Arbitration CAS 2006/A/1102 Johannes Eder v. Ski Austria & TAS 2006/A/1146 World Anti-Doping Agency (WADA) v. Johannes Eder & Ski Austria, award of 13 November 2006

Panel: Mr Hans Nater (Switzerland), President; Mr Andreas Reiner (Austria); Mr Georg Engelbrecht (Germany)

Cross-country skiing
Doping (intravenous infusion of a saline solution)
Validity of disciplinary sanctions under Austrian Law
Proportionality of the sanctions
Presumption of innocence
Requirements for legitimate medical treatment
No significant fault or negligence

1. **In Austrian law, it is generally accepted that an association may impose disciplinary sanctions upon its members if they violate the rules and regulations of the association. The jurisdiction to impose such sanctions is based upon the freedom of associations to regulate their own affairs. The association is granted wide discretion in determining the violations which are subject to sanctions. By voluntarily acceding to the association, an athlete accepts the application of the disciplinary rules und its sanctions.**

2. **A standard suspension of two years is in compliance with the principle of proportionality, as well as a suspension of one year in case of no significant fault or negligence. Austrian law does not require a sanction lower than one year to be fixed in the case of no significant fault or negligence. The sanction is necessary and adequate to secure a worldwide standard in the application of anti-doping rules.**

3. **The presumption of innocence is a concept of criminal law. Disciplinary sanctions imposed by associations are subject to the civil law and must be clearly distinguished from criminal penalties. The shifting of the burden of proof to the athlete to demonstrate that he or she acted without (significant) fault does not conflict with the presumption of innocence. Athletes have a rigorous duty of care towards their competitors and the sports organization to keep their bodies free of prohibited substances. Anti-doping rule violations do not "just happen" but are, in most cases, the result of a breach of that duty of care. This justifies (i) to presume that the athlete acted with fault or negligence and (ii) to shift the burden of proof from the sanctioning body to the athlete to exonerate him- or herself. On the other hand, to impose on the sanctioning body to demonstrate that the athlete acted with fault or negligence would make the fight against doping extremely difficult or impossible.**

4. **The legitimacy of a medical treatment is to be judged according to six tests or criteria: 1) the medical treatment must be necessary to cure an illness or injury of the particular**

athlete; 2) under the given circumstances, there is no valid alternative treatment available, which would not fall under the definition of doping; 3) the medical treatment is not capable of enhancing the athlete's performance; 4) the medical treatment is preceded by a medical diagnosis of the athlete; 5) the medical treatment is diligently applied by qualified medical personnel in an appropriate medical setting; and 6) adequate records of the medical treatment are kept and are available for inspection.

3. **There is no significant fault where an athlete performs on himself an infusion of a product (e.g. saline solution) to cure an established disease, such treatment not being intended to enhance sporting performance but having been recommended by medical doctors in order to cure the disease and the remedy being suitable to it.**

Johannes Eder ("Mr Eder" or "the Athlete"), born on 19 October 1979, is a member of the Austrian Ski Federation ("Ski Austria"). Mr Eder was nominated for the relay competition in the discipline of cross-country skiing at the Olympic Winter Games in Turin taking place on 19 February 2006.

On 18 February 2006, the day before the competition, Mr Eder suffered from severe diarrhoea.

At around 18:30, Mr Eder consulted Dr Peter Baumgartl, the responsible medical doctor of the Austrian Nordic team. Dr Baumgartl, at that moment, attended the ski jumping competition at Pragelato and told Mr Eder that he would contact him later on. Despite the fact that the ski jumping competition took place only a few kilometres from the lodging of Mr Eder, as the traffic was heavy on Saturday, 18 February 2006, the transfer from one place to the other was rather time-consuming and difficult.

Dr Baumgartl did not show up at the team lodgings of the Austrian athletes. After Mr Eder had tried in vain to reach Dr Baumgartl again, at around 20:00, he contacted his private medical doctor, Dr Lechner, a former medical doctor of Ski Austria. Dr Lechner recommended Mr Eder to inject himself a saline solution by infusion.

At around 20:15, shortly after Mr Eder had started to inject himself a saline solution by infusion, the Italian "Polizia Giudiziaria" arrived at the premises of the Austrian athletes, presented a search warrant, searched the house and carried out body checks as well as doping tests on the athletes. In the bedroom of Mr Eder, hidden under the bed, the Italian police found a used infusion bottle with rests of a saline solution and a used infusion needle.

The doping test on Mr Eder did provide no adverse analytical finding.

