



Arbitration CAS 2007/A/1416 World Anti-Doping Agency (WADA) & International Association of Athletics Federations (IAAF) v. United States Anti-Doping Agency (USADA) & Lindsey Scherf, award of 11 August 2007

Panel: The Hon. Hugh Fraser (Canada), President; Mr Peter Leaver (United Kingdom); Mr Jeffrey Benz (USA)

Athletics

Doping (failure to obtain an ATUE)

No Significant Fault or Negligence in case of refusal to submit a doping control

There is no Significant Fault or Negligence in case errors made by the IAAF, and by USADA place the athlete in somewhat of a quandary, and where athlete's subsequent error in judgment is a direct result of the errors made by agencies that should have provided better service to the athlete. Albeit the refusal to provide a sample, this case is a rare case in which exceptional circumstances exist and the athlete bears No Significant Fault or Negligence.

The First Appellant, the World Anti-Doping Agency (WADA), is the international independent organisation created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms. It coordinates the development and implementation of the World Anti-Doping Code (the WADC). WADA has its headquarters in Montreal, Canada.

The Second Appellant, the International Association of Athletics Federations (IAAF), governs the sport of athletics throughout the world. The IAAF has its seat in the Principality of Monaco.

The First Respondent, the United States Anti-Doping Agency (USADA) is the national anti-doping organization for the Olympic Movement in the United States. USADA's primary focus is on the areas of Research, Education, Drug Testing and Results Management.

The Second Respondent, Lindsey Scherf, is a 21 year old competitor in the sport of Athletics. She is a citizen of the United States.

Lindsey Scherf is a collegiate distance runner. She is scheduled to graduate from Harvard University in June 2008 with a B.A. in Psychology. During her freshman year at Harvard in 2005, she set an American Junior (under age 20) record for 10,000 meters and ran the 2nd fastest time ever by an American Junior female in the 5,000 meters. She has competed outside the United States on two occasions, the first being the 2005 IAAF World Junior Cross Country Championships, and the most recent being the 2007 Gold Coast Marathon in Australia.

Lindsey Scherf was first diagnosed with exercise induced asthma in 2003. She applied for, and received, an Abbreviated Therapeutic Use Exemption (“ATUE”) for her Flovent asthma medication from the IAAF in 2005 and from USADA in 2006 and 2007.

(...).

In January 2007, Lindsey Scherf travelled to Australia for a semester of study abroad. She decided to enter the Gold Coast Marathon, scheduled to be run in Brisbane, Australia on July 1, 2007, as this would provide her only opportunity to meet the US Olympic Marathon Trials qualifying time.

Ms. Scherf was of the belief that if she ever entered an international competition she would require an ATUE from her International Federation. Her father on her behalf contacted USADA and was advised that a separate IAAF ATUE would be needed, and that USADA would forward Ms. Scherf’s application to the IAAF.

On April 26, 2007, more than nine (9) weeks prior to the Gold Coast Marathon, Ms. Scherf applied for an (ATUE) from the IAAF for Flovent (...).

By late June 2007, Ms. Scherf had still not received word from the IAAF concerning the status of her applications. She diligently followed up with USADA since she understood that this agency had submitted the applications on her behalf. No information was provided to Ms. Scherf or to USADA concerning the status of her TUE applications prior to the start of the Gold Coast Marathon.

Ms. Scherf was aware that if she stopped using her Flovent medication 10-12 days prior to a competition it would be totally out of her system by race day. (...). However, she had contracted a serious throat and lung infection on June 12, 2007, which was three weeks prior to the marathon race.

On June 20, 2007, Ms. Scherf saw Dr. Maria Kowalczyk at the University of Queensland Student Health Office. Dr. Kowalczyk advised her to continue taking Flovent and also prescribed Singular and Ventolin since she had lost her voice and was not well. Dr. Kowalczyk advised Ms. Scherf not to compete in the Gold Coast Marathon due to concerns over her health. She was concerned that Ms. Scherf’s respiratory condition, if untreated, could result in myocarditis, a potentially fatal illness.

