

“HARD CASES MAKE BAD LAW”

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HOW MUCH DISCRETION DOES A NADO HAVE....

There are two broad categories:

- Choice of legal process – consistent with the WADC and International Standards
- Choice of sanction calculation - the potential to reach “consent agreements” with an athlete

WHAT LEGAL PROCESS SHOULD BE FOLLOWED?

- Is there a choice?
- Is there another interpretation?
- Can I be creative?

Whatever the process -- be consistent.

'FOOD/MEAT CONTAMINATION' - HOW TO FAIRLY RESOLVE?

- The athlete and others have been in Mexico and many AAFs reported (trace concentration) from same team. Immediately ignore the AAF? If Clenbuterol? If not?
- Only one athlete with an AAF (trace concentration). Validate the explanation with a thorough Initial Review. Ignore the AAF?
- Rely on the reported AAF and assert a Presence violation. At a hearing the ADRV is confirmed but the athlete can be determined to be at No Fault, receive a 2 year sanction or receive a 4 year sanction.

DO THESE VARIED PROCESSES COMPLY WITH THE 'STRICT LIABILITY' PRINCIPLE?

- Should it matter if the test was in-competition so results achieved can be disqualified?
- Must 'proof of source' be strictly respected?
- Is a non-doping rationale essential?
- What if the substance is not in meat or is not a 'typical' contaminant (Clenbuterol)? New RM Standard may just describe a specific process for Clenbuterol (Version 1.0 - 5.1.2.2 c).

INVESTIGATIONS – WHO NEEDS TO KNOW WHEN?

- When to advise WADA an investigation is being commenced? The WADC and Standards are clear – “shall” notify WADA it is starting an investigation.
- What comprises an “investigation” vs. looking into the matter. Lots to evaluate to get to “reasonable cause to suspect”. (ISTI 12.3.2)
- Is reading a ‘tip’ and then looking on social media platforms an investigation?

WHEN MUST THE SUBJECT BE INFORMED?

- Privacy and data protection is critically important but so is the integrity of ongoing investigations.
- There is clear tension between the basic responsibility to disclose prior to or at the time of collection vs. the exception to “delay or suspend” disclosure to the subject to not jeopardize an investigation.
- What is the meaning in the ISPPA at Article 7.2 whereby a subject must be informed of Personal Information received from a third party with no consent “as soon as reasonably possible” and all delays justified? Is this realistic?

WHICH PROCESS APPLIES?

- A student-athlete subject to the WADC but entitled to a Medical Review (as an exception to the normal TUE requirement).
- AAF for Salbutamol at 1700 ng/ml. Corrected for specific gravity just over the allowable threshold.
- Salbutamol is a threshold substance – not prohibited under about 1000ng/ml
- An AAF can be excused with a controlled pharmacokinetic study to prove unique physiology regarding the athlete's specific metabolism of the drug.
- Claimed he was misusing the inhaler (bad technique) but prescription was for proper therapeutic does, well under daily limit.

HOW TO SOLVE?

- Put athlete through the study? Unlikely athlete can replicate test day results. Results of the study may actually undercut his explanation. Then must assert an ADRV. His fault may rise.
- Avoid study and impose an ADRV and a low fault sanction based on the athlete's explanation – sanction to be a warning or a few months.
- Ignore requirement for the controlled study and rely on the Medical Review process (to be consistent with, say, a testosterone AAF from a similar student-athlete).

OTHER ISSUES WHERE THE LEGAL PROCESS HAS BEEN PROBLEMATIC:

- Low concentration detected. When “should not” report an AAF when the substance is a non-threshold substance on the “exception” list? (TD2018MRPL 4.0)
- Wait for another legal or discipline process to conclude?
- When should a NADO inform the lab to cancel the analysis?
- Should “public disclosure” be the same in all cases, when not a minor?
- Others – let’s discuss?

THE SANCTION CALCULATION - WHO SHOULD DECIDE?

- There is always a choice between leaving it to an arbitrator to decide in every case or trying to reach a fair consent outcome to avoid a hearing.
- Can be easy when the outcome is a standard sanction at 4 or 2 years. It becomes much harder when *Fault* must be evaluated.

DRAFT WADC 2021, ARTICLE 10.8.2 “CASE RESOLUTION AGREEMENTS”

- In summary: “Where the Athlete admits the ADRV and agrees to Consequences acceptable to the ADO and WADA, at their sole discretion”.
- Up to a 50% sanction reduction considering all normal factors and depending on the seriousness of violation; degree of Fault and how promptly the violation was admitted.
- The sanction may start as early as the date of Sample collection
- No hearing will be held and no appeal is possible.

PRACTICAL CONSTRAINTS TO CONSENT AGREEMENTS

- On one hand: WADA or the IF will not agree to the outcome and will insist that the sanction is not supported by the facts or is too lenient. An appeal will often result.
- On the other: The NADO's concessions will create a precedent for future cases when a similar situation will inevitably arise. Athlete counsel will seek similar 'flexible' concessions from NADO.

IS THE HEARING NECESSARY?

- It is sensible to consent to an outcome when the NADO understands and accepts the facts that will be heard and accepted by the arbitrator. It becomes simply an exercise in judgement to evaluate the most likely outcome at the hearing.
- Never consent to an outcome simply to avoid a contested hearing. It is not equivalent to a ‘plea bargain.’

BETTER TO NOT CONSENT WHEN...

- There are questionable facts, only speculation and theories presented or an explanation that is just not believed.
- The otherwise minimum sanction is reached and the athlete seeks a further reduction based on a proportionality claim.
- There is no clear proof of source and the issue is a lack of “intent” to reduce the sanction to 2 years. Leave the “theoretical possibility” of determining a lack of intent (with no clear proof of source) to the arbitrator.

It is critical to have a system in place to evaluate and make rational decisions on sanction outcomes. Resist the temptation to let particularly extreme or specific circumstances motivate a 'one-off' result. Hard cases make bad law!

TOP 5 TIPS:

- Avoid 'ad hockery'
- Strive for a sanction outcome 'in the ball park'
- Understand probability risk and 'balance of probability'
- Consider establishing 'standard' outcomes
- Must every results management process be identical?

QUESTIONS/COMMENTS?

PLEASE SHARE YOUR UNIQUE RESULTS MANAGEMENT
CHALLENGES WITH YOUR NADO COLLEAGUES.

THANK YOU.