Arbitration CAS 2004/A/607 B. v. International Weightlifting Federation (IWF), award of 6 December 2004

Panel: Mr Hans Nater (Switzerland), President; Prof Richard H. McLaren (Canada); Mr Georg Engelbrecht (Germany)

Weightlifting
Doping offence
Manipulation of sample
Standard of proof
Sanction

1. **When the physical manipulation of the samples is undisputed, a prohibited doping method in the form of manipulation has occurred under Rule 5.1(b) of the IWF Anti-Doping Policy. The result is a doping offence as the alleged breach in the chain of custody, the alleged manipulation occurring during the period of custody and the alleged fact that the athlete has been victim of a conspiracy have not Under Rule 5.1(b) of the IWF Anti-Doping Policy been demonstrated. As a result, the athlete should be suspended according to the applicable rules.**

2. **As to the standards of proof to establish that an anti-doping violation has occurred, the IWF Anti-Doping Policy remains silent. According to Swiss law, which has been chosen by the parties, the Panel, based on objective criteria, must be convinced of the occurrence of an alleged fact. However, according to the jurisprudence of the Swiss Supreme Court, no absolute assurance is required; it suffices that the Tribunal has no serious doubts on a specific fact or that the remaining doubts appear to be light. This test is in line with standard CAS practice, providing that an anti-doping rule violation must be established to the comfortable satisfaction of the Tribunal. This standard of proof is greater than a mere balance of probability but less than proof beyond a reasonable doubt.**

The Appellant, B., born on 19 December 1974 in Pleven, Bulgaria, is a registered member of the Bulgarian Weightlifting Federation (BWF), which is affiliated with the International Weightlifting Federation since 1954.

The Respondent, the International Weightlifting Federation (IWF) is composed of the affiliated National Federations governing the sport of weightlifting and is the controlling body of all competitive lifting and has its seat in Budapest, Hungary.

Pursuant to the request of the Respondent IWF, Mrs Daniela Svensson, an international doping control officer, collected urine samples from the athletes of the Bulgarian weightlifting team in an unannounced out-of-competition test.

On 18 October 2003, the collection of samples took place in the town of Assenovgrad, Bulgaria, at a hotel near the training center of the Bulgarian national weightlifting team. Samples were collected from 18 Bulgarian weightlifters on that day.

It appeared that the trainer's apartment was on the same floor as the rooms in which the athletes to be tested were staying.

During the hearing held on 20 September 2004 in Lausanne, Mrs Svensson confirmed that once in the trainer's apartment, athletes were able to enter and leave the apartment at their discretion. The apartment was so small and overcrowded that its entrance door was kept open during the entire testing procedure. Regarding the circumstances under which the urine samples were collected, she admitted that athletes were not under constant supervision and a sample manipulation was possible during the doping control procedure.

The Appellant B. advises that he personally selected a cup for urine collection then proceeded to the bathroom of the apartment with Mrs Svensson's assistant, Mr Rumen Videnov. Once inside the bathroom, the latter was standing at one meter from the Appellant and could see the urine pass from the athlete to the collection beaker.

At the hearing, Mr Videnov confirmed that he did not check under the athlete's penis nor the athlete's rectum for the presence of any possible manipulating device.

It is undisputed that, in the presence of Mrs Svensson, the Appellant opened the sealed package containing the bottles, placed the urine from the collection beaker into the A and B bottles and then screwed the lids onto the bottles.

It is also undisputed that nobody else but the Appellant had touched the collection beaker from the moment he picked it out until the moment he was to decant his urine from the beaker into the two bottles.

The Doping Control Form was signed by the Appellant, Mrs Svensson and Mr Videnov. In its "Confirmation" section, it does not contain any remarks about irregularities observed during the sampling collection process.

During the weekend of the samples collection, Mrs Svenssons's domicile was not and could not have been broken into.

The samples of the 18 tested athletes were stored in a brown cardboard box filled with newspaper and sealed with duct tape. Mrs Svensson included part 3 of the Doping Control Form with the samples. Part 3 of the form does not reveal any information about the athletes who provided the

samples contained in the cardboard box. The exterior of the box does not provide any indication of its content.

