdiction of the CAS in this matter results from Art. 059.1 of the FEI Statutes (“the Statutes”) and from Art. 170.1.2 of the FEI General Regulations (19th edition) (“the GR”) with which provisions all participants involved in equestrian events agree to comply with, pursuant to art. 002 of the Statutes.

Although, as the Judicial Committee noted, the route by which the matter reached it was unorthodox and not in strict compliance with the GR, nonetheless, it accepted jurisdiction and reached a decision adverse to the Appellant.

Art. R47 of CAS Rules provides, so far as material, that “*A party may appeal from the decision of a disciplinary tribunal or similar body of a federation ... in so far as the statutes or regulations of the said body so provide, or as the parties have concluded a specific arbitration agreement and in so far as the appellant has exhausted the legal remedies available to him, prior to the appeal in accordance with the statutes or regulations of the said sports body*”.

These conditions are satisfied. There was a decision by the Judicial Committee. Further by signing the Order of Procedure dated 9 April 1998 the parties reached (additionally) a specific arbitration agreement. We accordingly consider that we are entitled to proceed to deal with the appeal in accordance with the Code of Sports-related Arbitration (Art. R47 et seq of the Code).

On 14 January 1998, the Appellant filed its statement of appeal accompanied by 3 exhibits. On 26 January 1998, the Appellant filed its appeal brief accompanied by 30 exhibits. On 16 March 1998, The Respondent filed its answer accompanied by 3 exhibits.

Finally we note that the agreement of the parties to dispense with an oral hearing means that the Panel has been deprived of the opportunity of evaluating the credibility of the witnesses from the way in which they presented their evidence face to face, and from having their evidence tested by cross-examination. However, our decision did not ultimately depend upon a resolution of conflicting versions of particular events.

LAW

1. Under Art. R57 of the CAS Rules “*The panel shall have full power to review the facts and the law*”.
2. In our view we are entitled, in the exercise of such power, to have regard to all relevant papers including any record of proceedings before the Judicial Committee, although entitled, indeed obliged, to reach a decision independent of and uninfluenced by the Committee's assessment of the evidence before it.
3. Bute is under the rules of the Respondent a Prohibited Substance [Veterinary Regulations (VR 1013, p. 54) Annex IV 'Anti-inflammatories']. The quantity is immaterial.
4. By reason of Article 142, the Appellant, as the Person Responsible for the horse W., had “legal responsibility for the horse under the VR” and, “unless otherwise stated, is liable under the Legal System” (i.e. Ch. X).

5. By reason of Article 146.1:

“any horse found to have Prohibited Substance in any of its tissues, body fluids or excreta at an event is automatically disqualified, together with the competitor, from all competitions at that event, which also entails the forfeiture of all prizes and prize money won at that event.”

6. By reason of Article 174:

“2. A fine should be imposed particularly in cases where the offender has ... infringed the ... Regulations or rules by negligence;

3. Disqualification should be imposed when it is specified in the Rules ... Disqualification from an event means that the competitor and the horses concerned ... may take no further part in that event.”

7. Although a myriad of issues have been raised in this protracted process, which has now engaged the attention of three bodies (the FEI Appeal Committee, the Judicial Committee and ourselves), at the core of the dispute are two simple issues:

- (i) Did W. have a prohibited substance in his body fluids or excreta at the time of the event?
- (ii) Was the Respondent under a duty to supply all relevant material to the Appellant in order to enable her to make an informed choice as to whether to request a 'B' sample and, if so, was it in breach of such duty.

8. It is indisputable that:

- (1) On 30 June 1996 the horse W., who had suffered from a swollen sheath, did have administered to him by Dr. Griesbaber, veterinarian, (albeit for proper therapeutic purposes) a prohibited substance i.e. Bute, prior to the event, although in what precise quantity we cannot finally determine on the limited evidence available. The use of Bute, a legitimate equestrian medication, is of course, no offence *per se*.
- (2) Dr. Griesbaber determined that W. was fit to compete in the event but in a facsimile letter of 2nd July 1996 to the Appellant stated *“If they do a dope test on W. he will test positive”*.
- (3) The view of Dr. Lange, the Veterinary Delegate at the event, when confronted with the medical record, was to the same effect.
- (4) Nonetheless, the Appellant did not withdraw her horse from the event.

9. In our assessment of the procedures leading to the determination that W. had a prohibited substance in his urine we reject entirely the attack made in the Appellant's submissions on the *bona fide* of Dr. Lange and of the Respondent.

10. Many serious criticisms of departure from the proper procedures were made in the Statement of Appeal. We are unpersuaded by the majority of these criticisms. There was in our view, no material risk of substitution, contamination, or imperfect analysis, or erroneous recording of the results of such analysis.