On 12 May 2006, Ski Austria's disciplinary committee (*"Disziplinarausschuss"*) took the following decision:

***"Johannes Eder** ist*

schuldig,

er hat anlässlich der Olympischen Winterspiele in Turin am 18.2.2006 im Quartier als Skilangläufer des ÖSV in Pragelato durch Eigenverabreichung einer Kochsalzlösung in Form einer Infusion gegen Punkt 2.6.3 der Verhaltensordnung des ÖSV (Dopingvergehen-Anwendung einer unerlaubten Methode) verstossen und wird hiefür gemäss Punkt 4.8 der Verhaltensordnung des ÖSV in Anwendung des Artikels 2.2 der Fis-Anti-Dopingregeln bzw. des identen Artikels des World Anti Dopingcodes in Verbindung mit Artikel 10.5.2 und in weiterer Verbindung mit Artikel 10.8 mit der

Sperre von einem Jahr, beginnend mit 18.2.2006

bestraft.

Rechtsmittelbelehrung:

Gegen dieses Disziplinarerkenntnis ist gemäss Artikel 13.2.1 der Fis-Anti-Dopingregeln bzw. des WADA-Antidopingcodes die Berufung an das Sportsschiedsgericht (Cour of Arbitration for Sport "CAS") zulässig. Die Berufung ist binnen 21 Tagen ab Zustellung des Disziplinarerkenntnisses an das Sportschiedsgericht in Lausanne einzubringen (Artikel 13.5 Fis-Antidopingregeln bzw. WADA-Antidopingcode)".

On 2 June 2006, Mr Eder filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the decision of 12 May 2006 by Ski Austria.

On 16 August 2006, WADA, on its part, filed a Statement of Appeal against Ski Austria's decision of 12 May 2006.

Upon WADA's proposal and the parties' agreement, the CAS joined the procedures in the cases Eder versus Ski Austria and WADA versus Ski Austria. On 27 September 2006, a hearing was held in Zurich.

LAW

Jurisdiction of the CAS

1. The jurisdiction of the CAS derives from Article 4.8 of Respondent's Order of Conduct (*"Verhaltensordnung für die Angehörigen der Nationalkader und Mannschaften des Österreichischen Skiverbandes"*) in connection with Article 13.2.1 of the FIS Anti-Doping Rules. In addition, neither party raised any objection to the jurisdiction of the CAS before or during the hearing. Accordingly, the jurisdiction is established.

2. WADA's right to appeal as well as the respective jurisdiction of the CAS arise from article 13.2.3 of the FIS Anti-Doping Rules. Therefore, the objection raised by the Athlete has no grounds.

Respect of the Time Limit for Appeal

3. It remained uncontested and is not at issue in the present proceedings that the Athlete's appeal was made in time.

4. With respect to the appeal of WADA, the Athlete claims that it had not been filed within due time.

5. The relevant Article 13.5 of the FIS Anti-Doping Rules, so far as material, reads:

*"**13.5 Time for Filing Appeals.** […] 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:*

a) 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;

b) If such a request is made within the ten-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".

6. Ski Austria informed WADA of its decision rendered on 12 May 2006 with letter of 18 May 2006 (Thursday). WADA contends that it received said letter on 22 May 2006 (Monday). WADA was unable to offer any proof for the receipt of the letter on 22 May 2006. In the Panel's view, it seems more than implausible that a letter posted in Austria on Thursday would arrive at the addressee in Switzerland one day later, i.e. on Friday. On Saturday, WADA is not supposed to receive any letters sent by registered mail. Accordingly, the Panel accepts without hesitation WADA's submission that the letter arrived on Monday, 22 May 2006.

7. On 1 June 2006, within the time limit provided for in Article 13.5 lit. a of the FIS Anti-Doping Rules, WADA requested the case file. The file was sent by Ski Austria to WADA's address in Canada on 17 July 2006 and was received there on 26 July 2006. WADA submitted its statement of appeal to CAS on 16 August 2006 and therewith observed the time limit set in Article 13.5 lit. b of the FIS Anti-Doping Rules.

8. Accordingly, WADA's appeal was filed in due time and is admissible.

Applicable Law

9. Article R58 of the Code of Sports-related Arbitration ("the Code") provides that 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 sport-related body which has issued the challenged decision is domiciled.

10. In the present case, pursuant to Article 4.8 of Ski Austria's Order of Conduct, the FIS Anti-Doping Rules apply. Therefore, the Panel shall decide the dispute according to these Rules and, as Ski Austria has its domicile in Austria and in the absence of a choice of law by the parties, according to Austrian law. The proceedings are subject to Articles R47 et seq. of the Code, and to the provisions of Chapter 12 of the Swiss Private International Law Act.

