

AMERICAN ARBITRATION ASSOCIATION
North American Court of Arbitration for Sport Panel

In the Matter of the Arbitration between
UNITED STATES ANTI-DOPING AGENCY,

Claimant

and

ALEXANDRA KLINEMAN,

Respondent

Re: AAA No. 77 190 00462 13 JENF

MODIFIED AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS (hereafter, the "Panel"), having been designated by the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations of the parties at a hearing held at the American Arbitration Association in Los Angeles, California on November 13, 2013, do hereby render our full award pursuant to our undertaking to do within the time required under the relevant rules.

1. **SUMMARY**

1.1 USADA agreed with Respondent's contention that she is not a drug cheat. Respondent is an exceptional, forthright person who unfortunately finds herself caught up in the persistent world-wide efforts to eradicate performance enhancing drugs in sport through the imposition of stringent minimum penalties even where clear and convincing proof exists that an athlete made a small error with no intent to gain a competitive advantage. Respondent and her

mother represent the collateral damage caused by athletes who intentionally cheat and then lie and cover-up their misconduct in order to thwart a laudable comprehensive system intently focused on rooting out such misconduct for the betterment of sport.

1.2 Given the facts of this case, the Panel finds that Respondent's fault was slight. Although Respondent was taking vitamin supplements, the substances were not the sports performance supplements that have caused many positive tests. They were of the multi-vitamin variety which the World Anti-Doping Code ("WADA Code") Comments contemplate as justifying a reduction in penalty. Moreover, Respondent demonstrated diligence in attempting to avoid ingesting any substance that could result in her testing positive. She was not blindly or casually taking vitamin supplements without inspecting their provenance and purity. In this case, viewing the facts from the perspective of Respondent prior to the accident, rather than after the fact, it is impossible to find significant fault.

1.3 Because Respondent demonstrated diligence in attempting to avoid taking Prohibited Substances, the Panel concludes that Respondent's fault is more in line with the CAS cases of *Squizzato*¹, *Puerta*² and *Hardy*³ than the CAS cases of *Edwards*⁴ and *Hipperdinger*⁵. As Respondent was slightly negligent, the Panel imposes a period of ineligibility starting from May 22, 2013 through to June 9, 2014, a period spanning 13 months.

2. PARTIES

2.1 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 United States Anti-Doping Agency

¹ *Squizzato v. FINA*, CAS 2005/A/830.

² *Puerta v. ITP*, CAS 2006/A/102.

³ *USADA v. Hardy*, AAA 77 190 00288 08 (2009).

⁴ *Torri Edwards and IAAF*, CAS OG 04/003.

⁵ *Hipperdinger v. ATP*, CAS 2004/A/690.

Protocol for Olympic Movement Testing, effective as revised January 1, 2009 ("USADA Protocol"). Claimant is located at 5555 Tech Center Drive, Suite 200, Colorado Springs, CO 80919-9918

2.2 At the hearing, Claimant was represented by C. Onye Ikwaukor, Esq., Legal Affairs Director of USADA, and by co-counsel Stephen Starks, Esq., of the law firm of Kroger Gardis & Regas LLP.

2.3 Respondent, Alexandra Klineman, is a twenty-three year old volleyball player and member of USA Volleyball.⁶ She is a graduate of Stanford University, where she was a four-time all-American, was national player of the year, and an academic player of the year. She has played two seasons in the professional league in Italy, A1 Series. She has been on the Pan American Games roster and, until the positive test, worked out with the U.S. National Team in Los Angeles during the off-season for the professional leagues.

2.4 At the hearing, Respondent was represented by Howard L. Jacobs, Esq., of the Law Offices of Howard L. Jacobs, 2815 Townsgate Road, Suite 200, Westlake Village, CA 91361.

3. JURISDICTION

3.1 The Panel has jurisdiction over this doping dispute pursuant to the Ted Stevens Olympic and Amateur Sports Act ("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

⁶ USA Volleyball is the National Governing Body ("NGB") for the Olympic sport of Volleyball in the United States. It is a member of the Fédération Internationale de Volleyball ("FIVB"), the international governing body for the sport of Volleyball in the Olympic movement.

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. . . .⁷

3.2 Under its authority to recognize an NGB⁸, the United States Olympic Committee ("USOC") established its National Anti-Doping Policies, the current version of which is effective as of January 1, 2009 ("USOC Policies"), which, in 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.⁹

3.3 Regarding Klineman, 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. . . .¹⁰

3.4 In compliance with the Act, the USADA Protocol, Article 15, provides that hearings regarding doping disputes "will take place in the United States before the American Arbitration Association ("AAA") using the Supplementary Procedures."¹¹

4. RULES APPLICABLE TO THIS DISPUTE

The rules related to the outstanding issues in this case are the FIVB Rules on anti-doping, which implement the WADA Code. As the FIVB rules relating to doping are virtually identical

⁷ *Ted Stevens Olympic and Amateur Sports Act ("Act")*, 36 U.S.C. § 220522(a).

⁸ Act, §220505(c)(4).

⁹ *National Anti-Doping Policies*, ¶12.

¹⁰ *Id.* at ¶11.

