

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

Emily Brunemann,

Respondent

Re: AAA No. 77 190 E 00447 08 JENF

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS (“Panel”), having been designated by the above-named parties, and having been duly sworn and having duly heard the proofs, arguments and allegations of the parties, and, after a hearing held on January 9, 2009 do hereby render the Panel’s full award pursuant to its undertaking to do so by January 26, 2009.

1. SUMMARY

1.1 This case involves Respondent’s first anti-doping violation, which she admits. She is an honest and forthright young athlete with a promising Olympic and international swimming career.

1.2 Respondent tested positive for a diuretic that is now designated as a Specified Substance under the 2009 Fédération Internationale de Natation (“FINA”) rules.¹ She tested positive during the period when the 2003 version of the WADA Code was in effect. She did not

¹ The diuretics are also Specified Substances under the 2009 version of the World Anti-Doping Code (“WADA Code”)

intend to enhance her sports performance or mask the presence of a Prohibited Substance.² Her positive out-of-competition test was caused by an unfortunate mistake, not by any intention to cheat or to otherwise violate the WADA Code.

1.3 The only disputed issue in this case is the period of Respondent's ineligibility under the doctrine of *lex mitior*, which the parties agree applies, but disagree regarding its effect and how her sanction should be determined. The Panel finds that the doctrine of *lex mitior* requires the application of the 2003 version of Article 10.3 of the WADA Code using the current Specified Substance list. Respondent's period of ineligibility based on her degree of fault for her first doping offense is hereby set at six months, with credit given for the period she served a provisional suspension starting from and including September 26, 2008.

2. PARTIES

2.1 Claimant, USADA, is the independent anti-doping agency for Olympic sports in the United States and is responsible for conducting drug testing and any adjudication of positive test results pursuant to the United States Anti-Doping Agency Protocol for Olympic Movement Testing, effective as revised August 13, 2004 ("USADA Protocol").

2.2 At the Hearing, Claimant was represented by William Bock, III, Esq., General Counsel, and Stephen A. Starks, Esq., Legal Affairs Director, of USADA, 1330 Quail Lake Loop, Suite 260, Colorado Springs, CO 80906.

2.3 The Respondent, Emily Brunemann, is a member of USA Swimming.³ She is a senior at the University of Michigan, and is the defending Big 10 Conference and National Collegiate Athletic Association ("NCAA") Champion in the 1650 m freestyle swimming event.

² USADA does not dispute these issues.

³ USA Swimming is the National Governing Body ("NGB") for the Olympic sport of swimming in the United States. USA Swimming is a member of the FINA and the United States Olympic Committee ("USOC").

She was also the 2007 USA Swimming National Champion in the 1500 m freestyle swimming event.

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

2.5 The Panel appreciates and commends the excellent briefing and oral presentations of counsel for both parties in this matter, and we appreciate the forthright manner in which the Respondent and her mother testified despite the difficulty of the situation.

3. JURISDICTION

3.1 This Panel has jurisdiction over this doping dispute pursuant to the Ted Stevens Olympic and Amateur Sports Act (“Act”), 36 U.S.C. §220501, *et seq.*, because this is a controversy involving Respondent’s opportunity to participate in national and international competition representing the United States. The Act states:

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 . . . to participate in amateur athletic competition, upon demand of . . . any aggrieved amateur athlete. . . , 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

3.2 Under its authority to recognize a NGB⁵, the USOC established National Anti-Doping Policies, this latest version of which are effective August 13, 2004 (“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

⁴ 36 U.S.C. §220521.

⁵ 36 U.S.C. §220505(c)(4).

policies and the USADA Protocol shall be a condition of USOC funding and recognition.⁶

3.3 Regarding athletes, the USOC Policies provide:

. . .By virtue of their membership in an NGB or participation in a competition organized or sanctioned by an NGB, Participants agree to be bound by the USOC National Anti-Doping Policies and the USADA Protocol.⁷

3.4 In compliance with the Act, Article 10 (b) of the USADA Protocol provides that hearings regarding doping disputes “will take place in the United States before the American Arbitration Association (“AAA”) using the supplementary Procedures.”⁸

4. RULES APPLICABLE TO THIS DISPUTE

The rules related to the outstanding issues in this case are the mandatory provisions of the WADA Code and the FINA Anti-Doping Rules. As the two sets of rules are virtually identical, the applicable WADA Code provisions (version 2003) will be referenced unless otherwise specified. They are as follows:

4.1 WADA CODE (Version 2003)

2.1 [Doping is] The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s bodily 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 bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on

⁶ USOC Policies, ¶13.

⁷ *Id.* at ¶12.

⁸ 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. 36 U.S.C. §220522.

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 body 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.

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. . . .

10.3 Specified Substances

The Prohibited List may identify specified substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents. Where an Athlete can establish that the Use of such a specified substance was not intended to enhance sport performance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a warning and reprimand and no period of Ineligibility from future Events, and at a maximum, one (1) year's Ineligibility.

Second violation: Two (2) years' Ineligibility

Third violation: Lifetime Ineligibility.