On 20 October 2003, Mrs Svensson shipped the box via DHL courier to the Institute of Biochemistry in Köln, Germany, which was an IOC accredited laboratory for doping analysis (the "Köln Laboratory").

On 22 October 2003, the Köln Laboratory received the collected samples, which were correctly closed.

In its report dated 12 November 2003, the Köln Laboratory confirmed the following:

> *"The samples were analysed as agreed according to the rules of the IOC Medical Commission for out-of-competition testing.*
>
> *The gas-chromatographical and mass-spectrometrical tests were negative except for the samples with the following code numbers: 377742, 377743 and 377744.*
>
> *These samples contain the same urine specimen (identical urine) and therefore are considered to be positive for physical manipulation.*
>
> *The physical manipulation (identical urines in three samples) was proven by all applied methods (GC/MS, HPLC, GC/NPD, LC/MS/MS), producing identical results for the three samples. Such results are not possible if the urine samples originate from three different athletes".*

Subsequently, DNA analysis performed by another laboratory in Köln confirmed that the three urine samples were identical, and that the urine in question had not been naturally produced by any of the three weightlifters. This is an agreed upon stipulation by the parties.

The test of the Appellant's B-sample was carried out shortly after the opening of the bottle. It confirmed the results of the analysis of the A-sample.

On 12 November 2003, after the A-sample results were identified, the Respondent reported the Köln Laboratory results to the BWF. The letter stated that identical urine was contained in the sample bottles provided by the Appellant and two other athletes. It was alleged that the three athletes had committed the doping infraction of physical manipulation which is a prohibited method. The letter also advised that the Appellant had been provisionally suspended for life. Finally, the letter outlined the possibility of having the B-sample analysed and the athletes' right to appeal.

On 16 November 2003, the BWF lodged an appeal against the decision in the letter of 12 November 2003. The BWF requested that the Appeal Committee overturn the suspension and *"exonerate their athletes from any guilt"*.

On 17 November 2003 the Respondent replied to the previous letter from the BWF. The IWF confirmed that it would treat the letter as an application for appeal on behalf of the athletes despite the fact the letter indicated only that the BWF wanted an appeal.

On 12 December 2003, a formal appeal brief was filed by the Appellant.

The Respondent sent a further letter to the BWF on 31 March 2004. The letter stated that following negotiations between the IWF and the BWF, the parties agreed to reduce the Appellant's sanction from a life time ban to eight years and the other athletes' suspensions from a two year ban to 18 months. The compromise was accepted by the Board of the IWF to avoid a long-lasting and expensive legal process if the athletes appealed. The letter also indicated that the BWF would have to pay a fine of USD 60,000, of which USD 30,000 had already been paid, because the BWF had three doping offences within one calendar year.

On 13 April 2004, the Appellant sent to the Executive Board of the Respondent a statement in which he refused the 8 year suspension and expressed his *"disregard of the fact that IWF made certain 'negotiations' with the Bulgarian Federation (as stated clearly in your letter) for doping offences"*.

On 15 April 2004, the Respondent proposed that the Appellant submit directly to the Court of Arbitration for Sport (CAS) his statement of appeal against the decision of the IWF Executive Board.

The same day, the BWF let the Respondent know that the athletes V. and M. accepted "the IWF Board's decision taken at the end of March 2004".

The Appellant filed an application with CAS on 21 April 2004.

On 20 July 2004, the parties signed the following joint stipulations:

"A. Facts that are not in dispute:

1. *B. was previously suspended for two years for doping on account of a positive test for substance of the group of anabolic steroids.*
2. *The urine in the A and B bottles of all three samples numbered 377742, 377743 and 377744 was identica1.*
3. *DNA analysis confirms that the urine in all three samples was not endogenously produced by any of B., M. and V.*
4. *B.'s urine specimen was in his exclusive custody and control from the time it was produced through the time it was poured into the Berlinger A and B bottles numbered 377744 and the caps on those bottles were screwed tight until they locked.*
5. *B. is not claiming that his sample number 377744 was manipulated or tampered with by anyone before the tops were screwed tight on the Berlinger bottles or after the sample arrived at the Cologne anti-doping laboratory.*
6. *The human body produces approximately 1 ml of urine every minute. The DNA analysis perfomed by Dr. Henke on samples numbered 377742, 377743 and 377744 would have detected endogenous urine produced by B., M. and V. if their endogenous urine was greater than 10% of the urine tested. The DNA analysis did not detect endogenous urine from any of the three weightlifters.*

