

FINA Doping Panel 02/21

comprised of

Robert Fox (SUI) Chairman

In the proceedings against

Mr. Artem Podyakov (“Athlete”), Ulitsa Zegelya, 1, Lipeck, Lipetskaya oblast', 398000, RUSSIA

Affiliated to the Russian Swimming Federation

and

Fédération Internationale de Natation (“FINA”), Chemin de Bellevue
24 A/B, Lausanne, Switzerland

A. THE PARTIES

1. FINA is the world governing body for the sport of Aquatics (meaning swimming, open water swimming, diving, high diving, water polo, artistic swimming and Masters programme). FINA has its headquarters in the city of Lausanne, Switzerland. According to FINA Rule C 5, one of the main objectives of FINA is to provide fair and drug free sport. In furtherance of this goal FINA has adopted and implemented, in accordance with FINA's responsibilities under the World Anti-Doping Code, the FINA Doping Control Rules (Hereinafter the "FINA DC Rules").

2. Mr. Artem Podyakov (hereinafter the "Athlete" or "Mr. Podyakov"), born on 18 March 1990, is an Open Water swimmer and was affiliated with the Russian Swimming Federation at the time of the relevant facts. Mr. Podyakov's results in Open Water Swimming include a fourth place at the FINA 10km Marathon Swimming World Cup in Brasil on 31 January 2010.

3. The Russian Swimming Federation (hereinafter: "RSF") is a member of FINA. RSF 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 to and must be followed by Athletes, Athlete Support Personnel, coaches, physicians, team leaders, and club representatives under the jurisdiction of SASF.

The Athlete is a member of RSF and thus is subject to the jurisdiction of the FINA DC. The Athlete participates in the sport of sprint swimming.

4. Mr. Podyakov stopped taking part in FINA Competitions since February 2016.

B. WHAT THIS CASE IS ABOUT

5. The present case is referred to the FINA Doping Panel because the Athlete is accused of breached Article 2.2 of the 2013 FINA Doping Control Rules by using the prohibited substance Acetazolamide in 2013. FINA further alleges that no Anti-Doping Rule Violation (“ADRV”) was pursued against him, because he was protected by an elaborated doping scheme that went on in Russia at that time.

C. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

6. Following allegations of organized doping practices in Russia which involved the corruption of the Moscow Anti-Doping Centre ("Moscow Laboratory"), the World Anti-Doping Agency (WADA) recovered the internal database of the Moscow Laboratory. This internal database of the Moscow Laboratory is referred to as the LIMS.

7. Following investigation of these allegations of organized doping practices, and in particular of the LIMS, WADA provided international federations with investigation reports on the athletes implicated in these organized doping practices.

8. In light of this, on 14 April 2021, FINA was provided with the final version of a report from WADA on the Athlete which detailed evidence that he committed an ADRV in 2013 ("WADA Report").

9. More precisely, the Report detailed the following.

- On 23 November 2013, the Athlete provided a urine sample (the “Sample”) to RUSADA during an Out-of-Competition doping control and on 25 November 2013, it arrived at the Moscow Laboratory for analysis.
- Following the Initial Testing Procedure ("ITP") and a successful Confirmation Procedure (“CP”) analysis, the Sample (Part “A”) produced

a reportable Adverse Analytical Finding (AAF) for Acetazolamide at a concentration of 0.345 micrograms per millilitre (mcg/mL).

- Acetazolamide is always prohibited (both in-competition and out-of-competition) as per Section S.3 of the 2013 Prohibited List and the Athlete did not have a Therapeutic Use Exemption for this substance.
- Examination of the CP Raw Data files by an Independent Laboratory Expert appointed by the I&I WADA, confirmed the existence of a reportable AAF for Acetazolamide in the Sample. There is no evidence of any departure from applicable International Standards.
- The Moscow Laboratory did not report an AAF, instead the Sample was falsely recorded as 'negative' in ADAMS by the Moscow Laboratory following the issuance of a "Save" directive.
- Indeed, on 29 November 2013, the Moscow Laboratory emailed the results of the ITP analysis of the Sample to Doctor Rodchenkov and the Liaison, Aleksey Velikodny (Mr Velikodny). In the body of the email Doctor Sobolevsky stated the following:

"2867092, M, swimming, training camp | 15539, RU Lobnya, 29 collection 2013-11-23 acetazolamide".

