



**Arbitration CAS 2013/A/3241 World Anti Doping Agency (WADA) v. Comitato Olimpico Nazionale Italiano (CONI) & Alice Fiorio, award of 22 January 2014**

Panel: Mr Marco Balmelli (Switzerland), Sole arbitrator

*Softball*

*Doping (whereabouts failures)*

*Minimum sanction for whereabouts failures*

*Substantive change of the WADA Code*

1. According to art. 10.3.3 WADA Code, the sanction for a violation of art. 2.4 WADA Code (whereabouts filing failures and/or missed tests) is a period of ineligibility of at minimum one year and at a maximum two years. Art. 10.5.2 WADA Code regarding reduction of the period of ineligibility based on no significant fault or negligence cannot apply to further reduce a sanction for a violation of art. 2.4 WADA Code.
2. As a signatory of the WADA Code, CONI must implement the articles (and corresponding comments) of the WADA Code listed in its art. 23.2.2 without substantive changes. The sanction regime on individuals (art. 10 WADA Code) has been implemented correctly in the (Italian) Norme Sportive Antidoping (NSA). As a consequence of art. 23.2.2 WADA Code, the corresponding articles of the NSA shall be interpreted in the same manner as the WADA Code. Therefore, by applying art. 4.5.2 NSA (equivalent to art. 10.5 WADA Code) to reduce a sanction for whereabouts filing failures and/or missed tests below the minimum sanction of one year, CONI introduced a substantive change and the sanction is neither in compliance with the WADA Code nor the NSA.

**I. PARTIES**

1. The World Anti-Doping Agency (“WADA” or the “Appellant”) is a Swiss private law foundation with its seat in Lausanne, Switzerland, and its headquarters in Montréal, Canada. WADA is the global regulator of the World Anti-Doping Agency Code (“WADA Code”).
2. The Comitato Olimpico Nazionale Italiano (“CONI” or the “First Respondent”) is a member of the International Olympic Committee (IOC) and is responsible for the development and management of sports activity in Italy. As a signatory of the WADA Code, CONI is the national anti-doping organisation in Italy recognised by WADA.

3. Ms. Alice Fiorio (“Second Respondent” or “Athlete”) is an Italian professional softball player.

## **II. FACTUAL BACKGROUND**

### **A. Background Facts**

4. Below is a summary of the relevant facts and allegations based on the parties’ written submissions and evidence adduced. Additional facts and allegations found in the parties’ written submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his award only to the submissions and evidence it he considers necessary to explain his reasoning.
5. The award manly concerns the interpretation and implementation of the WADA Code and its sanction regime by the Italian anti-doping agency CONI. The factual background is undisputed and summarises as follows:
6. As a softball player on a national level and member of the Federazione Italiana Baseball Softball (“FIBS”), the Athlete has been identified by the Ufficio di Procura Antidoping of CONI (“UPA”) for inclusion in the Registered Testing Pool on 31 May 2011. By signing the corresponding receipt on 27 August 2011, the Athlete confirmed that she was aware of her duties to file her accurate current location information (“whereabouts information”) according to Article 14.3 of the WADA Code.
7. On 26 July 2012, the UPA asked the Athlete to explain why she had missed to file her whereabouts information for the period as from 1 July 2012 until 30 September 2012. After this request remained unanswered, the UPA informed the Athlete on 3 September 2012 that her omission constituted a filing failure (“first failure”).
8. The Athlete also failed to file her whereabouts information for the period 1 October 2012 until 31 December 2012 for which she did not provide justification either. Hence, the UPA informed the Athlete on 8 November 2012 that her omission constituted another filing failure (“second failure”).
9. On 14 February 2013, a doping control officer wanted to conduct an out-of-competition doping control on the Athlete in accordance with her whereabouts information. Although her whereabouts information stated, that she was present at the campus of her softball club, the Athlete was not present. On the telephone, she explained to the doping control officer that she was in Turin and could not return until the next day. She stated that she had to see her doctor in Turin and forgot to update her whereabouts information as she was preoccupied with her physical state. The UPA did not regard this explanation as a valid justification for the missed test and communicated to the Athlete that she committed a so called missed test (“third failure”).

10. As a consequence, the UPA informed the Athlete that she had violated Article 2.4 of the Norme Sportive Antidoping (“NSA”) due to three filing failures/missed test within 18 months.