¹¹ The supplementary procedures refer to the American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes, as approved by the USOC's Athletes' Advisory Council and NGB Council, effective January 1, 2009 ("AAA Supplementary Procedures").

to the WADA Code, the applicable WADA Code provisions (version 2009) will be referenced.

The relevant WADA Code provisions are as follows:

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample Specimen

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Sample. Accordingly, it is not necessary that intent, fault, negligence or knowing Use or the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1

3.1 Burdens and Standards of Proof

The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is 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 the Code places 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 probability, except as provided in Article 10.4 and 10.6 where the Athlete must satisfy a higher burden of proof.

3.2 Methods of Establishing Facts and Presumptions

Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases. . . .

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

The period of Ineligibility imposed for a violation of Article 2.1 [Presence of Prohibited Substance or its Metabolites or Markers], Article 2.2 [Use or Attempted Use of Prohibited Substances or Prohibited Method] or Article 2.6 [Possession of Prohibited Substances and Prohibited Methods] shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Article 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:

- First Violation: Two years' Ineligibility.

10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances

10.5.1 No Fault or Negligence

If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 [Presence of Prohibited Substance], the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.

10.5.2 No Significant Fault or Negligence

If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 [Presence of a Prohibited Substance or its Metabolites or Markers], the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

[Comment to Article 10.5.1 and 10.5.2: The Code provides for the possible reduction or elimination of the period of Ineligibility in the unique circumstances where the Athlete can establish that he or she had No Fault or Negligence, or No Significant Fault or Negligence, in connection with the violation. This approach is consistent with basic principles of human rights and provides a balance between those Anti-Doping Organization that argue for a much narrower exception, or none at all, and those that would reduce a two-year suspension based on a range of other factors even when the Athlete was admittedly at fault. These Articles apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. Article 10.5.2 may be applied to any anti-doping rule violation even though it will be especially difficult to meet the criteria for a reduction for those anti-doping rule violations where knowledge is an element of the violation. . . . To illustrate the operation of Article 10.5.1, an example where *No Fault or Negligence* would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances:

(a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a Prohibited Substance by Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substances); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and Athlete exercised care in not taking other nutritional supplements.) For purposes of assessing the Athlete's or other Person's fault under Article 10.5.1 and 10.5.2, the evidence considered must be specific and relevant to explain the athlete's or other Person's departure from expected standard of behavior. . . . (emphasis added)

10.9 Commencement of Ineligibility Period

Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension [whether imposed or voluntarily accepted] shall be credited against the total period of Ineligibility imposed. . . .

10.9.2 Timely Admission

Where the Athlete or other person promptly [which, in all events, for an Athlete means before the Athlete competes again] admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the Anti-Doping Organization, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed.

5. **STIPULATIONS OF THE PARTIES**

On August 17, 2013, the parties entered into the following stipulation:

"The United States Anti-Doping Agency ("USADA") and Ms. Alexandra Klineman stipulate and agree, for the purposes of all proceedings involving USADA urine specimen numbers 1556702, 1558603 and 1558958, the following:

1. That the USADA Protocol for Olympic and Para-Olympic Movement Testing ("Protocol") governs all proceedings involving USADA specimen numbers 1556702, 1558603 and 1558958;
2. That the mandatory provisions of the World Anti-Doping Code (the "Code") including, but not limited to, the definitions of doping, burdens of proof, Classes of Prohibited Substances and Prohibited Methods, and sanctions, the Protocol, the Federation Internationale de Volleyball ("FIVB") Anti-Doping Rules and the United States Olympic Committee ("USOC") Anti-Doping Rules are applicable to any hearing involving the doping offense based on USADA urine specimen numbers 1556702, 1558603 and 1558958;
3. That Ms. Klineman gave the urine sample designated as USADA urine specimen number 1556702 as part of USADA's Out-of-Competition testing program on May 22, 2013;
4. That Ms. Klineman gave the urine sample designated as USADA urine specimen number 1558603 as part of USADA's Out-of-Competition testing program on June 19, 2013;
5. That Ms. Klineman gave the urine sample designated as USADA urine specimen number 1558958 as part of USADA's Out-of-Competition testing program on June 26, 2013;
6. That each aspect of the sample collection and processing for the A and B bottles of USADA urine specimen numbers 1556702, 1558603 and 1558958 were conducted appropriately and without error;
7. That the chain of custody for USADA urine specimen numbers 1556702, 1558603 and 1558958 from the time of collection and processing at the collection site to receipt of the sample by the World Anti-Doping Agency ("WADA") accredited laboratory in Los Angeles, California (the "Laboratory") were conducted appropriately and without error;
8. That the Laboratory's chain of custody for USADA urine specimen numbers 1556702, 1558603 and 1558958 were conducted appropriately and without error;

9. That the Laboratory, through accepted scientific procedures and without error, determined that the A & B bottles of USADA urine specimen number 1556702, and the A bottles of USADA urine specimen numbers 1558603 and 1558958 contained an elevated testosterone/epitestosterone (T/E) ratio greater than 4:1. Additionally, that by using the Gas Chromatography Isotope Ratio Mass Spectrometry ("GC/IRMS") method, also known as Carbon Isotope Ratio ("CIR") analysis, the Laboratory reported the Samples as Adverse Analytical Findings because the IRMS analyses reflected values consistent with the administration of a steroid of exogenous origin;

