



DECISION of the TRIBUNAL of the FEI

dated 13 JULY 2007

Positive Medication Case: 2006/01

Athlete / NF: Thomas Frühmann, AUT

FEI Rider ID: 10002922

Event: CSI4*-W London-Olympia, GBR, 13-19 December 2005

Sampling Date: In competition test on 15 December 2005

Prohibited Substance: Hydrochlorothiazide (Diuretic)

1. COMPOSITION OF PANEL

Mr Ken E. Lalo
Mr Patrick A. Boelens
Mr Leonidas Georgopoulos

2. SUMMARY OF THE FACTS

2.1 Memorandum of case: By Legal Department.

2.2 Summary information provided by the Athlete: The FEI Tribunal took into consideration all correspondence and documents presented in the case file and produced at the hearing, as also made available by and to the Athlete.

2.3 Oral hearing: on 12 July 2006 in Lausanne, Switzerland

Present: The FEI Tribunal Panel

For the FEI:

Mr Alexander McLin, FEI General Counsel
Ms Annie Cormier Smith, FEI Legal Counsel
Mr Mikael Rentsch, FEI Legal Counsel
Ms Diana Di Clemente, FEI Legal Assistant

For the Athlete:

Mr Thomas Frühmann, Athlete

Dr Christian Flick, Legal Counsel for the Athlete

3. RULES CITED

Applicable rules and regulations:

Statutes 21st edition, effective 21 April 2004, ("**Statutes**"), Arts. 001, 002, 057 and 058 and Statutes 22nd edition, effective 15 April 2007, ("**New Statutes**"), Arts. 1, 2, 34 and 37.

General Regulations ("**GR**"), 21st edition, effective 1st January 2005, Arts. 145, 174.6.1 and 174.11 and General Regulations, 22nd edition, effective 1 June 2007, Arts. 100.6, 145 and 174 ("**New GR**").

FEI Anti-Doping Rules for Human Athletes ("**ADRHA**"), 1st edition, effective 1st June 2004, revised July 2005, Introduction and Arts. 2, 3, 4, 5, 7.2, 9 and 10.

World Anti-Doping Code, version effective March 2003.

4. DECISION:

A. The Relevant Facts

- 1) Mr. Thomas Frühmann (the "**Athlete**") took part at the CSI4*-W in London-Olympia (GBR) from 13 to 19 December 2005 (the "**Event**").
- 2) The Athlete was selected for in-competition testing on 15 December 2005. Analysis of the urine sample no. A1054933 taken from the Athlete performed by HFL Laboratory ("**HFL**"), a WADA accredited laboratory, was found to contain hydrochlorothiazide.
- 3) A confirmatory analysis was requested by the Athlete. Analysis of the urine sample no. B1054933 by HFL confirmed the presence of hydrochlorothiazide.
- 4) The 2005 Prohibited List of the World Anti-Doping Code classifies hydrochlorothiazide as a diuretic (Class S5).

B. Jurisdiction

- 5) The Athlete questions the jurisdiction of the Tribunal (named "Judicial Committee" at the time of the Event and the hearing under the then applicable Statutes and currently called "Tribunal"; see New Statutes, Art. 34) as he expresses the view that he has no

legal or contractual relationship with the FEI whose members are the National Equestrian Federations.

- 6) Art. 001.2 of the applicable Statutes at the time stated, as one of the purposes of the FEI, "to establish statutes, regulations and rules for the conduct of international events in equestrian disciplines and so enable and facilitate individual competitors and teams from different nations to compete in international events against each other under equal and fair conditions" (Art. 1.2 New Statutes).
- 7) According to Art. 002.4 of the Statutes, everyone involved in FEI events agrees "to comply with, and be bound by the Statutes, Regulations, Rules and any decision by an authorized body of the FEI" (Art. 2.6 New Statutes).
- 8) The Athlete is a member of the Austrian National Federation, who is a member of the FEI and by competing in international events under FEI Statutes, Regulations and Rules, he has implicitly agreed to comply with and be bound by these Statutes, Regulations and Rules.
- 9) The Tribunal is therefore of the opinion that the FEI has jurisdiction over the Athlete.
- 10) Within the legal framework of the FEI, the Tribunal has jurisdiction over this matter pursuant to Articles 057 and 058 of the Statutes (Art. 34 New Statutes).
- 11) Art. 145 of the GRs refers to the World Anti-Doping Code ("WADA Code") that was introduced in equestrian sports. The FEI has promulgated ADRHA under Art. 145 of the GRs (Art. 145 New GR).
- 12) By competing in FEI international events and in the Event, the Athlete has agreed to comply with and be bound by the ADRHA and has, therefore, accepted these rules as a condition of participation.
- 13) Art. 5 of ADRHA authorizes in-competition testing of all Athletes affiliated with a National Federation by the FEI, the Athlete's National Federation and any other Anti-Doping Organization.
- 14) The schedule of the Event explicitly states that the Event was governed by the FEI Regulations and Rules.
- 15) The Tribunal therefore concludes that the FEI and its authorized bodies have jurisdiction over the Athlete and the subject matter of this case.

