



SUBSTANTIAL ASSISTANCE

WHAT IT IS.

WHY IT CAME ABOUT.

HOW IT WORKS IN THEORY AND IN PRACTICE.

As has been explained thoroughly in past IPOD Editions, further to the adoption of the revised World Anti-Doping Code, the ISSF Anti-Doping Rules were also modified to reflect the implemented changes. The revised Code and ISSF Anti-Doping Rules have been in effect since January 2015.

One of the provisions significantly altered as a result of this regulatory revision process was Article 10 of the ISSF Anti-Doping Rules, which deals with sanctions.

Article 10 outlines varying mandatory sanctions to be imposed depending on the type of anti-doping rule violation. These include for example:

- First violation for presence, use or possession: either two or four years (Article 10.2);
- First violation for non-intentional presence of specified substances: two years (Article 10.2.2);
- First violation for trafficking or administration: four years to life (Article 10.3.3); and
- Whereabouts violation: one to two years (Article 10.3.2).

Article 10 also explains that the sanction imposed for any given anti-doping rule violation can vary, or be reduced, suspended, or even eliminated. The decision as to which sanction should be imposed will be influenced by factors such as:

- Whether the anti-doping rule violation involved intentional conduct;
- Whether the anti-doping rule violation in question is a first or a subsequent violation;
- The early admission of the violation;
- Whether the substance was a specified substance or a contaminated product;
- The prohibited substance detected (if any);
- The athlete proving "no fault" or "no significant fault";

And

- Whether substantial assistance was provided.

WHAT IS "SUBSTANTIAL ASSISTANCE"?

As identified above, one of the ways by which an athlete who has been charged with the commission of an anti-doping rule violation can reduce his or her sanction is by providing Substantial Assistance to the Anti-Doping Organization who has charged him or her with the violation. Simply put, Substantial Assistance is a new way for an athlete charged with an anti-doping rule violation to reduce his or her sanction.

Substantial Assistance is a tool that allows for credit to be given to athletes (and/or support personnel) who assist Anti-Doping Organizations to pursue other individuals involved in doping. In any such situation, part of a ban imposed on an individual can be suspended on the basis that information provided by the athlete results either in discovering or establishing the anti-doping rule violation of another person, or in the criminal conviction of another person.

WHY PROVIDE FOR SUBSTANTIAL ASSISTANCE?

If you recall, one of the significant findings that transpired from the high profile Lance Armstrong case was the sophisticated network of athletes, coaches, trainers, doctors and others who were involved in aiding and abetting the doping program employed by members of the US Postal Service cycling team. This finding underlined what we have always known: athletes who dope, rarely, if ever, act alone.

Indeed, it is widely agreed that while the overwhelming majority of doping violation sanctions are against athletes, athletes are usually not solely responsible for these violations. Athletes are usually aided and abetted by individuals, be it coaches, trainers, family members, "friends" who supply prohibited substances and/or methods and who enable

doping in sport. Yet, these individuals are for the most part supplying the "drugs" to athletes with impunity.

The general consensus when the Code revision were under way in 2014 was that much more work was required to catch and punish the non-athletes in the doping supply chain. A reduction of sanction based on Substantial Assistance was a product of this revision process.

SUBSTANTIAL ASSISTANCE AND THE INVESTIGATIVE PROCESS

As mentioned in various past IPOD editions, information and intelligence gathering has become an important element of all worldwide testing and anti-doping efforts. Correspondingly, the new Substantial Assistance provision reflects the view that the protection of clean athletes relies on a two-pronged approach of both testing and intelligence-led investigations, as reflected in the 2015 Code and International Standard for Testing and Investigations (ISTI).

Indeed, the Substantial Assistance provision can be of pivotal importance when conducting investigations. This is because likely the most immediate and valuable source of information that can be used to catch the real cheats and the real suppliers has gone largely untapped until now. That source is the athletes!

Who knows better, or at least knows where suspected doping may be happening, than the athletes themselves?

As stated by former United Kingdom Anti-Doping (UKAD) agency's CEO, Andy Parkinson "The first thing to recognize is that a doping athlete does not always, or indeed normally, work in isolation. All too often we see that the athlete is just the tip of an iceberg of highly profitable and illegal activities".

Allowing a convicted athlete to provide credible information on third parties' doping activities in exchange for a reduction in sanction

therefore serves a higher purpose. This information influences how, when and who might be pursued, and where the investigative focus needs to further lie. Sufficient evidence can lead, as has already been the case in many jurisdictions, to the successful prosecution of both athletes and their entourage.

Of course, for the most part, athletes who may possess incriminating information on coaches or other athletes have remained silent. This silence is certainly based in a fear of retaliation from other athletes, or a misguided notion that providing information would be “snitching on” or “ratting out” or whistleblowing their fellow athletes. There seems to be an unwritten code of silence.