On advice from USADA’s TUE Coordinator, Ms. Scherf decided to check with officials responsible for the Gold Coast Marathon to determine if there would be drug testing. She had decided to continue taking her asthma medication due to her respiratory difficulties and had determined that she would not compete in the Marathon if there was to be drug testing, unless her TUE was granted prior to the commencement of the race.

Ms. Scherf continued to communicate with race officials until the day of the marathon. She was advised that there had been no drug testing in the three previous years, and that it was highly unlikely that there would be a last minute decision by the Australian Sports Anti-Doping Authority to carry out drug tests at this competition.

Ms. Scherf then asked the Elite Athlete Service Manager for the Gold Coast Marathon to advise her if he became aware that drug testing would be implemented at the race as stated earlier. She had decided that she would not run the race if so notified. After not receiving any further notification, Ms. Scherf ran the marathon and was the second female finisher in a time of 2:41:19 which was slower than she had hoped for, but good enough to qualify her for the U.S. Olympic trials.

Shortly after finishing the race Ms. Scherf was advised that she had been selected for drug testing. She believed that the drug test would be positive for Flovent and consulted her father in the United States as to what to do.

Mr. Scherf was furious with his daughter for competing without the appropriate TUE or a guarantee that there would be no drug testing following the race. He advised his daughter that she would most likely face a two year ban if she tested positive for Flovent without an IAAF TUE. He thought that the penalty for refusing to provide a drug test might be less, and that the potential to straighten things out after the fact would be better for a refusal, than it would be for a failed test. Ms. Scherf therefore decided that she would not submit to a drug test.

Ms. Scherf's father later realized that he had given his daughter bad advice and left messages for her to ask to be tested the next day. When Ms. Scherf made this request to race officials she was advised that it was too late.

In 2007, the IAAF had apparently posted a list of its international events on its website. This fact was not known to USADA prior to the running of the Gold Coast Marathon. As it turned out, The Gold Coast marathon was not an international event within the meaning of the IAAF rules. Therefore, Ms. Scherf's USADA TUE would have been valid for the Gold Coast Marathon on July 1, 2007.

On or about the 19th of July, 2007, the Australian Sports Anti-Doping Authority (ASADA) notified the International Association of Athletes Federation (IAAF) of Lindsey Scherf's refusal to submit to doping control.

On August 1, 2007, the IAAF asked USA Track & Field (USATF) to undertake results management of the matter as provided for in Rule 37.2 of the IAAF Anti-Doping Rules ("the IAAF ADR").

On August 14, 2007, USATF requested that USADA conduct results management as the national anti-doping organization in the United States. USADA administered Ms. Scherf's case pursuant to the USADA Protocol for Olympic Movement Testing (the "Protocol").

USADA conducted an investigation of the facts of the case. The investigation included a review of the documents provided by ASADA, a review of the correspondence submitted by Ms. Scherf, a telephone interview with Dr. Maria Kowalczyk of the Queensland Health Service Department, electronic communications with representatives of the Gold Coast Marathon and telephone interviews of Ms. Scherf, and her father, John Scherf.

At the conclusion of the investigation, the relevant written documents, as well as a written report concerning the investigation were submitted to USADA's Anti-Doping Review Board (ADRB)

pursuant to Article 9 of the Protocol. The ADRB is an independent body consisting of three individuals independent of USADA with expertise in sports and anti-doping matters. Notice was given to Ms. Scherf of USADA's review pursuant to article 8 of the Protocol and she made a written submission to the ADRB.

The ADRB recommended proceeding with the case as an anti-doping rule violation. Thereafter, Ms. Scherf was charged by USADA with a doping violation and notified that she could receive a period of ineligibility of up to two years.

Pursuant to Article 10 of the Protocol, USADA is required to apply the sanction applicable under the rules of the International Federation and the United States Olympic Committee (USOC) Anti-Doping Policies.

