



Arbitration CAS 2017/O/5193 International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation (ARAF) & Stanislav Emelyanov, award of 15 December 2017

Panel: Mr Murray Rosen QC (United Kingdom), Sole Arbitrator

Athletics (race walking)

Doping (Athlete Biological Passport; blood doping)

Rule 40.8(d) IAAF Competition Rules and third rule violation

In referring to the circumstances in which a second anti-doping rule violation will be considered as a multiple violation (in relation to a first violation), Rule 40.8(d) of the 2015 IAAF Competition Rules *mutatis mutandis* applies to the question of whether a third anti-doping rule violation will be considered as a multiple violation (in relation to a second violation).

I. PARTIES

1. The Claimant, the International Association of Athletics Federations (“the IAAF”) is the international federation governing athletics worldwide and has its registered seat in Monaco.
2. The First Respondent, the All Russia Athletics Federation (“ARAF”) is the national governing body for athletics in Russia and as such, a member federation of the IAAF. ARAF’s registered seat is in Moscow, subject to its suspension as mentioned below.
3. The Second Respondent, Mr Stanislav Emelyanov (“the Athlete”) is a 26 year-old Russian race-walker competing in IAAF international events and thus an International-Level Athlete for the purposes of the IAAF Competition Rules referred to below.

II. FACTUAL BACKGROUND

4. Whilst the Sole Arbitrator has taken account of all the parties’ submissions and exhibits filed, the following summary is intended to assist in explaining the reasoning below and does not purport to be comprehensive. Additional matters may be mentioned if and as considered relevant.

A. Blood doping and ABPs

5. Blood doping is defined by the World Anti-Doping Agency (“WADA”) as *“the misuse of certain techniques and/ or substances to increase one’s red blood cell mass, which allows the body to transport more oxygen*

to muscles and therefore increase stamina and performance”.

6. This may be achieved by various methods, in particular by administering recombinant human erythropoietin (“rEPO”) by injection to trigger erythropoiesis (the stimulation of red blood cells); or by infusing synthetic oxygen carriers or the athlete’s own previously-extracted red blood cells, or a matching donor’s, in order to increase haemoglobin concentration (“HGB”); rEPO is a Prohibited Substance in class “S2. Hormones and related substances”; and synthetic oxygen carriers and blood transfusions are Prohibited Methods under class “M1. Enhancement of oxygen transfer” on the World-Anti Doping Code Prohibited List.
7. To combat blood doping, WADA developed (and in 2009 the IAAF introduced into its blood testing programme) Athlete Biological Passports (or “ABPs”) - electronic records collating a specific athlete’s test results and other data over time, including the values in his or her blood samples of haematological parameters known to be sensitive to changes in red blood cell production - according to WADA’s “ABP Operating Guidelines” and maintained on its web-based database, the Anti-Doping Administration and Management System (“ADAMS”).
8. The values recorded include percentages of reticulocytes, that is, immature red blood cells or (RET%). The ratio of the HGB and the RET% values is used to calculate a further value, known as the OFF-score, which is sensitive to changes in erythropoiesis.
9. Marker values from the blood samples are fed into an “Adaptive Model”, which uses an algorithm which takes into account variability of such values within the population generally and factors affecting the variability of the athlete’s individual values (including gender, ethnic origin and age), in order to establish a longitudinal profile over a period of time with upper and lower limits to a “specificity” of 99% within which the athlete’s values would be expected, assuming normal physiological conditions.
10. The Adaptive Model also calculates the probability of abnormality of the sequence of values in the ABP profile; and each time a blood sample is recorded, the Adaptive Model calculates where the reported HGB, RET% and OFF-score values fall within the athlete’s expected distribution. After each new test, a new range of expected results for the athlete is determined.

B. The Athlete

11. On 15 December 2012 the Athlete was sanctioned by the ARAF Anti-Doping Commission with a two (2) year period of ineligibility commencing on that date in connection with abnormalities in his ABP (“Violation 1”).
12. On 7 April 2017, the Athlete was sanctioned by the Court of Arbitration for Sport (CAS 2016/A/4655) with an eight (8) year period of ineligibility commencing on that date in connection with an Adverse Analytical Finding regarding EPO following an out-of-competition doping test by the IAAF at the race-walking centre in Saransk on 2 June 2015 (“Violation 2”).
13. Between 11 October 2015 and 6 September 2016, 7 ABP blood samples were collected by the IAAF from the Athlete, analysed by the WADA-accredited laboratory in Moscow and logged

in ADAMS using the Adaptive Model. The results as regards his HGB, RET% and OFF-scores, were as follows:

No.	Date of Sample	HGB g/dL	RET%	OFF-score
1.	11 October 2015	16.40	0.79	110.70
2.	15 October 2015	16.80	0.69	118.20
3.	15 February 2016	12.70	1.17	62.10
4.	23 June 2016	14.30	1.19	77.50
5.	24 June 2016	14.60	1.20	80.30
6.	19 July 2016	13.10	0.92	73.50
7.	6 September 2016	12.90	1.05	67.50

C. The Expert Panel

14. The Athlete's ABP was submitted for review on an anonymous basis (using the code "BP99JLA9") to a panel of experts comprising Professors Yorck Olaf Schumacher, Giuseppe d'Onofrio and Michel Audran ("the Expert Panel") in the fields of clinical haematology (diagnosis of blood pathological conditions), laboratory medicine and haematology (assessment of quality control data, analytical and biological variability and instrument calibration) and sports medicine and exercise physiology.
15. The Expert Panel examined the Athlete's ABP and produced a joint report dated 31 January 2017 stating unanimously among other things that:

"... the profile was flagged with abnormalities at 99.0% once for sample 6, once for sample 7, both for low hemoglobin values ... the sequence for hemoglobin is abnormal at >99.9% ... the data of samples 1 and 2 of the athlete bears abnormal features: samples 1 and 2 show high hemoglobin and OFF-score values, paired with relatively low reticulocyte, while samples 4, 5, 6 and 7 show much lower hemoglobin and Off-scores paired with higher and stable reticulocyte. The picture observed in samples 1 and 2 (taken during a short period) is typically observed when red blood cell mass is supraphysiologically elevated (high hemoglobin concentration) and has subsequently lead to downregulation of the erythropoiesis (relatively low reticulocytes). It is characteristic of the use and subsequent discontinuation, an "OFF-phase", of an erythropoietic stimulant or the recent application of a blood transfusion ... in the absence of an appropriate physiological explanation, the likelihood of the abnormality described above being due to blood manipulation, namely the artificial increase of red cell mass using for example erythropoiesis stimulating substances, or blood

transfusion is high” and that “the likelihood of environmental factors or a medical condition causing the described pattern is low -... it is highly likely that a prohibited substance or prohibited method has been used and that it is unlikely that the passport is the result of any other cause”.

16. On 8 February 2017, the IAAF Anti-Doping Administrator wrote to the Athlete notifying him of the alleged abnormalities in his ABP profile and stating that the IAAF was considering charging him but that such charges would not be brought until he had been given the opportunity to provide an explanation for the alleged abnormalities, by 22 February 2017.
17. On 22 February 2017, the Athlete sent an email to the IAAF in which he denied that he had used a Prohibited Substance or Prohibited Method and stating that it would make no sense for him to do so in competition and, without providing any positive explanation for abnormalities in his ABP, commenting as regards samples 1 and 2, that urine taken on the same day did not screen positive for EPO; the samples were taken out of competition; and their analytical reliability were doubtful as they had been analysed by the Moscow laboratory shortly before the revocation of its accreditation.
18. On 5 March 2017, the Expert Panel issued a second joint report commenting on the Athlete’s purported explanations and concluding:

“... In summary, the arguments forwarded by the athlete cannot explain the hematological abnormalities in the BP99JLA9 ABP profile. On the other hand, it is typical to observe such features assuming blood manipulation, notably an artificial increase in red cell mass, likely caused by intake of ESA and/or blood transfusion ... We therefore confirm our previous opinion that it is highly unlikely that this profile is the result of a normal physiological or pathological condition, and it is highly likely that it was caused by the use of prohibited substances or prohibited methods”.

D. The suspension of ARAF

19. ARAF is currently suspended from membership of the IAAF. Such suspension was confirmed by the IAAF Council meeting in Monaco on 26 November 2015 and on 17 June 2016 and 1 December 2016, the IAAF Council decided that ARAF had not met the conditions for reinstatement to membership.

