



FIVB

Disciplinary Panel

Decision

In the matter of
Mr. Diogo SOUSA
(United States Virgin Islands)

19 October 2015

THE FIVB DISCIPLINARY PANEL

Constituted in accordance with Article 8.1.2
of the FIVB Medical and Anti-Doping Regulations 2015
and composed by

Ms. Margaret Ann Fleming, Chair	(Scotland) Disciplinary Panel Vice-Chair
Mr. Mounir Ben Slimane	(Tunisia) Disciplinary Panel Member
Dr. Annie Peytavin	(France) Medical Commission Member

at the hearing which took place via telephone conference
on 23 September 2015, 3pm Swiss Time, heard the case identified as n. 2683676:

FACTUAL BACKGROUND

1. On 20 July 2015, the FIVB was notified by the WADA-accredited Laboratory in Los Angeles, USA regarding an Adverse Analytical Finding for the A-sample 2683676, which contained the prohibited substance “Cannabinoids/Carboxy – THC” in a concentration of 381 ng/mL.
2. The above-mentioned urine sample was taken in-competition on 26 June 2015 in Bavaro, Dominican Republic during the NORCECA 2nd Stage of Continental Circuit of Beach Volleyball (“Event”) and belongs to the athlete Mr. Diogo SOUSA (United States Virgin Islands, born 28.02.1988; “Athlete”).
3. After having received a copy of the doping control form from the NORCECA Volleyball Confederation (“NORCECA”), on 22 July 2015 the FIVB contacted the Athlete’s National Federation (“NF”) and through it informed the Athlete of his right to request the analysis of the B sample and to attend the opening thereof.
4. By email of 28 July 2015, forwarded by the NF to FIVB on 29 July 2015, the Athlete submitted in essence that:
 - He admitted being randomly selected for doping control during the Event;
 - He had concerns regarding the doping control process, namely the fact that he was left unattended after leaving the doping control station, was allowed

to swim in the ocean and to drink alcohol before returning to the doping control station.

The Athlete also submitted two (2) witness statements from:

- Mr. Mark Burik, Coach and athlete; and
- Ms. Kendra Van Zwieten, athlete.

However, the Athlete did not ask to have the B sample opened and analyzed nor did he explain how the prohibited substance entered his body.

5. By email of 29 July 2015, the FIVB acknowledged receipt of Athlete's submission.
6. On 29 July 2015, the NF informed FIVB that the Athlete had waived his right to the B sample analysis.
7. Also on the same day, NORCECA requested Dr. Víctor Figueroa, Doping Control Officer at the Event and a member of FIVB's and NORCECA's Medical Commissions, to submit a Report on the doping control process.
8. On 30 July 2015, FIVB was provided with Dr. Figueroa's report ("Report").
9. By letter dated 7 September 2015, the FIVB informed the Athlete that:
 - a) He had waived his right to have the B sample analyzed;
 - b) He had the right to be heard before the FIVB Disciplinary Panel either by telephone conference or by a hearing in person. The hearing by telephone conference would take place on 23 September 2015 at 3pm Swiss time; and
 - c) He had the right to submit additional information concerning his position.
10. On 14 September 2015, the FIVB reminded the Athlete of the time and date of the hearing.
11. On 16 September 2015, the FIVB informed the NF of the time and date of the hearing, and requested the Athlete be informed again.
12. On 17 September 2015, the FIVB wrote to the Athlete and requested his participation in the hearing.
13. On 23 September 2015, the hearing via telephone conference was attended –aside from the FIVB Disciplinary Panel– by the FIVB Medical and Anti-Doping Manager Mrs. Nadège Veintimilla, the FIVB Legal Advisor Mr. Andreas Zagklis and the FIVB Legal Affairs Manager Mr. Yann Hafner. The Athlete did not participate in the

telephone conference despite the persistent efforts of the FIVB to communicate with him both the day before the hearing as well as between 2.45pm and 3.15pm Swiss time on the day of the hearing.

14. During the hearing, the FIVB Disciplinary Panel decided to grant the Athlete one last opportunity to explain how the prohibited substance entered his body. To that effect, after conclusion of the hearing the FIVB wrote another email to the Athlete providing him with a deadline of 30 September 2015 to submit his position as to how the prohibited substance entered his body.
15. The Athlete did file any response within the set time-limit.

