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FINA Doping Panel 02b/18

14 May 2018

Comprised of

Robert Fox (SUI) Chairman

Peter Kerr (AUS) Member

David Lech (CAN) Member

In the proceeding against

The swimmer Matthew Willenbring (“the Athlete”)

Affiliated to USA Swimming Inc. (“USAS”)

Represented by Mr. Howard Jacobs, Legal Counsel

1. THE PARTIES

1.1 The FEDERATION INTERNATIONALE de NATATION (FINA) is the International Federation governing the sport of Aquatics. FINA has established and is carrying out, inter alia, a doping control program, both for in-competition as well as out-of-competition testing.

1.2 The USAS is a member of FINA. USAS is required to recognize and comply with FINA’s anti-doping rules which are set out in the FINA Doping Control Rules (“FINA DC”). The FINA DC is directly applicable and must be followed by Athletes, Athlete Support Personnel, coaches, physicians, team leaders, and club representatives under the jurisdiction of the USAS.

1.3 The Athlete is a member of the USAS and thus is subject to the jurisdiction of the FINA DC. The Athlete is a minor, 17 years of age at the time of the sample collection session.

2. NATURE OF THE CASE

- 2.1 The FINA Doping Panel heard a case involving the Athlete on January 12, 2018, and thereafter issued a decision that included the following paragraph:

All results obtained by Mr. Matthew Willenbring from 28 August 2017, shall be annulled together with the consequences thereof which shall include the forfeiture of any medals, points, prizes or prize-money achieved during that period.

- 2.2 By letter dated March 29, 2018, FINA wrote to Mr. Robert Fox, the Chairman of the FINA Doping Panel requesting that the Doping Panel consider additional questions. The letter from FINA is set out below:

“Dear Mr. Fox,

In its decision of 12 January 2018, the Doping Panel decided to impose a suspension of four (4) months on the swimmer Mr. Matthew Willenbring (USA).

In the paragraph 7.3, it is stated that “All results obtained by Mr. Matthew Willenbring from 28 August 2017, shall be annulled together with the consequences thereof which shall include the forfeiture of any medals, points, prizes or prize-money achieved during that period.”

However, in addition to annulment of the individual results, we are requesting now the Doping Panel to rule on the cancellation of results and medals for the following team events during the FINA World Junior Swimming Championships Indianapolis 2017:

- *Men 4x100m Freestyle Relay (4th) on 23 August 2017*
- *Mixed 4x100m Freestyle Relay (Silver Medal) on 25 August 2017*
- *Men 4x100m Medley Relay (Gold Medal) on 28 August 2017*

Thank you for your consideration and we look forward to hearing back from you.

Yours sincerely

Cornel Marculescu

Executive Director”

- 2.3 The Doping Panel (in the same configuration) has reconvened to address and answer the questions posed by FINA.
- 2.4 As a result of the FINA letter dated March 29, 2018, Mr. Robert Fox wrote to USAS on April 24, 2018, seeking their view regarding the request that the Doping Panel consider whether the results in the Relays swum on August 23, 2018, August 25, 2018 and August 28, 2018 should be disqualified.

- 2.5 In its reply, USAS accepted that due to the Athlete's anti-doping rule violation the result from the Relay swum on August 28, 2017 should be disqualified. However, USAS submits that the Relays swum on August 23, 2018 and August 25, 2018 should not be affected by the Athlete's anti-doping rule violation. USAS expressed its position this way;

"[...]

- 1. Under FINA's Doping Control Rules (DC 10.1.1) and the WADA Anti-Doping Code, the seriousness of the doping offense should be considered in evaluating which Events' results should be disqualified. Due to Mr. Willenbring receiving only a four (4) months suspension ("light degree of fault," 6.74 on page 24 of the findings of the FINA Doping Panel), it is clear that FINA does not feel that there was significant fault or seriousness with this doping offense.*
 - 2. The adverse finding of Mr. Willenbring was for a diuretic, which does not provide any direct performance benefit. Additionally, the fact that the lab at UCLA did not find any performance enhancing substance, nor did the findings of Professor Pascal Kintz, during his analysis and evaluation of Mr. Willenbring's hair, reinforces the findings of the Doping Panel that there was no intention to take a performance enhancing substance.*
 - 3. On page 20 of the full decision of this case, within 6.63, the FINA Doping Panel emphasizes that there were no performance enhancing benefits and a lesser degree of fault in this case. [...]"*
- 2.6 The Doping Panel accepts that it remains seized of the matter and has the jurisdiction and the authority to address the questions posed by FINA. No party has taken a contrary position. USAS has been notified of FINA's request and has been given an opportunity to respond. The Doping Panel has carefully considered USAS' position and views.

