

**AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal**

In the Matter of the Arbitration between

UNITED STATES ANTI-DOPING AGENCY (**USADA**),

Claimant

and

SAM TIERNEY,

Respondent

Re: AAA Case No. 01-16-0002-4207

AWARD OF ARBITRATOR

Pursuant to the American Arbitration Association's (**AAA**) Commercial Arbitration Rules as modified by the American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes as contained in the Protocol for Olympic and Paralympic Movement Testing Effective as revised January 1, 2015 (the **USADA Protocol**), pursuant to the Ted Stevens Olympic and Amateur Sports Act, 36 USC 22501, et seq. (the **Act**), an expedited evidentiary hearing was held by telephone on June 20, 2016, before Maidie Oliveau, as sole arbitrator (the **Arbitrator**) with Claimant, Respondent and their legal counsel in attendance and offering argument and evidence. The Arbitrator does hereby AWARD as follows:

I. THE PARTIES

1. Claimant, USADA, as the independent anti-doping agency for Olympic Sports in the United States, is responsible for conducting drug testing and for adjudication of any positive test results and other anti-doping violations pursuant to the USADA Protocol. William Bock, Esq., of the law firm Kroger, Gardis and Regas, who is also General Counsel of USADA, acted as USADA's representative, appeared and represented USADA.

2. Respondent, Sam Tierney, is a 23 year old swimmer, multiple All American and team captain who graduated a year ago from the University of Missouri and still lives and trains in Missouri. He has been a pro athlete for one year and is not part of any team. He joined the USADA Registered Testing Pool (the **Registered Testing Pool**) on April 30 and completed his required tutorial on anti-doping on May 3, 2016. Due to Respondent's plans to compete in the U.S. Olympic Team Trials on June 26, 2016 he requested an expedited hearing which was held on June 20. Paul Greene of Global Sports Advocates, LLC appeared and represented Respondent Sam Tierney (collectively, Claimant and Respondent shall be referred to as "the parties" and individually a "party").

II. JURISDICTION AND APPLICABLE LAW

A. Jurisdiction

3. The Arbitrator has jurisdiction over this doping dispute pursuant to the Act §220522 because this is a controversy involving Respondent's opportunity to participate in national and international competition. The Act states, in relevant part, that:

"An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it . . . agrees to submit to binding arbitration in any controversy involving . . . the opportunity of any amateur athlete, coach, trainer, manager, administrator or official to participate in amateur athletic competition, upon demand of the corporation or any aggrieved amateur athlete, coach, trainer, manager, administrator or official, conducted in accordance with the Commercial Rules of the American Arbitration Association, as modified and provided for in the corporation's constitution and bylaws. . . ."

4. Under its authority to recognize an NGB , the United States Olympic Committee ("USOC") established its National Anti-Doping Policies, the current version of which is effective as of January 1, 2015 ("USOC Policies"), which, in relevant part, provide:

". . . NGBs shall not have any anti-doping rule which is inconsistent with these Policies or the USADA Protocol, and NGB compliance with these Policies and the USADA Protocol shall be a condition of USOC funding and recognition."

5. Regarding Respondent, the USOC Policies provide:

". . . each NGB shall be responsible for informing Athletes and Athlete Support Personnel in its sport of these USOC National Anti-Doping Policies and the USADA Protocol which is incorporated into the agreement between the USOC and USADA. By virtue of their membership in an NGB, license from a NGB, participation in an Event or Competition organized or sanctioned by an NGB, selection for a national team, receipt of benefits from an NGB or the USOC or

by virtue of their inclusion in the USADA RTP, Participants agree to be bound by the USOC National Anti-Doping Policies and the USADA Protocol. . . ."

6. In compliance with the Act, the USADA Protocol, Article 17, provides that hearings regarding doping disputes "will take place in the United States before the American Arbitration Association ("AAA") using the [USADA Protocol]."and in accordance with Article 16 of the USADA Protocol, USADA may require a hearing to be conducted on an expedited basis "where doing so is reasonably necessary to resolve an Athlete's eligibility... before a Protected Competition..."
7. No party disputed the Arbitrator's jurisdiction here and in fact all consented to it and participated in these proceedings without objection.

