

Doping Hearing Panel
of the
International Biathlon Union

The Doping Hearing Panel, sitting in the composition of Christoph Vedder (Chair), Edward G. Williams and Walter O. Frey, according to Rule 8.1.3 IBU Anti-Doping Rules, heard the case of Ms Albina Akhatova on May 8, 2009 at the headquarters of International Biathlon Union in Salzburg, Austria. The following persons were present:

- Ms Nicole Resch, General Secretary of IBU, representing IBU
- Mr Martin Kuchenmeister, Executive Director, representing IBU
- Ms Albina Akhatova
- Mr Tagir Samakayev, Legal Representative of the Athlete
- Mr Dmitry Loev, Representative of the Russian Biathlon Union, as observer
- Ms Natalia Maryanchik, Interpreter for Ms Akhatova

Having heard the submissions of the parties and having duly deliberated the facts and the law the Panel renders the following decision:

I. Statement of Facts

1

Ms. Albina Akhatova (hereinafter referred to as "the Athlete"), an Athlete under the jurisdiction of the Russian Biathlon Union (hereinafter referred to as "RBU"), was tested by the International Biathlon Union (hereinafter referred to as "IBU") during the Biathlon World Cup at Östersund, Sweden, in December 2008. She was submitted to an out-of-competition test ("OOCT") on 5 December 2008.

2

The A sample 2283562 was analysed in the WADA accredited laboratory in Lausanne, Switzerland on 10 December and the following days and showed the presence of recombinant EPO ("rEPO").

3

The second opinion given by the director of the WADA accredited laboratory in Vienna, Austria, Dr. Günter Gmeiner, in a report dated 13 January 2009, confirmed the presence of rEPO.

4

The results of the analysis of the A sample, together with the full package of documents, were reported by the Lausanne laboratory to the IBU on 28 January 2009.

5

Upon receipt the IBU Anti-Doping Administrator, Ms. Nicole Resch, conducted the initial review of the adverse analytical finding ("AAF") on 29 January 2009 with the result that no Therapeutic Use Exemption ("TUE") was applicable and no departure from the International Standard for Testing ("IST") or International Standard for Laboratories ("ISL") was apparent.

6

On the same day, by letter of 29 January 2009 which included the full documentation package, the Athlete, the RBU, the WADA and the RUSADA were notified of

- a. the adverse analytical finding
- b. the anti-doping rule violated (Article 2.1. IBU's Anti-Doping Rules)
- c. the athlete's right to promptly request the analysis of the B sample or, failing such request, that the B sample analysis may be deemed waived
- d. the scheduled date, time and place of the B sample analysis (which shall be in the time period specified in the ISL), if the athlete or IBU chooses to request the analysis of the B sample (9 or 10 February 2009)
- e. the opportunity of the athlete and/or the athlete's representative to attend the B sample opening and analysis at the scheduled date, time and place if such analysis is requested; and
- f. the athlete's right to request copies of the A and B sample laboratory documentation package which includes information as required by the ISL as soon as those are available;
- g. the possibility to request a provisional hearing by sending a written statement until 7 February 2009.

7.

In a letter dated 31 January 2009, the athlete declared

"I have never used any forbidden substances. I cannot explain the presence of erythropoietin in my sample. During the entire training process I only used medication administered by the team physician."

8.

As the laboratory informed the IBU Anti-Doping Administrator that it was not possible to conduct the B sample analysis within the time frame of seven days provided for by IBU's Anti-Doping Rules ("ADR"), the time windows of 9 to 11 February or 10 to 12 February were

offered to the athlete. By letter of 2 February 2009, the Athlete choose the second date for the B sample analysis.

9

The opening and analysis of the B sample took place on 10 to 12 February in the WADA accredited laboratory in Lausanne. As representatives of the Athlete were present: Ms. Larissa Zhukovskaya, Mr. Nikolay Durmanov, Mr. Michael Geistlinger and Mr. Takhir Samankaev.

10

The analysis of the sample B 2283562 revealed the presence of rEPO and, therefore confirmed the results of the A sample. The analysis results were reported to IBU under letter of 12 February 2009.

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By letter of 13 February 2009, sent by IBU's Anti-Doping Administrator from Pyeong Chang, Korea where the Biathlon World Championship took place, the Athlete, the RBU and the WADA were notified of the results of the B sample analysis. They were further informed that

"a disciplinary process before the IBU Doping Hearing Panel will be initiated, as soon as the complete documentation package from the laboratory will be received by IBU, according to Art. 8 of the IBU Anti-Doping Rules."