11. The FEI's rules require that the Veterinary Delegate and Treating Veterinarian be separate individuals [Art. 1009.8]. The Event Schedule showed Dr. Lange as both Veterinary Delegate (p. 3) and Treating Veterinarian (p. 7). It is not possible to reach a firm conclusion on whether and if so when, he acted in a dual capacity, although we accept that from the start of the event, on 5 July 1996, Dr. Ballmann fulfilled the role of Treating Veterinarian, on call at his clinic.
12. It may well be that Ms Lorenz who was in charge of the Appellant's horses would not in fact have disclosed to Dr. Lange, W.'s treatment with Bute (in whatever form she did disclose it) had she known that he was the Veterinary Delegate, however in our view, she would have been at fault in not so doing, in circumstances where Dr. Grieshaber had expressly warned that W. should not be allowed to compete.
13. In CAS 92/73 (N. v. FEI) a CAS panel said:

"... it is clear that the appellant was obliged to inform the competition veterinary of the treatment administered to his horse L. This obligations is the prerogative of the person responsible, even in the case of legitimate treatment of the horse in the sense of article 177, paragraph 5.3 of the GR. This is also laid down in article 1009, paragraph 11 of the BR, which states that, if a horse has been treated for illness or injury immediately before or during a competition, the Veterinary Delegate/Commission should inform the President of the Jury of the competition of this fact who will then jointly decide whether the horse will be allowed to take part in the competition or continue to do so.

It is also in conformity with the spirit of the fight against doping led by the FEI, and moreover in the interest of riders, that, prior to competitions, the latter are obliged to draw attention to treatments which might cause problems.

...

The obligation to draw attention to the treatment was therefore the duty of the appellant for both events and for both horses".

We adopt and apply these words.
14. We further draw attention in this context to the express obligation to comply with "the common principles of behaviour, fairness and accepted standards of sportsmanship" referred to in GR Article 168.
15. There was an admitted lack of security of stable areas at the event, which is to be regretted. However in this instance there is no evidence that it did lead, or plausible theory how it could have led, to substitution or contamination of the sample.
16. It was, in our view, undesirable that the Medical Control Form, dated 5 July 1996, sent by Dr. Lange to the laboratory did in its comment, although not in its formal parts, identify both the name of the horse and the treatment Dr. Lange believed it to have received (Dr Lange's note on the medication control form read as follows: "*Remarks from the veterinarian: By error I saw a treatment form for the horse W. which indicated that it had been treated over the past six days with Penicillin,*

Furosemide and daily one gram dose of Phenylbutazone. Despite explicit advice to the contrary, the owner insisted that the horse start [English translation]). Anonymity is desirable, even if not expressly required by FEI rules, and avoids the risk of accusation of bias.

17. We would finally note that the Statutes and Rules of the FEI do not make it a condition precedent in law for the validity of a test for prohibited substances that each and every item of stipulated procedure be followed to the letter: compare, for example, the English breathalyser law under the Road Traffic Act 1967. Nor is it a condition precedent as a matter of fact.
18. We do not, however, wish to suggest that adherence to such stipulated procedure is not highly desirable both in fairness to the person who or (in the case of equestrian events) whose horse is tested, as well as to avoid subsequent controversy. In the FEI's words, "[t]his is a very important facet of many FEI events (Art. 1017 VR) and all aspects must be strictly carried out according to the instructions listed here" (Art. 1015 VR). Nor do we wish to suggest that departure from such procedure may not in fact cast sufficient, indeed powerful, doubt upon the results of an allegedly adverse test relied on to the detriment of such person.
19. But in every case the particular facts must be studied; and if the Panel is satisfied that the sample tested came from the person or horse in question, and that the chain of custody is established, that no question of contamination arises, that the equipment used to test was appropriate and that the results were correctly interpreted, then it should not be deterred from upholding a verdict as to the presence of a prohibited substance merely because some departure from procedure may be proven, still less because of matters irrelevant to the validity of the test.
20. None of the factors previously referred to at paras. 11, 15 and 16, singly or cumulatively, affected our decision as to whether a violation was made out.
21. However:
 - (1) By fax and letters dated 9 December 1996 the Respondent informed the Executive Director of the American Horse Show Association (AHSA) that analysis of the samples "*revealed the presence of the prohibited substance*" (i.e. Bute): stated that what was sent was "a complete report" and asked whether a confirmatory analysis was requested;
 - (2) The enclosures to the report sent with the letter disclosed the results of the urine test only;
 - (3) A negative blood test (fax Laboratory to Appellant's attorney dated 26 February 1998) was reported to the FEI contemporaneously with the positive urine test (second fax Laboratory to Appellant's attorney dated 26 February 1998);
 - (4) While we acquit the Respondent of any deliberate attempt to mislead the Appellant – the legal department who sent the documents referred to under (1) above being ignorant of the blood test (letter dated 10 March 1998 from Respondent to Appellant's attorney) – in fact it inadvertently caused her to be unaware of the complete results of the laboratory analysis;

