



Arbitration CAS 2007/A/1318 Anthony Lobello v. International Skating Union (ISU), award of 6 December 2007

Panel: Mr David Williams (New Zealand); President; Mr Jeffrey Benz (USA); Mr Michele Bernasconi (Switzerland)

Skating

Doping (whereabouts information)

Standard of proof

Burden of proof

1. **According to Art. 3.1 ISU Rules, the standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. When the ISU Anti-Doping Rules place the burden of proof upon a skater or other persons alleged to have committed an ISU 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.**
2. **In the context of an alleged failure by a skater to provide whereabouts form to the ISU, the ISU has not proved its case in terms of Article 3.1 of the Rules, if the athlete has produced (although late) a document (a facsimile and its confirmation sheet) establishing that he/she fulfilled his/her obligation to provide whereabouts information to the IF and if the IF has not proven any fabrication of evidence by the athlete.**

The Appellant, Anthony Lobello, is a professional short-track speed skater and a member of US Speedskating.

The Respondent, the International Skating Union (ISU), is the governing body of international ice skating and is responsible for implementing the 2006 ISU Anti-Doping Rules (“the Rules”) compiled in accordance with the World Anti-Doping Code.

Each of the parties has been legally represented throughout. Their respective counsel participated at the telephone hearing which preceded the making of this Award.

Pursuant to Article 5.5.1 of the Rules the ISU is obliged to select a “Registered Testing Pool” of skaters who must provide up-to-date information of their whereabouts to the ISU, by filing quarterly reports. Article 5.1 states as follows:

“The ISU shall identify a Registered Testing Pool of those Skaters who are required to provide up-to-date whereabouts information to the ISU, details of which are defined in Article C.3 of the ISU Anti-Doping Procedures. The ISU may revise its Registered Testing Pool from time to time as appropriate. Each Skater in the Registered Testing Pool shall file quarterly reports with the ISU on forms (electronic, faxed or mailed) provided by the ISU, which specify on a daily basis the locations and times where the Skater will be residing, training, competing and vacationing. Skaters shall update this information as necessary so that it is current at all times. The ultimate responsibility for providing whereabouts information rests with each Skater, however, it shall be the responsibility each Member to use its best efforts to assist the ISU in obtaining whereabouts information as requested by the ISU”.

On 30 May 2006 the ISU informed US Speedskating that Mr Lobello had been included in the ISU Registered Testing Pool for 2006/07.

The ISU wrote to Mr Robert Crowley at US Speedskating on 24 April 2007, informing him that the Appellant had received his third formal warning for failing to provide a whereabouts form, and that *“we regret to inform you that as per Article 8 of the ISU Anti-Doping Rules (Communication No.1372) this case will now be submitted to the ISU Disciplinary Commission. We remind you that, as stated in Article 10.4.3 of the Rules, the sanction for a first violation is three months to one year ineligibility. In addition, as stated in Article 12.3.3 of the ISU Rules, Members who fail to inform the ISU of skaters’ whereabouts may also be fined by the Disciplinary Commission. Please demonstrate to us what, if any, efforts US Speedskating undertook to keep us informed of this skater’s whereabouts after receiving the first two warnings of October 27, 2006 and January 19, 2007”.*

On 24 April 2007 the ISU filed a complaint against Mr Lobello with the ISU Disciplinary Commission. The complaint alleged that Mr Lobello had failed to submit the required quarterly whereabouts form for the second quarter of 2007, despite having been reminded by the ISU to do so. The complaint further alleged that Mr Lobello had received two formal warnings in the preceding 12 months, for failures to submit whereabouts forms for the fourth quarter of 2006 and the first quarter of 2007, and as the latest warning was therefore his third in the preceding 12-month period, Mr Lobello was in violation of Articles 2.4, 5.5.4 and 5.5.7 of the ISU Anti-Doping Rules.

Those Articles provide as follows:

“2.4 Violation of the requirements regarding Skater availability for Out-of-Competition Testing including failure to provide required whereabouts information set forth in Article 5.5 (Skater whereabouts requirements) and missed tests which are declared based on reasonable rules.

5.5.4 Any Skater in the ISU Registered Testing Pool who fails to submit a required quarterly whereabouts report after receipt of two formal written warnings from the ISU or the Member to do so in the preceding 12 months shall be considered to have committed an ISU Anti-Doping Rule violation pursuant to Article 2.4.