E. The charge

20. By a letter dated 6 March 2017, the Athlete was charged by IAAF with an alleged third anti-doping rule violation in connection with the above abnormalities in his ABP occurring after notification of Violation 2.
21. The Athlete was informed by such letter of his right to request a hearing; he was told that in view of the suspension of ARAF’s membership of the IAAF, his case would be referred to CAS; and he was asked to state a preference by 20 March 2017 as to whether it was heard by a Sole Arbitrator of CAS (with the possibility of a further appeal) in accordance with IAAF Rule 38.3 or a CAS Panel for a single hearing in accordance with IAAF Rule 38.19.

22. By a second letter dated 6 March 2017, the IAAF informed the Athlete that he was provisionally suspended.
23. By an email dated 20 March 2017, the Athlete reiterated his explanation as above but did not otherwise respond to the IAAF as requested.

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT (CAS)

24. On 12 June 2017, the IAAF filed a Request for Arbitration with CAS in accordance with Articles R38 of the Code of Sports-related Arbitration (2017 Edition, “the Code”). The IAAF asked CAS to treat its Request for Arbitration as its Statement of Appeal and Appeal Brief for the purposes of Articles R47 and R51 of the Code and that the matter be submitted to a Sole Arbitrator. The Request for Arbitration contained a statement of facts and legal arguments and included a request for relief.
25. In accordance with the 2015 IAAF Rules and pursuant to Article R29 of the Code, the proceedings were conducted in English.
26. On 16 June 2017, the CAS Court Office initiated the present arbitration and specified that it had been assigned to the CAS Ordinary Arbitration Division but would be dealt with according to the Appeals Arbitration Division rules. The Respondents were invited to submit their Answers but both failed to respond.
27. On 27 July 2017, the CAS Court Office informed the parties that it had not received any communication with regard to the requests included in its letter dated 16 June 2017. The First Respondent was invited to inform the CAS Court Office of whether the Athlete had received the letter of 16 June 2017 and its appendices and the Claimant and First Respondent were invited to communicate the Athlete’s personal address.
28. By a Notice of Formation of Panel dated 3 August 2017, Mr Murray Rosen QC was appointed as sole arbitrator.
29. By letter from the CAS Court Office dated 9 August 2017, the parties were invited to indicate whether they requested a hearing in this matter. The IAAF indicated that it did not. The Respondents again failed to respond.
30. On 5 September 2017, having received from the IAAF a postal address for the Athlete and in the absence of any indication regarding the delivery (or not) of the CAS Court Office letter of 16 June 2017 to the Athlete. The CAS Court Office re-sent this and its other to the Athlete and again invited him to submit an Answer.
31. This letter was delivered to the Athlete on 14 September 2017. It informed him that if he remained silent, it would be considered that he had chosen not to file any written submissions in the matter, and the Sole Arbitrator would proceed without the same.

32. On 27 October 2017, the CAS Court Office issued the Order of Procedure in this case (“the OP”) which it requested the parties to sign. The IAAF did so on the same day. As before, neither Respondent replied.
33. As recited in the OP and pursuant to Article R57 of the Code, the Sole Arbitrator considers himself to be sufficiently well informed to decide this matter without the need to hold a hearing.

IV. THE PARTIES’ SUBMISSIONS

34. In summary, again the IAAF submitted that the Athlete’s ABP and the reports thereon by the Expert Panel, in the absence of proper explanation by the Athlete for the abnormalities in his samples, constituted clear and reliable proof of blood doping subsequent to notification of Violation 2 contrary to the applicable IAAF Rules and that the appropriate sanction in the case of such a third violation was a lifetime ban.
35. The IAAF sought by way of relief:
- “(i) CAS has jurisdiction to decide on the subject matter of this dispute;*
 - “(ii) The Request for Arbitration of IAAF is admissible;*
 - “(iii) The Athlete be found guilty of an anti-doping rule violation in accordance with Rule 32.2 (b) of the IAAF Rules;*
 - “(iv) A lifetime period of ineligibility be imposed upon the Athlete, commencing on the date of the (final) CAS Award;*
 - “(v) The arbitration costs be borne entirely by the First Respondent pursuant to Rule 38 of the IAAF Competition Rules or, alternatively, by the Respondents jointly and severally;*
 - “(vi) The IAAF is awarded a significant contribution to its legal costs”.*
36. Neither the Athlete nor ARAF submitted any response to the Request for Arbitration or to any of the letters from the CAS Court Office referred to above and neither submitted any evidence or arguments against the IAAF’s contentions.