At the conclusion of their investigation USADA offered Ms. Scherf the opportunity to accept a sanction which included a period of ineligibility of one year which was calculated by considering the two year period of ineligibility for a refusal to submit to a drug test under the IAAF rules and a one year reduction in the period of ineligibility for exceptional circumstances consistent with the sanction provisions of the IAAF and USOC rules, and the mandatory provisions of the Code.

Ms. Scherf accepted this resolution by written agreement executed on October 31, 2007, which also provided that her sanction was subject to review and possible appeal by WADA and the IAAF.

On November 2, 2007, USADA informed WADA of the sanction accepted by Lindsey Scherf.

On November 12, 2007, WADA filed with the Court of Arbitration for Sport an appeal against USADA's decision.

On November 22, 2007, the First Appellant filed its Appeal brief.

On December 17, 2007, the First Respondent filed its answer.

On December 27, 2007, the IAAF filed an intervener brief. The IAAF was subsequently admitted to this arbitration procedure as the Second Appellant.

On January 3, 2008, the Second Appellant filed its brief.

On February 4, 2008, the Second Respondent filed her answer.

On May 22, 2008, a hearing was convened at the CAS regional offices in New York.

LAW

Applicable Rules

1. ASADA sent the file to the IAAF pursuant to Article 15.3.1 of the WADC.
2. Lindsey Scherf was not registered in the IAAF Registered Testing Pool, and the Gold Coast Marathon was not a registered IAAF International competition. Therefore, pursuant to Article 37.2 of the IAAF ADR, the results management process is to be conducted by the relevant person or body of the athlete's national federation, i.e. USATF.
3. USATF entrusted USADA to investigate the Lindsey Scherf case and to impose the appropriate sanctions if necessary.
4. The decision that is being appealed was rendered pursuant to the following rules:
 - The Protocol;
 - The USOC National Anti-Doping Policies ("USOC ADP");
 - The IAAF ADR.

Applicable Law

5. Article R58 of the CAS Code provides:

"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".
6. Such provision was expressly mentioned in the Order of Procedure agreed to by the parties.
7. No issue of applicable law arose in the present case.

CAS Jurisdiction

8. The Jurisdiction of the CAS in the present case is based on the USADA Protocol for Olympic Movement Testing and the IAAF Anti-Doping Rules, and is re-confirmed by the signature of the Procedural Order by the parties.
9. Article R57 of the CAS Code provides that on an appeal to CAS the Panel has full power to review the facts and the law.

Issues

10. In light of the admitted anti-doping rule violation by Lindsey Scherf, the sole issue is whether she should have been required to serve the customary two year period of ineligibility.

Summary of the Parties' positions

A. WADA

11. WADA argues that Lindsey Scherf in her letter to ASADA dated July 3, 2007 admitted that in refusing to submit to a drug test, she hoped that *"the penalty for refusing a drug test would be less severe than the penalty for testing positive ..."*. Furthermore WADA asserts that this violation of anti-doping rules should be construed as a severe offence. They add that, according to the revised WADC, scheduled to be introduced in 2009, the applicable sanction in cases of refusal to submit to sample collection could be increased to up to four years where aggravating circumstances exist.
12. WADA maintains that in order to benefit from a reduction of the sanction for No Significant Fault or Negligence, the athlete must establish that 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 relation to the anti-doping rules violation.
13. WADA further submits that such a reduction is meant to occur only in cases where the circumstances are truly exceptional, i.e. when an athlete can show that the degree of fault or negligence in the totality of the circumstances was such that it was not significant in relationship to the doping offence (WADC, comment to Article 10.5.2).
14. WADA points out that alleged irregularities in the TUE procedure or uncertainty about the existence of a TUE can never justify a refusal to submit to sample collection. Furthermore says WADA, Ms. Scherf was fully aware of her obligations and she knowingly chose to refuse to submit to sample collection, accepting the possible consequences of such doping offence, which had been brought to her attention several times.
15. WADA also submits that allegations of physical illness, dehydration, a knee injury, emotional upset, and poor advice from her father do not diminish the athlete's responsibility to submit to drug testing.
16. In WADA's opinion therefore, Lindsey Scherf should not benefit from a reduction of the otherwise applicable sanction of two years.