However, the Athlete or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing (in the case of a second or third violation) this sanction as provided in Article 10.5.

[10.3 Comment: *This principle is carried over from the OMADC and allows, for example, some flexibility in disciplining Athletes who test positive as a result of the inadvertent use of a cold medicine containing a prohibited stimulant.*

“Reduction” of a sanction under Article 10.5.2 applies only to a second or third violation because the sanction for a first violation already builds in sufficient discretion to allow consideration of the Person’s degree of fault.]

10.4⁹ Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances (effective January 1, 2009)

Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete’s sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following.

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two[2] years of Ineligibility.

To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance-enhancing substance. The Athlete’s or other Person’s degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

10.8 Commencement of Ineligibility Period.

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 to be served. Where required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the Athlete, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection.

10.9¹⁰ Commencement of Ineligibility Period (effective January 1, 2009)

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

⁹ WADA Code 2009 version.

¹⁰ *Id.*

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.

4.2 FINA RULE 4.2.1 Specified Substances (effective January 1, 2009)

All Prohibited Substances, except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List, shall be “Specified Substances” for purpose of the application of DC 10 (Sanctions on Individuals). Prohibited Methods shall not be “Specified Substances.”¹¹

4.3 January 1, 2009 Prohibited List

S5. Diuretics and Other Masking Agents

Masking agents are prohibited. They include: . . . Thiazides (e.g. . . hydrochlorothiazide) triamterene

and other substances with a similar chemical structure or similar biological effect(s) [except drosperinone and topical dorzolamide and brinzolamide, which are not prohibited].

5. STIPULATION

In December of 2008, the parties entered into the following stipulation (“Stipulation”):

1. That the USADA Protocol for Olympic Movement Testing (“Protocol”) governs the hearing for an alleged doping offense involving USADA specimen number 1509649;
2. That the mandatory provisions of the World Anti-Doping Code (“Code”) including, but not limited to, the definitions of doping, burdens of proof, Classes of Prohibited Substances and Prohibited Methods, and sanctions, and contained in the USADA Protocol at Annex A, and the Fédération Internationale de Natation (“FINA”) Anti-Doping Rules are applicable to this hearing or the alleged doping offense involving USADA specimen number 1509649;
3. That Brunemann gave the urine sample designated as USADA specimen number 1509649 on August 29, 2008, as part of the USADA out-of-competition testing program;

¹¹ WADA Code 4.2.2 (2009 version) provides as follows: “Specified Substances. For purposes of the application of Article 10 (Sanctions on Individuals), all *Prohibited Substances* shall be “Specified Substances” except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List. Prohibited Methods shall not be Specified Substances.”

4. That each aspect of the sample collection and processing for the A and B bottles of USADA specimen number 1509649 was conducted appropriately and without error;

5. That the chain of custody for USADA specimen number 1509649 from the time of collection and processing at the collection site to receipt of the sample by the World Anti-Doping Agency accredited laboratory at the University of California at Los Angeles (“UCLA Laboratory”) was conducted appropriately and without error;

6. That the UCLA Laboratory’s chain of custody for USADA specimen number 1509649 was conducted appropriately and without error;

7. That the UCLA Laboratory, through accepted scientific procedures and without error, determined the sample positive for the finding of the substance hydrochlorothiazide and triamterene in both the A and B bottles of USADA specimen number 1509649 (“Positive Test”);

8. That the concentration level of hydrochlorothiazide and Triamterene found USADA specimen number 1509649 was low;

9. That at the time of her positive test, Ms. Brunemann’s mother, Mary Lynn Brunemann, had a prescription medicine bottle for triamterene/hydrochlorothiazide, which medication had been prescribed in relation to her fibrocystic breast disease and mastodynia;

10. That the parties agree that Ms. Bruenmann’s provisional suspension started no later than September 26, 2008, and further agree that Ms. Brunemann may argue at the hearing for an earlier start date to her provisional suspension;

11. That Ms. Brunemann reserves the right to argue exceptional circumstances under the applicable rules;

12. That Ms. Brunemann provided urine samples to USADA on August 4, 2007 and July 14, 2008. Both of these urine samples were reported negative by USADA.

6. PROCEDURAL ASPECTS OF CASE

6.1 The Panel and the parties held a preliminary hearing by telephone conference on December 29, 2009. At the preliminary hearing, the Panel made certain rulings and resolved certain issues. The Panel issued its order on December 30, 2008 establishing the briefing schedule and the hearing date and location.

6.2 After receipt of the Respondent's brief and exhibits on December 26, 2008 and USADA's brief and exhibits on January 2, 2009, the Panel, by order dated January 3, 2009 ("Briefing Order"), requested further briefing on the following issues: (1) what version of the WADA Code (2003 or 2009) applies to this case; (2) whether the application of one version or the other makes or should make a difference in the resolution of this case; (3) if the 2003 version of the WADA Code is applicable, whether and how the doctrine of *lex mitior* applies to this case; and (4) whether any 2009 rules (WADA, FINA or otherwise) are relevant and should be considered by the Panel in resolving this case, in addition to any applicable 2003 WADA Code provisions.