B. Applicable Law

8. The rules related to the outstanding issues in this case are the FINA rules on anti-doping, which implement the World Anti-Doping Agency Code (the **WADA Code**). As the FINA rules relating to doping are virtually identical to the WADA Code, the applicable WADA Code provisions (version 2015) will be referenced throughout this Award. The relevant WADA Code provisions are as follows:

2.2 Use or Attempted Use by An Athlete of a Prohibited Substance or a Prohibited Method

2.2.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. 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.

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10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substance or Prohibited Methods

The period of Ineligibility for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6.

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.2 The anti-doping rule violation involves a Specified Substance and the Anti-Doping Organization can establish that the anti-doping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

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10.5 Reduction of the Period of Ineligibility Based on No Significant Fault or Negligence

10.5.1.Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Article 2.1, 2.2 or 2.6.

10.5.1.1 Specified Substances

Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

DEFINITIONS

Fault: Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's ... experience, whether the Athlete ... is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's ... departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.

No Fault or Negligence: The Athlete or Other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. ...

No Significant Fault or Negligence: The Athlete or Other Person's establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation.

III. FACTUAL BACKGROUND/PROCEDURAL HISTORY

9. On June 3 and 4, 2016, Respondent was subject to doping control conducted at the Arena Pro Swim Series in Indianapolis, IN. On the Doping Control Official Records (the **Doping Control Records**) for each of these samples, Respondent declared, among other things, "1 puff, Inhaler on May 31, 2016". This inhaler was a Breo Ellipta inhaler (the **Inhaler**) which includes a beta-2 agonist (Vilanterol Trifenatate) which is a "Specified Substance" prohibited at all times pursuant to S3 of the 2016 WADA Prohibited List. The WADA Prohibited List has been adopted under both the USADA Protocol and by FINA. At the time Respondent used the Inhaler, he did not have an approved Therapeutic Use Exemption (**TUE**).
10. On June 9, 2016, Respondent submitted a TUE application to USADA. On June 16, 2016, Respondent received notice that his TUE application was denied. USADA then advised Respondent by telephone on June 16, that he was charged with an anti-doping rule violation based on his use and/or attempted use of a Prohibited Method pursuant to WADA Code, 2.2.
11. Respondent checked the WADA Prohibited List after being told the Inhaler contained a Prohibited Substance. He looked through each ingredient listed and could not find any of them among the Prohibited List. He knew from USADA that one of the ingredients was a beta-2 agonist, but had no way of knowing that Vilanterol Trifenatate was a beta-2 agonist based on the WADA Prohibited List. He would have had to investigate further on one of the web sites identified by USADA.
12. USADA sent Respondent its charging letter on June 20, 2016, seeking to apply a three-month period of Ineligibility as described in WADA Code, 10.2, beginning on the day Respondent accepted the sanction, failed to request a hearing or failed to respond, or the date of the hearing decision in this matter. In addition, USADA sought disqualification of the competitive results obtained on and subsequent to May 31, 2016, the date of Respondent's admitted use, including forfeiture of any medals, points and prizes, consistent with the WADA Code.
13. On June 20, 2016 Respondent requested a hearing before a sole arbitrator and on the same day, this Arbitrator was appointed and a hearing was held telephonically.
14. According to USADA, Respondent in his telephone call with USADA on June 16, 2016 was very honest about what had happened with the Inhaler, he maintained communication with USA Swimming about the situation and was very cooperative. Respondent told USADA that in the first part of May, he had a cough, low energy and was swimming very poorly, so he went to an urgent care clinic where he was diagnosed with acute bronchitis and the doctor prescribed prednisone and antibiotics. She told Respondent he should be better in a couple of days. On May 23, Respondent went back to the clinic with the same symptoms and the same doctor diagnosed that he still had bronchitis. This time, she prescribed antibiotics and the Inhaler.
15. On both visits to the clinic, Respondent explained to the doctor that he was a competitive athlete, subject to restrictions based on the Olympic rules and he had to be careful what he took. She told him each time that what she was prescribing for

the bronchitis would not be a problem. Respondent did not look up the Inhaler's ingredients in the WADA Prohibited List or otherwise make an attempt to check its ingredients at that time, because nothing the doctor said caused him any concerns. He thought the bronchitis treatment was like Tylenol. He does not blame the doctor and understands it is his responsibility to know what substances he is taking.

