



Arbitration CAS 2019/A/6109 Dayana Dimitrova v. International Weightlifting Federation (IWF), award of 18 July 2019

Panel: Mrs Sylvia Schenk (Germany), President; Mr Jeffrey Benz (USA); Mr Markus Manninen (Finland)

Weightlifting

Doping (furosemide)

Validity of a decision rendered by the competent IWF Anti-Doping Administrator

IWF's right to test an athlete irrespective of his/her suspension

Sanction applicable to a second anti-doping rule violation

1. **There is no reason for a decision to be declared invalid where such decision has been taken by the competent IWF Anti-Doping Administrator in accordance with the IWF Anti-Doping Program (ADP).**
2. **Furosemide is prohibited at all times. Therefore it does not matter whether the athlete was in or out of competition when the sample was collected. Under the IWF ADP there is a right in the IWF to test an athlete irrespective of his/her suspension, i.e. the athlete is subject to in- and out-of-competition testing at all relevant times. The IWF has express authority to test athletes competing in IWF events, and there can be no dispute that athletes are subject to that regime when they enter IWF events, whether that entry is appropriate or not. In fact, they consent to that jurisdiction as a condition of entry under the IWF rules. To consider otherwise would mean that potentially any athlete who is provisionally suspended for having committed a prior ADRV, and violates the terms of that suspension by competing, could benefit with impunity for any ADRV committed at such a competition. This would result, in essence, in an anti-doping rules pause with respect to that athlete. Opening the door to such a possibility shall be rejected.**
3. **An athlete who admitted to having taken a product containing Furosemide, i.e. a Specified Substance prohibited at all times, “in regard to” her “menstrual problems” did so intentionally. The fact to have taken said product despite already having been sanctioned for a positive sample due to the same substance, demonstrates tremendous disregard of her duty to avoid ingesting prohibited substances. Accordingly, the athlete committed her second ADRV and should be declared ineligible for a period of eight (8) years.**

I. PARTIES

1. Ms Dayana Dimitrova (“Appellant” or the “Athlete”) is a Bulgarian professional weightlifter, born on 22 October 2000, affiliated to the Bulgarian Weightlifting Federation (“BWF”) which is a national federation governing the sport of weightlifting in Bulgaria and affiliated to the International Weightlifting Federation.
2. The International Weightlifting Federation (“Respondent” or the “IWF”) is the worldwide governing body for the sport of weightlifting and has its headquarters in Lausanne, Switzerland.
3. The Appellant and the Respondent will together be referred to as the “Parties”.

II. FACTUAL BACKGROUND

4. The circumstances and provisions discussed below constitute a summary of the relevant facts and evidence as set forward by the Parties in their respective written submissions. This factual background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out where relevant, in connection with the legal discussion. The primary facts were substantially uncontested.
5. The Appellant challenges the decision signed by the IWF Legal Counsel, passed on 28 December, 2018, based on three positive samples collected from the Athlete, suspending her for a period of eight (8) years (the “Appealed Decision”).

A. Anti-Doping Rule Violation on 20 March 2017

6. On 20 March 2017, in the city of Dobrich, Bulgaria, the Bulgarian National Anti-Doping Organization (the “Bulgarian NADO”) collected an urine sample from the Athlete (out-of-competition).
7. In its analysis, the World Anti-Doping Agency (“WADA”) Accredited Laboratory of Seibersdorf established the presence of Furosemide (S5 Diuretics and Masking Agents). On 21 April 2017, the Bulgarian NADO notified the Athlete (via the BWF) of the positive sample.
8. On 25 April 2017, a hearing was held in Sofia before a session of the Result Management Commission of the Bulgarian NADO. In the hearing, the Appellant stated that she has no idea how the prohibited substance Furosemide entered into her body, and that she never had problems with her weight to compete in her category (48 kg).
9. On 26 April 2017, another hearing was held before the Result Management Commission. The hearing was attended by the Athlete’s coach, Mr Bozhidar Bozhilov, who stated that in the days before the collecting of the sample, the Athlete *“had a monthly physiological discomfort accompanied with strong pain and swelling in the lower part of the abdomen”* due to the delay of her monthly period. Therefore, Mr Bozhilov prepared a bearberry tea (1.5 litres) in which he dissolved three tablets

of Furanthril (Furosemide). According to Mr Bozhilov, the Appellant did not know that the bearberry tea which she drank within three days contained Furanthril.