**B. Proceedings before the CONI National Anti-Doping Tribunal (“CONI” or “TNA”)**

11. After a hearing exercised by the UPA, the case was handed to the CONI National Anti-Doping Tribunal, requesting an ineligibility of one year and a fine of 500 Euros.
12. On 21 May 2013, the Athlete filed a statement of defence, requesting an ineligibility of only 6 months and no fine due to a reduction for no significant fault or negligence (art. 4.5.2 NSA).
13. On 23 May 2013, the UPA replied that the minimum duration of ineligibility due to violation of art. 2.4 NSA is one year and cannot be reduced any further.
14. On 30 May 2013, CONI rendered its decision (“CONI award”). It stated that art. 4.5.2 NSA can be applied when ruling over a breach of art. 2.4 NSA and reduced the sanction of one year by half due to no significant fault or negligence. Accordingly, CONI imposed a period of six months ineligibility on the Athlete (from 30 May 2013 until 29 November 2013).

**III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

15. On 8 July 2013, the Appellant filed a statement of appeal/appeal brief against the CONI award with the Court of Arbitration for Sport (“CAS”) in accordance with Article R48 of the Code of Sports-related Arbitration Rules (the “Code”). Furthermore, the Appellant requested that the appeal be decided by a Sole Arbitrator.
16. On 24 July 2013, CONI submitted its answer.
17. On 15 August 2013, the Appellant filed an additional submission, bringing to the attention to the Sole Arbitrator a recent CAS decision (Oceania Registry – Ref. A1/2013).
18. After the documents could not be delivered to the Second Respondent, the Appeal Brief as well as all correspondence up to that date were sent to the Second Respondent on 18 September 2013.
19. On 4 October 2013, the Second Respondent submitted her arguments, seeking for dismissal of the appeal, with the Appellant who forwarded it to CAS on 8 October 2013.
20. On 8 October 2013, the case was handed to the Sole Arbitrator.
21. On 31 October 2013, the Appellant stated his preference to have issued an award based on the parties’ written submissions and commented on the First Respondent’s Answer.

22. Further to an evidentiary request from the Sole Arbitrator, the First Respondent submitted the TNA complete case file on 7 November 2013 and underlined that it would not take an active part to the present procedure and therefore leave the issue regarding the holding, or not, of a hearing to the Sole Arbitrator's discretion. On 8 November 2013, the Second Respondent asked for legal aid in the procedure at hand and asked for the Legal Aid Application Form. The same day, the Second Respondent was provided with the Application Form by the CAS Counsel. The Second Respondent however failed to return this form to the CAS Court Office.
23. On 12 November 2013, the CAS Court Office forwarded the TNA complete case file, it received on 11 November 2013, to the Sole arbitrator and to the relevant parties.
24. On 3 December 2013, the parties were informed that Sole Arbitrator had decided to issue his award on the basis of the CAS file, which includes the CONI file. Further, the Sole Arbitrator accepted the Appellant's submission dated 31 October 2013 and invited both Respondents to reply to such observations within a week. None of the Respondents submitted any answer to the Appellant's observations dated 31 October 2013.
25. The Order of Procedure, including the agreement on submitting an award based on the file and the parties' submissions, was signed by the Appellant 17 December 2013, by the First Respondent 18 December 2013 and by the Second Respondent 19 December 2013.

#### **IV. SUBMISSIONS OF THE PARTIES**

26. The Appellant requested for relief as follows:
  1. *The appeal of WADA is admissible.*
  2. *The decision rendered by the CONI National Anti-Doping Tribunal on 30 May 2013 in the matter of Ms Alice Fiorio is set aside.*
  3. *Ms. Alice Fiorio is sanctioned with a one-year period of ineligibility starting on the date on which the CAS award is rendered into force. Any period of ineligibility, whether imposed on, or voluntarily accepted by, the Athlete before the entry into force of such award, shall be credited against the total period of ineligibility to be served.*
  4. *WADA is granted an award for costs.*
27. The Appellant's Appeal Brief, in essence, may be summarised as follows:
  - The Second Respondent committed a violation of art. 2.4 NSA/art. 10.4 WADA Code due to three filing failures and missed tests.
  - According to art. 4.3.3 NSA/art. 10.3.3 WADA Code, the period of ineligibility for violations of art. 2.4 WADA Code shall be at a minimum one year and at a maximum two years based on the Athlete's degree of fault.