6.3 The Briefing Order also directed USADA to disclose the length of the period of ineligibility it was requesting for Respondent with reference to the relevant article(s) and applicable version of the WADA Code. The Briefing Order directed the parties to disclose and produce any additional CAS cases either Party believed was relevant. The Briefing Order also directed the parties to disclose and produce all cases (if any) in which factors other than the athlete's fault, including the effects of the period of ineligibility on the athlete's sporting career, were considered in exceptional circumstances cases.¹² The Panel also requested that the parties comment on the applicability or non-applicability of the AAA and CAS decisions in the case of Eric Thompson.

6.4 The Briefing Order also directed the parties to produce a summary of all of Respondent's drug tests, identified as in-competition or out-of-competition (and the result), conducted under the WADA Code by USADA, Respondent's NGB, or IF. Finally, the Briefing

¹² In its response, USADA asserted that it already had identified in its pre-hearing brief "cases (as persuasive authority) for every material legal position taken by USADA and likely necessary to a resolution of this case. " While Respondent supplied additional cases in response to this request, USADA refused to comply with the Panel's request for several reasons, including that "there is insufficient time to undertake the research requested by the Panel" and that "there is no basis in the USADA Protocol, the Supplementary Rules or elsewhere for the Panel's order."

Order directed the parties to disclose and produce any documents evidencing the drug education (and dates of said education) provided specifically to Respondent by her NGB, her IF, USADA, or WADA.

6.5 Except as noted in footnote 12 of this award, the parties provided the supplemental information requested by the Panel.

6.6 The evidentiary hearing was conducted on January 9, 2009 in Ann Arbor, Michigan (“Evidentiary Hearing”) on the campus of the University of Michigan with all arbitrators, parties, and counsel present. The Panel wishes to thank the Athletic Department at the University of Michigan for providing an excellent Evidentiary Hearing location and assisting with the logistics of the Evidentiary Hearing.

6.7 The following individuals testified at the request of Respondent: Mary Lynn Brunemann (Respondent’s mother), Jim Richardson (Respondent’s swimming coach at the University of Michigan), Jon Urbanchek (Respondent’s swimming coach at Club Wolverine) and Respondent. USADA did not call any witnesses. Olivier Niggli (WADA Director of Legal Affairs) testified by telephone at the request of the Panel.

6.8 All exhibits filed in the parties pre-hearing briefs were admitted into evidence, along with additional exhibits presented at the Evidentiary Hearing. The parties made opening statements and closing arguments. The parties responded to the questions of the Panel. The Panel requested additional documents be disclosed at the conclusion of the January 9, 2009 hearing. The parties provided the requested additional documents to the Panel and the hearing was closed on January 15, 2009.

6.9 Also present at the hearing were John Ruger, the USOC’s Athlete Ombudsman, Ms. Brunemann’s father and brother, and a family friend.

7. PARTIES' ARGUMENTS

Respondent's Arguments

7.1 Through her pleadings, pre-hearing brief, oral argument, and testimony at the Evidentiary Hearing, Respondent argued that her positive drug test was caused by her mistake. She was suffering from constipation after returning from a trip to Mexico and took what she thought was her mother's laxative during her swimming off season. The prescription medication she took contained triamterene and hydrochlorothiazide. This is the method by which these substances entered her system.

7.2 Respondent argued that while triamterene and hydrochlorothiazide are diuretics that could be used to mask the presence of another Prohibited Substance in Respondent's urine, the levels of triamterene and hydrochlorothiazide found in her urine were too low to have any masking effect and could not have enhanced her performance. In fact, this was an out-of-competition test, and Respondent had no plans to participate in any competitive swimming event on or near the date she was drug tested.

7.3 Respondent argued that while she should be sanctioned, her period of ineligibility should not at the most exceed four months because Respondent did not take the medication to enhance her performance or mask the presence of a Prohibited Substance. Further, the medication did not enhance her performance. Respondent made an innocent mistake in taking her mother's medication and should not receive a period of ineligibility that would prevent her from defending her Big Ten and NCAA women's intercollegiate swimming titles during the 2008-09 season and what would effectively be a life-time ban if she received a sanction over six

months given the new regulations to Rule 45 of the *Olympic Charter*.¹³ Respondent argues that given the regulations to Rule 45, the Panel's imposition of a period of ineligibility of more than six months in this case would violate the fundamental principle of proportionality under Swiss law.

7.4 Respondent argued that triamterene and hydrochlorothiazide are now classified as Specified Substances under FINA rules and the WADA Code. That means under the doctrine of *lex mitior*, Respondent should be sanctioned under Article 10.3 of the 2003 version of the WADA Code, which provides the Panel with flexibility and does not limit its discretion to impose a sanction ranging from a warning to a one-year period of ineligibility.¹⁴

7.5 Respondent argued that there are many Specified Substances cases in which the athletes intentionally took a Specified Substances, tested positive, and only received a warning. Therefore, the goal of harmonization requires the Panel to provide a period of ineligibility in this case of no more than four months (time already served under the Provisional Suspension).