B. IAAF

17. IAAF Rule 40.1(b) provides that the sanction for a first violation for a refusal to submit to

doping control is a minimum of two years.

18. In accordance with IAAF Rule 40.3, the minimum two year sanction may be reduced on account of there being exceptional circumstances such that the athlete can demonstrate that she bears no significant fault or no significant negligence for the violation; however, the reduced period may be no more than half the minimum period of ineligibility otherwise applicable.
19. No significant fault or no significant negligence is defined in the IAAF rules as follows:
“When exceptional circumstances have been determined in an athlete’s case under Rule 38 to demonstrate that the athlete’s fault or negligence, when viewed in the totality of the circumstances, was not significant in relationship to the anti-doping rule violation”.
20. The IAAF submits that, in determining whether the present case is a truly exceptional case that warrants a reduction in the minimum 2 year sanction, the Panel should have regard to the following three factors:
 - (i) the seriousness of the violation of refusing to submit to doping control;
 - (ii) the nature of the conduct of an athlete who refuses a doping test; and
 - (iii) the specific conduct of the athlete in this case.
21. The IAAF argues that a refusal to submit to doping control is considered to be a particularly serious violation of the anti-doping rules. They maintain that if this offence is not punished as severely as testing positive for a prohibited substance, athletes would have every incentive to refuse to submit to testing, thereby undermining the very basis of any detection based testing regime.
22. The IAAF further submits that it should be a very rare circumstance for an athlete who knowingly or intentionally conducts himself in such a manner to receive a reduction in the otherwise applicable minimum 2 year sanction. It also notes that, in future, violations of the rule may result in an increased sanction of up to 4 years.
23. The IAAF argues that Ms. Scherf acted with significant fault and/or negligence when she refused to submit to doping control on 1 July, 2007.
24. To support this contention the IAAF maintains the following:
 - Ms. Scherf was an experienced athlete who was hoping to qualify for the Olympic trials;
 - She had previously applied for and received a TUE from the IAAF;
 - She could have easily accessed the IAAF rules and procedures for applying for a TUE by downloading them from the IAAF website;
 - Ms. Scherf chose to rely on USADA to submit her TUE application to the IAAF on her behalf;

- She failed to make direct contact with the IAAF to obtain information about her TUE application;
 - She was reckless in entering the Gold Coast Marathon without confirming her TUE status;
 - She repeatedly ignored the advice of doping control officials;
 - Her indication more than 24 hours after her refusal that she had changed her mind was irrelevant since it was no longer feasible to have her tested.
25. The IAAF adopted and agreed with the WADA submissions on the issue of no significant fault or negligence. It concluded that there were no exceptional circumstances that could lead to a finding of no significant fault or negligence and, therefore, this was not one of those “*most exceptional of cases*” referred to in the IAAF rules.