- In defining the sanction for the Second Respondent, CONI further applied art. 10.5.2 WADA Code, which states the opportunity to reduce the sanction up to a maximum of one half in case the Athlete has no significant fault or negligence.
  - By adapting art. 10.5.2 WADA Code, CONI applied the WADA Code wrongly, since art. 10.5.2 WADA Code cannot apply to reduce a sanction for a violation of art. 2.4 WADA Code. This is evident from: i) The commentary on the WADA Code, ii) its drafting and the drafting of the NSA, iii) CAS case law and iv) academic commentary.
28. The First Respondent's submission, in essence, may be summarised as follows:
- The Appellant properly stated the point of law discussed in this case, namely the question whether art. 10.5.2 can be applied to reduce a breach of art. 2.4 WADA Code.
  - Some commentaries to the articles of the WADA Code are guidelines for the hearing bodies and are not mandatory.
  - The last part of the commentary of art. 10.5.2 WADA Code reads "[...] 10.5.2 *should not be applied in cases where Articles 10.3.3 or 10.4 apply*" instead of "10.5.2 *shall not be applied*". Since it has to be understood as a guideline, CONI should be allowed to make its own judgment call.
29. The Appellant answered to the First Respondent's submission as follows:
- The commentary can in fact be interpreted as a guideline in certain aspects but the word "should" in the commentary on art. 10.5.2 has an imperative force.
  - The commentary clearly states that art. 10.5.2 does not apply in cases involving art. 10.3.3 or 10.4 since these articles already take into consideration the Athlete's degree of fault. By applying 10.5.2, the absence of a severe fault would be counted double, which disagrees with the sanction regime of the WADA Code.
  - Since it is very important to ensure a harmonised anti-doping program, the commentary on the sanction regime of the WADA Code is mandatory.
30. The Second Respondent's submission, in essence, may be summarized as follows:
- She has no financial liquidity to mandate a lawyer.
  - Her test-missing was caused by exceptional circumstances because she had to travel to her hometown to meet her doctor.
  - She cannot understand why WADA files for a prolongation of her ineligibility.
  - She pleads confirmation of the CONI award.

## **V. ADMISSIBILITY**

31. Article R49 of the Code provides as follows:

*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.*

32. According to art. 37 and 38.1 NSA, the Appellant has the right to appeal to the CAS against first instance doping decisions. The deadline is within 30 days with regard to specific deadlines submitted in art. 13.2.3 WADA Code. The last paragraph of art. 13.2.3 WADA Code states:

*The filing deadline for an appeal or intervention filed by WADA shall be the later of:*

- (a) Twenty-one (21) days after the last day on which any other party in the case could have appealed, or*
- (b) Twenty-one (21) days after WADA's receipt of the complete file relating to the decision.*

33. Hence, the deadline to appeal expires 21 days after the last day on which the Second Respondent could have appealed against the CONI award (30 day deadline).
34. In light of the above, considering that the statement of appeal was filed on 8 July 2013 and the Appealed Decision was notified to the parties on 7 June 2013, it follows that the appeal is admissible.

## **VI. JURISDICTION**

35. Article R47 of the Code provides as follows:

*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar 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-related body.*

36. The parties agree that CAS has jurisdiction as confirmed by signing the Order of Procedure. Jurisdiction is also based on art. 38.1 NSA and 13.2.3 WADA Code.

## **VII. APPLICABLE LAW**

37. Article R58 of the Code provides 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 reasons for its decision.*

38. For professional softball players and members of the FIBS, the NSA is applicable (art. 3.1 FIBS statutes). The NSA incorporates the sanctioning regime of the WADA Code. CONI referred in its award to NSA (version 1/2013) as well as the WADA Code (version 2009), whereas the cited articles are identical. As a result, the Sole Arbitrator considers that the NSA and WADA Code shall apply in the case at hand. The laws of Italy apply subsidiary. However, no party led any evidence of the content of relevant Italian law, nor was the Sole Arbitrator asked to consider or apply any provision of Italian law.

39. Namely, the Sole Arbitrator considers the following articles relevant:

Art. 2.4 NSA / 2.4 WADA Code (Anti-Doping Rule Violation)

*“Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing, including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the Athlete shall constitute an anti-doping rule violation”.*

Art. 4.3.3 NSA / art. 10.3.3 WADA Code (Ineligibility for other Anti-Doping Rule Violations)

*“For violations of Article 2.4 (Whereabouts Filing Failures and/or Missed Tests), the period of Ineligibility shall be at a minimum one (1) year and at a maximum two (2) years based on the Athlete’s degree of fault”.*

Art. 4.5.2 NSA / art. 10.5.2 WADA Code (Elimination or Reduction of Period of Ineligibility based on Exceptional Circumstances)