LEGAL CONSIDERATIONS

16. According to the WADA 2015 Prohibited List, the substance Carboxy – THC is included in the category S8 (cannabinoids) and is prohibited in-competition. In this case, the Panel notes the comment in the laboratory report that “[t]he mean concentration measured is 381 ng/mL”, which is approximately twice the Decision Limit of 180 ng/mL. Therefore, the analysis of the sample resulted in an Adverse Analytical Finding.
17. According to Article 2.1 of the FIVB Medical & Anti-Doping Regulations 2015 (“FIVB MADR”) and of the World Anti-Doping Code (“WADA Code”), the presence of a prohibited substance in an athlete’s bodily specimen constitutes an anti-doping rule violation, sanctioned as per Article 10 of the FIVB MADR.
18. The above-mentioned sample (Nr. 2683676) belongs to the Athlete.
19. No Therapeutic Use Exception exists in this case, as per Article 4.4 of the FIVB MADR.
20. The FIVB Disciplinary Panel shall review first whether the doping control process was carried out properly in order to determine whether an anti-doping rule violation has occurred in the present case.
21. According to Article 3.1 of the MADR, the FIVB shall have the burden of establishing that an anti-doping rule violation occurred. The standard of proof shall be whether FIVB has established an anti-doping rule violation to the comfortable satisfaction of the FIVB Disciplinary Panel bearing in mind the seriousness of the allegation made.

This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probabilities.

22. According to Article 3.2.2 of the MADR, departures from any other International Standard or other anti-doping rule or policy set forth in the WADA Code or these Anti-Doping Rules which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such evidence or results. If the Athlete or other Person establishes a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding or other anti-doping rule violation, then the FIVB shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation.
23. The Athlete contends that the doping control process was unprofessional and improperly carried out due to the fact that:
 - a) He was left unattended after leaving the doping control station;
 - b) He was allowed to swim in the ocean; and
 - c) He was allowed to drink alcohol before returning to the doping control station.
24. The contentions of the Athlete under points (b) and (c) above, supported by the witness statements of Mr. Mark Burik and Ms. Kendra Van Zwieten, are not contested by the Report. However, the Report indicates that these activities are not prohibited by the WADA Code provided that the Athlete is supervised by a chaperone. In this respect, the Report confirms that the Athlete was under the supervision of Ms. Mirtha Moreta, who acted as chaperone during the entire doping control process, also when the Athlete was not in the doping control station.
25. In this respect, the Panel notes that the WADA International Standard for Testing and Investigations (“WADA ISTI”) provides in Annex F (Urine Samples – Insufficient Volume) that, *“while waiting to provide an additional Sample, the Athlete shall remain under continuous observation and be given the opportunity to hydrate”* (Article F.4.5). The Panel finds that both requirements were observed in this case.

26. In addition, the WADA Guidelines for Urine Sample Collection (“Urine Sample Collection Guidelines”) allow the Doping Control Officer to consider any reasonable Athlete request for permission to leave the Doping Control Station so long as the Athlete is continuously chaperoned and kept under direct observation during the delay (Article 5.1.3). Likewise, the Urine Sample Collection Guidelines also provide that the Doping Control Officer or Chaperone *“can’t prevent the Athlete [from] eating and drinking products of his/her choice, but it is recommended that the Athlete choose from a selection of individually sealed, non-alcoholic beverages to hydrate”* (Article 6.1.2). Thus, while it was not recommended that the Athlete drank alcohol, it was not barred, and the Athlete has failed to show how these actions could possibly have contaminated his sample so that the substance Carboxy – THC would appear in it.
27. Thus, based on the above, the Panel finds that the fact that the Athlete was allowed to swim in the ocean and that he was allowed to drink alcohol before returning to the doping control station do not constitute a departure from the applicable WADA ISTI and, in any event, could not have caused the Adverse Analytical Finding.
28. Furthermore, the contention of the athlete under point (a) is that the partial sample was left unsealed and unmonitored in the bin, allowing for the possibility of a sample contamination.
29. The M-1 Doping Control Form (“DCF”), signed by the Athlete, provides a wealth of information regarding the doping control process.
30. The Panel notes the entry on the DCF that the Athlete arrived at the doping control station at 13:32 and provided Dr. Víctor Figueroa with a partial urine sample at first.
31. The Report explains the procedure followed in this case of partial sample and reads as follows: *“the athlete himself takes a seal of partial sample, covers the sample and seals it with purple ribbon, signs with the amount measure of the urine”* and *“when he provides the missing amount, the same athlete breaks the purple seal and opens his sample”*. The Panel finds this description to be compliant with the WADA ISTI and, as will be demonstrated in the following paragraphs, also consistent with the facts established by the DCF.