5.5.7 If the Skater cannot be located for an ISU Out-of-Competition no notice or short notice Testing due to incorrect or insufficient information provided to the ISU/Anti-Doping Organization, the Member to which the Skater is affiliated shall be obliged to pay expenses for the unsuccessful attempt at testing”.

Mr Lobello filed a Statement of Reply to the ISU’s complaint by way of a letter of 14 May 2007. It is important to note that, while he offered factors in mitigation of his actions, he did not at that stage deny the ISU’s allegations, and waived his right to an oral hearing. The letter began as follows:

“I, Anthony Lobello, am embarrassed and distressed about my third warning for not filing the whereabouts form with the ISU in a timely manner and the pending disciplinary sanctions that will result. I have no excuse for my actions and understand the potential consequences that I will face. However, I would like to take this opportunity to explain the very unusual circumstances”.

Mr Lobello said that such circumstances were that his schedule had been out of his control during the relevant period. Following the World short track individual and team championships he had not been sent home to Michigan but rather to Colorado Springs for a day and then to Salt Lake City. US Speedskating had just told him that the National Team short track programme would be moved to Salt Lake City and that he had to find housing etc. He had just three or four days to begin his move from Michigan, then he had to drive to his family home in Florida and then to Utah, all of which had placed him under stress. Once he was settled in Salt Lake City he had immediately sent his new permanent address to the ISU, on the same day on which he received his third formal warning.

The ISU Disciplinary Commission issued its decision on 8 June 2007. It held that Mr Lobello had violated Articles 2.4, 5.5.4 and 5.5.7 of the ISU Anti-Doping Rules. The Disciplinary Commission imposed a six-month period of ineligibility on Mr Lobello commencing on 8 June 2007. This was half the available maximum sanction.

On 29 June 2007 Mr Lobello filed a Statement of Appeal with the Court of Arbitration for Sport (CAS) pursuant to Art. R47 and R48 of the CAS Code of Sports-related Arbitration (the “Code”), claiming that he had unearthed fresh evidence that exonerated him of the violations of which he had been found to be in breach. The Statement of Appeal noted that the Appellant also intended to file a motion with the ISU Disciplinary Commission, seeking reconsideration of its decision of 8 June 2007, and that if that motion was successful he would withdraw his CAS appeal.

It is important to note that the Appellant did not apply for a stay of enforcement pending the determination of his appeal.

On 3 July 2007, as foreshadowed in the Statement of Appeal, the Appellant wrote to the ISU Disciplinary Commission seeking reconsideration by that body of its decision of 8 June 2007, based on the newly-adduced evidence.

On 13 July 2007, following agreement by the parties, CAS advised that the appeal proceedings had been suspended until further notice, pending the determination by the ISU Disciplinary Commission of Mr Lobello’s request for reconsideration.

The ISU Disciplinary Commission issued its decision on the request for reconsideration on 27 July 2007. The request was refused on the grounds that, first, the Disciplinary Commission’s rules of procedure did not confer the authority to reconsider the decision, and secondly that, in any event, the new evidence adduced by Mr Lobello was in Mr Lobello’s possession at the time that the Disciplinary Commission first considered the ISU’s complaint, and should have been put forward at that time. The lateness in adducing the new evidence was of Mr Lobello’s own making and therefore, as a matter of general principle under Swiss procedural rules, the evidence could not be accepted.

On 31 July 2007 CAS advised the parties that, following the decision of the ISU Disciplinary Commission of 27 July, the CAS proceedings had been removed from suspension. CAS asked that the Appellant therefore file an appeal brief.

On 9 August 2007 the Appellant filed his appeal brief.

On 28 August 2007 the ISU filed its Answer to the Appellant's appeal brief.

The hearing in this matter was held by telephone on 20 November 2007 commencing at 15.45 CET. Both counsel made extensive oral submissions and they also responded to questions from the Panel.

Section C of the Code sets out the Specific Provisions applicable to the Appeal Arbitration Proceedings. Art. R57 of the Code deals with the scope of the Panel's review and the hearing and states in part as follows:

"The Panel shall have full power to review the facts and the law. Upon transfer of the file, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments. He may also request communication of the file of the disciplinary tribunal or similar body, the decision of which is subject to appeal. Articles R44.2 and R44.3 shall apply".

It follows that the parties are not limited to the evidence that was previously presented to the first instance tribunal. To the contrary, the Panel is entitled to consider new evidence: see for example *H* CAS 2002/A/281. This was accepted by the Respondent at paragraph 1.1 of its Answer.