The new World Anti-Doping Code and ISSF Anti-Doping Rules address this issue to a certain extent through the sanction reductions associated with the provision of information by athletes involved in doping (i.e.: providing “substantial assistance”). The Substantial Assistance provision, namely article 10.6.1, is meant to encourage athletes engaged in doping to provide information on others involved, and particularly, those up the supply chain.

As explained by Paul Melia CEO of the Canadian Center for Ethics in Sport (CCES) in his blog, “it follows that those that we catch can also provide us with invaluable information and evidence, such as how they sourced doping substances, or who else was involved. This can help us prevent other athletes going down a similar path in the future and can assist all anti-doping organizations in refining their strategies to prevent doping.”

HOW THE CONCEPT WORKS IN THEORY:

Article 10.6 of the ISSF Anti-Doping Rules deals with Substantial Assistance. It reads as follows:

10.6 Elimination, Reduction, or Suspension of Period of Ineligibility or other Consequences for Reasons Other than Fault

10.6.1 Substantial Assistance in Discovering or Establishing Anti-Doping Rule Violations

10.6.1.1 The ISSF may, prior to a final appellate decision under Article 13 or the expiration of the time to appeal, suspend a part of the period of Ineligibility imposed in an individual case in which it has results management authority where the Athlete or other Person has provided Substantial Assistance to an Anti-Doping Organization, criminal authority or professional disciplinary body which results in: (i) the Anti-Doping Organization discovering or bringing forward an anti-doping rule violation by another Person, or (ii) which results in a criminal or disciplinary body discovering or bringing forward a criminal offense or the breach of professional rules committed by another Person and the information provided by the Person providing Substantial Assistance is made available to the ISSF. After a final appellate decision

under Article 13 or the expiration of time to appeal, the ISSF may only suspend a part of the otherwise applicable period of Ineligibility with the approval of WADA. The extent to which the otherwise applicable period of Ineligibility may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the Athlete or other Person and the significance of the Substantial Assistance provided by the Athlete or other Person to the effort to eliminate doping in sport. No more than three-quarters of the otherwise applicable period of Ineligibility may be suspended. If the otherwise applicable period of Ineligibility is a lifetime, the non-suspended period under this Article must be no less than eight years. If the Athlete or other Person fails to continue to cooperate and to provide the complete and credible Substantial Assistance upon which a suspension of the period of Ineligibility was based, the ISSF shall reinstate the original period of Ineligibility. If the ISSF decides to reinstate a suspended period of Ineligibility or decides not to reinstate a suspended period of Ineligibility, that decision may be appealed by any Person entitled to appeal under Article 13.

10.6.1.2 To further encourage Athletes and other Persons to provide Substantial Assistance to Anti-Doping Organizations, at the request of the ISSF or at the request of the Athlete or other Person who has (or has been asserted to have) committed an anti-doping rule violation, WADA may agree at any stage of the results management process, including after a final appellate decision under Article 13, to what it considers to be an appropriate suspension of the otherwise-applicable period of Ineligibility and other Consequences. In exceptional circumstances, WADA may agree to suspensions of the period of Ineligibility and other Consequences for Substantial Assistance greater than those otherwise provided in this Article, or even no period of Ineligibility, and/or no return of prize money or payment of fines or costs. WADA's approval shall be subject to reinstatement of sanction, as otherwise provided in this Article. Notwithstanding Article 13, WADA's decisions in the context of this Article may not be appealed by any other Anti-Doping Organization.

10.6.1.3 If the ISSF suspends any part of an otherwise applicable sanction because of Substantial Assistance, then notice providing justification for the decision shall be provided to the other Anti-Doping Organizations with a right to appeal under Article 13.2.3 as provided in Article 15.2. In unique circumstances where WADA determines that it would be in the best interest of anti-doping, WADA may authorize the ISSF to enter into appropriate confidentiality agreements limiting or delaying the disclosure of the Substantial Assistance agreement or the nature of Substantial Assistance being provided.

THE GUARANTEES

In exchange for providing valuable and credible information, which should help discover or establish an anti-doping rule violation by a third party, the offending athlete or other person willing to provide Substantial Assistance is provided with the following assurances:

- That a reduction in sanction is in fact possible if agreed upon;
- That the agreed-upon reduction in the period of ineligibility cannot be challenged on appeal;
- That in appropriate circumstances, the disclosure of the Substantial Assistance may be limited or delayed;

And

- That in exceptional circumstances, WADA may approve a Substantial Assistance agreement that provides for no period of ineligibility.

THE CONDITIONS

There are of course various conditions that must be met in order for a reduction of a sanction based on Substantial Assistance to effectively work:

1. WADA approval

WADA must agree that the applicability of the Substantial Assistance provision meets all applicable regulatory conditions established as defined in the Code and the ISSF Anti-Doping Rules. WADA must also agree that allowing for a suspension of a “cheater’s” sanction is in the best interest of the greater fight against anti-doping.