- 16) The Athlete claims lack of independence of the Tribunal as the FEI Medical Committee added recommendations and the FEI Legal Department added legal submissions to the file from which he infers a "possibility of influence and intervention" which might bias the independence of the Tribunal. This might have been the case if these documents had not been disclosed to the Athlete or his Counsel. Both documents were added to the file that was sent to the Athlete, his counsel and his National Federation on 17 May 2006 through the appropriate channels in preparation of the oral hearing and thus granting them the possibility to add their remarks and observations to those recommendations and legal submissions. Those Recommendations and legal submissions represent the views of the FEI, have no binding effect on the Tribunal and were communicated to the Tribunal at the same time as to the Athlete, his Counsel and his National Federation.

C. Analysis

C.1 Doping offense

- 1) The Tribunal is satisfied that the laboratory reports reflect that the tests were accurately performed in an acceptable method and that the findings of HFL are accurate. The Tribunal is satisfied that the test results show the presence of the prohibited substance, hydrochlorothiazide. The Athlete accepted the test results and did not contest the accuracy of the testing methods. The FEI has thus sufficiently proven the objective elements of a doping offence.
- 2) The establishment of the objective elements of a doping offence creates the presumption of guilt of the Athlete. The Athlete has the opportunity to eliminate or reduce the period of ineligibility provided by Art. 10 of ADRHA based on exceptional circumstances.
- 3) In his declaration of 13 March 2006, the Athlete, who was 54 years old at the time of the Event, produces medical reports showing that he is under permanent medical treatment for arterial hypertension and that a drug, containing the prohibited substance, is regularly taken by him for medical purposes.
- 4) The recommendations of the FEI Medical Committee of 10 May 2006 accept that the diuretic taken by the Athlete does not offer any competitive advantages and was prescribed by a physician for the Athlete's medical condition of hypertension. It accepts that the violation was inadvertent and therefore not an intentional attempt to gain a competitive advantage or to circumvent the rules. The FEI Medical Committee nevertheless concludes that it constitutes a clear violation of ADRHA.

- 5) The FEI Medical Committee also confirms that on 10 May 2006 it still had not received a Therapeutic Use Exemption (TUE) Form requesting the permission to use the medication.
- 6) In his "Legal Opinion and Motions" of 7 June 2006, the Athlete expressed the view that in equestrian sports, the definition of the "Athlete" according to Art. 2.1 of the WADA Code and the ADRHA should refer to the horse as the only "Athlete" "in the classical sense of the word".
- 7) This interpretation cannot be accepted. Although it is not specified in the WADA Code, it has been accepted by the FEI and WADA that the competitor and the horse are considered as two different individuals regarding anti-doping controls. The FEI has therefore always made a clear distinction between the anti-doping tests for horses and the anti-doping tests for competitors. This is supported by Article 145 GR referring to the "Medication Control [and] Anti-Doping [...] of Competitors" and Article 146 GR referring to "Medication Control [...] of Horses". This distinction is further evidenced by the fact that the ADRHA only apply to human athletes and that as of June 2006 a new set of rules, the Equine Anti-Doping and Medication Control Rules ("EADMCRs"), apply only to horses that compete under FEI regulations and rules. Therefore, the Competitor could not objectively pretend that the Horse would be the only "Athlete" that could be tested.
- 8) The Tribunal concludes that the ADRHA should be applied in this case and is of the opinion that the Athlete has committed a doping offence according to Art. 2.1 ADRHA.

C.2 Application of Art.10.2,3,5 ADRHA

- 9) The Athlete argues that Art. 10.3 ADRHA applies to his case as the prohibited substance should be considered as a "specified substance [that is] particularly susceptible to unintentional anti-doping rules violations because of [its] general availability in medicinal products or which [is] less likely to be successfully abused as [a] doping agent[)". He argues that, if the Athlete can establish that the use of a "specified substance" was not intended to enhance sport performance, another table of sanctions might be applied by the Tribunal.
- 10) The Tribunal cannot accept this view as the "specified substances" are mentioned in the Prohibited List that is annually revisited. In the WADA Prohibited List 2005 which was applicable at the time of the Event the prohibited substance detected is expressly listed as a Prohibited Substance under S5 "Diuretics and other masking

agents", i.e. not as a so-called "specified substance" to which Art. 10.3 ADRHA is meant to apply.

