

BEFORE THE NEW ZEALAND RUGBY UNION JUDICIAL COMMITTEE

No. 2/18

BETWEEN

DRUG FREE SPORT NEW ZEALAND

Applicant

AND

HENRY BOYHAN

Respondent

DECISION ON ANTI-DOPING APPLICATION

Dated *26* **November 2018**

Hearing: By telephone conference on 15 October 2018

Judicial Committee: Barry Paterson QC, Chair
Dr Ian Murphy
Ben Castle

Counsel: Paul David QC for Applicant

Present: Hayden Tapper of DFSNZ

Registrar: Stuart Doig

1. The applicant, Drug Free Sport New Zealand (**DFSNZ**) has brought an application alleging that Mr Boyhan breached the provisions of the Sports Anti-Doping Rules 2014 (**SADR**).
2. The provisions of the SADR which Mr Boyhan is alleged to have breached are:
 - (a) SADR 3.2 – Use or Attempted Use of A Prohibited Substance.
 - (b) SADR 3.6 – Possession of the Prohibited Substance.
 - (c) SADR 3.7 – Trafficking or Attempted Trafficking of Prohibited Substance.
3. Mr Boyhan was provisionally suspended under the provisions of the SADR on 21 September 2018.
4. Mr Boyhan did not participate in the hearing and after considering the circumstances, the Committee determined that it would proceed with the hearing in his absence. Mr Boyhan had been given ample opportunity to participate in the process but had elected not to do so. In an email dated 18 October 2018 to the Registrar of the Committee, Mr Boyhan stated:

... sorry for the late response I have been on holiday and without internet connection. I have no statement to give and don't wish to be involved in the hearing. I would just like to be given my ban and be able to move on as this whole situation has had a great effect on my mental well-being.
5. Mr Boyhan was given formal notice of this hearing and provided with a copy of the written submissions of DFSNZ. He was advised that if he wished to file written submissions, he should do so at least three days before the hearing. He was also advised that if he wished to challenge any of the evidence given on behalf of DFSNZ or make any submissions regarding the sanction to be imposed, he should join the conference.
6. In an email dated 12 November 2018 to the Registrar, which will be more fully referred to below, he admitted many of the facts alleged by DFSNZ. He concluded by saying "I apologise for not being the easiest person to contact, but please be assured I will never do this again and I make sure to share this lesson with those around me". This email was in response to Mr Boyhan

receiving the notice of the hearing and from this and his previous behaviour, the Committee determined that he did not intend to participate in the hearing.

The Factual Allegations

7. The allegations as made in the written application, and which are confirmed by the evidence provided on behalf of DFSNZ, are:
- (1) On or about 18 October 2014, Henry Boyhan ordered 10 ml of liquid Clenbuterol from a website trading under the name "NZ Clenbuterol".
 - (2) On 22 October 2014, Mr Boyhan confirmed payment for the 10ml of liquid Clenbuterol and provided an address of '[name withheld], 31 Rautara Street, Orakie [sic], Auckland'.
 - (3) On about 2 November 2014, Henry Boyhan emailed 'NZ Clenbuterol' asking "what other performance enhancers do you have".
 - (4) On about 4 November 2014, Henry Boyhan ordered and paid for 168 x 10mg pills of Metandienone (brand name Dianabol). He provided the delivery address of '[name withheld] 133 Riddell Road, Glendowie 1071, Auckland'.
 - (5) On about 14 November 2014, Mr Boyhan confirmed the purchase of the Dianabol pills arrived on 13 November 2014.
 - (6) On about 21 December 2014, Mr Boyhan ordered another 10 ml of Clenbuterol.
8. It is not necessary to name the two persons to whom Mr Boyhan directed that the Clenbuterol and Metandienone were delivered to but the evidence establishes that the named persons actually lived at the addresses at the time.
9. The evidence supporting these allegations is set out in three separate witness statements filed on behalf of DFSNZ and supported with the necessary documentation to enable this Committee to its comfortable satisfaction to accept the facts as alleged.
10. When Mr Boyhan received from DFSNZ the notice of intention to bring this application, he responded in an email of 28 March 2018 in which he stated:

Yes I confirm that I purchased the said products from Clen NZ in 2014. However, they were not purchased for the intent of performance enhancing within my sport. As you can see, they were purchased after the rugby season.

11. In the email of 12 November 2018, referred to above, Mr Boyhan provided the following written statement:

The products were purchased with no intent to improve my sporting ability, nor intended for my personal intake. You will see the times in which the products were purchased fall outside the times I was participating in any sport and they were also delivered to other people. The reason they were purchased was to improve my friend's physical appearances coming into Summer, which they were both struggling mentally with. I have never in my life consumed a performance enhancer, however I do now understand that purchasing the drugs is still a breach of DFSNZ policies. At the age of 18 I was uneducated which meant I made bad decisions which I was unable to evaluate the consequences of, I was only trying to help friends in need. The products were incredibly accessible online and at the time I didn't think I was doing any wrong. I am incredibly sorry and full of regret for making those decisions 4 years ago – this case has come at a huge shock and it has taken a long time for me to get my head around. In which I apologise for not being the easiest person to contact, but please be assured I will never do this again and I make sure to share this lesson with those around me.