- On 2 December 2013, Mr Velikodny emailed the Moscow Laboratory and Doctor Rodchenkov and stated, under the heading "Save":

"2867092, PODYAKOV ARTEM A., swimming – open water, training camp | 15539, RU Lobnya, collection 2013-11-23, acetazolamide".

- Moreover, the analytical documents from the analysis of the reportable AAF were selectively manipulated and data deleted to the betterment (protection) of the Athlete. In other words, analytical evidence that the Athlete was using Acetazolamide was destroyed and evidence that the Sample was 'negative' was created.
- The destruction of the analytical evidence and creation of false evidence was unsuccessful. More specifically, the Independent Experts recovered the "deleted" CP Raw Data files from the Moscow Data and discovered evidence of multiple PDF manipulation.

10. FINA then began conducting its internal and external review of this report.

11. On 17 May 2021, FINA notified Mr. Podyakov of the start of an investigation into a potential ADRV pursuant to Article 5.3.2.1 of the International Standards for Results Management (ISRM). By the same letter, Mr. Podyakov was provided with the evidence based on which FINA believed he has committed an Anti-Doping Rule Violation (ADRV) pursuant to Article 2.2 of the 2013 FINA Doping Control Rules (Use). Mr. Podyakov was also given the opportunity to provide any explanation in respect of this potential ADRV by 31 May 2021.

12. Mr. Podyakov did not reply to this letter.

13. On 25 August 2021, FINA charged Mr. Podyakov with an ADRV pursuant to Article 2.2 of the 2013 FINA DC Rules. By the same letter, Mr. Podyakov was afforded until 6 September 2021 to either (i) admit that he committed an ADRV or (ii) challenge the assertion of the ADRV.

14. On 27 September 2021, the Athlete informed FINA that he was challenging the assertion of the ADRV.

15. Considering the above, FINA referred the case of Mr. Artem Podyakov to the FINA Doping Panel to confirm that he committed an ADRV and impose on him the applicable consequences.

16. On 1 November 2021, the Chairman of the FINA Doping Panel wrote to the Athlete informing him of the FINA referral and the prayers contained therein. A deadline to 11 November 2021 was given to the Athlete to allow him to confirm his request for a hearing or not and the possibility to file a defence, should he not request a hearing.

17. There was no response offered within the set deadline and the Chairman of the FINA Doping Panel on 29 November 2021 wrote to the Athlete once again and informed him that that pursuant to the FINA Doping Control Rules 2021 (FINA DC) and more specifically Appendix 2 FINA

Doping Panel Procedural Rules (FINA DC Appendix), more specifically art. 14 § 1, upon receipt of the written petition by the FINA, the Chair of the Doping Panel shall assign the case to a member appointed from amongst the members of the Doping Panel to adjudicate the case. The decision was for the Chairman to handle the matter himself. A deadline to 6 December 2021 was set for the Athlete to challenge this decision or provide a motive of recusal of the chosen FINA Doping Panel member. He was also once again provided the opportunity to file a statement of defence or any evidence he wished to rely on for his case. Mr. Podyakov did not reply to this letter.

18. On 30 November 2021, the RSF replied in an email the following: “...As for Mr. Podyakov we didn't receive any reply from him and in this connection we consider that FINA and WADA can make the decision according to their rules...”

D. JURISDICTION & APPLICABLE RULES

19. As per Articles 12.3 and 12.5 of the FINA Constitution, the FINA Doping Panel is the responsible body to adjudicate cases relating to violations of the FINA DC Rules. The FINA Doping Panel therefore has jurisdiction to rule on this case. Pursuant to the FINA Doping Control Rules 2021 (FINA DC) and more specifically Appendix 2 FINA Doping Panel Procedural Rules (FINA DC Appendix), more specifically art. 14 § 1, upon receipt of the written petition by the FINA, the Chair of the Doping Panel shall assign the case to a member appointed from amongst the members of the Doping Panel to adjudicate the case.