7.6 Respondent argued that the Specified Substance sanctions in Article 10.4 of the 2009 version of the WADA Code (which provides for a maximum ineligibility period of two years for a first offense) are not applicable in this case because Respondent's doping violation

¹³ The new regulations to Rule 45 of the *Olympic Charter*, adopted by the IOC Executive Board on June 27, 2008, provide as follows:

“INTERNATIONAL OLYMPIC COMMITTEE – Regulation Regarding Participation in the Olympic Games Rule 45 of the *Olympic Charter* (OC)

1. Any person who has been sanctioned with a suspension of more than six months by an anti-doping organization for any violation of any anti-doping regulations may not participate, in any capacity, in the next edition of the Games of the Olympiad and of the Olympic Winter Games following the date of expiry of such suspension.
2. These Regulations apply to violations of any anti-doping regulations that are committed as of 1 July 2008. They are notified to all International Federations, to all National Olympic Committees and to all Organising Committees for the Olympic Games.”

¹⁴ The Panel recalls that during oral arguments, USADA did not contest that the Panel has more flexibility in determining Respondent's period of ineligibility under the 2003 WADA Code version of Article 10.3 than it does under the 2009 WADA Code version of Article 10.4.

occurred in August 2008 when the 2003 version of the WADA Code (Article 10.3 provides a maximum ineligibility period of one year for a first offense) was in effect. This effectively doubled the range of sanctions for Specified Substances and therefore should not be applied under the doctrine of *lex mitior*, which requires that the less severe sanction provision be applied.

7.7 Respondent argued that WADA officials promoted the 2009 version of the WADA Code as being more fair to athletes who did not intend to cheat and tested positive as a result of a mistake. Respondent introduced into evidence, without objection, a January 2, 2009 online article titled “WADA Claims New Anti-doping Code Is Fairer But Not Everyone Happy,” in which David Howman, Chief Executive of WADA, stated that as a result of the amendments “those who have inadvertently taken something will be treated fairer.”¹⁵ Respondent argued that if USADA’s argument that the 2009 version of the WADA Code doubled the penalty for Specified Substances to two years required the Panel to initially impose a two-year period of ineligibility, and limited the factors a Panel could consider to reduce that two-year period to exclusively the issue of the athlete’s negligence, then innocent athletes would be treated more harshly under the 2009 version of the WADA Code contrary to Mr. Howman’s statements and therefore USADA’s interpretation must be in error.

USADA’s Arguments

7.8 USADA conceded that Respondent sustained her burden of proof concerning how the diuretics (which now are Specified Substances under the 2009 version of the WADA Code) entered her system,.

7.9 USADA argued that a positive test for a diuretic (a Prohibited Substance under the 2003 version of the WADA Code, and now a Specified Substance under the 2009 version of the WADA Code) requires a presumptive period of ineligibility of two years under either Article

¹⁵ <http://www.insidethegames.com/show-news.php?id=4564>.

10.2 of the 2003 WADA Code or Article 10.4 of the 2009 WADA Code. The Panel can then reduce this two-year period of ineligibility based only on exceptional circumstances under Article 10.5 of the 2003 WADA Code or Respondent's degree of fault under 10.4 of the 2009 WADA Code. USADA argued that the Court of Arbitration for Sport ("CAS") cases that considered other factors like the impact of the sanction on the athlete's career, the financial damage a sanction could cause, and the athletic events the athlete would miss are not proper matters for the Panel to consider in reducing the period of ineligibility below two years under Article 10.4 of the 2009 WADA Code.

7.10 USADA argued whether an athlete intended to enhance their performance is only a threshold consideration under Article of 10.4 of the 2009 WADA Code. The athlete must prove this threshold requirement before obtaining any reduction in their period of ineligibility. Once an athlete proves there is no intent, the only criterion the Panel may properly consider to reduce the period of ineligibility from two years is Respondent's degree of fault, which USADA argued is limited to consideration of Respondent's degree of negligence.

7.11 USADA argued that Respondent's conduct in taking the prescription medication of her mother without carefully examining the label was significantly negligent. Therefore, there should not be a significant reduction in the two-year period of ineligibility for Respondent because she is familiar with the anti-doping regime for athletes. She has been in the NCAA's testing system for three years and in USADA's out-of-competition anti-doping system for ten months. Taking her mother's prescription medication was a violation of the law and *ipso facto* significantly negligent. Further, Respondent did not have her list of Prohibited Substances with her when she took her mother's medication out of the bottle at her parents' home in Crescent Springs, Kentucky.

7.12 USADA acknowledged that *lex mitior* applies in this case, but argued that Article 10.4 of the 2009 WADA Code is the applicable provision the Panel should apply in determining Respondent's period of ineligibility. Because the Specified Substance list in the 2009 version is much broader, USADA asserted that the Panel cannot use *lex mitior* to apply Article 10.3 of the 2003 WADA Code in determining sanctions for usage of banned substances now defined as Specified Substances under the 2009 WADA Code. Therefore, the new list of Specified Substances under Article 4.2 of the 2009 WADA Code and sanctions for usage of Specified Substances under 10.4 of the 2009 WADA Code must be applied together.