Discussion

12. The Committee does not accept Mr Boyhan's statement when he says that the products were purchased at a time when he was not participating in any sport. He was at the time registered as a player with the NZ Rugby Union. The evidence is that he played for the Sacred Heart College First XV in 2014 and the College Old Boys (Victoria) Rugby Club in 2015. In July 2015 he was named as a member of the Wellington Under 19 Training Squad. He played for the Auckland Marist Sevens on 21 August 2014.

Trafficking

13. The allegation which carries the severest sanction is that of trafficking. Trafficking is defined in the SADR and the relevant portion of the definition is:

Trafficking: Selling, giving, transporting, sending, delivering or distributing a *Prohibited Substance or Prohibited Method* (either physically or by any electronic or other means) by an *Athlete, Athlete Support Personnel* or any other *Person* subject to the jurisdiction of an *Anti-Doping Organisation* to any third party.

14. The evidence discloses that Mr Boyhan purchased Clenbuterol and Metandienone and directed that the prohibited substances be forwarded to

two other persons. They were not fictitious persons. The Committee is comfortably satisfied that this action falls within the definition of “selling, giving, transporting, sending, delivering or distributing” the substances. By an electronic means the substances were purchased and the direction from Mr Boyhan was to send them to the two other individuals. Whether he gave them to those individuals or sold them to them is irrelevant. The actions fall within the definition of trafficking.

Possession

15. The definition of possession in SADR includes the actual physical possession, which in respect of some of the substances may not have existed in this case, but also includes constructive possession. Constructive possession can only exist if the person had exclusive control over the prohibited substance. In this case, Mr Boyhan purchased the substance and directed the address to which they were to be sent. He had constructive possession because he had control over a substance which he had purchased and directed the destination of it. The Committee is comfortably satisfied that the possession allegations had been made out.

Use

16. In respect of two of the substances, use may not have been established as these substances may have never been in Mr Boyhan’s possession. “Use” is defined in SADR as “the utilisation, application, ingestion, injection or consumption by any means whatsoever of any prohibited substance”. The use must be by the athlete. In the circumstances the Committee cannot be comfortably satisfied that the substances ordered on 18 October 2014 and 4 November 2014 were used by Mr Boyhan. It is possible to draw an inference that the pills ordered on 21 December 2014 were used by Mr Boyhan but the Committee does not make such an inference. In view of its findings that Mr Boyhan committed anti-doping violations under the provisions of SADR 3.6 and 3.7, it is not necessary to determine this issue. Certainly, Mr Boyhan had possession of the Clenbuterol ordered in December.

Conclusion

17. The Committee is comfortably satisfied that the allegations in respect of the violations of SADR 3.6 and 3.7 are made out.

Sanction

18. Under SADR the violations are to be treated as one violation and the sanction imposed is to be that in respect of which the violation carries the greater sanction. This is the trafficking allegation which carries a minimum sanction of a Period of Ineligibility of 4 years allows for the sanction to be anything from 4 years to lifetime. The sanction for possession is only 2 years.
19. There is no reason to reduce the Period of Ineligibility below 4 years. The issue is whether the starting date should commence prior to the date of the Provisional Suspension. Mr David concedes that Mr Boyhan is entitled to backdating for delay and also for a timely admission and in accordance with the provisions of SADR 14.9.1 and 14.9.2.
20. The backdating for a timely admission has normally been six months and the backdating for delay has normally been four months, although there is a precedent for a longer period of six months. In an unrelated case the DFSNZ has submitted that a backdating of twelve months is appropriate for the combination of a timely admission and delay. After considering previous precedents the Committee has determined that the backdating should be twelve months, which if an apportionment is required, is six months for the timely admission and six months for the delay. The backdating will commence from the date of the Provisional Suspension.
21. The sanction imposed upon Mr Boyhan is a Period of Ineligibility for 4 years to commence on 21 September 2017.
22. During the Period of Ineligibility, Mr Boyhan is prohibited from participating in any capacity in a *Competition* or activity (other than authorised anti-doping education or rehabilitation programs) authorised or organised by any *Signatory* or *Signatory's* member organisation, or other member organisation of a *Signatory's* member organisation, or in *Competition* authorised or organised by any professional league or any *International* or *National-level Event Organisation* or any elite or national-level sporting activity funded by a governmental agency.

23. Under the provisions of Rule 5.2.3 of the New Zealand Rugby Union Anti-Doping Regulations (26 July 2012), Mr Boyhan is entitled to have the finding and/or sanction referred to a Post-Hearing Review Body.

Dated 26 November 2018



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Barry Paterson QC
Chairman, Judicial Committee