12

As a consequence of the adverse analytical finding based on the A sample which had been reported to the IBU on 28 January and after the initial review made by the IBU Anti-Doping Administrator on 29 January 2009, IBU already had notified the Athlete of her provisional suspension by letter of 4 February 2009. She was informed that

"In case of non specified substances found in an A sample a provisional suspension is mandatory, Art. 7.6.1 of the IBU Anti-Doping Rules. The suspension shall take immediate effect. A provisional suspension means that you are barred temporarily from participation in any IBU competition."

13

The complete documentation of the B sample analysis was sent by IBU to the Athlete and RBU under letter of 31 March 2009.

II. Procedure before the Doping Hearing Panel

1. The IBU Doping Hearing Panel

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The IBU Doping Hearing Panel (hereinafter referred to as "DHP" or "the Panel") is the competent body to hold the hearings according to Article 8 ADR 2009 which gives the athletes the right to a fair hearing. Within the framework of the IBU the Panel is the body to decide whether or not, in a given case, an anti-doping rule violation was committed. According to Article 8.1.8 ADR 2009, the decisions of the DHP may be appealed to IBU's Court of Arbitration or, according to Article 13.2.1 ADR 2009, if both parties agree, directly to the Court of Arbitration for Sport in Lausanne, Switzerland. In such a situation, the decision of the DHP constitutes a "*decision of a federation*" appealable to CAS according to R47 CAS Code.

15

Following the decision of the IBU Congress in September 2008 the IBU Executive Board, by resolution of 6 February 2009 established the DHP according to Article 8.1.1 ADR 2009. It consists of a list of eight "*experts with experience in anti-doping*" (Article 8.1.1 ADR 2009) duly elected in accordance with the requirements of Article 8.1.1 ADR 2009.

16

Although the DHP is part of the institutional framework of the IBU and renders, in matters of alleged anti-doping rule violations, the final decisions for the IBU, it acts in complete

independence of the IBU. According to Article 8.1.1 sentence 3 ADR 2009 *“Each panel member shall be otherwise independent of IBU”*.

17

The proceedings before the DHP are contentious trials between the IBU and the athlete concerned as parties. According to Article 8.1.2 ADR 2009 the *“cases shall be assigned to (it) for adjudication”* which means a decision reached by judges. The *Principles for a Fair Hearing* laid down in Article 8.3 ADR 2009 speak of the right of *“each party”* to present evidence and provide in its various items for a *“fair and impartial hearing panel”* and other guaranties which apply to judicial proceedings.

2. The Proceedings before the Hearing

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By letter of 31 March 2009, according to Article 8.1.2 ADR 2009, the IBU referred the alleged anti-doping rule violation of Ms. Akhatova to the DHP.

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The Chairman of the DHP, according to Article 8.1.3 ADR 2009, appointed Mr. Edward Williams, Mr. Walter Frey and himself as the particular Panel to hear the case of Ms Akhatova. As required by Article 8.1.3 ADR 2009 the Panel members have not been involved in the case previously and do not have the same nationality as the Athlete.

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According to Article 8.1.4 ADR 2009 a hearing

“shall be held in Salzburg within 30 days after the IBU has sent the complete documentation to the federation of the athlete of the positive ... B sample from the laboratory”.

The 30 days time limit had started on 31 March 2009 after the IBU had sent the complete documentation to both the athlete and the RBU. The RBU requested to delay the hearing and the IBU agreed to postpone the hearing in order to facilitate a fair hearing for the Athlete. Accordingly, the date of the hearing was fixed for 8 May 2009.

21

Corrections of a *“mistake”* in the laboratory’s report concerning the A sample analysis were provided by the Lausanne laboratory and sent to the DHP, the Athlete and the RBU on 6 May 2009.

3. The Hearing and the Submissions of the Parties

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The hearing was held on 8 May 2009 at the headquarters of IBU in Salzburg, Austria. The parties were present as indicated above. The RBU attended the hearing as an observer according to Article 8.1.5 ADR 2009. After the opening of the hearing the parties made their opening statements.

23

IBU’s oral submissions with regard to the facts and the law were summarized in written form and handed over to the Panel and the Athlete. Based on the facts and the applicable rules the IBU submitted that

“The presence of a prohibited substance was found in her A sample and confirmed by the respective B sample. No arguments were provided by the athlete prior to this hearing which were reasonable to reduce the claim of a two years suspension by the IBU.”