16. The parties stipulated that the Inhaler the doctor prescribed was not the appropriate treatment for bronchitis, but rather is for the treatment of asthma, which Respondent did not have. Respondent testified that he would have been more concerned and might have looked on the WADA Prohibited List had he known he was getting asthma medication.
17. The parties also stipulated that the medication had no performance enhancing effect on Respondent, as he took it May 31 and competed several days later.
18. The anti-doping education Respondent had was a ten-minute video he took upon joining the Registered Testing Pool. He has no support regarding anti-doping. Respondent did look at the Inhaler's ingredients upon receiving it, but nothing stated on it registered as a problem. He said he had never heard of anyone testing positive for bronchitis medicine nor did he understand he had been prescribed asthma medicine.
19. This time of year is Respondent's competitive season, with the Olympic Trials coming up on June 26, and additional competitions immediately thereafter (the World Championships, the U.S. Open on August 3 and the Grand Prix beginning later in August 2016) . If he is ineligible during this period, he will in effect be ending his swimming career as the results in these meets determine available funding.
20. The parties stipulated that the start date of any sanction would be May 31, 2016, the date indicated as the last time Respondent used the Inhaler, due to: Respondent's cooperation and immediate admission of the anti-doping rule violation; and that the anti-doping rule violation is not as a result of a positive test, but rather an admission on his Doping Control Records.

IV. SUBMISSIONS OF THE PARTIES

A. Claimant

21. Based on Respondent's admissions on his Doping Control Records, USADA contends that Respondent has committed an anti-doping rule violation for the use and/or attempted use of a Prohibited Method pursuant to the FINA Doping Control Rules as set forth also in WADA Code, 2.2.
22. During the hearing, USADA explained that its determination of the sanction was based on consistency with past beta-2 agonist positive doping cases under similar circumstances where a physician prescribed the medication. In those cases where athletes accepted a sanction from USADA, dating from 2005 to the present, most of the athletes obtained a TUE and were issued a public warning along with

disqualification of all competitive results obtained on and subsequent to the test. In this case, Respondent's application for a TUE was denied, as he does not have asthma and there are alternative medications that are not prohibited for the treatment of bronchitis.

23. There was one recent case, involving Gwen Berry (**Berry**), a 26 year old track & field athlete who declared the exact substance as used by Respondent on her Doping Control Record and also tested negative during an in-competition sample collection. USADA accepted her explanation that the Prohibited Substance from her inhaler was not being used in an effort to enhance her performance and that she was taking the prescribed medication in a therapeutic dose under the care of a physician. Ms. Berry accepted a three-month period of ineligibility which began on March 29, 2016, the date on which USADA received the results from her in-competition sample collection. In addition, Berry was disqualified from all competitive results obtained on and subsequent to the date of the competition, including her American Record hammer throw, as well as forfeiture of any medals, points and prizes.
24. In addition, USADA looked to CAS 2010/A/2216 *Ryan Napoleon V. Fédération Internationale de Natation (FINA)*, where the athlete used his father's inhaler which contained Formoterol (an asthma medication and Prohibited Substance), and was given a three (3) month period of ineligibility along with disqualification of all competitive results obtained on and subsequent to the date of the competition during which he tested positive. USADA also looked to CAS 2009/A/1782 *Filippo Volandri v. International Tennis Federation (ITF)*, where the athlete's degree of fault was found to be minor in relation to his anti-doping rule violation for an excessive amount of salbutamol (an asthma medication and Prohibited Substance) for which he had a TUE, and a reprimand was imposed along with the disqualification of all competitive results obtained at the tournament where he tested positive. In that case there were additional circumstances which were factors in the panel's decision, unrelated to the athlete's degree of fault.
25. An additional 2012 sanction imposed by USADA for a different substance, Canrenone, a diuretic, and non-Specified Substance, which was found in Hope Solo's (**Solo**) sample during an out of competition test, resulted in a warning to the athlete. In that case, USADA agreed with Solo that she had made a mistake upon taking a doctor prescribed medication that had not enhanced her performance.
26. USADA concurred that the Solo case was very similar to Respondent's with respect to the degree of fault and that the substance was not the controlling factor in determining the sanction. Similar to Respondent, Solo had been prescribed the medication for menstrual cramps and was therefore not on high alert with regard to a potential Prohibited Substance.
27. USADA also was sympathetic to the Respondent in that his physician gave him asthma medication rather than treating the bronchitis, which makes this case unique. Respondent appears to have gotten medication he was not expecting.