10. That Ms. Klineman expressly waives her right to have the B bottles of USADA urine specimen numbers 1558603 and 1558958 opened and analyzed by the Laboratory;

11. That Ms. Klineman agrees that the testing performed on her specimen numbers 1556702, 1558603 and 1558958 by the Laboratory establishes the presence of an anabolic androgenic agent on the World Anti-Doping Agency (WADA) prohibited list in her specimens (the "Positive Tests")

12. That USADA and Ms. Klineman agree that the Positive Tests on her specimen numbers 1556702, 1558603 and 1558958 constitute a single, first doping offense;

13. That Ms. Klineman believes her Positive Tests on her specimen numbers 1556702, 1558603 and 1558958 were caused by her use of Dehydroepiandrosterone ("DHEA") over a period of time;

14. That the parties agree that the Laboratory findings for USADA urine specimen numbers 1556702, 1558603 and 1558958 are consistent with the use of DHEA;

15. That USADA is not conceding that the source of Ms. Klineman's Positive Tests has been identified;

16. That Ms. Klineman accepted a Provisional Suspension on July 2, 2013, and has agreed not to compete in any competitions under the jurisdiction of FIVB, USA Volleyball, and the United States Olympic Committee ("USOC"), or any clubs, member associations or affiliates of these entities, until her case is deemed not to be a doping offense, she accepts as sanction, she fails to contest this matter, or a hearing has been held and a decision reached in this matter. The time served under the Provisional Suspension will be deducted from any period of ineligibility that she might receive beginning on July 2, 2013, the date she accepted the Provisional Suspension;

17. That Ms. Klineman agrees to waive her right to a review of her case by a Panel of the independent Anti-Doping Review Board, as afforded to her in accordance with Section 11 of the Protocol. . . .”

6. **PROCEDURAL ASPECTS OF CASE**

6.1 On July 1, 2013, Respondent was notified by USADA that her May 22, 2013 sample tested positive for a Prohibited Substance. The letter stated, in part, the following:

“The Laboratory reported that your A Sample contains an elevated testosterone/epitestosterone (T/E) ratio greater than 4:1. Additionally, using the Gas Chromatography Isotope Ratio mass spectrometry (“GC/IRMS”) method, also known as Carbon Isotope Ratio (“CIR”) analysis, the Laboratory reported your Sample as an Adverse Analytical Finding because the IRMA analysis reflected values consistent with the administration of a steroid of exogenous origin.”

6.2 On July 2, 2013, Respondent executed the “Acceptance of Provisional Suspension.” On July 30, 2013, Respondent was notified of her Adverse Analytical Findings for the same substance in her June 19, 2013 and June 26, 2013 samples, all of which were taken out of competition. For the purposes of an anti-doping violation and consistent with the parties stipulation, all three samples are considered as one violation. Therefore, there was no need to execute an additional Acceptance of Provisional Suspension.

6.3 On July 2, 2013, Respondent notified USADA that, after an investigation into the supplements she was taking, she discovered that her mother had accidentally placed DHEA supplements into Respondent’s vitamin organizer. She did not request that her B sample be tested in any of her positive tests. Further, Respondent waived her right to have USADA’s Board of Review evaluate the case.

6.4 The Panel and the parties held a preliminary hearing by telephone conference on October 24, 2013. After the preliminary hearing, the Panel issued its Scheduling Order

(Procedural Order No. 1) on October 29, 2013 (“Initial Scheduling Order”) setting a hearing on November 13, 2013.

6.5 USADA had the burden of proof regarding Respondent’s Adverse Analytical Finding. However, Respondent admitted the Adverse Analytical Finding. Therefore, the only issues remaining for this Panel were matters for which Respondent had the burden of proof. Given this fact, the parties and the Panel agreed to reverse the normal order of presentation in briefing and at the hearing.

6.6 The Evidentiary Hearing took place on November 13, 2013 in Los Angeles, California at the offices of the American Arbitration Association. Testifying in person on behalf of Respondent were Kathie Klineman (her mother), Mike Klineman (her father), and Respondent. Testifying by telephone on behalf of Respondent was multiple volleyball Olympic medalist and Ms. Klineman’s coach Karch Kiraly. The Panel found the testimony of all of Respondent’s witnesses credible. USADA did not present any witnesses. All documents submitted by the parties were admitted without objection.

7. **FACTUAL BACKGROUND AND TESTIMONY AT THE HEARING**

7.1 As USADA did not present any witnesses that challenged or contradicted the testimony of Respondent’s witnesses, and the Panel found the testimony of all of Respondent’s witnesses credible, the factual findings of the Panel are consistent with the testimony of the witnesses in this case.