IBU’s prayers for relief were:

“The IBU requests a two year suspension from the day of the sample collection on Dec. 5th 2008, for the athlete Albina Akhatova from Russia born on November 13th

1976 as a disciplinary consequence of her first single IBU Anti-Doping Rule (ADR) violation; Art. 2.1;10.2 WADA CODE”.

24

Due to the *lex mitior*¹ principle IBU, as already in the results management process, applies the ADR 2009 and the WADA Code 2009 in its submissions. In its view

“the new Rules offer the possibility for better justice on an individual basis with regard to the new Art. 10.5.3 (substantial assistance in discovering or establishing ADR violations.”

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The Athlete’s oral statement was summarized and, together with related documents, most in Russian language, submitted to the Panel and to the IBU in written form.

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The Athlete submitted that, according to the transitional rule, the anti-doping rules in force in December 2008 apply to her case.

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The Athlete acknowledged the facts and the results of the sample analysis.

28

However, the Athlete claimed that some irregularities occurred. It was submitted that the process of analysing of the A sample took 49 days instead of about 10 and that the package of documentation was prepared in more than 1 1/2 month instead of the usual 14 days. In particular, the “typographic mistakes” corrected by the Lausanne laboratory in a later amendment to its report were causing doubts with regard to the results of the analysis. It was further submitted that the out-of-competition testing on 5 December 2008 was too early and within the time range of an in-competition testing.

29

In particular, the Athlete relied on the submission that exceptional circumstances must be taken into consideration. The RBU had set up a commission to investigate the anti-doping rule violation of the Athlete. Parts of the proceedings before that commission and its “decision” were submitted in order to defend the Athlete’s case.

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First, it was submitted that the Athlete, as the commission of RBU stated, bears no fault or negligence because she did not intentionally take any prohibited substance. She was informed by the team physician, Mr. Dimitriev, that the medication “Cardio-Protector”, she was given by him, did not contain any prohibited substances.

31

Secondly, it was submitted that the Athlete provided substantial assistance in discovering “anti-doping rule violations by support personnel (the physician)”. According to this submission, before the commission of the RBU” the Athlete „declared her wish to provide substantial assistance in the investigation.“ The decision of the RBU commission stated:

“Moreover, the Commission appreciates the Athlete’s cooperation and providing all possible assistance in the process of the investigation”.

32

It was further submitted that Mr. Dimitriev declared before the RBU commission that he recommended and prescribed to the Athlete to take the product “Cardio-Protector” in November 2008. According to the Athlete, five ampoules of “Cardio-Protector” were injected

¹ The *lex mitior* principle is a fundamental principle of law which applies generally and, within the framework of IBU’s rules, is specifically mentioned in Article 19.7.1 ADR 2009. In the particular circumstances of the case to which, of course, the edition of IBU’s rules apply which were in force in December 2008, the application of the *lex mitior* principle leads to the conclusion that those rules of the IBU ADR 2009 must be applied which are more favorable to the Athlete than the previous ones (see also par. 38, 39 of this decision).

between 16 and 26 November 2008 and, therefore, not mentioned on the Doping Control Form.

33

Furthermore, the Athlete submitted that, if the case may be, the period of ineligibility should start on the day of the sample collection which, according to her, was 5 December 2008.

34

In summary the athlete submitted the following:

“Taking into consideration the above described:

- violations of the Athlete’s basic rights from the side of the anti-doping organization;*
- the Athlete’s substantial assistance in establishing Anti-Doping Rules violations by another person from the Athlete’s personnel (physician) (Art. 4.6 of the IBU Disciplinary Rules, Art. 10.5.3 of the WADA World Anti-Doping Code);*
- absence in the Athlete’s conduct fault or negligence, that is the Athlete Akhatova A. bears no fault or negligence for the prohibited substance found in her sample (Art. 4.4 of the IBU Disciplinary Rules, Art. 10.5.1 of the WADA World Anti-Doping Code), we consider it necessary to apply to this case of the Anti-Doping rules violation Art. 4.4 of the IBU Disciplinary Rules and Art. 10.5 of the WADA World Anti-Doping Code “Elimination or reduction of period of ineligibility based on exceptional circumstances”.*

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In reply to the opening statement of the Athlete IBU submitted that the substantial assistance, if any, must have been provided to the IBU as the prosecuting Anti-Doping Organisation. Till today neither the Athlete nor the RBU provided a report of the proceedings before the RBU Commission to the IBU. In addition, according to IBU, the information provided before the DHP is neither sufficient in substance nor proved.