C. *USADA*

26. USADA agrees philosophically with the WADA statement that “*as a matter of principle it is clear that a refusal ought to be punished as severely if not more severely than a positive test*”. It goes on to point out, however, that the legal rules which USADA is bound to apply did not permit it to reject an exceptional circumstances analysis out of hand merely because the case involved a refusal.
27. USADA submitted that Lindsey Scherf did bear fault for not submitting to doping control, and that she should have informed herself of the rules pertaining to doping control.
28. Furthermore, USADA indicated in its brief that it did not, and does not, accept any contention that bad advice from Ms. Scherf’s father or anyone else, her physical condition following the marathon, her emotional state, her inquiries regarding doping control, or the IAAF’s failure to grant her a TUE in and of themselves could have constituted exceptional circumstances.
29. What USADA did consider was whether the error made by the IAAF in failing to process the ATUE application promptly, and by USADA in incorrectly advising her of the need for an IAAF TUE, could operate to mitigate or lessen Ms. Scherf’s degree of fault.
30. USADA points to the basic principle reaffirmed in a number of sport arbitrations decisions that “*where the conduct of one party has led to legitimate expectations on the part of a second party, the first party is estopped from changing its course of conduct to the detriment of the second party*” (CAS 98/200 and CAS 2003/A/401).
31. USADA further submitted that it found that the errors of the IAAF and USADA did not excuse Ms. Scherf’s fault in refusing to submit to doping control, but they did help to create a chain of events which on a balance of probabilities appear to have significantly mitigated Lindsey Scherf’s fault in refusing doping control. USADA’s counsel, William Bock in his brief telephone submission to the hearing, acknowledged that the errors made by USADA put Lindsey Scherf in a position where she then applied bad judgement.

32. USADA maintained that under the circumstances revealed by its thorough investigation of the matter, it was highly improbable that any of the nefarious explanations for Ms. Scherf's conduct could be supported.
33. USADA also argued that its determination of exceptional circumstances was entitled to deference by the Panel.
34. USADA concluded therefore that while Ms. Scherf bore some fault it was not under the circumstances significant.

D. Lindsey Scherf

35. The Respondent Lindsey Scherf adopted the explanation for the finding of no significant fault or negligence contained in the USADA brief.
36. Lindsey Scherf submits that USADA conducted an extremely thorough and detailed investigation prior to its finding that she was not significantly at fault and was not significantly negligent. She notes that the investigation included the following:
 - review of the documents provided by ASADA;
 - review of correspondence and documents provided by Lindsey Scherf and her father;
 - a telephone interview with Lindsey Scherf's treating physician in Australia, Dr. Maria Kowalczyk;
 - telephone interviews with Lindsey Scherf and her father;
 - follow-up e-mail communications with representatives of the Gold Coast Marathon; and
 - preparation of and submittal of a detailed written report to USADA's Independent Anti-Doping Review Board.
37. Ms. Scherf submits that she was at all times open, frank, and honest in her dealings with USADA, and with the Gold Coast Marathon officials. She stated that with the help of her father, she was doing her best to comply with the complicated and confusing TUE process.
38. Ms. Scherf argues that the criticism by the IAAF of her decision to submit her TUE applications through USADA is unfair in that this was a procedure encouraged by USADA and a procedure that she had followed when making previous applications.
39. Ms. Scherf also points out that USADA is in the business of anti-doping and yet it did not appreciate that she did not need a further TUE in order to compete in the Gold Coast Marathon. She submits that it should not be expected that a 21 year old athlete of limited international experience would understand completely rules that National anti-doping agencies have difficulty understanding.

40. To further underscore this point, Ms. Scherf notes that the IAAF may have been confused about their own rules since they mistakenly granted approval for the TUE for Flovent on July 12, 2007. The Gold Coast Marathon was not on the list of IAAF International competitions, and after realizing that this approval had been granted in error, the IAAF withdrew Ms. Scherf's TUE on August 1, 2007.