7.2 Respondent is a world-class volleyball athlete. World-class volleyball athletes in the United States have similar schedules consisting of essentially two seasons. The European league season starts from October and runs through April. The volleyball athletes of a caliber to compete for a spot on the United States Olympic Team start their U.S. National Team practices

and training in early May and continue to practice with the U.S. National Team through the end of September. Prior to her positive test, Respondent practiced and played with the U.S. National Team. As a member of the team, Respondent had been drug tested on a number of occasions; all those tests were negative for any Prohibited Substances.

7.3 As a national team member, USA Volleyball gives Respondent a blood test each year when she returns from Europe. USA Volleyball also requires that the athletes go through a physical examination. If the athletes are deficient in some area, USA Volleyball addresses the deficiencies through nutrition and dietary supplements, multi-vitamins and iron pills. USA Volleyball is assisted in this program by a USOC nutritionist. The nutritionist is available to the athletes almost every day. USA Volleyball does not recommend or select specific brand choices, but USA Volleyball clearly encourages its athletes to take supplements to address nutritional deficiencies. In this regard, USA Volleyball determined that Respondent's iron levels were low and advised her that she needed to take a supplement for iron.

7.4 In May of 2013, Respondent had just returned from Europe. She moved in with her parents because they live in Los Angeles within reasonable commuting distance to USA Volleyball's training site. At about this time, Respondent's mother, Kathleen Klineman ("Mrs. Klineman") observed Respondent taking her vitamin supplements. Every day Respondent would take each supplement pill individually from its original manufacturer's container, a repetitive and time-consuming process early in the morning as Respondent was preparing for an hour long drive to morning practices.

7.5 Upon observing her daughter's morning routine, Mrs. Klineman told Respondent there was a more efficient way to take her supplements. Mrs. Klineman had a plastic vitamin organizer.

Mrs. Klineman stated that she could put Respondent's weekly supply of supplements in the daily organizer so that Respondent would not have to open every bottle every morning.

7.6 Respondent agreed and showed her mother the supplements she was taking. These supplements were to be placed into the organizer. One side of the organizer had her mother's daily supplements, and the other side had Respondent's daily supplements.

7.7 Respondent was taking the following supplements: One-a-Day Essential, Nature's Bounty Fish Oil, B-Complex, Nature's Bounty Probiotic 10, Solaray Cal-Mag Citrate (for cramping), Nature's Bounty Vitamin E, Nature's Bounty Biotin, Nature's Bounty Cinnamon, and Mason Natural/Slow Fe (iron pill). The USA Volleyball National Team nutritionist who worked for the USOC informed Respondent that certain protein powders had caused positive tests in other athletes. Given this advice, Respondent did not take any protein powders or supplements associated with building muscles or improving athletic performance.

7.8 Respondent and her mother kept their vitamin supplement bottles separate, for the most part. However, when guests would come over for dinner, Mrs. Klineman would place all the supplement bottles in a single basket or bin to clear space on the kitchen counter or table.

7.9 In the first week of using the organizer, Respondent noticed a pill that she had not seen before and asked her mother about that pill. The mother stated the pill was Estrovan, a pill Respondent should not be taking. Even though the organizer was separated by Respondent's side and Mrs. Klineman's side, Respondent and her mother agreed after this incident to start putting only the pills that they were both taking into the organizer in order to avoid Respondent accidentally taking a pill that belonged to her mother.

7.10 Most of the supplements Respondent and her mother were taking were distributed by Nature's Bounty, a well known and widely available brand that they purchased from a

national pharmacy chain. The various Nature's Bounty products they purchased all come in green bottles that are identical in shape, often identical in size, and are similarly labeled. Thus, at casual glance all of the bottles appear the same; only the names on the labels differentiate the products.

7.11 Respondent did not know at the time that her mother was also taking a Nature's Bounty supplement that contained DHEA, the cause of Respondent's positive test. According to Mrs. Klineman's testimony, she probably placed the Nature's Bounty DHEA she was taking with the other Nature's Bounty bottles that Respondent was taking when preparing to receive company in their home or cooking a large meal. As the bottles of Respondent's carefully selected vitamin and other supplements looked the same as her mother's supplement, it would be hard to notice the inclusion of her mother's supplement with the Respondent's group of bottles without specifically looking for the bottle that contained her mother's supplement.

7.12 On July 1, 2013, at around 4:13 pm PST, Respondent was notified by USADA through an e-mail with an attached letter that she had tested positive for a Prohibited Substance. Respondent then called the National Team's trainer, Jill Wosmek, to determine what had happened. The trainer informed Respondent that she should go through all the bottles of supplements she was taking to determine if they could be the cause of the positive test. When respondent went through the green bottles, she noticed for the first time a Nature's Bounty bottle that had DHEA in large letters on the front label. She did not recognize the name DHEA, so she went online to look up the WADA Prohibited Substance List to see if the substance was included there. There she found that DHEA was a Prohibited Substance. After discussing this information with the trainer, they came to the conclusion that the DHEA was likely the cause of the Adverse Analytical Positive. The DHEA pill was a small round white pill without markings

that looked nearly identical to Respondent's iron pill, so she did not notice the difference, as she had with the much different colored, sized, and shaped Estrovan pill.