- (5) The mischief was compounded by the destruction of all W.'s samples within one year of their receipt (Laboratory to Appellant's attorneys dated 25 February 1998) - despite an undertaking given by the Respondent to the Appellant's attorneys that they would be preserved until instruction was given to destroy them (letter dated 1 May 1997). This destruction also contravened VR 1023 (8) which postpones destruction until after conclusion of the appeal process provided for under the GR;
 - (6) Because of (5), the Appellants' request for confirmatory analysis (by letter from the Appellant's attorney to Respondent on 29 December 1997) could not be granted.
22. In our view, although the co-existence of a negative blood test with a positive urine test does not by itself cast doubt on the validity of the urine test, we are of the view that had the Appellant been informed of the existence of the negative blood test, more likely than not she would have asked for a confirmatory analysis.
23. The Appellant cannot be held to have waived her right to an analysis of the 'B' sample by failing to request one within ten days (VR 1023.4) when, because of the omission of the Respondent, she was not given the material on which to exercise an informed choice. We cannot, as it seems to us, speculate as to what such confirmatory analysis would have shown.
24. The procedure for analysis under VR 1023 and 1024 contemplates that:
 - (1) a Person Responsible is entitled to ask for a confirmatory analysis (VR 1023 1, 4, 5, 6, 7);
 - (2) such an analysis may not confirm the presence of a prohibited substance (VR 1024.8);
 - (3) if it does not do so, "the case must be dropped and no further action taken" (ditto).
25. In short, the presence or absence of a prohibited substance is considered to be established on the basis of analysis of two samples (if the person responsible requests analysis of the second) not one. On the facts of this case, we consider it unfair to place reliance on the analysis of one sample only (cf. IOC Medical Code: Ch.VI Art. III).
26. Thus,
 - in relation to Issue (ii) at para. 7 above, we conclude that the Respondents was under a duty to supply all relevant material to the Appellant in order to enable her to make an informed choice as to whether to request a 'B' sample, and it was, on the facts, in breach of such duty;
 - in relation to Issue (i) at para. 7 above, we find the Respondent's allegation that W. had a prohibited substance in his body fluids or excreta at the time of the event, non-proven. The available evidence (unsurprisingly) suggested the presence of such substance: but the available evidence cannot be shown in the circumstances to be sufficient evidence.
27. If there was a violation of Article 164(2), then the penalty imposed appears to us to be wholly reasonable. Indeed the attack on it is not discrete from the attack on the finding of liability.

We accept that the Appellant did not seek to gain advantage from the administration of Bute to W.: such administration was carried out for *bona fide* therapeutic purposes. But she knew of such administration and was prepared to take a risk that it remained in the horse's system during the event. She should equally have been prepared to pay the price. Article 174(2) makes a fine an appropriate sanction in such circumstances.

28. The Judicial Committee states in its decision:

“It is therefore clear that [P.] was not only disregarding the express advice of Dr. Lange but was acting contrary to the clear advice of her own German doctor.

While all competitors, particularly children, deserve sympathy when their horses or ponies cannot start, this circumstance is not uncommon in every discipline and at every level of equestrian sport.

As the uncontradicted evidence shows, the position was made very clear to [P.] before she persisted in her purpose and she was not unfairly prejudiced in any way by any action of Dr. Lange or other officials.

No doubt Mrs. Lorenz may have believed, when she arrived at the show, that Dr. Lange was the Treating Veterinarian but we cannot understand [P.'s] disapproval of the fact that the Veterinary Delegate became acquainted with the treatment and medication of W.

If a horse which has been receiving very recent treatment with Prohibited Substances (no doubt quite proper treatment from the veterinary point of view) is brought to the event with a view to competing, as it is obligatory to inform the Veterinary Delegate and the Ground Jury of the facts. It was quite wrong to conceal them.”

29. We endorse that viewpoint. The fact that we allow the appeal (on the basis of material which the Judicial Committee did not have the opportunity to consider) should not be read as an encouragement to other Persons Responsible to take risks of the kind taken by the Appellant.
30. For the foregoing reasons, however, we allow the Appellant's appeal and cancel the decision of the Judicial Committee, but consider that in all the circumstances each party should bear its own costs of and connected with the proceedings before us.

The Court of Arbitration for Sport hereby rules:

1. The appeal lodged by P. is upheld.
2. The decision of 17 December 1997 pronounced by the FEI Judicial Committee against the Appellant is cancelled.

(...)