7.13 USADA argued the requirement that sanctions be proportionate under Swiss law is fully satisfied by evaluation of the Respondent's degree of fault, regardless of whether the period of ineligibility imposed in this case would result in Respondent's 7 year ban (effectively a life-time ban for her) from the Olympic Games under the new regulation to Rule 45 of the *Olympic Charter*.

8. TESTIMONY OF THE PARTIES

8.1 Mary Lynn Brunemann, Respondent's mother, testified about the family's August 2008 summer vacation to Cancun Mexico, and her medical condition that requires prescription medication. She testified about what Respondent knew, or did not know, about Mrs. Brunemann's therapeutic prescription for Mrs. Brunemann's medical condition. She also testified regarding Respondent's athletic career. James C. Richardson, Jr., Respondent's University of Michigan women's swimming coach, testified regarding Respondent's character and the level of anti-doping education provided to student athletes by the University Michigan. Jon Urbanchek, Respondent's Club Wolverine swimming coach, testified regarding

Respondent's character and the level of drug education provided to the athletes in Club Wolverine and by the University of Michigan. Respondent testified regarding her athletic career, goals, ingestion of her mother's prescription medication, and the circumstances surrounding her positive test.

8.2 Olivier Niggli, WADA Director of Legal Affairs, testified regarding how the new WADA Code's Specified Substance provision should be interpreted. He also testified regarding WADA's lack of knowledge or consideration of the IOC's plans to amend the regulations to Rule 45 of the *Olympic Charter* when the WADA Code was amended.

8.3 The Panel found the testimony of all of the witnesses informative and credible and thanks them for their participation in the hearing.

9. **FINDINGS**

9.1 Emily Brunemann is a well spoken, forthright athlete with a promising Olympic and international swimming career. She is an elite swimmer who has been a member of the University of Michigan's women's intercollegiate swimming team since the Fall of 2005. She was placed into USADA's Out-of-Competition Registered Testing Pool on October 29, 2007 ("Testing Pool"). At that time she received USADA's 2007 Guide to Prohibited Substances and Prohibited Methods of Doping, USADA's Athlete Handbook, the USOC Anti-Doping Policies, and the USADA Protocol for Olympic Movement Testing. She did not receive any group or individualized instruction or education regarding these rules. However, she understood she was responsible for ensuring that no Prohibited Substances entered her body.

9.2 Prior to August 29, 2008, USADA drug tested Ms. Brunemann four times: August 4, 2007 (in-competition), March 22, 2008 (in-competition), July 14, 2008 (out-of-

competition), and August 2, 2008 (in-competition). All four of these tests were negative for any Prohibited Substances. During her intercollegiate swimming career, in accordance with NCAA rules, the NCAA and the University of Michigan (combined) tested Respondent an additional four times. All four of these tests were negative for any prohibited substances.

9.3 Respondent's August 29, 2008 USADA out-of-competition drug test was positive for a low "concentration . . . of hydrochlorothiazide and triamterene found in USADA specimen number 1509649. . ." ¹⁶ Effective January 1, 2009, hydrochlorothiazide and triamterene are Specified Substances under FINA and WADA rules. This positive test is Respondent's first doping offense.

9.4 After participating in the USA Swimming Olympic trials in early August 2008 (during which she was drug-tested by USADA with negative results), Ms. Brunemann did not participate in any competitive swimming or training during August 2008. During the week prior to her August 29, 2008 positive test, Ms. Brunemann returned from a summer vacation trip to Cancun, Mexico with her family. She was staying at her parents' home in Crescent Springs, Kentucky. She was feeling constipated and discussed this issue with her mother, whom she knew regularly took a laxative for constipation.

9.5 On Friday, August 22, 2008, while her mother was at work, Ms. Brunemann took one pill from a bottle of her mother's prescription medication that was by her mother's sink in the bathroom. She thought the pill was her mother's laxative for constipation. She checked the bottle label to ensure it was her mother's medication and not her father's prescription medication for high blood pressure. However, she did not otherwise read the bottle's label that clearly stated "TRIAMTER/HCTZ."

¹⁶ Stipulation No. 8.

9.6 Ms. Brunemann was not aware of her mother's medical condition and did not know that her mother was taking any medication other than a laxative. Unfortunately, the bottle she took the pill from contained prescription diuretics used to treat her mother's medical condition, not a laxative. When she left home on Friday, August 22, 2008 to return to the University of Michigan in Ann Arbor, Respondent took this pill with her. Because she continued to experience constipation (the symptoms of which had lasted for approximately 1 ½ weeks), Ms. Brunemann ingested this pill while in Ann Arbor on either Monday, August 25 or Tuesday, August 26, 2008.

9.7 The pill that Ms. Brunemann ingested from the bottle of her mother's prescription medication was the source of her positive test for triamterene and hydrochlorothiazide. The concentration level of triamterene and hydrochlorothiazide found in her urine was low and insufficient to mask the use of any Prohibited Substances that could enhance athletic performance.