7.13 Respondent asked her mother whether it was possible that she had taken the DHEA. Respondent and her mother then determined how many pills were in the DHEA bottle compared to the purchase date of the DHEA. In this way, they concluded that Respondent was probably taking DHEA as well. Within five hours, or by 9:38 pm PST, Respondent notified USADA regarding the vitamin supplements she had taken and also informed USADA she had taken DHEA by accident. As a consequence of these disclosures, as stated in the Procedural Section above, USADA did not test the B Sample or submit the matter to its Board of Review. In addition, Respondent immediately signed an Acceptance of Provisional Suspension form.

8. PARTIES' ARGUMENTS

8.1 As stated above, the parties agree that this case comes under WADA Code Article 10.5.2. In other words, there is no dispute about her ingestion of a Prohibited Substance. Respondent did not intend to cheat or gain any competitive advantage. Thus, reduction in the two-year sanction is appropriate. At issue is the appropriate degree of reduction in light of Ms. Klineman's fault. Respondent sought the maximum reduction to 12 months and USADA, after being pressed by the Panel, stated that it sought a reduction in the 18 months.

A. Respondent's Arguments

8.2 Through her pleadings, pre-hearing brief, oral argument, and testimony at the Evidentiary Hearing, Respondent argues that in determining Respondent's level of fault the Panel must look at the "totality of the circumstances", which involves the following facts:

- 1) Alexandra Klineman carefully selected her vitamins and supplements, and merely delegated to her mother the ministerial task of taking those vitamins and supplements that she directed be used out of the bottles and placing them into a daily pill organizer;

- 2) The vitamins and supplements that Alexandra Klineman's mother organized for her were the same substances that Respondent had been taking without incident for many months, if not years. These supplements did not contain any ingredients that would be considered particularly risky; they were fairly normal vitamins and supplements, sourced from companies who marketed widely for health and nutrition customers, rather than to a more specialized market for body-building or muscle-building. None of the supplements could be considered as "sports supplements" in any traditional sense;
- 3) Alexandra Klineman's mother started using DHEA to treat menopausal related symptoms. She did not intend to give the DHEA supplements to Alexandra Klineman;
- 4) The DHEA supplements were unmarked, round white tablets, which looked similar in size, color, and shape to one of the slow-release iron supplements that Alexandra Klineman had been given by her mother for years. Thus, there was nothing unusual about these tablets that would have made Respondent suspicious about the nature of the pill she was ingesting;
- 5) Alexandra Klineman is generally careful about what she ingests, as she understands her anti-doping obligations and she is not cavalier about them; and
- 6) During the brief time that Alexandra Klineman unknowingly ingested DHEA, she was in her off-season, and did not compete at all.

Respondent argues that the totality of the circumstances in this case puts her in the category of cases that received the maximum reduction, or a one-year sanction.

8.3 Respondent also argues that imposing a sanction of more than one-year would seriously reduce Respondent's ability to make the National Team in 2014, and that failure to make the National Team in 2014 would all but eliminate her from making the U.S. Olympic Team in 2016. As a consequence, an eighteen month sanction as USADA suggests would *de facto* be a three-year sanction and not proportional to Respondent's level of fault. Respondent argues that the Panel must consider these consequences in imposing its sanction based on the legal doctrine of proportionality, despite the WADA Code's express direction, in the Comment to Articles 10.5.1 and 10.5.2 of the WADA Code, that consideration of the potential loss of upcoming competitions or competitive opportunities is not proper when a panel assesses the length of sanction.

B. USADA's Arguments

8.4 Through its pleadings, pre-hearing brief, oral argument, and testimony at the Evidentiary Hearing, citing the CAS cases of *Hipperdinger*¹² and *Edwards*¹³, USADA argues that athletes such as Respondent should be held accountable for the negligence of her mother because Mrs. Klineman is in the Respondent's circle of associates as defined by the WADA Code. USADA argues that Respondent was, therefore, obligated to educate her mother about the WADA Code and her responsibilities as an athlete. USADA argued that her failure to educate her mother exhibited fault. USADA argues that not only must Respondent prove that she was not significantly at fault, she must also prove that her mother was not significantly at fault. USADA argues that she cannot make those required showings.

8.5 USADA also argues that considering Respondent's competitive schedule in imposing a sanction would violate the plain language of the comments to WADA Code Article 10.5.2. Although it was reluctant to do before the hearing, and even during the opening statements, USADA conceded in its closing arguments that it believed that a period of ineligibility of 18 months was in order in this case. Further, USADA argued that a sanction of 18 months would not violate the notion of proportionality, irrespective of the prospective competition or qualifying schedule of Respondent, because the WADA Code as a whole has been found to comply with the notion of proportionality.

9. ISSUES FOR THE PANEL TO DECIDE

Given the parties' agreement on the fundamental issues as set forth in detail above, two issues remain for the Panel to decide: 1) Respondent's level of fault, thereby determining her period of ineligibility, and 2) the appropriate start date for Respondent's period of ineligibility.

¹² *Hipperdinger v. ATP*, CAS 2004/A/690.

¹³ *Torri Edwards and IAAF*, CAS OG 04/003.