The Panel's Decision

41. The USADA Protocol and the USOC ADP both provide for a sanction of two years for a first doping offence. The IAAF Rules establish a minimum period of ineligibility of two years for a first doping offence.
42. The Second Respondent Lindsey Scherf acknowledged that she had committed an anti-doping rule violation by refusing to submit to doping control. She signed the USADA Acceptance of Sanction which began as follows:
"I, Lindsey Scherf, accept the following sanction as a result of my doping offence arising from my July 1, 2007, refusal to submit to sample collection. I acknowledge that I have violated applicable rules, including the USADA Protocol for Olympic Movement Testing ("Protocol"), the United States Olympic Committee Anti-Doping Policies and the IAAF Anti-Doping Rules, all of which have adopted the WADC, ..."
43. The Panel heard from Ms. Scherf who impressed as an honest, open and conscientious young athlete. She testified that she is essentially a collegiate runner who does not have an agent and who has had to rely on her father to assist her with much of the paperwork and administrative details that her busy schedule prevents her from attending to.
44. The hearing was advised that Ms. Scherf submitted the IAAF ATUE application to USADA on April 26, 2007, nine (9) full weeks before the Gold Coast Marathon. She assumed that the documentation had been forwarded by e-mail in a timely fashion to the IAAF by Camila Zardo who at the time was USADA's TUE Coordinator.
45. Ms. Zardo testified that she had been under the impression that the e-mail with supporting documents had been sent to the IAAF on May 1, 2007. She discovered in preparation for the appeal that the e-mail with the TUE application was not sent to the IAAF until June 26, 2007 just a few days prior to the July 1, 2007 marathon race.
46. Ms. Scherf also testified that she diligently pursued the matter of drug testing for the Gold Coast marathon with the Elite Athlete Service Manager, Ryan McDonald. She apprised him of the fact that she was taking medication that could not be ceased for health reasons and needed to know prior to the race whether drug testing would take place. She believed that she had an understanding from Mr. McDonald that he would inform her as soon as he became aware that drug testing was to take place.
47. The Panel learned after hearing testimony from Ryan McDonald that he knew on June 27, 2007 that drug testing would be conducted by ASADA at the Gold Coast Marathon, but for reasons

of confidentiality did not share that information with Ms. Scherf.

48. The Panel accepts Ms. Scherf's contention that she had previously submitted her applications for a TUE to USADA and saw no reason to depart from that practice on this occasion. In fact, Camila Zardo testified that the IAAF wanted USADA to take authority over the TUE application process for its National level athletes.
49. The IAAF also criticizes Ms. Scherf for not approaching that organization directly when she had concerns about the length of time that it was taking to process her TUE application. However, Camila Zardo also testified that she was aware of many occasions when athletes would not receive the same response as USADA did when they attempted to contact International Federations on their own behalf.
50. The Panel also acknowledges that the IAAF rules and procedures regarding the TUE application process are confusing even for those who have responsibility for those issues on a daily basis. Criticisms about the ease of accessing the relevant sections of the IAAF website also have some validity. Counsel for Ms. Scherf demonstrated for the panel that at 6:40 pm on the day of the hearing one could still not download the relevant information from the IAAF web site. USADA in its brief indicated that it had experienced the same difficulty.
51. Ms. Scherf naively believed that a race official would inform her of the certainty that drug testing would take place at the Gold Coast Marathon, and that her good faith in seeking such assurance would be respected. The Panel agrees that errors made by the IAAF, and by USADA placed the athlete in somewhat of a quandary. Her subsequent error in judgment was as a direct result of the errors made by agencies that should have provided better service to the athlete.
52. USADA thoroughly investigated the matter and was satisfied that this was a case of exceptional circumstances where an athlete's fault was not significant, and where her negligence if any was not significant.
53. The Panel finds that exceptional circumstances did exist in this case, and agrees that Ms. Scherf bears No Significant Fault or Negligence, because her fault or negligence when viewed in light of all the circumstances was not significant in relation to her anti-doping rule violation. The Panel would, however, wish to make it clear that this is a rare case in which an athlete who has failed or refused to provide a sample will be able to satisfy a CAS Panel that the sanction is to be reduced on the ground of No Significant Fault or Negligence. Such cases will not often occur.
54. This conclusion makes it unnecessary for the Panel to address the issue of deference with regard to USADA's decision of October 31, 2007.

The Court of Arbitration for Sport rules:

1. The Appeal filed by WADA and the IAAF against a decision of the United States Anti-Doping Agency dated October 31, 2007, is dismissed.

(...)

4. All other prayers for relief are dismissed.