3. JURISDICTION AND APPLICABLE RULES

- 3.1 The jurisdiction of the FINA Doping Panel arises out of the provisions of the FINA Rules C 22.8, C 22.9 and FINA DC 8.1.
- 3.2 The applicable Rules in this case are the FINA DC in effect since January 1, 2015.

4 LEGAL DISCUSSION

A. THE FACTS

- 4.1 The Doping Panel previously held that Athlete had incurred an anti-doping rule violation (Presence) flowing from a sample collection session conducted in Indianapolis, Indiana, USA on August 28, 2017. The sample collection session on August 28, 2017 was performed immediately after the Athlete competed in the Men's 4X100m Medley Relay – an event at the 2017 FINA World Junior Swimming Championships. The USA Medley Relay, on which the Athlete was a member, won a gold medal in the event in World Record time.
- 4.2 The Athlete was sanctioned by the Doping Panel with a four month period of ineligibility. The sanction commenced on August 28, 2017 and, pursuant to FINA DC 10.1, the Doping Panel determined that the results of the Athlete would be annulled from August 28, 2017 together with the forfeiture of any medals, points, prizes or prize-money from that date onward. This was clearly stated in the Doping Panel's decision.
- 4.3 The Doping Panel was well aware that on August 28, 2017, the Athlete was a member of a winning Medley Relay but was content in its reasoned decision to limit the sanction imposed on the Athlete to the annulment and forfeiture of "individual results" (largely to protect the identity of the Athlete who was a minor at the time and whose identity the Doping Panel wanted to protect from public reporting). It remained an open question what decision, if any, FINA might elect to make regarding the status of the other members of the Medley Relay that won the event (with the Athlete) on August 28, 2017.
- 4.4 The Doping Panel has now been specifically asked by FINA to rule on the potential cancellation of results and medals for the three Relay events held on August 23, 2017, August 25, 2017 and August 28, 2017. For each Relay the Athlete was a participating member. Each Relay was conducted at the 2017 FINA World Junior Swimming Championships.

B. THE LAW

4.5 FINA DC 10.1 and 10.1.1

Disqualification of Results in the Competition during which an Anti-Doping

Rule Violation Occurs

An anti-doping rule violation occurring during or in connection with a Competition may, upon the decision of the ruling body of the Competition, lead to Disqualification of all of the Athlete's individual results obtained in that Competition with all Consequences, including forfeiture of all medals, points and prizes, except as provided in DC 10.1.1.

Factors to be included in considering whether to Disqualify other results in a Competition might include, for example, the severity of the Athlete's anti-doping rule violation and whether the Athlete tested negative in the other Events.

DC 10.1.1 If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Events shall not be Disqualified unless the Athlete's results in Events other than the Event in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation.

4.6 FINA DC 11.2

Consequences to Teams

DC 11.2 Where any Anti-Doping Rule has been violated by a member of a relay in swimming, or team in open water swimming, or a duet or team in artistic swimming or diving, the relay, duet or team shall be Disqualified from the Competition, with all resulting Consequences including forfeiture of any medals, points and prizes.

4.7 FINA DC Appendix 1: "Competition" [plus footnote]

Competition: A series of individual Events conducted together under one ruling body (e.g. FINA World Championships). Also, the act of participating in an Event.²

² *This definition has been changed from the Code definition in order to be consistent with other FINA Rules. Under FINA Rules, a "Competition" is the same as an "Event" under the Code.*

4.8 FINA DC Appendix 1: “Event” [plus footnote]

Event: A single race, match, game or singular sport contest.³

³ *This definition has been changed from the Code definition in order to be consistent with other FINA Rules. Under FINA Rules, an “Event” is the same as a “Competition” under the Code.*

C. SANCTION

- 4.9 It is important to note that the three Relays in question took place on the day of the sample collection session (August 28, 2017) and a few days previously. This is not a situation (which is perhaps more typical) where the relevant results sought to be disqualified as a result of a doping violation were achieved after the sample collection session, when the athlete was still entitled to compete, and did so. At an athlete’s eventual doping hearing a panel will wish to consider all earlier achieved results that may have been earned during a period of time when the subsequently imposed sanction will be in effect. In such a situation, a FINA Doping Panel may be persuaded to exercise the discretion contained in FINA DC 10.8 whereby results and awards earned subsequently (after the sample collection session) shall be disqualified unless “fairness requires otherwise.” We make no comment on whether FINA DC 10.8 and the exception from disqualification based on “fairness” can ever apply to a Relay or other team event or if it is strictly limited to individual results. Suffice to say, the provisions of FINA DC 10.8 do not apply to this matter.
- 4.10 The Athlete incurred his doping violation from a urine sample collected immediately after the Medley Relay on August 28, 2017. This Doping Panel has already decided that the Athlete’s individual result from the Medley Relay swum on August 28, 2017 must be disqualified. USAS has accepted that the Medley Relay result for the team should be disqualified as a result of the Athlete’s anti-doping rule violation on August 28, 2017.
- 4.11 The question remains - what to do regarding the other two Relays? USAS believes that FINA DC 10.1 gives the Doping Panel discretion to consider (i) the severity of the Athlete’s violation and (ii) the fact that the Doping Panel has previously concluded that the Athlete did not intend to cheat and did not enhance his sport performance as a result of the violation. Unfortunately, the Doping Panel cannot accept the USAS’