10. LEGAL ANALYSIS

A. *Length of Sanction*

10.1 As hindsight is 20-20, it is always much easier to determine what a person should have done to avoid an accident after seeing the accident take place. Determining retrospectively what went wrong to cause an accident does not mean that a person who failed to take all possible steps to avoid the accident was negligent or at fault. Total prescience is not demanded by the WADA Code, or by any fair and equitable legal system.

10.2 The parties have agreed that this is a No Significant Fault or Negligence case. The Panel finds on the basis of the evidentiary record that: (1) there was no intention to dope, (2) there was no intention to gain a competitive advantage, (3) no competitive advantage was gained, and (4) Respondent diligently took reasonable precautions to avoid ingesting a prohibited substance. (See *Squizzato v. FINA*, CAS 2005/A/830, ¶10.14; *Thompson v. USADA*, CAS 2008/A/1490, ¶8.5).

10.3 Since the rulings in *Edwards*¹⁴ and *Hipperdinger*¹⁵, the 2009 version of the WADA Code has added more flexibility to a panel's ability to reduce an athlete's period of ineligibility when a panel finds, as we have, that the athlete did not intend to enhance sport performance. In its communication to athletes, in WADA Questions & Answers regarding the 2009 Code, P. 3, WADA states the following:

"A greater flexibility is introduced as relates to sanctions in general. While this flexibility provides for enhanced sanctions, for example in cases involving aggravating circumstances (see above), lessened sanctions are possible where the athlete can establish that the substance involved was not intended to enhance performance." (WADA Q & A: 2009 Code, p.3.) (emphasis added)

¹⁴ *Torri Edwards and IAAF*, CAS OG 04/003.

¹⁵ *Hipperdinger v. ATP*, CAS 2004/A/690.

10.4 Nevertheless, this new flexibility must be exercised under the limits and conditions set in the WADA Code. With respect to Respondent's request for a reduction under 10.5.2, the Panel is of the view that it should follow the direction of the Comments which state in pertinent part:

"For purposes of assessing the Athlete's or other Person's fault under Article 10.5.1 and 10.5.2, the evidence considered must be specific and relevant to explain the athlete's or other Person's departure from 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 this Article." (WADA Code, Comments to 10.5.1 and 10.5.2)

10.5 The initial issue to determine is whether Respondent's negligence was on the high end or was slight. In order to obtain reasonably uniform sanctions globally, such an analysis must compare Respondent's conduct with the sanction given to other innocent athletes who have gone through this process.

10.6 This is not a case of ingesting a contaminated supplement, a danger about which athletes have been warned. The evidence demonstrated persuasively that Respondent exercised due diligence in avoiding vitamin supplements that USA Volleyball's and the USOC's nutritionist identified as causing positive tests. Respondent was only taking vitamins, as more specifically described in the comment section of 10.5.2.

10.7 USA Volleyball routinely performed periodic blood testing on its athletes for the purpose of determining their overall health. When those tests revealed deficiencies in an athlete's diet, USA Volleyball, with the assistance of a USOC nutritionist, recommended that athletes take vitamin supplements, among other substances, to cure those deficiencies. Moreover, undisputed evidence established that USA Volleyball, with the assistance of the USOC nutritionist, and Respondent's doctors recommended that she take an iron supplement

because her iron levels were chronically low. This fact is relevant to determining the level of Respondent's fault in accidentally taking a pill containing DHEA that closely resembled her iron supplement pill.

10.8 Respondent did not send her mother to the store to buy her vitamins. Respondent carefully considered which vitamins were acceptable in accordance with the directions of her NGB and the USOC and purchased those bottles herself. In this way, Respondent's case is different from *Squizzato*. In *Squizzato v. FINA*, CAS 2005/A/830, the athlete used a foot fungus cream that contained a prohibited steroid. The cream was purchased by *Squizzato*'s mother. The steroid was clearly listed on the label, but neither the athlete nor her mother read the label. The panel found that *Squizzato* was not significantly negligent and reduced her period of ineligibility from 24 months to 12 months. In making its finding of no significant fault or negligence the panel held:

“As the [athlete] appears to have no intention whatsoever to gain an advantage towards her competitors, her negligence in forgetting to check the content of a medical cream can be considered as mild in comparison with an athlete that is using doping products in order to gain such advantage.” (*Squizzato* at ¶10.14.)

10.9 Respondent purchased her vitamins and then instructed her mother on which ones she was taking and how to put them in the organizer. Respondent established conclusively that she had no knowledge whatsoever that Mrs. Klineman was taking a product containing DHEA for her menopause symptoms and as an anti-aging product. This assertion was credible given the personal nature of the mother's symptoms and was bolstered by Respondent's response of immediate inquiry when she discovered the Estrovan pill. After discovering this extra pill, Respondent immediately changed how they were using the organizer in order to eliminate the possibility of confusion and to avoid inadvertent mixing of her mother's pills with Respondent's supplements. This action was taken so that only the products that Respondent was taking would

be included in the organizer, even on her mother's side of the organizer. This immediate revision of procedure demonstrated that Respondent was keenly aware of her responsibility to ensure that no Prohibited Substance entered her body and that she showed diligence in this regard by taking steps to prevent the ingestion of a Prohibited Substance.