V. JURISDICTION

37. As a consequence of the suspension of its membership, ARAF was and remains in no position to conduct the process and hearing of the IAAF’s charge against the Athlete by way of delegated authority from the IAAF pursuant to Rule 38 of the 2015 IAAF Rules and there is no point in seeking to impose a deadline on it to do so.
38. As a result, the IAAF is entitled pursuant to Rule 38.3 of the 2015 IAAF Rules to refer the case of the Athlete to CAS, to be heard in the first instance by a Sole Arbitrator.

39. Consequently, it follows that CAS has jurisdiction over the present matter and the present case shall be dealt with in accordance with the Appeals Arbitration rules.

VI. ADMISSIBILITY

40. Rule 38.3 of the 2015 IAAF Rules provides:

“... If a hearing is requested by an Athlete, it shall be convened without delay and the hearing completed within two months of the date of notification of the Athlete’s request to the Member ... If the Member fails to complete a hearing within two months, or, if having completed a hearing, fails to render a decision within a reasonable time period thereafter, the IAAF may impose a deadline for such event. If in either case the deadline is not met, the IAAF may elect, if the Athlete is an International-Level Athlete, to have the case referred directly to a single arbitrator appointed by CAS. The case shall be handled in accordance with CAS rules (those applicable to the appeal arbitration procedure without reference to any time limit for appeal). The hearing shall proceed at the responsibility and expense of the Member and the decision of the single arbitrator shall be subject to appeal to CAS in accordance with Rule 42 ...”.

41. The Request for Arbitration was not subject to a specified time limit but was made with reasonable expedition and indeed included all of IAAF’s requests, arguments and evidence sufficient to constitute IAAF’s Statement of Appeal and Appeal Brief for the purposes of Articles R47 and R51 of the Code.
42. Pursuant to Rule 47 of the IAAF Rules, the statute of limitation for anti-doping rule violation proceedings is “ten years from the date on which the anti-doping rule violation is asserted to have occurred”.
43. As a result, the Sole Arbitrator finds that the IAAF’s Request for Arbitration filed on 12 June 2017 is admissible, because the 7 samples that are part of the present proceedings were collected from the Athlete between 11 October 2015 to 6 September 2016 and the Athlete was provisionally suspended on 6 March 2017.

VII. APPLICABLE LAW

44. Article 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”.

45. As an International-Level Athlete participating in IAAF events, the Athlete is bound by the IAAF’s Rules.

46. The IAAF's current Anti-Doping Rules which entered into force on 3 April 2017 provide by Article 21.3 that anti-doping rule violations committed prior to that date are subject to the rules (including procedural rules) in place at the time of the alleged violation. The IAAF Competition Rules in force at the time of the alleged anti-doping rule violation in October 2015 were those effective from 1 January 2015 ("the 2015 IAAF Rules").
47. The 2015 IAAF Rules include the following:
- Rule 30.1 - "... *the Anti-Doping Rules shall apply to the IAAF, its Members and Area Associations and to Athletes, Athlete Support Personnel and other Persons who participate in the activities or Competitions of the IAAF, its Members and Area Associations by virtue of their agreement, membership, affiliation, authorisation or accreditation*".
- Rule 42.23 - "*In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Anti-Doping Regulations)*".
- Rule 42.24 - "*In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitrations shall be conducted in English, unless the parties agree otherwise*".
48. Accordingly, the Sole Arbitrator considers that the 2015 IAAF Competition Rules are applicable in this case and Monegasque law should apply on a subsidiary basis.

VIII. MERITS

A. Violation

49. Rule 32.2(b) of the 2015 IAAF Rules forbids the use or attempted use of Prohibited Substances or Prohibited Methods. Under IAAF Rule 33.3, this may be proved by any reliable means "*including, but not limited to, evidence of third persons, witness statements, experts' reports, documentary evidence and conclusions drawn from longitudinal profiling*".
50. Blood doping and the nature and effect of an athlete's "ABP" have been considered in many previous CAS cases, including CAS 2010/A/2235; CAS 2012/A/2773; CAS 2014/A/3614 & 3561; CAS 2016/0/4463; CAS; CAS 2016/0/4469; and CAS 2016/0/4481.
51. It is well established under this jurisprudence that the ABP model is a "reliable means" of establishing anti-doping rule violations: see for example paragraph 13 of CAS 2012/A/2773 - "*Systems which make use of these longitudinal profiles have evolved to become widespread and highly effective means of detecting EPO doping*" and paragraphs 278-9 of CAS 2014/A13614 & 3561 in which the Panel stated that it was "*convinced that the ABP Model is a reliable and a valid mean of establishing an ADRV ... numerous peer-reviewed applications have confirmed the ABP's reliability ...*".
52. The Sole Arbitrator accepts the IAAF's submission that the Athlete's ABP profile as analysed by the Expert Panel, in the absence of explanation by the Athlete, constitutes satisfactory evidence that the Athlete has committed the anti-doping rule violation charged in breach of IAAF Rule 32.2(b).