10. On 12 June 2017, the Disciplinary Commission at the Bulgarian Olympic Committee held a hearing on the cases of the Appellant and her coach.
11. On 14 June 2017, the Disciplinary Commission issued two decisions determining a period of ineligibility for the Athlete of six (6) months starting 20 March 2017 and four (4) years ineligibility for the Athlete's coach, Mr Bozhilov.
12. Consequently, the Bulgarian NADO appealed the decisions before the Bulgarian Sport Arbitration (sic) (the "BSA").
13. On 13 October 2017, the BSA issued two decisions which upheld the Disciplinary Committee decisions of 14 June 2017.

B. Anti-Doping Rule Violation on 5 April 2017

14. On 5 April 2017, i.e. before the Appellant was notified of the positive sample of 20 March 2017, the IWF collected another sample from the Athlete at the IWF Youth World Championships in Bangkok, Thailand (in-competition). After analyses of the sample in the WADA Accredited Laboratory of Cologne, on 28 April 2017, the laboratory established the presence of Furosemide.
15. The Appellant was notified of this result by a letter from the IWF dated 1 May 2017, and was provisionally suspended by the IWF as of the same date.
16. On 3 May 2017, the Athlete's coach, Mr Bozhilov, sent a written statement to the IWF, admitting that he had put three tablets of Furanthril in 1.5 litres of bearberry tea which was given to the Athlete without her knowledge on 1, 2 and 3 April 2017, due to pain and discomfort in the abdominal area.
17. On 26 August 2017, at the request of the IWF, Mr Bozhilov gave further explanations on how and why he gave the tablets to the Appellant.
18. The Cologne laboratory, at the request of the IWF, gave the following expert view on Mr Bozhilov's explanation: *"We have compared the data sample of 405 99 33 and the declaration of the coach with the data from an excretion study with furosemide. Our conclusion: It cannot be excluded that the detected urinary furosemide concentration of about 2.2 µg/ml in sample 405 99 33 from 5th April 2017 is due to the scenario described by the coach of the athlete (administration of 20 mg furosemide per day on 1st, 2nd and 3rd April 2017)".*
19. There was no further communication between the Parties from the end of August 2017 until November 2018.

C. Anti-Doping Rule Violation on 20 October 2018

20. After the expiration of the sanction imposed on the Athlete by the BSA in the case of the anti-doping rule violation dated 20 March 2017, i.e. on 20 September 2017, the Appellant and the BWF concluded that she can compete again. The BWF listed the Appellant for the 2018 European Junior and U23 Championships in Zamosc, Poland.
21. At this event, the IWF collected a sample from the Athlete (in-competition) on 20 October 2018, which was analysed in the WADA Accredited Laboratory of Cologne.
22. On 13 November 2018, the laboratory of Cologne reported the presence of the prohibited substance Furosemide in the A sample.
23. On 15 November 2018, Dr. Eva Nyirfa, IWF Legal Counsel, notified the Athlete that the presence of Furosemide was detected in the Athlete's sample and charged her "*with the violation of Article 2.1 and/or 2.2 of the IWF Anti-Doping Policy (IWF ADP)*" and stated: "*The Athlete participated in the abovementioned Event despite the IWF's imposition of a provisional suspension further to the Adverse Analytical Finding returned by sample 405 99 33 for Furosemide (S5 Diuretics and Masking Agents)*".
24. On 26 November 2018, in a letter to the IWF, the Appellant stated: "*I never used prohibit substances in my career and I never needed to lose weight in order to compete in my category, because I didn't had problems keeping my weight in most of the time. However, in the present case, I used Furanthril by myself and only in regard to my menstrual problems. I did not intend to use the said medicament for sports results*".
25. On the same date, 26 November 2018, the Athlete's counsel informed the IWF that due to her limited financial possibilities she will not request a hearing.
26. In the Appealed Decision, dated 28 December 2018, the IWF Legal Counsel determined the sanctions applicable to each ADRV committed by the Appellant:
 - a) the Appellant "*shall be rendered ineligible by the IWF for a period of two (2) years until 5 April 2019 as a consequence of the Anti-Doping Rule Violations committed on 20 March 2017 and 5 April 2017*".
 - b) the Appellant "*shall be rendered ineligible for a period of eight (8) years by the IWF*" (until 20 October 2026) as a consequence of the Anti-Doping Rule Violation committed on 20 October 2018.

III. ARBITRAL PROCEEDINGS

A. Proceedings before the CAS

27. On 21 January 2019, the Appellant filed the Statement of Appeal and asked for a 15-day extension of the time limit to file the Appeal Brief that was not objected by the Respondent.