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The Panel asked the Athlete to explain how the rEPO came into her body after having taken “Cardio-Protector”. No reliable explanation was given.

III. In Law

1. Applicable Law

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As the introduction to the WADA Code in either version of 2004 and 2009 states the rules of the WADA Code are mandatory to the stakeholders, including the International Federations such as the IBU, and must be adopted, implemented and enforced by the International Federations. However, the WADA Code is not directly applicable to athletes in a particular case. Therefore, the rules and regulations of the IBU which are adopted in order to implement the WADA Code, *i. e.* IBU’s ADR, in particular, apply exclusively.

38

As the alleged anti-doping rule violation occurred in early December 2008 the ADR as in force at that time apply to the case, *i.e.* the IBU’s ADR as amended in September 2008 (“ADR September 2008”). This is confirmed by Article 19.7.1 ADR 2009. However, according to the transitional provision of that Article 19.7.1 ADR 2009, the ADR 2009 apply retroactively if the *lex mitior* principle so requires². Hence, the Panel applies the ADR and IBU’s Disciplinary Rules in force at the material time, except for those rules of the ADR 2009 which are more favourable to the Athlete as the predecessor rules. However, the Panel observes that the rules relevant to the case, in particular with regard to the anti-doping rule violation, the sanctions and the elimination or reduction of a sanction, in substance are the same in the ADR 2009, on the one hand, and the ADR September 2008 together with IBU’s Disciplinary Rules as amended in September 2008 (“DR September 2008”) which contain the rules on the sanctions, on the other hand. Prior to the entry into force of the ADR 2009 IBU’s anti-doping rules were divided between ADR September 2008 and DR September 2008.

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² see above par. 24

The Panel is of the view that that Article 8 ADR 2009 which provide the Athlete the right to a fair, independent and impartial hearing before the DHP is rule more favourable to her and, therefore, applies according to the *lex mitior* principle³ which is enshrined in Article 19.7.1 ADR 2009. Moreover, the Athlete accepted the hearing offered by IBU under Article 8 ADR 2009 without making objections.

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The same applies to the results management process which was handled according to Article 7 ADR 2009, in particular the initial review and the notification.

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The Athlete did not raise any objection with regard to the proceedings after IBU had received the laboratory report, including the results management and the B sample analysis, and the proceedings before the DHP.

2. Anti-Doping Rule Violation According to Rule 1.2.2. ADR September 2008

42

The analysis of the Athlete's B sample collected on 5 December 2008 revealed the presence of rEPO. "rEPO" is a prohibited substance on the WADA Prohibited List. This constitutes a doping offense in the sense of Rule 1.2.2 ADR September 2008. No intent, fault or negligence or knowing use on the Athlete's part must be demonstrated. In the particular case, according to Rule 1.2.2. (a) ADR September 2008, sufficient proof has been established by the presence of rEPO in the B sample, which confirmed the results of the A sample. The athlete did not object the results of the sample analysis.

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According to Rule 3.1.1 ADR September 2008, WADA-accredited laboratories are deemed to have conducted the analysis and custodial procedures in accordance with the ISL. This presumption and, hence, the reliability of the results can be rebutted by the Athlete by establishing that, first, a departure from the ISL occurred which, second, could reasonably have caused an adverse analytical finding.

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The alleged irregularities, submitted by the Athlete, however, are not of a kind to be able to cause a false positive. The Athlete does no longer uphold that the OOCCT conducted on 5 December 2008 violated "her right"; the IBU have had the right to test her on 5 December 2008. Furthermore, the expert testimony of Dr. Gmeiner confirmed to the comfortable satisfaction of the Panel that the errors which were corrected later do not affect the original results of the analysis and, hence, the adverse analytical finding. Moreover, the corrections affect the A sample analysis results, exclusively.

45

The Panel had heard the expert evidence of Dr. Günter Gmeiner, Director of the WADA accredited laboratory in Vienna, Austria in the parallel case of Ms Yourieva. According to his testimony the Vienna laboratory is a WADA accredited laboratory specialized for EPO research. In particular, Dr. Gmeiner explained the mistakes corrected at a later stage. According to his testimony, the errors, which were later corrected by the laboratory, only appear in the package of documentation which was prepared after obtaining the results from the analysis. The original results are taken from the raw data obtained from the analysis directly. These data unambiguously reveal the presence of rEPO in the athlete's samples.

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Therefore, the Athlete committed an anti-doping rule violation according to Rule 1.2.2 ADR September 2008.