53. Samples 1 and 2 of 11 and 15 October 2015 reveal high HGB (16.4 and 16.8 g/dL) and low RET% (0.79 and 0.69), resulting in very high OFF-score values (110.7 and 118.2). As explained by the Expert Panel, the HGB sequence of the Athlete is abnormal at a specificity of more than 99.9% and the abnormality of samples 1 and 2 (amidst other samples with lower HGB and higher RET% values) is symptomatic of the use and discontinuation of an erythropoiesis stimulating agent (“ESA”).
54. The Athlete offered no pathological or environmental explanation for the abnormal blood values found, doing no more than making unsubstantiated denials of doping to the IAAF, which the Expert Panel’s second report adequately addressed and refuted. Moreover he failed, despite proper opportunity, to defend the IAAF’s charge before CAS or respond with any evidence or submissions.
55. The right of both Respondents to be heard has been fully respected and the Sole Arbitrator is satisfied that the Athlete was guilty of the violation charged.

B. Period of Ineligibility

56. Rule 40.8(d) of the 2015 IAAF Rules provides as follows:

“For the purposes of imposing sanctions under Rule 40.8, an anti-doping rule violation will only be considered a second violation if it can be established that the Athlete or other Person committed the second anti-doping rule violation after the Athlete or other Person received notice pursuant to Rule 37 or after reasonable efforts were made to give notice of the first anti-doping rule violation; if this cannot be established, the violations shall be considered together as one single first violation and the sanction imposed shall be based on the violation that carries the more severe sanction”.

57. In referring to the circumstances in which a second anti-doping rule violation will be considered as a multiple violation (in relation to a first violation), Rule 40.8(d) of the 2015 IAAF Rules must obviously apply *mutatis mutandis* to the question of whether a third anti-doping rule violation will be considered as a multiple violation (in relation to a second violation).
58. The Athlete must have ceased using the ESA at most 2 to 3 weeks prior to sample 1 taken on 11 October 2015: see the quotation at paragraph 114 of CAS 2012/A/2773 mentioned above -

“... [the] association of high haemoglobin with low reticulocytes is a strong evidence of artificial inhibition of reticulocyte formation caused by the suspension of an ESA [erythropoiesis stimulating agent] (or, less likely, by reinfusion of multiple blood bags). It is an indicator of the so-called OFF phase, which is seen when an ESA has been suspended one[e] to three weeks before, such as is observed in doped athletes before important competitions. When the ESA is stopped, haemoglobin remains high for at least two to three weeks, depending on the dosage, which reticulocytes are reduced because the high haemoglobin inhibits endogenous EPO production”.

59. Accordingly, the Sole Arbitrator is satisfied that the Athlete committed the violation currently charged and found, after being notified of Violation 2 on 10 July 2015. As such, his violation presently charged and found constitutes a third anti-doping rule violation for the purposes of

Rule 40.8(d) of the 2015 IAAF Rules (under which successive anti-doping rule violations, committed after notification of a previous violation or violations within a 10-year period, are totted up to arrive at the prescribed range of sanctions).

60. Under Rule 40.8(b) of the 2015 IAAF Rules, the applicable sanction for a third anti-doping rule violation within 10 years is a lifetime period of ineligibility (unless eliminated or reduced in circumstances which do not apply here). In accordance with Rule 40.10 of the 2015 IAAF Rules that period of ineligibility will commence on the date of the final CAS Award.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Request for Arbitration filed by the International Association of Athletics Federations against the All Russia Athletics Federation and Mr Stanislav Emelyanov on 12 June 2017 is upheld.
2. Mr Stanislav Emelyanov is found guilty of an anti-doping rule violation in accordance with Rule 32.2(b) of the 2015 IAAF Rules.
3. Mr Stanislav Emelyanov is sanctioned with a lifetime period of ineligibility starting from the date of the final CAS Award.

(...)

6. Any other and further prayers or requests for relief are dismissed.