28. On 18 February 2019, the Appellant filed her Appeal Brief.
29. On 25 February 2019, the CAS Court Office informed the Parties that the Panel appointed to hear the case was constituted as follows:
- President: Ms Sylvia Schenk, Attorney-at-Law in Frankfurt, Germany
- Arbitrators: Mr Jeffrey G. Benz, Attorney-at-Law and Barrister in London, United Kingdom
- Mr Markus Manninen, Attorney-at-Law in Helsinki, Finland
30. On 12 March 2019, the Respondent requested a 10-day extension to file the Answer that was confirmed by letter of the CAS Court Office on 19 March 2019.
31. On 27 March 2019, the Respondent filed its Answer.
32. By email dated 1 April 2019, the Appellant informed the CAS Court Office that she will not request a hearing to be held. On 4 April 2019, the Respondent informed not to oppose this request.
33. On 8 May 2019, the Parties were informed in a letter by the CAS Court Office that the Panel will decide this case based solely on the Parties' written submissions.
34. On 23 May 2019, the CAS Court Office sent an Order of Procedure to the Parties. The Respondent's counsel signed the Order of Procedure on 31 May 2019, the Appellant's counsel on 4 June 2019.

B. Submissions of the Parties

a. The Position of the Appellant

35. In the Statement of Appeal, the Appellant challenged the Appealed Decision of the IWF dated 28 December 2018 and submitted the following requests for relief:
1. *To set aside and annul the entire decision passed on 28 December 2018 by the IWF.*
 2. *To order the Respondent to bear all the costs incurred with the present procedure.*
 3. *To order the Respondent to pay the Appellant a contribution towards its legal and other costs, in an amount to be determined at the discretion of the Panel.*
36. In the Appeal Brief, the Appellant submitted the following requests for relief:
- Primary – ruling de novo***
- 1) *To set aside the IWF decision dated 28 December 2018, for being rendered by the IWF Legal Counsel, Mr. [sic] Eva Nyirfa who is part of the IWF Secretariat in absence of any valid and lawful delegation of powers or any other evidence that such decision has been ever taken by the competent Anti-Doping Administrator or delegate;*

2) *In regard to the sample collected in Bangkok, Thailand to confirm the sanction for the period of ineligibility of two years starting as of 5 April 2017; and*

3) *To establish that the Appellant cannot be sanctioned on the basis on the sample (434 05 76) collected in Poland on 20 October 2018 due to the arguments detailed in point IV.2. above.*

In any event

6) *To order IWF to bear all the costs incurred with the present procedure.*

7) *To order IWF to pay Dayana Dimitrova a contribution towards its legal and other costs, in an amount to be determinate at the discretion of the Panel.*

In support of its request for relief, the Appellant's submission, in essence, may be summarized as follows:

37. The Appealed Decision should be set aside because it was issued by the IWF Legal Counsel, Dr. Eva Nyirfa, who is not competent for such a decision. The Appealed Decision should be passed by the IWF Anti-Doping Administrator or its delegate, who are competent to impose sanctions pursuant to Article 10.7.1. of the IWF ADP.
38. The sample collected from the Appellant on 20 October 2018 shall not be taken into consideration due to the following situation:
 - a) After the correspondence exchanged between the Parties in August 2017 on the positive sample dated 5 April 2017 the Respondent did not take timely action on the case. Thus the Appellant felt entitled to participate in the 2018 European Junior and U23 Championships in Zamosc, Poland, and the BWF listed her for that event.
 - b) The 2018 European Junior and U23 Championships were an IWF event and the IWF was responsible to carefully review all the participants.
 - c) By allowing the Appellant to participate in the event the IWF provoked chaos that led to the Athlete taking part in the competition and being subject of an anti-doping control despite being provisionally suspended.
 - d) The Appellant concludes that she should not be charged by the IWF for a sample collected at the competition in Poland during a period of provisional suspension.

b. The Position of the Respondent

39. In its Answer, the Respondent submitted the following requests for relief:

1. *The Appeal filed by Ms Dayana Dimitrova is dismissed.*
2. *The IWF is granted an award for costs.*

In support of its request for relief, the Respondent's submission, in essence, may be summarized as follows:

40. The Appealed Decision is valid as it has been rendered by the competent IWF body:

- a) As per Art. 7.10.3 of the IWF ADP, where an athlete waives or fails to request a hearing in accordance with art. 7.10.2 of the IWF ADP, *“a hearing before the IWF Hearing Panel shall not be required. Instead the IWF Anti-Doping Administrator or its delegate will issue a written decision about the commission of the anti-doping rule violation and the Consequences imposed as a result, and setting out the full reasons for any period of Ineligibility imposed, including (if applicable) a justification for why the maximum potential period of Ineligibility was not imposed”*.
 - b) In accordance with Art. 2.1 of the *“IWF Manual for Handling Anti-Doping related Intelligence”*, the IWF Anti-Doping Administrator is the IWF Legal Counsel.
 - c) As the Athlete had not requested a hearing, the IWF Anti-Doping Administrator had the power to render the Appealed Decision. As per the applicable rules, the IWF Anti-Doping Administrator is the IWF Legal Counsel. It has not been challenged by the Athlete that Ms Eva Nyirfa is the IWF Legal Counsel. As a result, Ms Nyirfa had the power to render the Appealed Decision, which is therefore valid.
41. The doping control conducted on the Appellant on 20 October 2018 is valid as the IWF had the testing authority for in- and out-of-competition testing no matter whether the Athlete was provisionally suspended or not:
- a) The Respondent confirms that the Appellant was provisionally suspended on 1 May 2017 with the notification on the positive sample dated 5 April 2017 and thus not entitled to compete at the 2018 European Junior and U23 Championships in Zamosc, Poland.
 - b) According to Art. 5.2.2 of the IWF ADP, *“IWF may require any Athlete over whom it has Testing authority (including any Athlete serving a period of Ineligibility) to provide a Sample at any time and at any place”*. If an athlete serving a period of ineligibility remains subject to the testing authority of the IWF, then a fortiori the same applies to an athlete subject to a provisional suspension.
 - c) The IWF was therefore entitled to test the Appellant, whether in- or out-of-competition. Had she not been competing at the event the IWF could have decided to conduct an out-of-competition test on the Athlete on the same date. Such sample would have equally returned positive, as furosemide is prohibited at all times (in- and out-of-competition), and the sample collected would have been valid. The fact that the Athlete was allowed to compete in an IWF Event although provisionally suspended was of no relevance for the validity of the finding.
 - d) Additionally, the Appellant had already been sanctioned for an anti-doping rule violation in the past (and had been notified and provisionally suspended for a second violation as well). She even claimed that *“she had been convinced that such a small concentration could not lead to an Adverse Analytical Finding”*, thereby admitting that she knew the product was prohibited; the fact that she allegedly assumed that the intake would not lead to an AAF is manifestly not an excuse. She was aware that she could be tested at any point in time, and more particularly when participating in an IWF Event, as she had been tested on the occasion of an IWF Event (e.g. the 2017 IWF Youth World Championships) in the past. She also knew that she would be subject to a sanction in the event that the sample returned positive.

IV. LEGAL ANALYSIS

A. Jurisdiction

42. The jurisdiction of the Court of Arbitration for Sport (“CAS”) to adjudicate upon this Appeal was not disputed. It is based on Article 13.2.1 of the IWF ADP.

B. Admissibility of the Appeal

43. The Statement of Appeal was filed within the 21-day time limit set by Article 13.7.1 of the IWF ADP. Therefore, the appeal is admissible.

C. Applicable Law

44. Article R58 of the CAS Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

45. The Panel considers the IWF Statutes and Regulations applicable to this case and, subsidiarily, Swiss law.

V. THE MERITS

46. The decision in the case at hand depends on whether (A.) the Appealed Decision has been rendered by the competent IWF Anti-Doping-Administrator, and (B.) the positive sample dated 20 October 2018 can be seen as a second anti-doping rule violation despite the Appellant having been provisionally suspended at that time.

A. The Function of the IWF Anti-Doping Administrator

47. According to Art. 2.1 of the *“IWF Manual for Handling Anti-Doping related Intelligence”*, the IWF Legal Counsel is the IWF Anti-Doping Administrator.

48. According to Article 7.10.3 of the IWF ADP the *“IWF Anti-Doping Administrator ... will issue a written decision about the commission of the anti-doping rule violation and the Consequences imposed as a result”* if an athlete has waived *“a hearing expressly”* following Art. 7.10.2 of the IWF ADP.

49. Thus the Panel holds, that the Appealed Decision has been taken by the competent IWF Anti-Doping Administrator and that there is no reason for it being invalid.