Merits

A. The Validity of the Applied Anti-Doping Rules

a) Is Rule M2.b of the Prohibited List 2006 valid?

11. The Athlete submits that the prohibition of intravenous infusions provided for in Rule M2.b of the Prohibited List 2006 is incompatible with
    (i) the Austrian law of associations,
    (ii) the principle of proportionality of the Austrian law,
    (iii) the athlete's personal right to choose the kind of therapy and to choose a most effective treatment of an illness,
    (iv) the athlete's freedom of economic pursuit protected by Article 6 "Staatsgrundgesetz" (StGG),
    (v) the right to sufficient and efficient therapy pursuant to section 133 para. 2 of the "Allgemeines Sozialversicherungsgesetz" (ASVG) and
    (vi) the principle *"nulla poena sine lege stricta"* pursuant to Article 18 "Bundes-Verfassungsgesetz" (B-VG) and Article 7 ECHR.

12. In addition, the Athlete asserts that the disciplinary punishment of an association can be – and is in the present case – *contra bonos mores* in terms of section 879 of the Austrian Code on Civil Law ("ABGB") and points out that Rule M2.b is a unilateral norm issued by superior monopolising associations and, being highly vague, according to section 915 ABGB has to be interpreted in favour of the athlete. The Athlete submits that Rule M2.b is null and void and thus inapplicable.

13. In Austrian law, it is generally accepted that an association may impose disciplinary sanctions upon its members if they violate the rules and regulations of the association. The jurisdiction to impose such sanctions is based upon the freedom of associations to regulate their own affairs. The association is granted wide discretion in determining the violations which are subject to sanctions. By voluntarily acceding to the association, the athlete has accepted the application of

the disciplinary rules und its sanctions. Hence, the Panel sees no reason why Rule M2.b should be incompatible with the mentioned provisions of the Austrian law.

14. Article 6 StGG as well as Art 18 B-VG and Art 7 ECHR are fundamental rights protecting citizens against violations of such rights by the state and its organs. These provisions are therefore not applicable to legal relationships between private entities such as associations and its members.

15. Section 133 ASVG para 2 provides for sufficient and efficient therapy granted to the insured by the compulsory health insurance. The provision defines the scope of benefits the insurance is obligated to provide, but does not entail the athlete's right to inject himself a saline infusion under particular circumstances.

16. The athlete's personal right to choose the kind of therapy and to choose a most effective treatment of an illness is not violated by Rule M2.b because it does not prevent the athlete from seeking a doctor's advice and professional medical treatment.

17. Rule M2.b is an anti-doping rule adopted to safeguard the purposes and interests of an association such as Ski Austria. The rule is necessary and adequate in order to prevent athletes from manipulating blood testing results. The overall interest of the fight against doping justifies that athletes must adhere to prohibitions as stated in Rule M2.b. The Panel is of the opinion that this Rule does not contradict the principle of proportionality and is therefore also in compliance with bona mores according to section 879 ABGB.

b) Are the Articles 10.2, 10.5.1 and 10.5.2 of the FIS Anti Doping-Rules valid?

18. The Athlete, referring to Article 10.5.1 (burden of proof) and Article 10.5.2 in connection with Article 10.2 (minimum doping ban of 1 year) of the FIS Anti-Doping Rules, takes the position that these provisions
    (i) are absolutely disproportional, in particular with respect to practice bans in other areas of the Austrian law,
    (ii) they violate Article 6 para 2 ECHR (presumption of innocence), and
    (iii) being an excessive conventional penalty, are *contra bonos mores* according to section 879 ABGB.

19. Hence, in the Athlete's opinion, said Articles should be deemed null and void.

20. The Panel considers that a standard suspension of two years is in compliance with the principle of proportionality, as well as a suspension of one year in case of no significant fault or negligence. The Austrian law does not require a sanction lower than one year to be fixed in the case of no significant fault or negligence. The sanction is necessary and adequate to secure a worldwide standard in the application of anti-doping rules to which Ski Austria is committed as

the national skiing federation. Even if, under Austrian law, the rules applicable to conventional penalties applied also to disciplinary sanctions of associations – which is not the case – the suspension of one year is not excessive. The athlete was clearly aware of the sanctions when he acceded to the association of Ski Austria. The sanctions are therefore not against *bona mores* according to section 879 ABGB. Hence, Article 10.5.1 and 10.5.2 in connection with Article 10.2 of the FIS Anti-Doping Rules comply with Austrian law.