B. Facts that are in dispute:

7. *Whether B. used a device or technique to manipulate his sample so as to provide a "clean" urine sample that was not his own.*

8. *Whether between the time that B., M. and V. screwed the tops on the Berlinger bottles of their samples numbered 377742, 377743 and 377744 and the time that the samples arrived at the Cologne laboratory, a person different from the Appellant sabotaged the samples by replacing the weightlifters' urine with the urine of some other persons.*

9. *Whether the Berlinger bottle system, which contained the urines of B., M. and V., could have been opened, the contents switched and then the bottles resealed without leaving any detectable sign on any parts of the Berlinger bottle system".*

The Appellant's statement of appeal dated 21 April 2004 challenged the Respondent's decision dated 31 March 2004. The Appellant submitted the following request for relief:

"(b) Declaring that there is no doping offence "physical manipulation" committed by the Appellant as opposed to the appealed decision of IWF Executive Board;

(c) Repealing the imposed sanction "8-years suspension" as improperly and unfoundedly imposed;

(d) Declaring that Appellant's all rights as member of the BWF and rights to compete in further sports competitions of any kind are restored to the Appellant".

A detailed appeal brief was sent by the Appellant on 29 April 2004.

On 25 May 2004, the Respondent submitted its answer requesting that the Panel enter an award confirming that B. committed a doping violation by manipulating his sample, affirming the 8 year suspension and awarding any additional relief that the Panel finds to be appropriate.

The Respondent presented rebuttal witnesses and two expert opinions on 2 September 2004 in response to the evidence submitted by the Appellant on 28 June 2004.

Based on an Expert Opinion provided on 28 June, the Appellant claimed that the Berlinger bottle caps can be opened after immersion in hot water without producing any visual detectable damage.

To the contrary, based on the consistent application of three test methods to the Appellant's A-sample bottle cap and its results, Dr Dörner concluded that the caps had never been immersed in hot water.

A hearing was set for 28 June 2004. Due to the new evidence of the Appellant and his request for additional witnesses shortly before 28 June 2004, the parties as well as the members of the Panel agreed on postponing the hearing until 20 September 2004.

During the hearing, the Panel viewed a videotape of a live experiment (the Experiment) illustrating the conclusion of the expert opinion submitted by the Appellant on 28 June 2004.

The Panel had a chance to examine the bottle used in the Experiment. A deformation of the safety sealed tabs of the black plastic stopper of the bottle could be observed.

At the hearing, several witnesses were heard, some of them by telephone conference, with the agreement of the Panel and pursuant to art. R44.2 §4 of the Code of Sport-related arbitration (the "Code").

At the end of the hearing, the Chairman asked the parties whether they had a fair chance to present their case, including all evidence they wished to submit. Both parties affirmed.

On 27 September 2004, with the permission of the Panel, the parties submitted post-hearing briefs.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from section 16 of the Respondent's Anti-Doping Policy rules and of art. R47 of the Code. It is further confirmed by the order of procedure duly signed by the parties.

2. It follows that the CAS has jurisdiction to decide the present dispute.

3. Under art. R57 of the Code, the Panel has the full power to review the facts and the law. The Panel did not therefore examine only the formal aspects of the appealed decision but held a trial *de novo* - took new evidence and examined all facts and legal issues involved in the dispute.

Applicable law

4. Art. R58 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".

5. Applicable IWF Anti-Doping Policy:

"1 POSITION STATEMENT

(…)

1.2 Doping is forbidden. No person who is subject to this Policy shall engage in a doping offence or assist, encourage or otherwise be a party to a doping offence.

