AMERICAN ARBITRATION ASSOCIATION

Commercial Tribunal

UNITED STATES ANTI DOPING AGENCY ("USADA"),

        Claimant,

vs.

BARBARA GICQUEL,

        Respondent.

        Case No. 01-20-0004-9764

I the undersigned arbitrator, having been designated in accordance with USADA Protocol for Olympic and Paralympic Movement Testing (USADA Protocol), and operating under the American Arbitration Association ("AAA") Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes ("Supplementary Procedures"), and having been duly sworn, and having duly heard the proofs and allegations of the parties, hereby AWARDS as follows:

Claimant was represented by William Bock, Jeffrey Cook and Ted Koehler from the United States Anti-Doping Agency. Respondent was represented by Howard Jacobs and Lindsay Brandon from Law Offices of Howard L. Jacobs.

This matter involves Barbara Gicquel, an 80 year-old cyclist who tested positive in 2019 for methyltestosterone after winning a race and setting a world record in the time trials for the Masters 75-79 age group at the USA Cycling Masters Track Nationals. The facts of her use of methyltestosterone and the reasons for the use will be discussed later in this Award. After a series of hearings and evidence presentation, the arbitrator finds that employment of methyltestosterone by Barbara Gicquel was in violation of the anti-doping rules set forth by the USADA. Therefore, the arbitrator hereby

AWARDS as follows:

1. The Claimant shall be suspended for a period of two years from the date of the award.
2. The Claimant shall pay all costs and expenses incurred in the arbitration proceedings.
3. The Claimant shall forfeit any and all earnings and bonuses received during the suspension period.

This Award is final and conclusive and shall be binding on the parties.

AWARD - Case No. 01-20-0004-9764
of communications, the United States Anti-Doping Agency ("USADA) and Ms. Gicquel entered
into a Sanction Agreement on April 15, 2020 under which Ms. Gicquel agreed to the
disqualification of her results from the August 29, 2019 event and a one-year sanction under the
World Anti-Doping Code. The parties could not agree on the extent to which the disqualification
should be applied retroactively or whether previous results, prizes, medals and records should be
forfeited. That is the issue presented to the Sole Arbitrator in this matter. USADA contends that
the disqualification should commence on November 19, 2009 (10 years from when Ms. Gicquel
was formally notified that USADA intended to proceed with sanctions). Ms. Gicquel contends
that Anti-Doping Code Rule 10.8 does not permit additional disqualifications and that, even if
additional disqualifications were permitted, the Sole Arbitrator should conclude that fairness
requires that no additional disqualifications be ordered.

Ms. Gicquel began taking a medication called Estratet in 2005 under the supervision of
her doctor, Aleksandra Frey, who she consulted with to deal with bronchitis and the effects of
menopause. Previous to this time Ms. Gicquel had competed in cycling events since 1997 without
the use of Estratet. She was prescribed a dosage of 1/2 tablet every other day and continued that
dosage until her failed drug test in 2019. The parties agree that Estratet contains
methyltestosterone and that methyltestosterone is a Prohibited Substance on the World Anti-
Doping Agency Prohibited List.

In 2012, Ms. Gicquel began competing in the Masters Track and Velodrome events and
between 2016 and 2019 won many events and set national and world records in her age
categories. Although she was tested following some of those events, she did not fail a drug test
until the meet on August 29, 2019. At that event, she set a new world record, breaking her old
world record. In the doping control form associated with the August 29, 2019 event, she listed
many medications and supplements that she had taken in the previous seven days but did not
include Estratet on that form. The following day, she supplemented her list of supplements and
medications she had taken, but again did not include Estratet in that list.

In late September 2019 she was notified that she had tested positive for methyltestosterone
and was told she could apply for a Therapeutic Use Exemption ("TUE") which, if successful,
would have permitted the retroactive use of Estratest. Ms. Gicquel made a TUE submission the following month which was denied by USADA on November 13, 2019 on the grounds that the materials submitted by Ms. Gicquel did not establish a medical condition that required the use of methyltestosterone and further concluded that methyltestosterone "on a balance of probabilities, is likely to produce performance enhancement beyond what would be considered a return to a normal state of health."

This decision was confirmed by the Anti-Doping Review Board on December 19, 2019, but a stipulation was entered into so that Ms. Gicquel could submit a revised TUE application for methyltestosterone. The revised TUE application was submitted on March 17, 2020 and contained substantial new information from her treating physician, her pulmonologist, medical journals and letters from Ms. Gicquel and her attorney. The contents of those materials will be analyzed later in connection with the appropriate disqualification for the use of methyltestosterone. Again, the TUE application was denied and the parties ultimately entered into the Sanction Agreement mentioned above.

Ms. Gicquel has raised the issue of whether Article 10.8 of the UCI Anti-Doping Code permits disqualifications prior to August 29, 2019. That Article provides:

“In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Rider obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.”

The key language in this Article is "all other competitive results of the Rider obtained from the date...(an) other anti-doping rule violation occurred...shall...be disqualified." Ms. Gicquel dismisses this language without citation to any previous cases interpreting this Article and without a coherent argument as to why the language should be ignored. USADA, on the other hand, cites several cases including Ganeeva, Trofimov and Ulrich in which disqualification was applied retroactively from the date of the failing test if it could be established that earlier violations
occurred. Those cases are consistent with the language of the Article. This interpretation does not
eliminate the fact that there must be earlier anti-doping rule violation(s) and must also take into
consideration the "fairness" doctrine incorporated in the Article.