20. Considering the above, the FINA Doping Panel has jurisdiction to render a decision in this case.

21. This case shall be adjudicated based on applicable FINA Regulations and Swiss law. In particular, the Doping Panel should apply the substantive rules of the 2013 FINA Doping Control Rules (unless the Doping Panel determines the principle of “*lex mitior*” appropriately applies

under the circumstances of the case) and the procedural rules of the 2021 FINA DC Rules.

E. LEGAL DISCUSSION

E.1 ESTABLISHMENT OF THE ADRV OF USE (DC 2.2)

22. FINA submitted that it had met its burden of proof by establishing - to the required degree of comfortable satisfaction - that the Athlete committed an ADRV (i.e. the Use of the Prohibited Substance Acetazolamide).

23. To this end, FINA relied in particular on the WADA Report and its attachments.

To the satisfaction of the FINA Doping Panel, the evidence clearly established that the Athlete used Acetazolamide in 2013. The arguments raised in the FINA referral are compelling.

24. “Use” is defined in the FINA DC Rules as:

“The utilization, application, ingestion, injection or consumption by any means whatsoever of any Prohibited Substance or Prohibited Method”.

25. As detailed in the WADA Report, examination of the CP Raw Data files by an Independent Laboratory Expert appointed by the I&I WADA, confirmed the existence of a reportable AAF for Acetazolamide in the Sample the Athlete provided to RUSADA during an Out-of-Competition doping control on 23 November 2013.

26. FINA also appointed a scientific expert to review the CP Raw Data files. This scientific expert also confirmed the existence of a reportable AAF for Acetazolamide in the Sample.

27. Moreover, there is no evidence of any departure from applicable International Standards, nor has the Athlete come forward with such a claim.

28. Acetazolamide simply could not have been found in the Athlete's Sample without him having used, applied, ingested, injected or consumed that substance. It results from the above that the Athlete clearly used the prohibited substance Acetazolamide within the meaning of the 2013 FINA DC Rules.

29. Intent or even knowledge of the use of a prohibited substance is not necessary to establish that an ADRV occurred under DC 2.2 of the FINA Doping Control Rules, hence, the Doping Panel need not contemplate if the Athlete knew he was doping or intended to. Pursuant to DC 2.2.1 of the FINA DC Rules, the mere 'use' of a prohibited substance is sufficient, which, in this case, has been proven by the evidence on file. The Evidence produced by FINA is reliable based on the following grounds.

30. As per DC 3.2 of the FINA DC Rules, an ADRV for Use can be established by any reliable means, including documentary evidence like the WADA Report.

31. As explained in great details in the WADA Report, the evidence filed by FINA in this case is highly reliable.

Additionally, several other hearing panels recently recognized the reliability of similar evidence arising from Laboratory Information Management System ("LIMS") Data, for example for example IAAF v. RUSAF & Svetlana Shkolina CAS/O/5667, and CAS ad hoc Division and (OG Rio) 16/009 Russian Weightlifting Federation (RWF) v. International Weightlifting Federation (IWF).

32. In view of all the above, the FINA Doping Panel considers that FINA has met its burden of proof to establish the ADRV of Use and that the only issues outstanding in the present proceedings are the sanctions and consequences to be applied to the ADRV.

E.2 SANCTION AND CONSEQUENCES

Period of Ineligibility

33. FINA submitted to the FINA Doping Panel a prayer for an ineligibility period of 4 years pursuant to the Athlete's ADRV.

34. According to DC 10.2 of the 2013 FINA DC Rules, the base sanction for the use of the Prohibited Substance Acetazolamide is a two-year period of ineligibility, unless the conditions for eliminating or reducing the period of ineligibility, as provided in DC 10.4 and 10.5 are met.

35. Under certain conditions, this two-year period of ineligibility can be either eliminated where there is No Fault or Negligence (DC 10.4) or reduced based on No Significant Fault or Negligence (DC 10.5.1.1).