21. The presumption of innocence is a concept of criminal law. Disciplinary sanctions imposed by associations are subject to the civil law and must be clearly distinguished from criminal penalties. The shifting of the burden of proof to the athlete to demonstrate that he or she acted without (significant) fault does not conflict with the presumption of innocence. Athletes have a rigorous duty of care towards their competitors and the sports organization to keep their bodies free of prohibited substances. Anti-doping rule violations do not "just happen" but are, in most cases, the result of a breach of that duty of care. This justifies (i) to presume that the athlete acted with fault or negligence and (ii) to shift the burden of proof from the sanctioning body to the athlete to exonerate him- or herself. On the other hand, to impose on the sanctioning body to demonstrate that the athlete acted with fault or negligence would make the fight against doping extremely difficult or impossible.

c) Intermediate Result

22. Rule M2.b of the Prohibited List as well as Articles 10.5.1 and Article 10.5.2 in connection with Article 10.2 of the FIS Anti-Doping Rules are in compliance with Austrian law, and, therefore, applicable in the case at hand.

B. Has a doping offence been committed?

23. Article 2 of the FIS Anti-Doping Rules 2005/2006 rules:

"Article 2 Anti-Doping Rule Violations

The following constitute anti-doping rule violations:

2.1 […]

2.2 Use or Attempted Use of a Prohibited Substance or a Prohibited Method.

[…]".

24. Rule M2.b of the relevant Prohibited List provides under the heading "Chemical and Physical Manipulation":

"Intravenous infusions are prohibited, except as a legitimate acute medical treatment".

25. The parties are in disagreement on whether the Athlete may rely on the exception provided for in Rule M2.b of the Prohibited List.

26. Consequently, the Panel has to consider whether the administering of an intravenous infusion of a saline solution by the Athlete constituted a "legitimate acute medical treatment".

27. In the case CAS 2002/A/389-393, the (earlier) Panel identified six tests or criteria by which the legitimacy of a medical treatment would be judged. They were the following:
    (1) The medical treatment must be necessary to cure an illness or injury of the particular athlete.
    (2) Under the given circumstances, there is no valid alternative treatment available, which would not fall under the definition of doping.
    (3) The medical treatment is not capable of enhancing the athlete's performance.
    (4) The medical treatment is preceded by a medical diagnosis of the athlete.
    (5) The medical treatment is diligently applied by qualified medical personnel in an appropriate medical setting.
    (6) Adequate records of the medical treatment are kept, and are available for inspection.

28. These criteria were identified before Rule M2.b of the Prohibited List came into effect. Even so, they can be adduced as a guideline regarding the interpretation of said Rule.

29. The Panel has no basis to put into question that the Athlete suffered from severe diarrhoea on the evening of 18 February 2006. It is true that the Athlete, even so he stopped the infusion after 15 to 20 minutes, intended to participate in the relay the next day. As his forerunners lost considerably time in comparison with the competitors, the officials did not let him start. Therefore, the Panel has no knowledge whether the Athlete would have been capable of racing.

30. Furthermore, the Panel got the impression that an infusion of a saline solution works as an effective relief against the loss of liquid caused by diarrhoea. The Panel accepts that a saline solution is not a substance capable to enhance an athlete's performance.

31. However, the Panel finds that in this case the other elements of legitimate medical treatment were not met: The intravenous infusion was administered by the Athlete himself, in his bedroom. The Athlete was not examined by a medical doctor prior to the administering of the infusion. There were no medical personnel present when the Athlete set himself the infusion. And finally, no records of any kind were drawn.

32. The Panel concludes that the infusion of a saline solution administered by the Athlete on himself did not comply with the requirements for legitimate medical treatment and therefore must be considered as a doping offence.

C. Sanction

a) The Relevant Rules

33. With regard to sanctions, the relevant FIS Anti-Doping Rules provide, so far as material, as follows:

*"**10.2 Imposition of Ineligibility for Prohibited Substances and Prohibited Methods**. […] the period of Ineligibility imposed for a violation of […] Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) […] shall be:*

First violation: Two (2) years' Ineligibility".

34. And:

"10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances.

10.5.1 If the Athlete establishes in an individual case involving […] Use of a [...] Prohibited Method under Article 2.2 that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. […]

10.5.2 […] 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. […]".

35. In Appendix 1 of the FIS Anti-Doping Rules, the terms "No Fault or Negligence" and "No Significant Fault or Negligence" are defined as follows:

"No Fault or Negligence. The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she has Used or been administered the Prohibited Substance or Prohibited Method".