3. Elimination or Reduction of the Sanction

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³ see above par. 24

The Athlete chiefly submitted that the sanction must be eliminated or reduced due to exceptional circumstances.

48

As provided in Rule 4.4 DR September 2008 a sanction can be eliminated if the Athlete establishes that she bears no fault or negligence. As a prerequisite the Athlete must establish "*how the Prohibited Substance entered his system*". According to the substance of the written submissions and the RBU's commission's decision and also according to her submissions in the hearing where she was given ample opportunity to give an explanation, the Athlete did not provide any reliable explanation how EPO entered her body. The Athlete failed to establish and, hence, did not discharge her burden of proof to demonstrate how rEPO came into her body. The "Cardio-Protector" which she admittedly had taken some days before the doping control does not contain rEPO or related substances. Furthermore, none of the instances contained in the Comments to Article 10.5.2 WADA Code 2003 have been involved or proved.

49

According to Rule 4.5 DR September 2008 the sanction may be reduced if the Athlete would have had established that she bears no significant fault or negligence. In connection with the general obligation of the Athlete laid down in Rule 1.2.3 (a) ADR September 2008 which reads

"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method."

Rule 4.5 DR September 2008, as explained in the Comment to Article 10.5.2 of the WADA Code 2003, requires "truly exceptional" circumstances in order to be applicable.

50

This Comment which is to be taken in consideration in interpreting IBU's relevant anti-doping rules indicates illustrative instances none of which has been submitted or proved by the Athlete. No other similar truly exceptional circumstances which may indicate that the Athlete bears no significant fault or negligence have been established before the Panel.

51

The Athlete further submitted to have provided substantial assistance. Rule 4.6. DR September 2008 requires that the substantial assistance provided to the IBU or any other Anti-Doping Organization must have resulted in discovering or establishing an anti-doping rule violation committed by another person. The Panel leaves the question open whether or not the commission set up by RBU or RBU itself is an Anti-Doping Organization in the sense of the rules, in the case of an anti-doping proceedings initiated and conducted under the jurisdiction of IBU.

52

In any event no assistance has been given to IBU prior to the hearing nor has the Athlete established during the hearing before the Panel that she had provided or actually provides substantial assistance before the commission of RBU which reportedly has lead to establish an anti-doping rule violation committed by the team physician, Mr. Dimitriev. Mere allegations without proof were submitted to the Panel. Neither the decision of the commission set up by RBU to investigate the case nor the submissions of the Athlete before the Panel provided information in relation to any proceedings or sanctions against Mr. Dimitriev initiated by RBU.

53

The Athlete did, until now, not provide any substantial assistance which resulted in discovering or establishing an anti-doping rule violation by another person. The Panel observes that the written explanations submitted during the hearing before the Panel are almost identical in substance and even in wording for Ms Jourieva, Ms Akhatova and Mr Yaroshenko against whom parallel anti-doping proceedings were heard before the Panel. [Although it is outside its jurisdiction the Panel notes, as a result of the identical defense heard in the cases of all three athletes Ms Jourieva, Ms Akhatova and Mr Yaroshenko, that it

is hard to escape the conclusion that systematic and deliberate anti-doping rule violations and attempts to evade the consequences of those violations took place].

4. Sanction of Two Years According to Rule 7.7.1 DR September 2008

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For an anti-doping rule violation which consists in the presence of a prohibited substance under Rule 1.2.2 DR September 2008 a sanction of two years is provided for by Rule 7.7.1 DR September 2008.

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According to Rule 7.7.5 DR September 2008 the period of ineligibility begins on the day when the sample on which the sanction is based had been collected. Therefore, the two years period of ineligibility began on 5 December 2008.

IV. Conclusions

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The samples taken from Ms Akhatova on 5 December 2008 revealed the presence of the prohibited substance of rEPO and, therefore, Ms Akhatova committed an anti-doping rule violation according to Rule 1.2.2 ADR September 2008.

57

The Panel did not find exceptional circumstances in the sense of Rules 4.4, 4.5, and 4.6 DR September 2008 which could justify an elimination or reduction of the regular sanction.

58

Therefore, according to Rules 7.7.1 and 7.7.5 DR September 2008, Ms Akhatova must be declared ineligible to compete for a period of two years commencing on 5 December 2008.

V. Decision

On these grounds the Panel decides:

Ms Akhatova is ineligible to compete for a period of two years commencing on 5 December 2008.

The Doping Hearing Panel

11 August 2009

Christoph Vedder
Chairman of the Panel

Edward G. Williams

Walter O. Frey