9.8 Ms. Brunemann took the pill without her mother's knowledge. She did not ask her mother about the contents of her mother's prescription medication bottle. She did not take any steps to ensure that the pill was a laxative or, even if it was a laxative, that the pill did not contain a Prohibited Substance. Had Respondent carefully inspected the bottle, she would have seen that the pills contained diuretics, which are now a Specified Substance under both 2009 FINA and WADA anti-doping rules. Respondent did not consult USADA's 2008 Guide to Prohibited Substances and Prohibited Methods of Doping and Drugs before taking the pill. She did not call the USADA Drug Reference Hotline. She did not check USADA's website. Had she taken any of these steps, she would have discovered that triamterene and hydrochlorothiazide are banned substances. Given these facts, the Panel finds that Respondent was negligent.

However, the Panel also finds that Respondent did not intend to cheat or enhance her sports performance. Respondent made an apparent one-time mistake that could have been avoided, and that was inconsistent with her otherwise clean anti-doping record.

9.9 Respondent was a relatively new entrant into the USADA out-of-competition drug testing program and her inexperience likely contributed to her mistake. While her recent entry into the anti-doping program and her relative inexperience do not absolve Respondent of her negligence in this case, the fact that Respondent did not receive any formalized anti-doping instruction or training other than printed materials or e-mail reminders also likely contributed to her mistake.¹⁷ Respondent was a naïve athlete who thought that if she did not intend to use banned performance enhancing substances, or those that mask such usage, she would not test positive for a Prohibited or Specified Substance. In late August 2008, Respondent clearly did not fully comprehend the level of care she must take to avoid testing positive for a banned substance. She does now.

9.10 Respondent accepts full responsibility for her negligence and is remorseful regarding her positive test. Respondent voluntarily accepted a provisional suspension on September 26, 2008 for her positive USADA drug test. She would like to participate in USADA's education programs and to serve as an example to warn other athletes regarding how easy it can be to test positive if one is not vigilant.

9.11 The NCAA prohibits “[a] student-athlete under a drug-testing suspension from a national or international sports governing body that has adopted the World Anti-doping [sic] Agency (WADA) Code” from participating in NCAA intercollegiate competition “for the

¹⁷ The Panel notes that this is not the first case in which athletes subject to anti-doping testing have not received more formalized, in-person anti-doping education or training. The Panel believes that if Respondent had received such training, Respondent would not have made the mistake given rise to this proceeding. While this is not a matter for decision by the Panel, the Panel respectfully recommends that the testing agencies consider expanding their efforts at education so that unfortunate mistakes by honest, dedicated elite athletes, similar to that which occurred in this case, are minimized or eliminated.

duration of the suspension.” (2008-09 NCAA Drug-Testing Program, Bylaw 18.4.1.5.3.) She has not competed or traveled with the University of Michigan women’s swimming team during the 2008-09 season (which began in early October 2008). She will be unable to defend her Big 10 Conference championship or NCAA championship in the 1650 m freestyle women’s event as a result of the six month period of ineligibility imposed by the Panel.

10. LEGAL ANALYSIS

10.1 This Panel must resolve several issues before an appropriate sanction can be imposed. Because Respondent tested positive for a banned substance in August 2008 (when the 2003 WADA Code was in effect) and this hearing was held on January 9, 2009 (after the 2009 WADA Code became effective), the parties agree the doctrine of *lex mitior* is applicable to this case. What is in dispute is how *lex mitior* should be applied. USADA and Respondent disagree regarding whether the Panel should apply Article 10.3 of the 2003 WADA Code or Article 10.4 of the 2009 WADA Code in determining the sanction for Respondent’s usage of a diuretic, which is now classified as a Specified Substance. The parties also dispute the factors the Panel may consider in determining the appropriate period of ineligibility for Respondent’s first doping violation.

10.2 Under the doctrine of *lex mitior*, if newly applicable sanctions are less severe than those in effect at the time of the offense, the new sanctions must be applied. The objective of the doctrine of *lex mitior* is to ensure that an athlete who commits a doping offense is not sanctioned more severely if the WADA doping rules and sanctions change from the date of the athlete’s doping offense to the date of the hearing. This doctrine is well-established in *lex sportiva* through many cases arising in several different sports. See, e.g., *USADA v. Vencill*, (CAS