The Appellant outlined the grounds of his appeal in his Statement of Appeal of 29 June 2007. He stated that, subsequent to the decision of the ISU Disciplinary Commission on 8 June 2007, he had become aware that he had in fact submitted the form detailing his whereabouts for the first quarter of 2007. That form had been sent to the ISU by facsimile by Ms Tricia Stennes, an assistant coach employed by US Speedskating, on his behalf on 13 December 2006. Accordingly the Appellant ought not to have received a formal warning for failing to supply his whereabouts form for the first quarter of 2007. It followed that the Appellant had not failed to supply whereabouts forms on the requisite three occasions in the preceding 12 months, and accordingly the Appellant contended that he had not violated the ISU's Anti-doping Rules.

The Statement of Appeal submitted that the charges against the Appellant should be rescinded, the decision of the Disciplinary Commission of 8 June should be vacated, and the Appellant "returned to good standing".

On 9 August 2007 the Appellant filed his appeal brief. It repeated the claim set out in the Statement of Appeal, and said that the Appellant's whereabouts form for the first quarter of 2007 had been sent by facsimile from Tricia Stennes to the ISU, at the Appellant's request, on 13 December 2006.

The appeal brief stated that the facsimile to the ISU had been found amongst the Appellant's papers by his mother, Sharon Lobello. The brief annexed as exhibits, *inter alia*, a facsimile cover sheet from the Appellant to the ISU dated 13 December 2006, a whereabouts form dated 13 December 2006 which was signed by the Appellant, a transmission printout confirming that a 2-page facsimile had

been successfully sent to the facsimile number for the ISU on 13 December 2006, and a signed declaration from Tricia Stennes that she had sent the facsimile in question to the ISU at the Appellant's request.

The salient passages of the declaration of Ms Stennes are as follows:

"I recall transmitting a fax per a request from Anthony Lobello. I sent the fax from the US Olympic Education Center Office.

I trust the fax confirmation sheet to be accurate, for I have never had a reason to fax the ISU before and I have never faxed the ISU since".

It was noted in the appeal brief that the ISU did not communicate with skaters directly, but rather through their respective national bodies. As a result, it was claimed that the athletes concerned did not always receive communications from the ISU that were intended for them, and those communications that did reach their intended recipient were at times delayed. A letter dated 9 August 2007 from Robert Crowley, the Executive Director of US Speedskating, to the CAS Panel was exhibited to the appeal brief in support of this claim. That letter noted that the notice from the ISU to the Appellant dated 13 April 2007, requiring the Appellant to furnish his whereabouts form for the second quarter of 2007 by 24 April 2007, was not received by the Appellant until after 24 April 2007 because the letter had been sent via US Speedskating rather than to the Appellant directly, and US Speedskating had not had staff on-site at the time to forward the notice to the Appellant in time.

The appeal brief further argued that the ISU had on previous occasions failed to accurately record which skaters had and had not submitted their whereabouts forms, and gave as examples occasions when two American speedskaters whose whereabouts forms had been requested by the ISU when they had already been filed. The Appellant submitted that the same error had occurred in this case.

The appeal brief also noted that Mr Lobello had complied fully with the United States Anti-Doping Agency's testing requirements.

The Appellant filed written witness statements on his behalf on 10 and 11 October 2007. In support of his contention that he had in fact sent to the ISU the whereabouts form for the first quarter of 2007 the Appellant said the following:

"I witnessed the sending, by facsimile transmission, of the fax cover sheet and my "Whereabouts Form" to the ISU by Ms. Tricia Stennes...on December 13, 2006"

"At my request, my mother searched through and located among my papers...the facsimile confirmation sheet for that December 13 facsimile transmission, as well as the "Whereabouts Form" itself and fax cover sheet".

The Appellant's mother, Sharon Lobello, confirmed in her witness statement that *"On or about June 16, 2007, and at my son's request, I searched through my son's papers and other belongings...and found a copy of the fax cover sheet and "Whereabouts Form" addressed to the ISU dated December 13, 2006 and the facsimile confirmation sheet relative to the facsimile, showing that that facsimile transmission (2 pages) had been received by the ISU at its given facsimile number".*

In support of his point that communications from the ISU to individual skaters were not always received by the skater, and that those that were received were not always received in a timely manner, the Appellant stated:

"I never received any facsimile, email or other information, either orally or in writing, from either the ISU or USS (or anyone else), that the ISU had failed to receive my athlete "Whereabouts Form" for the first quarter (January, February and March, 2007)".