1.3 This Policy applies to:
a) all athletes competing in events under the jurisdiction of the IWF,
b) all athlete members of National Federations selected by the IWF for out-of-competition testing,

(…)

4 BANNED CLASSES OF SUBSTANCES AND DOPING METHODS

4.1 The IWF prohibits the presence of any substance or the use of any doping method prohibited by the International Olympic Committee (IOC) as identified in the current IOC Medical Code's Prohibited Classes of Substances and Prohibited Methods.

Out-of Competition Testing

4.2 Out-of-competition tests are to be analysed for the substances from the following sections of the IOC list:
(…)ii DOPING METHODS
(…)
- B: Pharmacological, chemical and physical manipulation.

5 DOPING OFFENCE

5.1 For the purpose of this Policy a Doping Offence is:
(…)
(b) the use of a prohibited doping method,
(…)

5.2 Any individual to whom this policy applies who is found to have committed a Doping Offence shall be liable to sanctions as indicated within this policy.

14 SANCTIONS

14.2 Subject to other provisions in this section, sanctions will apply for the following periods:
a) a two (2) years suspension for a first offence involving anabolic agents, peptide hormones, masking agents, diuretics and/or pharmacological, chemical and physical manipulation of urine. For a second offence, the sanction is a life suspension".

6. In the present matter at the beginning of the hearing held on 20 September 2004, the parties have agreed on the application of Swiss law. The Panel has not found any reasons for application of other rules of law.

Admissibility

7. Art. R49 of the Code provides the following:

"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 twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".

8. The appeal was filed on 21 April 2004, within the 21 days after the notification of the Decision sent by the Respondent to the BWF on 31 March 2004. It follows that the appeal is admissible.

Main issues

9. The main issues are:

a) Has a doping offence been committed?

b) Has the chain of custody been broken?

c) If the Appellant is found responsible for a doping offence, should the loss of the Respondent's internal investigation and other aspects of due process affect the application of the sanctions under the rules?

d) What is the applicable sanction?

A. Has a doping offence been committed?

10. The parties' agreed stipulations include the fact that the urine in both the A & B samples of all three athletes involved in this situation were identical. The agreed stipulations also indicate that all samples were not endogenously produced by any of the three athletes. The necessary implication of these stipulations is that a doping offence had occurred under the IWF Anti-Doping Policy {hereafter the "Anti-Doping Policy"}. The closing briefs also proceed on the basis that such is the case and then it is a question of responsibility for the offense and depending on that analysis exoneration for the Appellant.

11. The physical manipulation of the samples is undisputed. Under Rule 5.1(b) of the IWF Anti-Doping Policy a prohibited doping method in the form of manipulation has occurred. Therefore, the result is a doping offence, prohibited by the applicable Anti-Doping Policy.

B. Has the chain of custody been broken? If so, by whom?

12. This analysis is undertaken to establish as to where in the chain of custody the manipulation is likely to have occurred.

13. The Appellant claims the manipulation occurred during the period after the caps were screwed tightly on to the Berlinger bottles up to the point of the arrival of the sample at the Köln Laboratory. The Respondent claims the manipulation occurred during the period before the caps to the Berlinger bottles were tightly secured by the Appellant in front of the doping control officer. To support their respective positions regarding the probabilities as to where the eventual breach of the chain of custody occurred both parties produced new evidences after the exchange of their original written submissions. The Appellant submitted an expert opinion dated 28 May 2004 accompanied by a videotape and the Respondent produced two technical reports dated 5 and 23 August 2004.

14. Neither party asserts that the breach of the chain of custody occurred after the samples arrived at the Köln Laboratory.

15. As there is no criticism of the procedure after the Appellant's samples were received by the Köln Laboratory, the segments of possession left in the chain of custody where the manipulation could have occurred are the following:

- during the period of custody by Mrs Svensson;
- during the period of custody by the DHL courier;
- between urination and the securing of the Berlinger Bottle caps.

16. Based upon the evidence presented, the probability that the breach of the chain of custody occurred during either the period of custody by Mrs Svensson and by the DHL courier of depends upon the question of whether the Appellant and two other athletes' A and B Berlinger bottles caps were removed and the samples tampered with.