2004/A/unnumbered; March 11, 2004) (swimming); *FISA v. Lienhard*, at §2.1, Decision of FISA Executive Committee (March 7, 2004) (rowing); *ATP v. Oliver*, at ¶ 60, ATP Tour Anti-Doping Tribunal (February 5, 2004) (tennis); *S. v. UCI*, at ¶ 6 (CAS 2002/A/378) (August 8, 2002) (cycling); *A.C. v. FINA*, at ¶¶ 27-28 (CAS 96/149) (March 13, 1997) (*quoting UCI v. CONI*, (CAS 94/128) (February 1995)) (swimming); *UCI v. CONI*, at ¶¶ 33-34 (Advisory Opinion CAS 94/128) (February 1995) (international federation rights/obligations vs. National Olympic Committee rights/obligations). It is well established by CAS jurisprudence that *lex mitior* applies to anti-doping cases. *See, e.g., A.C. v. FINA*, at ¶¶ 27-28 (CAS 96/149) (March 13, 1997) (*quoting UCI v. CONI*, (CAS 94/128) (February 1995)); *USADA v. Vencill*, (CAS 2004/A/unnumbered; March 11, 2004); *ATP v. Oliver*, at ¶ 60, ATP Tour Anti-Doping Tribunal (February 5, 2004) (tennis); *FISA v. Lienhard*, at §2.1, Decision of FISA Executive Committee (March 7, 2004); *S. v. UCI*, at ¶ 6 (CAS 2002/A/378) (August 8, 2002) (cycling). In fact, none of the parties here dispute the application of the doctrine to this case. What is in dispute is how *lex mitior* should be applied.

10.3 Regarding the classification of the substances Respondent tested positive for, the Panel is of the opinion that the Panel must apply the classification of the substance currently in effect. *See Mellouli v. Fédération Tunisienne de Natation*, CAS 2007/A/1252, ¶76; *See also Edwards v. Int'l Ass'n of Athletics Fed's* CAS arbitration N° OG 04/003, ¶5.13; *Gatlin v. USADA, IAAF v. USATF & Gatlin*, CAS 2008/A/1461 and 2008/A/1462, ¶1.3.1. Under this approach, Respondent tested positive for a Specified Substance under Article 10.3 of the 2003 WADA Code, which is the applicable provision to be used in determining Respondent's period of ineligibility.

10.4 Regarding the length of sanction, in many Specified Substances cases under Article 10.3 of the 2003 WADA Code, the periods of ineligibility for accidental ingestion were far less than six months and, in some cases, only warnings were given to the athlete: Re: Steven Cisar who tested positive for tetrahydrocannabinol in October of 2008 (3 months)¹⁸; Re: Tim McNeill who tested positive for triamcinolone acetonide, a glucocorticosteroid in August of 2008 (warning and no period of ineligibility)¹⁹; Re: Nelacey Porter who tested positive for tetrahydrocannabinol in July of 2008 (3 months)²⁰; Royal Mithell who tested positive for tetrahydrocannabinol in July of 2008 (3 months)²¹; Morgan Hamm who tested positive for triamcinolone acetonide, a glucocorticosteroid (warning and no period of ineligibility)²²; Re: Rebekkah Brunson who tested positive for salmeterol, a beta-2 agonist (warning and no period of ineligibility).²³ Additional cases providing suspensions for less than six months are as follows: *Daniute v. Int'l DanceSport Fed.*, CAS 2006/A/1175 (3 months); *Dupuis v. Int'l Tennis Fed.*, (Decision of Int'l Tennis Fed. Indep. Anti-Doping Tribunal; September 29, 2006) (2.5 months), *Koubek v. Int'l Tennis Fed.*, (Decision of Int'l Tennis Fed. Indep. Anti-Doping Tribunal; January 18, 2005) (3 months) *Morgan v. WADA*, (FIBA AC 2005-1; June 22, 2005) (4 months – vitamin supplement contamination case).

10.5 With respect to the same substance that Respondent mistakenly took in this case, athletes have been given periods of ineligibility for six months or less. In November of 2008,

¹⁸ http://www.usantidoping.org/files/active/resources/press_releases/Press%20Release%20-%20Cisar-%20October%202008.pdf.

¹⁹ http://www.usantidoping.org/files/active/resources/press_releases/Press%20Release%20-%20McNeill%20-%20August%202008.pdf.

²⁰ http://www.usantidoping.org/files/active/resources/press_releases/Press%20Release%20-%20Porter%20-%20July%202008.pdf.

²¹ http://www.usantidoping.org/files/active/resources/press_releases/Press%20Release%20-%20Mitchell%20-%20July%202008.pdf.

²² http://www.usantidoping.org/files/active/resources/press_releases/Press%20Release%20-%20Morgan%20Hamm%20-%20June%202008.pdf.

²³ http://www.usantidoping.org/files/active/resources/press_releases/Press%20Release%20-%20Brunson%20-%20June%202008.pdf.

John McNally tested positive for chlorothiazide and hydrochlorothiazide and received a six months period of ineligibility.²⁴ In *ATP v. Oliver*, ATP Tour Anti-Doping Tribunal, (February 5, 2004), Oliver took a vitamin supplement that was contaminated with the diuretic hydrochlorothiazide. Oliver had purchased the vitamin supplement from a vendor who had a Federal Drug Administration approved lab on the premises and assured Oliver that no Prohibited Substances were in the vitamin supplements. In addition, hydrochlorothiazide required a prescription and should not have been in the athlete's vitamin supplement. Oliver was given a two months period of ineligibility.²⁵

10.6 These cases demonstrate that under Article 10.3 of the 2003 WADA Code, the Panel has discretion to set the Respondent's sanction in a range between a warning and a maximum of a one year period of ineligibility. Because Article 10.4 of the 2009 WADA Code doubles the potential sanctions for Specified Substances, the doctrine of *lex mitior* precludes the Panel from applying Article 10.4 in this case.