28. USADA argues that Respondent should have the sanction that is fair and right for clean athletes and the integrity of the sport and agrees that putting an end to a career in this case would be immensely unfair.

B. Respondent

29. The Respondent argues that he appreciates and respects the anti-doping process. He did not have any education other than the ten-minute video. He relied on the advice of the treating physician and was not alarmed based on her diagnosis of bronchitis. He had never heard of anyone testing positive for treatment for bronchitis.
30. The previous sanctions imposed by USADA are not absolutely precedential for this Arbitrator, and if they are, they can be distinguished because Berry, who accepted a three-month period of ineligibility, was a much more experienced competitor. She had won a Gold Medal in the Pan Am Games. Respondent does not have the benefit that she had of supplemental anti-doping education from the national team as well as her national governing body.
31. The Respondent also points to the Solo sanction as much more analogous to his situation, because she took a therapeutic dosage, given by her physician out of competition. She had no reason to investigate the ingredients as a prescription for menstrual cramps did not raise any alarms. The substance she took was prohibited by name on the Prohibited List, whereas the substance Respondent took was not listed by name on the Prohibited List. Even if he had looked, he would not have found it, though he admits if he had looked at the other sites suggested by USADA, he would have found it.
32. Respondent understands that the Arbitrator can not consider the circumstances of the timing of the sanction, falling square in the middle of Respondent's most important competitive period. Nevertheless, Respondent argues that the principle of proportionality would be violated under these circumstances and, as stated in CAS 2013/A/3327 *Marin Cilic v. International Tennis Federation* (2013), in such event, this Arbitrator may depart from the clear wording of the Code ("Elements other than fault ... should – in principle – not be taken into account since it would be contrary to the rules. Only in the event that the outcome would violate the principle of proportionality such that it would constitute a breach of public policy should a tribunal depart from the clear wording of the text." *Cilic* at ¶77). Specifically, the principle of proportionality is violated when compared to Berry's sanction, which occurred from March to June, though Berry lost her American record, she still could compete in her Olympic trials. Respondent would be unable to compete in Olympic trials, World Championships or the Grand Prix events in his sport with the imposition of a three-month period of ineligibility. Respondent argues this is a very disproportionate impact in a three-month period and is within the *Cilic* principle of a breach of public policy.
33. With respect to the cases cited by USADA, Respondent submits that the *Napoleon* case involves an athlete with a higher degree of fault, as Napoleon knew that his dad had an inhaler with different medicine than his own, yet kept his inhaler with his dad's in the same medicine cabinet and then mistakenly used his dad's instead

of his own inhaler. In so doing, Napoleon did not notice that his dad's inhaler had a different color bottom. He could have made different choices within his control to avoid an adverse analytical finding and so bears fault for that.

34. The *Volandri* case also involves an athlete with a higher degree of fault. Volandri took too much asthma medicine and exceeded the permitted threshold amount after he suffered a serious asthma attack the morning of a match. Volandri could have sought medical advice on how many puffs were too many, but did not. Again, he could have made different choices within his control to avoid an adverse analytical finding and so bears fault for that.
35. In contrast, Respondent did not take the medication incorrectly or take the wrong medication. Rather, he was prescribed the wrong type of medication by his physician.
36. Based on the above, Respondent submits that a warning in Respondent's case would be consistent with the cases cited by USADA.

V. MERITS

37. While the Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, I refer in this Award only to the submissions and evidence considered necessary to explain my reasoning.
38. Since Respondent has admitted the anti-doping rule violation, the only determination for this Arbitrator is the applicable period of ineligibility. WADA Code, 10.2.2 applies, as there is no indication the anti-doping rule violation was intentional. The maximum period of ineligibility therefore is two years. The determination then is the degree of fault under the definitions. Respondent does have some fault, as he has conceded.
39. In order to reduce the period of ineligibility, Respondent needs to establish No Significant Fault or Negligence, and the applicable period of Ineligibility "shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's ... degree of Fault" (WADA Code, 10.5.1.1) based on Respondent having used a Specified Substance.
40. It is clear that the Respondent has established No Significant Fault or Negligence as defined in the WADA Code, as his fault, "when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation."
41. Fault is defined in the WADA Code as "any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete's ... degree of Fault include, for example, the Athlete's ... experience, ... special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of

risk. In assessing the Athlete's ... degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's ... departure from the expected standard of behavior."