17. These segments of the chain of custody bring into play the expert opinion on the Berlinger Bottles produced by the Appellant. The experiments conducted by the Appellant's experts in their laboratory and their expert opinion based upon the experiments raises the possibility of the caps having been heated, the caps removed, the contents dumped out and someone else's urine being placed in 6 bottles and then re-sealed without leaving visible traces, thereby establishing a possible method of invasion of the samples.

18. In response, the Respondent submitted Dr Dörner's technical reports and testimony.

19. Dr Dörner has reviewed an appropriate amount of pertinent data. In particular, he made sure that his evaluations were made on bottles similar to the ones used during the sample collection process of 18 October 2003. He used three scientific test methods that allow for differentiating between caps with and without manipulation in hot water. Furthermore, the actual tops from the A sample bottles of the Appellant and of M., one of the other two

athletes involved, were part of the test conducted by Dr Dörner.

20. The Appellant does not dispute the validity of Dr Dörner's reports and the test results of the A cap. However, the Appellant submitted that the Panel should disregard Dr Dörner's conclusions based on *"Dr Dörner's lack of expertise"* and *"expert financial benefit of the outcome of the case with regards of post contractual negotiation with the producer – Berlinger company"*. The Appellant has not provided any evidence to support his claim of Dr Dörner's lack of expertise. Additionally, the Appellant's second assertion does not call into question the validity of Dr Dörner's results. In a similar vein, the Appellant relies on Dr Vasileva's testimony in asserting that other methods of manipulation such as hot air, microwave, ultrasonic and other techniques exist that could have been employed to manipulate the Appellant's samples. However, this assertion does not call into question the validity of Dr Dörner's tests and their application to the Appellant's A-sample cap.

21. The Panel has accepted to its comfortable satisfaction that Dr Dörner's reports and testimony are reliable and must be admitted into evidence. It is convinced that Dr Dörner is an expert in the field of polymers.

22. The Panel finds as beyond doubt, Dr Dörner's evidence that the Appellant's bottles were not tampered with. The conclusion of his reports is that neither of the two caps from the A-bottle of the Appellant and of M. had been subjected to heat by boiling or any other method of heating. The coefficient of thermal expansion had not changed for these two caps.

23. Aside from Dr Dörner's report, it appears that even the bottle boiled in the videotaped experiment illustrating the conclusion of the expert opinion submitted by the Appellant on 28 June 2004 was suffering from a visible alteration. The Panel notes that the safety sealed tabs of the black plastic stopper of the said bottle cap bent outward. In other words, the Appellant has failed to convince the Panel that a Berlinger bottle could be opened without leaving a trace as to it having been tampered with. As a matter of fact, Dr Stephanka Vasileva, Head of the Department "Polymeric Engineering", University of Chemical Technology and Metallurgy, Bulgaria, confirmed to the Panel that her team spent between 20 to 30 days to analyze the parameters of the Berlinger bottles. After that analysis only, she conducted several attempts of unsealing a Berlinger bottles and was still not able to present to the Panel a bottle opened and screwed tight again without a noticeable deformation.

24. The Panel also notes that it is highly unlikely that during the phase of custody of the bottles by the courier the particular six bottles involved could have been invaded in the unmarked package containing 36 bottles for which no identificaion as to which person the samples belonged. Under those circumstances and to the Panel's firm opinion, the Appellant did not make it plausible that a third party could sabotage six of the bottles following the sample collection process of 18 October 2003 without leaving a trace of some kind on the bottles.

25. Moreover, Dr Schänzer, Dr Dörner and Mrs Berlinger testified that when they tried to repeat the videotaped experiment, they were never able to successfully open a bottle without a visible deformation. It is therefore hardly plausible that a third party would be able to open

successfully all six sample bottles of the Appellant, of M. and V. without signs of tampering when Dr Schänzer, Dr Dörner and Mrs Berlinger had no flawless results despite several dozen attempts.

26. Finally, it is undisputed that many persons were present at the opening of the Appellant's B-sample bottle. They all carefully examined the cap of the bottle and confirmed that it was correctly sealed before its opening. Dr Schänzer testified that a deformation similar to the one noticed by the Panel on the bottle of the videotaped experiment would have been detected during the opening of the Appellant's B-sample bottle. In fact, no alteration was noticed.