As in many sports, the UCI Anti-Doping Code provides that “it is each Rider’s personal
duty to ensure that no Prohibited Substance enters his or her body.” The Code furthermore
provides that “it is not necessary that intent, Fault, Negligence or knowing Use on the Rider’s part
be demonstrated in order to establish an anti-doping violation.” The facts presented by the
parties and the Sanction Agreement establish that an anti-doping violation occurred on August 29,
2019 through the use of Estratetest. The letter from Ms. Gicquel attached to USADA’s Exhibit 20
establishes that she had taken the low dosage amount of Estratetest for 15 years prior to the failed
August, 2019 test. Since Estratetest contains a Prohibited Substance, and was not listed on any anti-
doping control form over those 15 years, anti-doping violations had occurred for more than a
decade.

The appropriate sanction for this decade-plus violation turns on what would be “fair” under
the circumstances of this case. As noted by the parties, this determination varies with the facts of
each situation. While the disqualifications ordered in other cases provide some guidance, each
case turns on its own facts. The ARAF, Zaripova & RUSADA case cited by USADA
demonstrates the fact-specific nature of cases looking at the fairness of the disqualifications. As
that Panel stated:

“(F)airness is a broad concept, covering a number of elements that the deciding body can take into account in its
decision not to disqualify some results...The Panel underlines that no single element is decisive alone: an
overall evaluation of them is necessary.”

That doctrine is applicable in this matter.

Any analysis of “fairness” begins with the Athlete’s intent to comply with or evade the
anti-doping rules of the relevant organization. In many cases, such as this one, the underlying
facts are not in dispute: the test results are not in question and the fact that the athlete voluntarily
consumed the supplement or medication are not in dispute. A key element in determining intent
is, therefore, often the testimony of the athlete and his or her demeanor in explaining the
circumstances of the ingestion of the supplement or medication. Because this matter was
submitted on briefs and written documents, the Sole Arbitrator did not have the opportunity to see
Ms. Gicquel testify on direct questioning or cross-examination.

In looking at the facts presented in the written materials, there are many that assist in
determining what would be a fair length of any disqualifications. For the first decade, or more,
that Ms. Gicquel took Estratest, there is no evidence that she had any information that it contained
a Prohibited Substance. She took it under a doctor’s prescription in small doses to treat issues
common to women as they enter menopause. Because there are so few athletes actively
competing at her age, the evidence presented to demonstrate that Estratest gave her a competitive
advantage is thin and derives from the assumption that methyltestosterone helps the performance
of all athletes, regardless of their age. Ms. Gicquel took several anti-doping tests while using
Estratest and passed all those until 2019, again demonstrating that she did not know that Estratest
contained a Prohibited Substance for many years. The fact that she passed the anti-doping tests
while taking Estratest offers some credence to the idea that it was in such small amounts that it did
not provide a competitive advantage. Finally, because of her age there were few other competitors
in many of her events and the use of Estratest may not have changed the results of any of those
competitions.

On the other hand, Ms. Gicquel admitted that sometime in 2015 she learned that Estratest
contained methyltestosterone and that she knew it was a Prohibited Substance at that time. The
record does not show how she learned that or what she did to determine what steps she should take
to either get approval for the use of Estratest or find a substitute that did not contain a Prohibited
Substance. Ms. Gicquel’s letter explaining why she did not stop taking Estratest or get approval to
use it was unsatisfactory and, because there was no live testimony to explain her actions,
disturbing. She wrote:

“At some point during the first year (of Masters Track racing) I discovered that my prescribed medication,
Estratest, was on your prohibited list, but it was easy to justify that since the list was written with young elite
female athletes in mind, it really wasn’t meant for older women like myself, so I continued to take it as prescribed,
fearful that if I didn’t, the COPD might well get worse and
I might lose my health and even my life earlier than necessary.”
There is, of course, nothing in the record to show that the anti-doping rules were meant only for “young elite” athletes. The letter does not explain why Ms. Gicquel did not include the Estratest on any anti-doping control forms during the next 4 years with a note explaining that she did not believe the rules applied to Master athletes. The letter does not explain why she did not seek a different medication in consultation with her physicians and, if none could be found, why she did not apply for a TUE. The letter, without additional testimony by her addressing the questions in the previous sentences, seems to take a cavalier approach to the comprehensive anti-drug rules that govern her sport and nearly all others.

No one can know if any competitor would have beaten her if she had ceased taking Estratest after she learned that it contained methyltestosterone or whether she might have won competitions and even broken world records without taking Estratest. The reason we will never know is that she did not include the medication on any anti-doping control form. She also could have advised the authorities that she was using Estratest before a race, as Mary Verrando-Higgins did, and if she still chose to compete might have had the same level of disqualification that Ms. Verrando-Higgins did (disqualification of the results of that race and only a one year sanction). However, she chose to make a unilateral decision that the anti-doping rules ceased to apply after the athlete achieved a certain age. This lack of transparency regarding the medications she was taking tips the balance of fairness in this matter.

The Sole Arbitrator concludes that the “fair” sanction under Article 10.8 is to disqualify results from when Ms. Gicquel learned that Estratest contained a Prohibited Substance through August 29, 2019. The Sole Arbitrator also concludes that it would be “unfair” to disqualify results prior to date she learned that Estratest contained a Prohibited Substance. The record does not precisely identify that date and the Sole Arbitrator believes it is appropriate to use the date August 29, 2015 to define when the disqualification applies.

The Administrative fees of the AAA totaling $1,000.00 are to be borne as incurred. The compensation and expenses of the Arbitrator totaling $3,197.64 are to be borne as incurred.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not
expressly granted herein are hereby denied.

IT IS HEREBY ORDERED.

Dated:  August 11, 2020

By:  

ÁLAN E. HARRIS
ARBITRATOR