36. For adult athletes, both articles require that the athlete establish how the prohibited substance entered his or her system. The athlete is required to prove his or her allegations on the "*balance of probability*", which, according to long established CAS jurisprudence, means that the athlete needs to convince the panel that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence:

The wording in CAS decisions is the following: "*...for the Panel to be satisfied [...] on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51 % chance of it having occurred*". (CAS 2009/A/1926 & CAS 2009/A/1930, ITF v. Richard Gasquet and WADA v. ITF & Richard Gasquet, §5.9; CAS 2011/A/2384, WADA and UCI v. Alberto Contador Velasco & RFEC, §209).

37. Mr. Podyakov merely challenged the assertion of the ADRV without providing any explanations. It is therefore clear that the Athlete did not establish the conditions for eliminating or reducing the period of ineligibility, as provided in DC 10.4 and 10.5.

38. As requested by FINA, the Doping Panel considers that the standard period of ineligibility is to be doubled to four years (pursuant to Article 10.6 of the 2013 DC Rules) because of aggravating circumstances present in this case.

39. These aggravating circumstances come from the fact that Athlete's ADRV was part of a sophisticated doping scheme. This situation is specifically mentioned in the Comment of Article DC 10.6 of the 2013 FINA DC Rules as an example of what must be considered as Aggravating Circumstances.

40. Mr. Podyakov had the chance to avoid the application of this Article by admitting the ADRV as asserted promptly after being confronted with the ADRV by FINA, but he chose not to do so.

Commencement of the Period of Ineligibility and Credit for Provisional Suspension

41. As to the commencement date of the period of ineligibility, DC 10.9 of the 2013 FINA DC Rules provides that, as a general rule, the period of ineligibility shall start on the date of the Doping Panel's decision. FINA Doping Panel sees no reason to deviate from this principle.

42. DC 10.9 also provides for credit for provisional suspensions. In this case, the Athlete has been provisionally suspended since 25 August 2021. Hence, the time he served under provisional suspension must be credited against the period of ineligibility imposed.

Disqualification

43. In accordance with DC 10.8 of the 2013 FINA DC Rules, all competitive results of the Athlete obtained from the date an ADRV occurred, through the commencement of any provisional suspension or ineligibility period, shall, unless fairness requires otherwise, be disqualified with all resulting consequences including forfeiture of any medals, points and prizes.

44. The Athlete has failed to establish any reasons to apply the fairness exception.

45. Moreover, the athlete has not participated in any FINA Competition since 26 February 2016 so the period of results disqualified would effectively be of less than three years.

46. Therefore, all competitive results obtained by Ms. Artem Podyakov since 23 November 2013 shall be disqualified with all resulting consequences including forfeiture of any medals, points and prizes.

Costs

47. According to DC 12.2, Member Federations shall be obliged to reimburse FINA or the designated organization for all costs (including but not limited to interpretation, hearing expenses and travel) related to an ADRV committed by a Person affiliated with that Member Federation.

48. As no such costs appear to have been borne by FINA in this case, the present decision is rendered without costs.

Right of Appeal

49. As per Article 13.6.1 of the FINA DC Rules, this decision can be appealed by Mr. Podyakov within twenty-one (21) days from the date of receipt of the decision by email, exclusively to the Court of Arbitration for Sport. The address of the Court of Arbitration for Sport is:

Court of Arbitration for Sport
Av. de Beaumont 2, 1012 Lausanne
Switzerland

F. CONCLUSION

1. Mr. Artem Podyakov has committed an anti-doping rule violation of DC 2.2 of the 2013 FINA Doping Control Rules.
2. A period of ineligibility of four years is imposed on Mr. Artem Podyakov, commencing on the date of the decision. The period of ineligibility served by Mr. Podyakov since 25 August 2021 shall be credited against the four-year period of ineligibility imposed.
3. All results obtained by Mr. Artem Podyakov since 23 November 2013 with all resulting consequences are disqualified, including forfeiture of any medals, points and prizes.

Done on 11 February 2022

Chairman of FINA Doping Panel

A handwritten signature in black ink, appearing to be 'R. Fox', written in a cursive style.

Robert Fox