10.10 USADA argued that Respondent was obligated to educate her mother concerning all aspects of the athlete's obligations under the WADA Code. However, the Panel has found no case that unequivocally imposed such a strict standard. The *Squizzato* case did not state that educating her mother was part of her duty of diligence. Such a standard, taken to its logical conclusion, would require that the athlete educate every individual who would ever prepare a meal for her regarding the strict standards of the WADA Code. That requirement is neither equitable nor practical.

10.11 USADA also argued that, to avoid testing positive for DHEA, Respondent should have inspected all the pills and vitamins her mother was taking. Looking at the case in retrospect, this argument has some merit. Looking at the case from Respondent's perspective prior to the positive test, however, the argument loses some of its force. Respondent purchased the items she wanted included in the organizer. She instructed her mother about those items and, when there was an apparent discrepancy in the pill in the organizer, Respondent instituted a new program to ensure only the vitamins she specifically designated would be loaded into the organizer. Respondent's her mother indicated her assent to her directives. In the Panel's view, this demonstrated diligence and Respondent's thorough level of care regarding what she ingested fully justified the Panel's finding that any fault by Respondent regarding management of her iron supplement was not significant. Given all of these factors, the Panel concludes that Respondent exercised a level of care greater than the athlete did in *Squizzato*.

10.12 In *Puerta v. ITF*, CAS 2006/A/1025, Puerta was a tennis athlete who was facing a second doping offense, which could lead to a life-time ban. The first doping offense was considered inadvertent, and his sanction in that instance was reduced as well. His second doping offense occurred because of a medication his wife was taking. According to the facts of the *Puerta* case, the athlete was eating at a table with his wife. He was drinking water from a glass on that table. When he got up to leave his wife took his glass and put her medication in the water and drank it. When *Puerta* returned to the table he noticed his empty glass and filled it with water. It was from this drink that the positive test occurred. The *Puerta* panel stated the following regarding *Puerta's* negligence:

“Proceeding from the premise that each case must demonstrate exceptional circumstances, the Panel has concluded, after examining and evaluating the facts in their totality, that the ingestion of etilefine occurred inadvertently. Although Mr. Puerta acted negligently in not ensuring that, despite his brief absence, his previous glass had not been used by another person, the degree of his negligence is so slight that a finding of “No Significant Fault or Negligence” is inevitable and necessary.” (*Id.* at ¶11.7.20.)

10.13 The *Puerta* tribunal imposed a sanction of two years on what could have been a life-time ban, but was supposed to be at a minimum eight years. (*Id.* at p. 43.) In the instant case, the mix-up with the Respondent's mother's DHEA is similar to *Puerta's* mix-up with his wife's medication in his water. Respondent, like *Puerta*, had no real way of knowing about the mix-up prior to the incident. With the wisdom of hindsight, the *Puerta* panel found minimal fault. Like *Puerta's* fault, Respondent's fault in the instant case was slight.

10.14 In *Hardy*,¹⁶ the athlete tested positive for a steroid, Clenbuterol. It was established that the Clenbuterol came from a contaminated vitamin supplement that Hardy was taking among a number of vitamin supplements purchased from a company called AdvoCare,

¹⁶ *USADA v. Hardy*, AAA Case No. 77 190 00288 08 (Interim Arbitral Award, May 2, 2009) (upheld by CAS on appeal).

with which she had a marketing agreement. Advocare and the athlete had personal conversations and Advocare assured the athlete regarding its products' quality and purity. There was no labeling of *Ms. Hardy's* products as having prohibited substances in them, and she had taken the supplements for months without a positive test, and she had spoken to her NGB and USOC personnel about the quality of and need for taking these products. The panel in *Hardy* stated:

“Respondent is a young adult who was no more than ordinarily negligent, and she took numerous steps to avoid taking contaminated supplements. She, of course, could have taken more steps, but she was not in any way Significantly Negligent. The Panel finds that, under the provisions of the Code, and based on the totality of the circumstances in this case, Respondent’s Ineligibility Period may be reduced to the maximum extend. An Ineligibility Period of one year is fair and reasonable

...¹⁷

10.15 Respondent’s actions were much like *Hardy's*. The factors favoring reduction of Respondent’s suspension include the following:

- She did not take or seek to take any supplement that had a history of problems or that was marketed to bodybuilders or for androgenic or performance enhancing effects;

- She only took one brand of supplement, which included individual vitamins and minerals or combinations of vitamins;

- USA Volleyball, her NGB, recommended she also take an iron supplement, so she purchased that supplement from the same widely distributed and well-respected brand she was using for her other supplements;

- The DHEA pill her mother inadvertently added to Respondent’s pill organizer was nearly identical in color, size, and shape as Respondent’s iron pill;

- Respondent gave explicit instructions to her mother specifically identifying what she was taking and which pills should be added to the organizer;

¹⁷ *Id.* at 14.

-When Respondent observed a pill she did not recognize, she immediately established a new procedure and gave new directions to her mother to ensure that she did not take the wrong pill in the future; and

- Respondent, exercising a reasonable degree of care, could not have known or discovered her mother's error in filling the vitamin organizer and that the small white pill she took was actually DHEA instead of her iron supplement.