27. The Appellant suggests that he is the victim of a conspiracy. Such a statement should not be made absent a basis in fact. *In casu*, the Appellant does not even put forward that manipulation occurred during the time Mrs Svensson had custody of the package of 36 urine samples, nor during the period of custody by the DHL courier. He did not mention the eventual motive, nor possible author of such alleged conspiracy. The Appellant adduced no evidence to ascertain a plausible plot hatched against him.

28. The Panel found Mrs Svensson's testimony both credible and compelling. It has never been challenged by the Appellant, who did not bring up any evidence related to a motive which Mrs Svensson could have had to sabotage the samples of the Appellant, of M. and of V. Therefore, the Panel does not see any reason to cast doubts on her affirming that she had nothing against the Appellant nor had any knowledge in chemistry or polymers and had never heard of samples being manipulated or of somebody attempting to open a Berlinger bottle without leaving a trace. The Appellant did not give any motive to the Panel to believe that Mrs Svensson could have succeeded where Dr Schänzer, Dr Dörner, Mrs Berlinger and the Department "Polymeric Engineering", University of Chemical Technology and Metallurgy, Bulgaria (which has not proven otherwise) failed and that she could have opened successfully all six sample bottles of the Appellant, of M. and V. without sign of tampering.

29. The period of custody by the DHL courier is well documented. The Panel shares the Respondent's opinion when he states that *"As the Panel concluded in the [CAS 98/211] case, "DHL is a carrier of international reputation, we see no reason to assume that the sample, which arrived timeously on this occasion, was not in DHL's custody throughout" (¶11.5). The DHL tracking log in this matter identifies the location of the package the entire time it was in the custody of DHL (...) Indeed, no one looking at the outside of the package would have known that it contained the doping samples of Bulgarian weightlifters or even doping samples at all unless they knew the business of the addressee, Duetsche Sportschule Institute fur Biocheme. (...) Even inside the package, the names and nationality of the athletes are omitted on the laboratory's copy of the doping control form".*

30. Based upon the evaluation of the foregoing evidence, the Panel is convinced that the breach in the chain of custody did not occur in the two segments of the chain of custody under discussion in this heading of its opinion.

31. During the segment of the chain of custody between urination and the securing of the Berlinger Bottle caps it is undisputed that the sample is entirely in the control of the athlete.

In the joint stipulation dated 20 July 2004, the Appellant makes no claim that his sample was tampered with by anyone before the time it was poured into the Berlinger A and B bottles and the caps screwed on.

32. A rigorous analysis of the events surrounding the sample collection phase leads to the conclusion that the conditions under which the test took place were not satisfactory and offered several opportunities for the Appellant and the other two athletes to engage in manipulation. The athletes were not under constant direct supervision. The apartment where the samples were being procured was over-crowded. The ease with which one could leave the room because of the multitude of persons and go elsewhere and return could leave the Appellant with ample time to set up a device without being noticed or slip out of sight and engage in some other manipulation or do something else.

33. There were three segments of time where the Appellant was not under the constant supervision of the doping control officer or her team:

- Mrs Svensson confirmed that on 18 October 2003 as she approached the training hall by car, four to five athletes were outside and recognized her. When she stepped out of her vehicle, at least one athlete was on the phone announcing her arrival to the trainer, who appeared to be at a cafeteria with the Appellant. During the hearing, Mrs Svensson confirmed to the Panel that it took her four to five minutes from the time she arrived at the training hall to the time she reached the Cafeteria, where she met the Appellant, in the company of the trainer.
- Once in the hotel lobby, Mrs Svensson took the elevator to access the trainer's apartment where the samples collection was to take place. Only four persons at a time could use it. Mrs Svensson confirmed that she did not know when the Appellant entered the room. Moreover, it is important to emphasize that the trainer's apartment was on the same floor as the rooms in which the athletes were staying.
- Once in the trainer's apartment, Mrs Svensson told the Panel that she did not keep track of who was coming in, nor at what time. The apartment was so small that its entrance door was kept open during the whole testing procedure. Athletes would come in and go out as they pleased, notably to fetch water since it was not provided. Direct supervising was made even more difficult since Mr Videnov had to leave the apartment for about ten minutes.