"I never received the "warnings" allegedly sent by the ISU to US Speedskating on December 29, 2006 and January 9, 2007".

"I never received the so-called "Second Formal Warning" allegedly transmitted by the ISU on or about January 19, 2007".

"Similarly, I never received any warning, either orally or in writing, from the ISU or USS (or anyone else) that I had not filed a "Whereabouts Form" for the second quarter (April, May and June, 2007) until after it was too late, at which time I also learned, for the first time (from Mr Crowley), that I had received a "Second Formal warning" for allegedly failing to file a Whereabouts Form in December 2006 (when, in fact, I had made such a filing)".

Mr Robert Crowley, the Executive Director of US Speedskating, confirmed in his witness statement that the ISU had sent to US Speedskating reminder notices for those skaters who had not submitted their whereabouts forms for the second quarter of 2007, but that those reminder notices were not sent to the named athletes, including the Appellant.

Mr Crowley also said in his witness statement that he was aware of situations where *"the ISU has incorrectly alleged that an athlete (or athletes) have failed to submit "Whereabouts Forms" when in fact they had"*.

The ISU filed its Answer on 28 August 2007. The Answer correctly stated that *"this appeal is about but one fact"*, namely whether the Appellant did or did not send a whereabouts form to the ISU on 13 December 2006. The Respondent contended that the Panel should find that it was not sent. It made the following submissions on that issue:

The recently adduced evidence that the facsimile had been sent would ordinarily suffice to prove that the form had been sent. However there were extenuating circumstances in this case which raised doubts about whether the fax in question was indeed sent to the ISU as the Appellant contended.

The Appellant had not previously denied his failure to provide the required whereabouts forms to the ISU. His *"sudden change of pleadings"* increased his burden of proof, and required that the new evidence be *"absolutely clear and convincing, and leave no room for doubt"*. The ISU had doubts as to whether the facsimile was in fact sent, and if it was, whether a proper whereabouts form was attached.

The Appellant submitted that he sent the whereabouts form (through Ms Stennes) on 13 December 2006, yet by 27 January 2007 he gave no indication that he had done so in response to reminders sent by the ISU, and sent the whereabouts form to the ISU with apologies for its delay. It was only after the ISU Disciplinary Commission had made its ruling that the Appellant *"suddenly recalled"* having sent the facsimile on 13 December 2006.

The Appellant had previously and subsequently communicated with the ISU by email, and doubts were raised when one asked why he did not send the whereabouts form at issue by the same method. The Respondent posed the question: why did the Appellant choose instead to send the form by facsimile via a third party (Ms Stennes)?

Of most significance was the check which had been made at the request of the ISU to I-axes, the service company which kept the records of the ISU's facsimile system. Under that system, called "right fax", every facsimile received by the ISU was immediately forwarded as an email to a special mail-box in the ISU computer, from where it then appears on the monitors of ISU staff. No faxes are therefore received by the ISU in paper form, the facsimile instead being delivered as an email.

The ISU arranged for a search of its records by I-axes, which found no record of any facsimile being received on 12, 13, 14 or 15 December 2006 from facsimile number 906 227 2848 (the originating number indicated by the facsimile confirmation sheet adduced in evidence by the Appellant). I-axes confirmed on 14 August 2007 that it had searched the log of all faxes received by the ISU and that all faxes received on 13 December 2006 had been successfully forwarded as emails. No facsimile received by the ISU between 12 and 15 December corresponded to the facsimile allegedly sent by the Appellant.

Further, even if a facsimile had been sent by the Appellant to the ISU on 13 December, it had not been proved that that fax attached the Appellant's whereabouts form. One could have expected the fax confirmation sheet to include the image of the first page of the fax but that was not the case.

For the foregoing reasons the ISU did not accept that the Appellant faxed the whereabouts form to the ISU as claimed.

The ISU stated that all other arguments made by the Appellant were "entirely irrelevant" to the issues in question. Nonetheless the ISU offered submissions on those points, which may be summarised as follows:

The ISU did not formally communicate directly with skaters, although ISU staff do send unofficial emails directly to skaters reminding them of deadlines. Such direct communication was made with the Appellant on occasion. Moreover, although the Appellant stated that communications from the ISU were not always received by the intended recipient skater, the Appellant did not state that communications did not get from the ISU to the national federation. It appeared on Appellant's evidence that the problem in fact lay in getting communications from the national federation to the individual skater.

The ISU denied that it had previously lost or misplaced whereabouts forms sent by skaters, or that it had done so on this occasion.