*“If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete’s Sample in violation of Article 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced”.*

40. Subsequently, the Sole Arbitrator will only refer to the articles of the WADA Code.

## VIII. MERITS

### A. Violation of the Anti-Doping Rules

41. It is undisputed that the Second Respondent failed twice to file her whereabouts information without any justified reason and missed an out-of-competition test according to her whereabouts within 18 months. CONI considered the Athlete's arguments for missing the test on 14 February 2013 not to be sufficient to excuse for not complying with her whereabouts information. Considering the CONI award and the files at hand, CONI substantiated its considerations conclusively. Since neither the First nor Second Respondent appealed such conclusion, the Sole Arbitrator observes that the Second Respondent has violated art. 2.4 WADA Code.

### B. Determination of the Sanction, Duration and Reduction of the Sanction

42. According to art. 10.3.3 WADA Code, the sanction for a violation of art. 2.4 WADA Code is a period of ineligibility of at minimum one year and at a maximum two years.
43. Considering all circumstances of the case at hand, the Sole Arbitrator notes that CONI correctly applied the minimum duration of ineligibility of one year. The question at hand is evidently, whether the further reduction of the sanction by applying art. 10.5.2 WADA Code as stated in the CONI award was correct.
44. Regarding this, WADA points out that according to the commentary of the WADA Code (which is directly included in the WADA Code document) art. 10.5.2 cannot apply to reduce a sanction for a violation of art. 2.4 WADA Code.
45. The commentary provides the following:

*Page 58 of the WADA Code document:*

*"[...] Article 10.5.2 should not be applied in cases where Articles 10.3.3 or 10.4 apply, as those Articles already take into consideration the Athlete's or other Person's degree of fault for purposes of establishing the applicable period of Ineligibility".*

*Page 62 of the WADA Code Document:*

*"[...] For example, Article 10.5.2 does not apply in cases involving Articles 10.3.3 or 10.4, since the hearing panel, under Articles 10.3.3 and 10.4, will already have determined the period of Ineligibility based on the Athlete's or other Person's degree of fault".*

46. With respect to the commentary, the Sole Arbitrator deems it evident that art. 10.5.2 does not apply in cases involving a sanction under art. 10.4 WADA Code. This finding is supported by the following:



- The WADA Code expressively names the possibility of the reduction according to art. 10.5 WADA Code in the articles concerned (e.g. art. 10.3.1, 10.3.2).
  - Art. 2.4 WADA Code already includes a range from one to two years depending on the Athlete's fault. As the Appellant pointed out correctly, the mitigating circumstances *would be counted double* if art. 10.5 were applied in a case concerning a violation of art. 4.2 WADA Code.
  - There is no case of the CAS known to the Sole Arbitrator concerning a violation of art. 2.4 WADA Code, in which the sanction period imposed was below one year.
  - Furthermore, the Appellant has provided relevant academic literature supporting its position.
47. The Sole Arbitrator sees no reason to follow CONI's interpretation of the commentary as guideline, especially not regarding the sanctioning regime of the WADA Code. A coherent implementation of the WADA Code is one of its main principles. As a signatory of the WADA Code, CONI must implement the articles (*and corresponding comments*) of the WADA Code listed in its art. 23.2.2 without substantive changes (art. 23 WADA Code). The sanction regime on individuals (art. 10 WADA Code) has been implemented correctly in the NSA. As a consequence of art. 23.2.2 WADA Code, the corresponding articles of the NSA shall be interpreted in the same manner as the WADA Code. By applying 4.5.2 NSA to reduce a sanction for a violation of art. 4.3.3 NSA, CONI introduced a substantive change, namely a sanction below one year. Therefore, the sanction imposed by CONI is neither in compliance with the WADA Code nor the NSA.
48. On all these grounds, the Sole Arbitrator states that a correct and consistent interpretation and application of the sanction system leads to the conclusion that art. 4.5.2 NSA (10.5 WADA Code) is not applicable in cases concerning a violation of art. 4.3.3 NSA (10.4 WADA Code). Hence, the minimum period of ineligibility of one year (art. 4.5.2 NSA) shall apply. Therefore, the appeal is upheld.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules that:**

1. The appeal filed by WADA on 8 July 2013 is upheld.
2. Ms Alice Fiorio is sanctioned with a one-year period of ineligibility starting on the date on which this award enters into force. Any period of ineligibility which was already spent by Alice Fiorio shall be credited against the total period of ineligibility.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.