34. It is undisputed that it is upon the Respondent to establish that the Appellant has manipulated the sample. As to the standards of proof to establish that an anti-doping violation has occurred, the IWF Anti-Doping Policy remains silent. According to Swiss law, which has been chosen by the parties, the Panel, based on objective criteria, must be convinced of the occurrence of an alleged fact. However, according to the jurisprudence of the Swiss Supreme Court, no absolute assurance is required; it suffices that the Tribunal has no serious doubts on a specific fact or that the remaining doubts appear to be light (Supreme Court decision [ATF] 130 II 321). This test is in line with standard TAS practice, providing that an anti-doping rule violation must be established to the comfortable satisfaction of the Tribunal (TAS 2002/A/403 & TAS 2002/A/408, p. 41; CAS 2001/A/345). This standard is close to art. 3.1

of the WADA Code, which provides that the standard of proof shall be whether the anti-doping-organisation 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 same article continues to state that this standard of proof is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

35. As far as the burden of proof is concerned in this segment of the chain of custody, the Panel finds no reasons to depart from the position expressed in the CAS 98/211 case (Digest of CAS Awards II 1998-2000, p. 255, 268):

"12.1 In essence, the Appellant contended that the burden of proof lay upon the Respondent to eliminate all possibilities other than manipulation by the Appellant.

12.2 We do not believe that this position reflects a correct legal analysis. The Respondent's burden was only, but sufficiently, to make the Panel "comfortably satisfied" that the Appellant was the culprit. But even if the Appellant's contention were correct, we consider that the Respondent discharged its burden.

12.3 In summary, it does not appear to us that there is, or was, any person other than the Appellant who at any relevant time had the motive, opportunity, or technical skill to manipulate the sample in a manner that would be undetected, or indeed that the sample was in any way manipulated.

12.4 Although invited to do so, Appellant's counsel declined – and in our view, was unable – to formulate any hypothesis that would point the finger at some such other person, whether identified or not. If and insofar as he invited us to consider in an abstract manner the possibility that either the Guys or some officer or employee of FINA were guilty of such manipulation, we utterly reject this suggestion".

36. The Panel, after careful analysis of the facts and evidence submitted to it by the parties, must conclude that there is a very high probability that manipulation occurred before or during urination and the securing of the Berlinger Bottle caps. The Respondent's evidence provides the suggestion that the weightlifter's device or catheterisation could have been used. Such methods are plausible explanations of how manipulation could have occurred. Of course, something else may have occurred. Nevertheless, the Appellant presented no hypothesis in this phase of the chain of custody as to how manipulation may have occurred. The Panel also notes that this is the one phase of the chain of custody that is entirely within the athlete's control. Once the probability that manipulation occurred in this phase of the chain of custody becomes apparent then some explanation or plausible hypothesis that the athlete was not involved must be brought forward to refute the circumstantial evidence as to the probability of the manipulation either being carried out by the Appellant or with his consent and approval.

37. The Panel, based on the evidence heard, finds that the Appellant had the motive and the opportunity to manipulate the sample himself or with the assistance of others. The Respondent made the Panel "comfortably satisfied" that the Appellant did manipulate the sample himself or with the assistance of others.

38. In reaching the foregoing conclusion the Panel notes that M. and V. who were caught with the same urine sample as the Appellant, accepted their sanctions, thereby conceding that they had been involved in a doping offence and that it had occurred. The Panel rejects the

Appellant's explanation that M. and V. agreed to accept their suspension out of fear of getting involved in a battle against the Respondent. Without any cogent evidence that two innocent athletes would accept a one and a half year suspension just prior to the Olympic Games the Panel does not accept the suggestion that these other two athletes accepted a suspension without some reason.

39. Finally, the Appellant did not give any acceptable reasons on why a third party would try to sabotage his urine sample with urine free of a prohibited substance. The normal course of events for sabotage would be the other way around. As Dr Schänzer clearly explained to the Panel, it is only because the three samples of the Appellant, of M. and of V. were analysed together and were following each other in the testing sequence at the Köln Laboratory that the person in charge came across the similarity of the urine samples. It was a pure coincidence that the three identical samples were analysed in sequence and the manipulation recognized. The Köln Laboratory was conducting an analysis for doping substances and not for identical samples. It seems much more plausible that someone who wanted to sabotage a urine sample, would mix it with a prohibited substance.