2. Results are obligatory

The athlete's assistance must be substantial enough to allow an Anti-Doping Organization to either discover or establish that an anti-doping rule violation was, has been or will be committed by a third party.

3. The information must be convincing

The information supplied by the athlete must be credible and constitute a sufficient basis upon which a case can be brought forward. So, the facts, story and evidence provided by the athlete in exchange for a suspended sanction must be reliable.

4. Full disclosure

The athlete will in all circumstances provide written and signed statements containing all the relevant information and certifying that it is true and verifiable. The athlete must disclose all the information he or she possesses (including on the athlete's own anti-doping rule violation) without exception. Should any information later be found to have been held back or fabricated, the Substantial Assistance will not be deemed valid and athlete's full sanction will be reinstated.

5. Full cooperation

The athlete must testify in any hearing and the athlete must assist in any investigation.

HOW THE CONCEPT WORKS IN PRACTICE

To be clear, the sanction is never actually reduced, part of the sanction is suspended. It has the same result, but the semantics are of great importance because should the assistance end up being fabricated or useless or should the athlete decide to stop cooperating at any time or in any part of the process, the suspended portion of his or her sanction could then be reinstated.

When an anti-doping organization decides that a suspended sanction based on Substantial Assistance is applicable, the length of the suspension shall depend on three things:

1. The individual athlete's anti-doping rule violation: The type, the substance, the facts surrounding the violation etc.
2. The nature of information provided by the athlete: Is it truly valuable and worthy? And
3. The relevance of the substantial assistance: The assistance provided must effectively result in a positive outcome.

Depending on the specifics of any given case any part of a sanction can be partly or even wholly suspended (i.e. reduced).

The following provides a real life example as a practical application:

In a recent case, the IAAF (the International Amateur Athletics Federation) had appealed to the Court of Arbitration for Sport (CAS) against a decision of the All-Russian Athletics Federation (ARAF) to suspend athlete Liliya Shobuk-

hova for a period of two years in connection with abnormalities with her Athlete Biological Passport. The IAAF was seeking a period of ineligibility of up to four years. Ms. Shobukhova had approached WADA in May 2014 with a view to providing Substantial Assistance within the meaning of the Code. In accordance with the conditions provided in article 10.6.1.2 as outlined above, the information and documentation provided by Ms. Shobukhova was of substantial value in uncovering and investigating anti-doping rule violations committed by other individuals, including athlete support personnel.

WADA considered the information provided by the athlete to be of significant value to clean sport and decided to exercise its authority by agreeing to the application of Article 10.6.1.2, the Substantial Assistance provision of the Code.

Also in accordance with the conditions provided in Article 10.6.1.2, Ms. Shobukhova formally committed to cooperate with WADA in the investigation and, ultimately, the adjudication of any and all cases that may result from the information she has provided.

As a result, the outcome of the CAS appeal was a settlement agreement between the parties. Because of the Substantial Assistance that Ms. Shobukhova provided in line with the provisions of the Code, WADA, IAAF and ARAF agreed to a seven-month suspension of the athlete's sanction.

The seven months was to be reduced from the imposed sanction of 3 years and 2 months. That brought the total length of the athlete's ineligibility period to two years and seven months.

Because of the Substantial Assistance provision of the rules, the athlete was able to provide valuable information which will lead

to uncovering other anti-doping rule violation in exchange for a reduction in her sanction.

In the end, it was the desired win-win scenario envisioned by the new Article 10.6.1.

CONCLUSION

In the same way that the criminal justice system and police forces offer reduced sentences for criminals in exchange for providing assistance, so too can those responsible for protecting clean sport. While we would always hope that those caught need no motivation to assist the authorities in their work, this is simply not the case. The reality is that the Substantial Assistance provision now provides additional concrete encouragement to gather better intelligence and evidence. It is a means to crack the often talked about "omerta" – the athlete's code of silence.

Many of you may think that the idea of lessening a doper's ban in return for information is a difficult concept to support. But if we really want to prevent doping, we must recognize that, as the end-user and sitting-duck, the doping athlete is usually not exclusively guilty for his or her activities and shortcomings.

Indeed, athletes and the general public agree that not just athletes, but also their just-as-guilty-if-not-more-so entourage, equally need to be held accountable when an anti-doping rule violation occurs. Substantial Assistance offers one means to achieve this objective.

Time will tell if the fight against doping will significantly benefit from this concept. Surely, in the short time that it has been in effect, Substantial Assistance has proven quite valuable.

Janie Soublière B.S., LL.M., LL.B.

Legal Consultant, Anti-Doping in Sport