32. Specifically, the DCF indicates under section 3 that a partial sample was delivered by the Athlete at 13:45 on the day of the doping control (Nr. 209647 – volume of 40 mL). Record shows the Athlete and Dr. Figueroa initialed the DCF next to these entries and thus acknowledged them.
33. The Report goes on to state that the partial sample stayed in the custody of Dr. Figueroa for the entire time that the Athlete was gone from the doping control station. This is not contested by any documentary or testimonial evidence procured by the Athlete.
34. Furthermore, the DCF confirms that the Athlete provided the rest of the sample (Nr. 2683676 – volume of 130 mL) at 15:15 on the day of the doping control. In this respect, the Report highlights that *“both athlete samples are mixed because none of the samples should be discarded”*. Again, the Panel notes that this action was in compliance with the WADA ISTI provisions of Annexes D (D.4.14) and F (F.4.8 and F.4.11), which provide that the partial samples shall be combined and the bottles filled “to capacity” prior to discarding any amount of urine.
35. Most notably, the Athlete did not register any comments on the DCF about the doping control process under section 4 of the DCF before signing it and leaving the doping control station.
36. Thus, the Panel is satisfied that the proper collection procedures for a partial sample were followed. The Panel also finds that the Athlete failed to support his contention that his sample was contaminated or could have been contaminated at any stage of the sample collection procedure.
37. As a result, the Athlete committed an anti-doping rule violation as per Article 2.1 of the FIVB MADR.
38. The FIVB Disciplinary Panel notes that the period of ineligibility for a violation of Article 2.1 of the FIVB MADR concerning a specified substance shall be as follows:
- four (4) years when the anti-doping rule violation involves a specified substance and the FIVB can establish that the anti-doping rule violation was intentional (Article 10.2.1.2 of the FIVB MADR);

- two (2) years if the FIVB cannot establish that the anti-doping rule violation was intentional (Article 10.2.2 of the FIVB MADR).
39. According to Article 4.2.2 of the FIVB MADR, all prohibited substances are deemed specified substances except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List. Category S8 is not identified as substances subject to this exception and, therefore, the substance Carboxy – THC is a specified substance.
40. In the case at hand, the Panel notes that the FIVB has provided no evidence suggesting that the Athlete’s anti-doping rule violation was intentional and no such evidence exists on the record examined by the Panel.
41. Accordingly, the applicable period of ineligibility shall be two (2) years (Article 10.2.2 of the FIVB MADR).
42. Turning now to the question whether the standard 2-year sanction should be eliminated or reduced, the Panel notes that, despite multiple invitations to do so, the Athlete did not participate in the hearing held on 23 September 2015 nor submitted any evidence as to the circumstances under which the prohibited substance entered his body. Given that the Athlete only contested the doping control process and did not seek to establish in the case at hand that he bears no (significant) fault or negligence, the Panel decides that Articles 10.4 (Elimination of the Period of Ineligibility where there is No Fault or Negligence) and 10.5 (Reduction of the Period of Ineligibility based on No Significant Fault or Negligence) of the FIVB MADR are not applicable to the matter at hand.
43. Consequently, the FIVB Disciplinary Panel holds that the period of ineligibility shall be two (2) years as provided for in Article 10.2.2 of the FIVB MADR.
44. Given that the Athlete has continued participating in official competitions since the end of the Event in which the sample in question was collected, the FIVB Disciplinary Panel finds that this period of ineligibility will start as of the date after the end of his last competition, namely as of 31 August 2015.
45. Lastly, considering that the anti-doping rule violation occurred during the Event, the FIVB Disciplinary Panel disqualifies all of the Athlete’s individual results, including

prize money in the amount of USD 150, obtained in the Event (Article 10.1 of the FIVB MADR).

Taking all the above into consideration

THE FIVB DISCIPLINARY PANEL

Concludes and Decides

1. The athlete Mr. Diogo SOUSA (United States Virgin Islands) has committed an anti-doping rule violation (presence of the prohibited substance Carboxy – THC in his bodily specimen) according to Article 2.1 of the FIVB MADR.
2. A sanction of two (2) years of ineligibility shall be imposed on the athlete Mr. Diogo SOUSA, according to Article 10.2.2 of the FIVB MADR.
3. The period of ineligibility shall start on 31 August 2015 and end on 30 August 2017, as per Article 10.11 of the FIVB MADR.
4. Mr. Diogo SOUSA's individual results, including prize money in the amount of USD 150, obtained during the NORCECA 2nd Stage of Continental Circuit of Beach Volleyball are forfeited and must be returned to the Event organizers.
5. This decision may be appealed in accordance with the attached Notice of Appeals.

Decided in Lausanne, on 19 October 2015

For the FIVB DISCIPLINARY PANEL

A handwritten signature in black ink that reads "Margaret Ann Fleming". The signature is written in a cursive, flowing style.

Ms. Margaret Ann Fleming
Chair

NOTICE OF APPEALS

(doping cases)

An appeal may be filed against this decision exclusively before the Court of Arbitration for Sport (CAS), in accordance with Article 13 of the FIVB Medical and Anti-Doping Regulations 2015 (FIVB MADR) and with the provisions of the Code of Sports-Related Arbitration (see www.tas-cas.org).

The time-limit to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of this decision by the appealing party.

In accordance with Article 14.7 of the FIVB MADR: “Notice to an Athlete or other Person who is a member of a National Federation may be accomplished by delivery of the notice to the National Federation.”

In the event of an appeal, this decision shall remain in effect while under appeal unless the CAS orders otherwise.

The address and contact details of the CAS are the following:

Court of Arbitration for Sport
Avenue de Beaumont 2
1012 Lausanne, Switzerland
Tel: +41 21 613 50 00
Fax: +41 21 613 50 01
e-mail: info@tas-cas.org
www.tas-cas.org