10.16 The factor that militates against a complete reduction is that Respondent delegated responsibility for organizing her daily supplement routine to her mother, and did not check periodically that no one mixed other Nature's Bounty bottles with Respondent's identical appearing Nature's Bounty bottles.

10.17 While her mother made a mistake that was clearly completely unintentional and could have been rectified by using a little more care in reading the bottles as she was filling the vitamin organizer, it simply is not the requirement that members of an athlete's entourage must completely free of mistakes for an athlete to qualify for a reduction in penalty. The WADA Code would be without meaning if the Panel was not required to assess the fault of the athlete primarily in managing the delegation of her obligations to a third party, and here the Panel has done that. In retrospect, Respondent could have done more, because, as shown by the facts here, her system was not completely foolproof. Nevertheless, perfection or invulnerability of procedure is not the applicable standard—the test for obtaining a reduction in penalty is whether the athlete acted without significant fault or negligence.

10.18 Given the facts here, Respondent's negligence was similar to Hardy's; that is, very slight and not significant. The Panel is of the view that while her fault was very slight, it was not so slight as to entitle her to the maximum reduction possible; there was more that

Respondent could have done to avoid this situation after she realized her mother had made a mistake with the Estrovan. The Panel is mindful that the process of attributing fault and reduction of penalty in accordance with the WADA Code is more of an art than a science and it has completed its tasks here with appropriate diligence mindful of the need to ensure harmonization and consistency while also doing substantial justice to the parties.

10.19 In view of the facts established at the hearing and as stated above, and considering the totality of the circumstances and the applicable provisions of the WADA Code, Respondent is entitled to a reduction of penalty at or near the maximum permissible under the No Significant Negligence standard. Therefore, the Panel has determined that Respondent's length of sanction shall run from May 22, 2013 through to June 9, 2014, a penalty spanning a period of thirteen months. This reduction represents the Panel's own evaluation and weighing of the evidence and the submissions received, as well as the Panel's careful, if cautious, consideration of the authorities that it has found of relevance.

10.20 Given that the facts in this case mandated a finding of No Significant Fault, and the length of the sanction imposed herein, the Panel has determined it was unnecessary to consider Respondent's argument that a sanction longer than one year would be a *de facto* sanction of three years and therefore not proportional.

B. Start Date for Sanction

10.21 Article 10.9.2 provides that, "Where an athlete promptly admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the Anti-Doping Organization, the period of Ineligibility may start as early as the date of Sample collection. . . ." USADA argued that the start date should be from the date Respondent signed her Acceptance of

Provisional Suspension. Respondent argues that the start date should be from the date of sample collection given the steps Respondent took to notify USADA immediately that she was not challenging the test results and the speed with which she sought to admit her culpability.

10.22 In this case, Respondent took the notion of “promptly” to an entirely new level. On July 1, 2013 she immediately investigated the cause of her positive test and notified USADA within five hours, on that same day, that she was not contesting the laboratory results. Under any type of an analysis or standard, she robustly satisfied the requirement to admit the anti-doping violation “promptly”. The Panel cannot see how she could have responded more “promptly” than she did. Moreover, Respondent immediately executed an Acceptance of Provisional Suspension, which took her out of competition until her eligibility status was adjudicated, thus further demonstrating her good faith to resolve her case.

10.23 Finally, Respondent waived both her right to have her B samples tested and her right to have the USADA Board of Review hear her case. These facts demonstrate there is absolutely nothing more Respondent could have done to cooperate with USADA or to otherwise minimize the complexity or cost of this proceeding.

10.24 Given the fact that Respondent (1) is an innocent athlete who tested positive by accident and (2) that she did everything humanly possible to provide USADA with all the information it required regarding her positive test, the Panel would have preferred that USADA stipulate that the start date would be the date of sample collection. Nevertheless, the Panel finds that Respondent unequivocally satisfied the requirements of WADA Code 10.9.2 and, therefore, the Panel rules that her sanction will start from May 22, 2013, the date the first sample that tested positive was taken.

11. DECISION AND AWARD

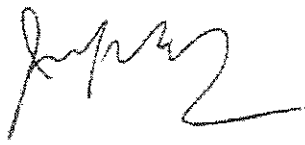
On the basis of the foregoing facts, legal analysis, and conclusions of fact, this Panel renders the following decision:

- a. Respondent has committed her first doping violation under Article 2.1 of the 2009 version of the WADA Code;
- b. Respondent has sustained her burden of proof under WADA Code Articles 10.5.2 and 10.9.2. Therefore, the Panel imposes a period of ineligibility starting from the date of the sample collection of her first positive test on May 22, 2013 and continuing through June 9, 2014, a period spanning thirteen months;
- c. The parties shall bear their own attorney's fees and costs associated with this arbitration;
- d. The administrative fees and expenses of the American Arbitration Association, and the compensation and expenses of the arbitrators and the Panel, shall be borne entirely by USADA and the United States Olympic Committee;
- e. 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; and
- f. This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Dated: December 12, 2013.



Christopher L. Campbell, Chair



Jeffrey G. Benz



Daniel F. Brent