- 11) The Tribunal also examined the possible application of Art.10.5 ADRHA which applies if the Athlete establishes that he bears no fault or negligence for the violation.
- 12) The Athlete submitted a medical report through which it was established that the prohibited substance was administered for the legitimate treatment of arterial hypertension and was prescribed by a physician.
- 13) During the hearing, on 12 July 2006, the Athlete also stated that he was tested in 2000 by the anti-doping authority of his NF and that a diuretic was found, but that he was allowed to compete in national equestrian events for which he received a national TUE. He thought that this national TUE was sufficient and that he only needed to inform the national anti-doping agency when his medication was altered.
- 14) During the same hearing, Frank Spadinger, the Sport Director of the Austrian NF at the moment was contacted by telephone and informed those present that an informative leaflet was sent to all the Austrian athletes concerned during April 2005 informing them about the proceedings that should be followed in connection with the anti-doping regulations and he confirmed that this information was also sent to the Athlete who, according to Mr. Spadinger's memory, confirmed its receipt by returning the appropriate form. A copy of this document was sent by fax to the FEI and disclosed to all parties concerned whereupon the Athlete stated that he never saw this document and that the signature was not his.
- 15) Still during the same hearing, the Austrian NF provided a copy of the TUE that was submitted by the Athlete on 30 May 2006 and also bore his signature. This document had not been forwarded to the FEI Medication Committee at the time of the hearing in order to comply with the ADRHA for international events.
- 16) The Tribunal examined both documents that were added to the file and is of the opinion that both signatures are at least similar. The letter of 29 April 2005 that was presumably sent to the Athlete mentions his actual address. It is therefore probable that the Athlete has received this document.

C.3 nemo censetur ignorare legem

- 17) The Tribunal accepts that the Austrian NF might have been negligent by not forwarding the Application Form for a TUE that has

been submitted by the Athlete on 30 May 2006, but this is not of any relevancy for the decision in this case. Furthermore, while there might have been a lack of communication between the Austrian NF and the Athlete, this does not mean that the Athlete should not try to make himself acquainted with recent developments in the FEI Regulations and Rules. The Tribunal is somewhat surprised that the Athlete, despite having been confronted with these proceedings, kept rather inactive about obtaining a TUE in order to avoid recidivism as, after a break of some years, he prominently returned to the international scene of equestrian events. It cannot be denied that the Athlete has been negligent in failing to obtain a TUE both before and also immediately after the Event.

- 18) The Tribunal accepts the Athlete's explanation that he was a holder of a national TUE since 2000 and was allowed to take the specified medication while participating in national competitions. The Tribunal views the fact that the Athlete did not confirm that his NF forwarded this TUE to the FEI and that the Athlete did not comply with the ADRHA, when he returned to compete at the international arena as somewhat negligent.
- 19) The Legal Department of the FEI in its legal submission, accepts that the Athlete should benefit from a reduction of the period of ineligibility in light of his explanations and the conclusions reached by the FEI Medical Committee.
- 20) The Legal Department of the FEI also confirms that the equestrian sport is distinct from any other sport if only for the presence of the horse as an athlete. However the WADA Code currently does not give any discretion to the FEI to adjust the sanction in light of the specifics of this sport. The FEI and its members accepted to abide to the WADA Code and it must reflect this acceptance in its decisions.
- 21) De lege ferenda, the FEI is advised to submit the recommendations of the Medical Committee to WADA for further discussions in the context of the review of the WADA Code.
- 22) The Tribunal accepts that it is established that the circumstances of the Athlete's negligence were less than significant in relationship to the anti-doping violation.
- 23) The Tribunal is of the opinion that the range of sanctions provided by the WADA Code and the ADRHA, as they relate to this specific situation, are far too severe to be proportionate when all the circumstances of this case are taken into consideration as it is clear that the Athlete had no intention to enhance his performance but

only to treat his arterial hypertension. The medication was life saving and required at the Athlete's age and for his condition. The medication could not enhance his performance and the medication could not have any positive effect what so ever on a rider in a jumping event.

- 24) Moreover, the nature of equestrian sport is such that despite applicable anti-doping provisions for human athletes, riders tend to be more concerned with drug and treatment matters concerning their mounts than themselves in the sport context. While this not an excuse for not reporting the use of a prohibited substance, it is nevertheless understandable.
- 25) The Tribunal became aware during the course of these proceedings of the revisions to the WADA Code which appear to reflect the opinion of the sports regulatory community for greater flexibility in sanctioning to respect the principle of proportionality in certain cases. The Tribunal, having reviewed the drafts of the revised WADA Code submitted as part of the consultation process with international sports federations, has determined that it is highly likely that the WADA Code amendments, providing relevant flexibility in sanctioning in the presence of mitigating circumstances, will be adopted in November 2007 and that the FEI's ADRHA will need to be adapted in compliance with the revised WADA Code. It also has determined that the circumstances of the instant case fall squarely within the spirit of the current revisions to the sanctioning provisions of the WADA Code, which the Tribunal supports. It therefore does not feel that it can, in justice, disproportionately sanction an athlete under the circumstances.
- 26) The Tribunal therefore decides to wait for the determination of the WADA Foundation Board on the adoption of the revised WADA Code and to review this issue of sanctioning in this case thereafter.
- 27) As it is clear that this determination will have no impact on the automatic disqualification of athletes in these circumstances, the Tribunal renders a provisional decision in this case.

D. Decision

As a consequence of the foregoing, the Tribunal provisionally decides as follows:

- 1) The disqualification of the individual result obtained by Mr. Thomas Frühmann in the Event, including forfeiture of any medals, points and prizes.

- 2) As soon as the current revision of the WADA Code is finalized and in effect, the case will be reconsidered as to eventual further sanctions, if any, and towards the costs of the proceedings.

A handwritten signature in blue ink, appearing to be 'D. Zuff', is written above a horizontal line.

[For the Tribunal]