On 16 November 2007 CAS faxed the parties in respect of the soon-to-be-held hearing. The fax contained a memorandum from the President that *"the purpose of this call is twofold. First, to allow counsel time to highlight the key points in the Appellant's Appeal Brief of 9 August 2007 and in the Respondent's Answer of 29 August 2007. Secondly, to allow the Panel to ask any questions of either counsel"*.

LAW

1. There appeared to be differing views at the hearing as to which party has the burden of proof. The position however is made quite clear under Article 3.1 of the ISU Rules, which states:

“Burdens and Standards of Proof

The ISU and its members shall have the burden of establishing that an ISU Anti-Doping Rule violation has occurred. The standard of proof shall be whether the ISU or its Member has established an ISU Anti-Doping Rule violation to the satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. The standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these ISU Anti-Doping Rules place the burden of proof upon the Skater or other Persons alleged to have committed an ISU 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”.

2. The usual position is therefore that the ISU bears the burden of proof. Although the ISU submitted that, in the particular circumstances of this case, the burden had shifted to the Appellant, the basis of this reversal of onus was not explained by Respondent’s counsel by reference to the Rules or any applicable legal principles. There is no provision in the Rules, as there is in other cases (see for example Article 2.6.1 which places the burden on the athlete to establish a Therapeutic Use Exception) which shifts the burden in cases like the present. The Panel therefore considers that Article 3.1 requires that the burden remains throughout with the ISU. However, for the purposes of this decision, the Panel will assume hypothetically that the burden did shift to the Appellant and consider whether the Appellant, in terms of Article 3.1, has established “by a balance of probability” that the whereabouts form was sent on 13 December 2006.
3. While the Appellant may be seriously criticised for his lack of diligence in failing to search for the relevant fax at an earlier stage, the Panel has come to the view on the material before it that the ISU has not proved its case in terms of Article 3.1 of the Rules.
4. While the ISU’s surprise at the late production of the fax of 13 December 2006 is understandable, the Panel does not consider that the ISU has succeeded in showing that the facsimile was not what the Appellant claimed it to be and/or that it was not sent on 13 December 2006. For the ISU to make its case it had in effect to prove that the Appellant had for instance forged or otherwise artificially created the facsimile and its confirmation sheet so as to make it appear that it had been sent to the ISU on 13 December, and that Ms Stennes was either mistaken in her recollection or was totally untruthful and indeed party to a fabrication of evidence. Upon due consideration of all evidence submitted and all arguments made, the Panel does not accept that such was the case. Although the facts cannot be established with absolute certainty in these unusual and difficult circumstances, the Panel considers that the doubts surrounding the transmission of the whereabouts form lead to the conclusion in this particular case that it was more likely than not that the whereabouts form was transmitted and received on 13 December 2006.

5. The Panel notes that the Appellant and his witnesses, while not cross-examined, made their statements explicitly under penalty of punishment for perjury pursuant to Title 28, United States Code, Section 1746.
6. For all of the foregoing reasons the appeal is upheld and the decision to impose a period of ineligibility is reversed and annulled.
7. The Panel is fully aware that the period of ineligibility imposed on the Appellant is coming to an end as this award is being issued. However, the Appellant bears the responsibility for that situation. As stated above, the Appellant could have been able to produce the whereabouts form during the procedure before the ISU. Furthermore, after the filing of his appeal with the CAS, the Appellant decided not to request a stay of the execution of the decision being appealed against. Finally, the Appellant requested that an oral hearing be held in the US, a request which was subsequently withdrawn (see above) and which delayed the CAS proceedings.
8. Based on the submissions made and the evidence available, no further issues are relevant to the case at hand and any other claims can be dismissed.
9. The Panel wishes to stress that nothing in this decision is to be taken as detracting from the need for skaters to fully comply with their important reporting obligations. In closing, the Panel respectfully suggests that the ISU may care to consider whether it should put in place an improved system as to whereabouts forms, perhaps with provision for the acknowledgement of receipt by the ISU in every case where it has received a skater's whereabouts form. In the alternative, the ISU may consider a review of the burden of proof rules so that both the ISU and the athletes are aware of the procedural risk of any miscommunication.

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr Anthony Lobello on 29 June 2007 against a decision of the International Skating Union Disciplinary Commission dated 8 June 2007 is upheld.
2. The decision of the ISU Disciplinary Commission of 8 June 2007 to impose a period of ineligibility on Mr Lobello is reversed and annulled.
3. (...)
5. All other or further claims are dismissed.