10.7 Respondent was negligent for failing to ensure that the pill she took for constipation did not contain any banned substances. She also failed to take adequate basic steps to avoid ingesting the Specified Substances. Given these facts, we find Respondent was more negligent than the athlete in the *Oliver* case. However, Respondent was relatively inexperienced with USADA's out-of-competition doping system (only ten months). In addition, Respondent did not intend to cheat and had not received any formal individualized or group education or training in anti-doping matters.²⁶ Based on the facts of this case, the Panel is of the opinion that

²⁴ [http://www.usantidoping.org/files/active/resources/press_releases/Press%20Release%20-%20McNally-%20November%202008\[1\].pdf](http://www.usantidoping.org/files/active/resources/press_releases/Press%20Release%20-%20McNally-%20November%202008[1].pdf).

²⁵ *Oliver* at ¶67.

²⁶ Under *WADA v. USADA and Thompson*. CAS 2008/A/1490, a Panel may consider the athlete's inexperience, lack of access to resources, lack of intent to enhance performance, and relatively young age, in determining whether significant fault or negligence is present for purposes of reducing a sanction. The Panel sees no reason similar concepts cannot be considered under the fault-based standard of the Specified Substances sanctioning rules. The

the period of ineligibility should be longer than that imposed in *Oliver* and more than the four months maximum period of ineligibility her counsel requested. Comparing Respondent's degree of fault to that of the athletes in the foregoing cases and their corresponding periods of ineligibility, the Panel sets Respondent's period of Ineligibility for her first doping offense, which was the mistaken usage of a Specified Substance, at six months.²⁷ Respondent's period of ineligibility starts as of the date of this Panel's decision with credit given for the time Respondent has served her provisional suspension. This effectively starts Respondent's period of ineligibility on September 26, 2008.

10.8 The sanction determined by this Panel is twice as long as the three month period of ineligibility recently imposed on a tennis player, who has been playing professionally for 10 years and has many years experience with the International Tennis Federation's anti-doping program, for his voluntary use of salbutamol in a concentration level exceeding this TUE without seeking any medical advice before doing so. In *ITF v. Volandri* (January 15, 2009), an ITF independent anti-doping tribunal applied the *lex mitior* doctrine in determining the appropriate period of ineligibility because salbutamol became a Specified Substance on January 1, 2009. Applying Article M.4 of the ITF Tennis Anti-Doping Programme (which corresponds to Article 10.4 of the 2009 WADA Code), the tribunal found that "the ITF does not allege that the player is a cheat who deliberately doped himself to enhance his performance" and the "no question of masking arises in the present case." (paragraph 76). The tribunal "therefore conclude[d] that we

WADA Code otherwise provides no guidance regarding how the Panel should apply the "fault" standard in determining the appropriate sanction for usage of a Specified Substances.

²⁷ Because Respondent's sanction does not exceed six months, there is no need for the Panel to address Respondent's arguments that a period of ineligibility exceeding six months would preclude Respondent from participating in the 2012 Olympics (and would effectively constitute a life-time ban) because of application of the new Rule 45 of the *Olympic Charter*, which would result in a disproportionate sanction in violation of the doctrine of proportionality. Had the Panel determined that a sanction of more than six months was warranted, the Panel would have had to seriously consider Respondent's proportionality argument.

have discretion to impose a period of ineligibility of up to two years, or at the minimum a warning and reprimand instead. We bear in mind that we should approach the question of sanctions so as to reach a result that meets the justice of the case overall.” (paragraph 77). Finding that “the player was at fault for inhaling too much salbutamol” (paragraph 81), the tribunal imposed a three-month period of ineligibility “in an attempt to arrive at a result that meets the justice of the case overall.” (paragraph 92).

11. **DECISION AND AWARD**

On the basis of the foregoing facts and legal aspects, this Panel renders the following decision:

11.1 Respondent has committed a doping violation under Article 10.3 of the 2003 version of the WADA Code.

11.2. The following sanction shall be imposed on Respondent:

11.2.1 A six-month period of ineligibility commencing September 26, 2008, including her ineligibility from participating in and having access to the training facilities of the United States Olympic Committee Training Centers or other programs and activities of the USOC including, but not limited to, grants, awards, or employment pursuant to the USOC Anti-Doping Policies only during the period of ineligibility.²⁸

11.3 The parties shall bear their own attorney’s fees and costs associated with this arbitration.

²⁸ In the event there is any dispute regarding the length of Respondent’s period of ineligibility, this period of ineligibility shall be interpreted to be not more than six calendar months following and including September 26, 2008.

11.4 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.

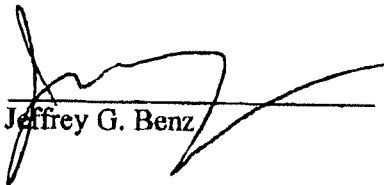
11.5 This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

11.6 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: January 26, 2009.



Christopher L. Campbell, Chair



Jeffrey G. Benz



Matthew J. Mitten