42. As set forth in *Cilic*, in order to determine the "category of fault", it is helpful to consider both the objective and the subjective level of fault. "The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities." *Cilic*, p. 16 ¶71.
43. The objective element is that a reasonable person when diagnosed by a physician as having bronchitis and taking the medicine prescribed by the physician in a therapeutic dose several days before competition would have perceived a small risk. USADA concedes that Respondent had no reason to know he was given the incorrect medication for his condition. In that situation, a reasonable person would indeed not be alarmed about the taking of prescribed medication. This is a light degree of fault.
44. The degree of fault is influenced by the subjective elements specifically referenced in the WADA Code definition of fault, i.e. Respondent's experience and the degree of risk he perceived. Respondent had been in the Registered Testing Pool for less than a month when the physician prescribed medication for bronchitis. An additional subjective element is that he had no way of knowing it was not the correct medication for bronchitis.
45. *Cilic* also distinguishes between cases where the substance was taken out-of-competition and there is an in-competition positive doping control versus the substance being taken in-competition. In Respondent's case, the Specified Substance is prohibited at all times, was taken out-of-competition but the anti-doping rule violation was not the result of a positive doping control in-competition or otherwise. Rather, the anti-doping rule violation was a result of Respondent's honest and thorough admission by disclosure on his Doping Control Records and by his doctor's completion of his TUE application for a substance taken out-of-competition.
46. The subjective elements in this case are indeed significant as they are listed as factors to be considered in the WADA Code. Respondent is an inexperienced elite athlete, with no exposure to regular anti-doping awareness when he got sick. There is no reason he should have perceived a risk from taking this medication which had been incorrectly prescribed. Though prescription medications are known to contain Prohibited Substances, Respondent was under a physician's care and taking the medicine for therapeutic purposes. It would have been preferable for the Respondent to check the ingredients, and in that he bears fault, but, as in the Solo case, there was no reason for Respondent to be alarmed about the taking of medication prescribed by his physician for bronchitis. He made a mistake not checking the Prohibited List web sites, the same mistake Solo (an experienced athlete at the time) had made.

47. In addition, the parties stipulated that there was no intent for Respondent to enhance performance by taking the substance. Nor was the substance actually performance enhancing when it was taken several days before the competitions during which Respondent completed the Doping Control Records.
48. Under *Cilic*, the subjective factors, just like the objective factors, are to be evaluated in the context of the case to ascertain whether the subjective factors actually contributed to the athlete's rule violation in the particular case. In these specific circumstances, the subjective factors clearly contributed to Respondent's rule violation which was not the result of a positive doping control, but the voluntary act of disclosure on his Doping Control Records. Thus, the degree of fault is moved to the lowest extremity of the light category of fault as *Cilic* categorizes the degrees of fault.
49. There is no need to find, and I do not find, that the principle of proportionality is invoked in this case. The WADA Code definition of fault specifically excludes from consideration of the degree of fault the "timing of the sporting calendar" and that is not considered in this decision.
50. Based on the circumstances of this case, the appropriate sanction is the lowest possible sanction, i.e. a public reprimand.
51. There are no competitive results to be disqualified as the Respondent did not take the Prohibited Substance during competition, and it had no effect on his competition results.

Findings and Decision

The Arbitrator therefore rules as follows:

- A. The parties stipulated that Respondent ingested a beta-2 agonist, which is a Specified Substance pursuant to S3 of the 2016 WADA Prohibited List, and is an anti-doping rule violation under Article 2.2 of the 2015 version of the WADA Code, for Use of a Prohibited Substance;
- B. Respondent has sustained his burden of proof under Article 10.5.1.1 of the WADA Code to qualify for a reduction in his period of ineligibility, to the minimum required under such Article: a reprimand and no period of ineligibility;
- C. The anti-doping rule violation did not take place in-competition, thus there is no disqualification of results under Article 9 of the WADA Code;
- D. The parties shall bear their own attorneys' fees and costs associated with this arbitration;
- E. The administrative fees and expenses of the American Arbitration Association, and the compensation and expenses of the Arbitrator, shall be borne by USADA and the United States Olympic Committee;
- F. This Award shall be in full and final resolution of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.



Maidie Oliveau
Sole Arbitrator
Dated: July 8, 2016