"No Significant Fault or Negligence. The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation".

b) No Fault or Negligence or No Significant Fault or Negligence?

36. The establishment of a doping offence *prima facie* requires a sanction of a period of Ineligibility under Article 10.2 of the FIS Anti-Doping Rules for a first offence of two years.

37. However, the Panel has to examine whether the proven circumstances are such that either *No Fault or Negligence* or *No Significant Fault or Negligence* has occurred.

38. The following factors have to be taken into account:

- The Athlete suffered from severe diarrhoea the evening before the relay competition he was supposed to participate took place.
- The Athlete contacted the responsible team doctor. The team doctor was not available to assist him respectively put him off. He told the Athlete that he would contact him later on and considered injecting him a saline solution by infusion.
- Since the team doctor was not available to assist him, the Athlete consulted his private medical doctor on the phone. Dr Lechner instructed him to administer himself a saline solution by infusion.
- The Athlete was in a stressful situation as
  i) at the eve of the most important competition of his sports life, he was confronted with a disease putting at risk his participation;
  ii) his non-participation would have hindered the Austrian team to participate in the relay competition (as there were no replacement skiers);
  iii) the possibility to treat his medical condition effectively by the infusion of a saline solution was brought up by two medical doctors;
  iv) time was working against him, as he did not know whether and when the team doctor would be able to reach him and he knew that an infusion lasts 1 to 1.5 hours.

39. Ski Austria took the view that the Athlete was not without any fault or negligence when using the Prohibited Method, as it could have been expected that he had doubts whether he was allowed to do what he did. However, Ski Austria, taking into account the circumstances described above, found that the Athlete's behaviour was only slightly negligent, since the subjective elements of the doping offence were missing to a large extend. Therefore, Ski Austria concluded that it had the discretionary powers of the Exceptional Circumstances provision in Article 10.5.2 of the FIS Anti-Doping Rules.

40. The Panel is not disposed to disagree with Ski Austria's assessment: The Athlete tried in vain to get medical assistance by his team doctor. He knew that the team doctor considered or planned to treat him by performing an infusion of saline solution. The Athlete could assume that the performing of such infusion by the team doctor would not have been a doping offence under Rule M2.b of the Prohibited List. His private medical doctor likewise was of the opinion that in his case the infusion of a saline solution was indicated and recommended him to perform on himself such infusion. Of course it would have been advisable for the Athlete to await the arrival of the team doctor or to try his best to get assistance by any other medical doctor. The fact that he lost his nerves, followed his private doctor's advice and performed the infusion himself does him no credit. Nevertheless, under the given circumstances, it seems difficult to find significant fault in it.

41. In addition, the Panel is of the opinion that with regard (and only with regard) to the question of the degree of the Athlete's fault, the vagueness of the provision in Article M2.b of the Prohibited List should be taken into consideration. The Athlete, when using a Prohibited

Method, (i) did so based on a medical doctor's disposition, (ii) with a view to cure a disease and (iii) using a remedy which in fact is suitable to counteract the loss of liquid caused by diarrhoea. Although it is true that no athlete can hide behind ignorance, the Panel understands that the Athlete, being in distress and let down by the team doctor, was inclined to take the infusion of the saline solution as a "legitimate acute medical treatment".

42. By weighing up all of the listed elements, the Panel reaches the conclusion that the Athlete acted without significant fault.

c) Period of Ineligibility

43. The period of Ineligibility under Article 10.2 of the FIS Anti-Doping Rules for the first offence is two years. That period may be reduced by Article 10.5.2 of the FIS Anti-Doping Rules but may not be less than one half of the two years otherwise applicable. Exercise of discretion accordingly allows imposition of a sanction between one and two years.

44. Ski Austria imposed the minimum period of Ineligibility of one year. While Ski Austria's verdict may be thought to err, if at all, on the side of generosity, the Panel would not dissent. In the Athlete's favour weigh that he did not have the intention to wrongfully enhance his performance or to mask prohibited substances or methods. He did not seek to gain advantage over his competitors. Furthermore, it has to be mentioned that the Athlete, since the beginning of the proceedings, did always cooperate with the authorities and did not embark on a strategy of obstruction.

45. As a result, the Panel does not feel disposed to overturn Ski Austria's verdict.

The Court of Arbitration for Sport rules that:

1. The appeal filed by Johannes Eder on 2 June 2006 is dismissed.

2. The appeal filed by WADA on 16 August 2006 is dismissed.

3. The decision issued by the Austrian Ski Federation on 12 May 2006 is confirmed.

(…)

6. All other claims are dismissed.