40. For all the foregoing -mentioned reasons, considering the Appellant's failure to cite any evidence whatsoever that would indicate manipulation by a third party it is beyond a reasonable doubt that manipulation occurred through something that the athlete did or condoned. On these findings of the evidence it has been proven by the Respondent as well as by the circumstances that the Appellant therefore committed a doping offence prohibited by the applicable Anti-Doping Policy.

C. If the Appellant is found responsible for a doping offence, should the loss of the Respondent's internal investigation and other aspects of due process affect the application of the sanctions under the rules?

41. In both the appeal and the post hearing briefs, the Appellant raised several issues related to the deficiencies in the Respondent's internal investigation and appeal process prior to the Appellant taking up the option to bring this appeal to CAS. The Panel finds extremely regrettable the way the Respondent handled the investigations and the appeal process after the sample manipulation had been detected. The Panel agrees with the Appellant when he alleges that the Respondent did not provide him with the opportunity to be heard and to defend himself before the Respondent's appropriate body. The Panel sincerely hopes that the Respondent will make sure that such circumstances should not be repeated again and that the principles of a fair hearing at the first instance will be respected from now on. It is the responsibility and duty of all international sports federations to conduct themselves in a fashion which is beyond reproach and is scrupulously in accordance with the anti-doping rules and policies contained within their organization's rulebook.

42. Before CAS proceeded to accept the jurisdiction conferred upon it by the agreement of the parties it could have sent the matter back to the Respondent to have the local procedures exhausted. It did not do so because the parties were in a dispute concerning how to proceed and found that the solution to that disagreement was to submit the matter, at the Appellant's

election, directly to CAS and forego the internal procedures of the IWF. Therefore, the jurisdiction of CAS is not disputed and has been confirmed by the order of procedure duly signed by the parties. In electing to proceed in this fashion there was no preservation of the claim to the loss of the investigation and other internal aspects of due process.

43. Art. R57 of the Code provides that *"the Panel shall have the power to review the facts and the law"*. Under this provision, the Panel's scope of review is basically unrestricted. It has the full power to review the facts and the law. In other words the Panel has the power to establish not only whether the decision of a disciplinary body being challenged was lawful or not, but also to issue an independent decision based on the Respondent's rules. According to a rule that exists in most legal systems, a complete investigation by an appeal authority, which has the power to hear the case, remedies, in principle, most flaws in the procedure at first instance. Hence, if there had been procedural irregularities in the proceedings before the Respondent, it would be cured by the present arbitration proceedings. Therefore, the Appellant cannot succeed with any argument that there were irregularities in the proceedings before the Respondent's body in the face of its election to proceed directly to CAS without the exhaustion of the internal procedures.

Sanctions

44. The applicable Anti-Doping Policy rules provide:

> *"14.2 Subject to other provisions in this section, sanctions will apply for the following periods:*
>
> *a) a two (2) years suspension for a first offence involving anabolic agents, peptide hormones, masking agents, diuretics and/or pharmacological, chemical and physical manipulation of urine. For a second offence, the sanction is a life suspension".*

45. It is an agreed stipulation that the Appellant was previously suspended for two years for doping on account of a positive test for a substance from the group of anabolic steroids. It is also undisputed that in the appealed decision dated 31 March 2004, the Respondent's competent body reduced the life suspension of the Appellant to 8 years.

46. During the hearing held on 20 September 2004, the Respondent confirmed that it was not asking for a higher suspension than 8 years.

47. For all the reasons set out above, the Panel dismisses the Appellant's appeal and affirms therefore the eight year suspension decided by the Respondent on 31 March 2004.

The Court of Arbitration for Sport rules:

1. The appeal of B. against the decision issued on 31 March 2004 by the International Weightlifting Federation is dismissed.

2. The decision issued by the International Weightlifting Federation on 31 March 2004 concerning B. is upheld.

(…)