B. The Sample Collected 20 October 2018 as a Second Anti-Doping Rule Violation

50. The Panel holds that there is no reason to disregard the anti-doping rule violation (“ADRV”) arising from the presence of a prohibited substance in the sample of the Appellant that was collected on 20 October 2018.
51. First of all, Furosemide is prohibited at all times, both in- and out-of-competition. Therefore it does not matter whether the Appellant was in or out of competition when the sample was collected on 20 October 2018.
52. Secondly, even a provisionally suspended athlete is bound by the IWF ADP.
53. As a result of the sample collected from the Appellant on 20 March 2017 testing positive for Furosemide, she was provisionally suspended and subsequently sanctioned with a six (6) month period of ineligibility by the BSA (the final authority in Bulgaria for adjudicating such cases).
54. In parallel, on 1 May 2017, the Athlete was provisionally suspended by the IWF following the sample collected on 5 April 2017, testing positive as well for Furosemide. This provisional suspension had not been lifted when the sample that also tested positive for Furosemide was collected during the European Junior and Under 23 Championships on 20 October 2018.
55. As the Appellant did not retire but continued as an athlete, even intending to compete at international level, she remained under the scope of the IWF ADP.
56. Thus under the IWF ADP there was a right in the IWF to test her irrespective of her suspension, i.e. she was subject to in- and out-of-competition testing at all relevant times. This can be drawn as well from the last sentence of Article 10.11.1 of the IWF ADP that states:
“An Athlete or other Person subject to a period of Ineligibility shall remain subject to Testing”.
57. In addition, the IWF has express authority to test athletes competing in IWF events, and there can be no dispute that athletes are subject to that regime when they enter IWF events, whether that entry is appropriate or not. In fact, they consent to that jurisdiction as a condition of entry under the IWF rules.
58. For the Panel to consider otherwise would mean that potentially any athlete who is provisionally suspended for having committed a prior ADRV, and violates the terms of that suspension by competing, could benefit with impunity for any ADRV committed at such a competition. This would result, in essence, in an anti-doping rules pause with respect to that Athlete. The Panel rejects opening the door to such a possibility. There is no concept in law or fairness that would dictate a result that a suspended athlete can enter events without regard to consequences and be immune from anti-doping testing occurring at such an event into which they should not have been entered. The Athlete’s counsel did not argue otherwise, only that the improper entry rendered the anti-doping testing invalid, but the effect of this argument would be as stated by the Panel in this paragraph, something the Panel will not accept.

59. Accordingly, the doping control conducted on the Athlete on 20 October 2018 was manifestly valid and must be considered a violation.
60. Given that the Appellant was only notified of the positive sample taken 20 March 2017 after the anti-doping control on 5 April 2017, both anti-doping rule violations must be considered as a single first violation according to Art. 10.7.4 of the IWF ADP which states:
*“For purposes of imposing sanctions under Article 10.7, an anti-doping rule violation **will only be considered a second violation if IWF can establish that the Athlete or other Person committed the second anti-doping rule violation after the Athlete or other Person received notice pursuant to Article 7, or after IWF made reasonable efforts to give notice of the first anti-doping rule violation.** If IWF cannot establish this, 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”* (emphasis added).
61. The Panel has considered that the failure of the IWF to timely act on the anti-doping rule violation of 5 April 2017 and the obvious lack of communication between the anti-doping organisations involved (i.e. the BWF, the Bulgarian NADO, the Bulgarian Olympic Committee and the IWF which under Article 7.8 of the IWF ADP has the obligation to identify prior ADRV) have led to the Appellant participating in the European Championships in Poland. But this does not impact the assessment of the case at hand. The Athlete was provisionally suspended as of 1 May 2017 and that provisional suspension was never lifted. Such provisional suspension concerned only the second ADRV that was sanctioned with a two (2)-year period of ineligibility, from 5 April 2017 to 5 April 2019. The expiration of the ineligibility period on 20 September 2017 concerned the ADRV of 20 March 2017 that was eventually adjudicated by the BSA.
62. The Appellant has admitted to having taken a product containing Furosemide, i.e. a Specified Substance prohibited at all times (in- and out-of-competition), *“in regard to”* her *“menstrual problems”*. In other words she did so intentionally and despite already having been sanctioned for a positive sample due to the same substance, thereby demonstrating tremendous disregard of her duty to avoid ingesting prohibited substances.
63. Accordingly, the Panel agrees with the IWF that the Appellant committed her second ADRV and should be declared ineligible for a period of eight (8) years, commencing on 20 October 2018. Consequently, the Appealed Decision shall be confirmed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 21 January 2019 by Ms Dayana Dimitrova against the decision rendered by the IWF Anti-Doping Administrator on 28 December 2018 is dismissed.
2. The decision rendered by the IWF Anti-Doping Administrator on 28 December 2018 is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.