position. The proposed discretion (relying on FINA DC 10.1) is not available to the Doping Panel.

- 4.12 Firstly, FINA DC 10.1 deals only with sanctions on individuals. The rules in FINA DC 10.1 are relevant only to the disqualification of individual results. When considering the disqualification of an individual's other results at a Competition, it is proper to consider the severity of the Athlete's anti-doping rule violation and whether the individual had earlier tested negative. However, the question that must be answered by the Doping Panel in this instance involves the disqualification of team results – not individual results. FINA DC 10.1 does not apply. Secondly, FINA DC 10.1.1 only applies when the Athlete is found to be at “no fault or negligence” for the violation. The Athlete was sanctioned to four months of ineligibility – he was not found to be at “no fault or negligence” for his violation. As a result, considering whether the Athlete's conduct was performance enhancing (or not) is not a relevant factor when evaluating whether to disqualify team results. FINA DC 11 was drafted specifically to address the disqualification of team results. In summary, the Doping Panel is not convinced that the provisions in FINA DC 10.1 and DC 10.1.1 (relied on by USAS) trump or supersede the specific provisions contained in DC 11 (Consequences to Teams) when the question to be answered involves the disqualification of Relay team results.
- 4.13 In this case, when evaluating whether to disqualify Relay team results pursuant to FINA DC 11, the determinative question is whether the three Relays were part of a single Competition? The Doping Panel must answer this affirmatively. The definitions of “Event” and “Competition” in the FINA DC are clear. Each relay listed in FINA's letter to the Doping Panel (Men 4X100m Freestyle Relay on August 23, 2017; Mixed 4X100m Freestyle Relay on August 25, 2017; Men 4X100m Medley Relay on August 28, 2017) were clearly part of the program at the 2017 FINA World Junior Swimming Championships. The Athlete was a participating team member in each Relay.
- 4.14 Despite the Doping Panel's sympathy to the Athlete's teammates from the various Relays he participated on, there is no alternative but to disqualify the results for all three Relays. Pursuant to FINA DC 11.2, the Anti-Doping Rule that was violated (referenced in the opening words) is not event specific and thus it is not possible to isolate the effect of the violation to just the 4X100m Medley relay held on August 28, 2017 – the date of the Athlete's sample

collection session. If this more limited team disqualification outcome was intended by the drafters of FINA DC 11 it would be clearly stated. Likewise, when evaluating whether to disqualify a Relay team result, if it was proper for the Doping Panel to consider the “severity” of a violation or whether an athlete’s conduct was “performance enhancing” this would be clearly stated, as it was in FINA DC 10.1 dealing with individual results. Such factors are totally absent from FINA DC 11. Instead, FINA DC 11.2 refers broadly to a doping violation incurred by “a member of a relay in swimming”. This of course describes the Athlete and provides the essential link from the Athlete to each of the Relay events he participated in at the Competition. Accordingly, the Athlete’s anti-doping rule violation, because he was a “member of a relay in swimming”, serves to taint all of the Athlete’s Relay performances at the Competition – the 2017 FINA World Junior Swimming Championships. The wording in FINA DC 11.2 is clear – it states that the team “shall” be disqualified from the Competition. There are no discretionary factors for the Doping Panel to consider, as was submitted by USAS.

5. **CONCLUSION**

- 5.1 For all the reasons set out above, all results obtained by the United States Relay teams in the following three events at the 2017 FINA World Junior Swimming Championships (Men 4X100m Freestyle Relay on August 23, 2017; Mixed 4X100m Freestyle Relay on August 25, 2017; Men 4X100m Medley Relay on August 28, 2017) shall be disqualified which shall include the loss of all records and the forfeiture of any medals, points, prizes or prize money.
- 5.2 All costs of this case shall be borne by USA Swimming Inc. in accordance with FINA DC 12.3.
- 5.3 Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland not later than twenty one (21) days after receipt of this reasoned judgement (FINA Rule C 12.11.4 and DC 13).



FINA Doping Panel Chairman

Robert Fox