UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. 9420

ADMINISTRATIVE LAW JUDGE: D. Michael Chappell

IN THE MATTER OF:

LUIS JORGE PEREZ Appellant

THE AUTHORITY'S SUPPORTING LEGAL BRIEF FOR PROPOSED CONCLUSIONS OF LAW AND ORDER

Comes now the Horseracing Integrity and Safety Authority, Inc. ("**HISA**") pursuant to the briefing schedule of the Administrative Law Judge dated December 14, 2023 and submits the following Supporting Legal Brief.

CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of this Proposed Conclusions of Law and Proposed Order is being served on January 8, 2024, via Administrative E-File System and by emailing a copy to:

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Chief Administrative Law Judge
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Introduction

On October 9, 2023, Arbitrator Barbara A. Reeves, Esq. (the "**Arbitrator**"), an arbitrator appointed by the Horseracing Integrity & Welfare Unit ("**HIWU**" or the "**Agency**") for the Horseracing Integrity and Safety Authority, Inc. ("**HISA**"), issued a decision (the "**Final Decision**") finding that Luis Jorge Perez ("**Dr. Perez**" or "**Appellant**") violated Rule 3214(a) of HISA's Anti-Doping and Medication Control Program ("**ADMC Program**") by possessing Levothyroxine ("**Thyro-L**"), a Banned Substance. The Final Decision imposed civil sanctions of a 14-month suspension and a $5,000 fine (the "**Consequences**").[1]

Dr. Perez issued a Notice of Appeal requesting an evidentiary hearing to contest the facts found by the Arbitrator and to supplement the record with further testimony. Appellant further asserted various legal challenges regarding jurisdiction and constitutionality that exceed the purview of this appeal.

Dr. Perez subsequently withdrew his request for an evidentiary hearing to contest facts and to supplement the record. This appeal, accordingly, concerns only whether Appellant can establish that the Consequences imposed on him are arbitrary, capricious, an abuse of discretion, prejudicial, or otherwise not in accordance with law.

Based on the record, it is evident that Dr. Perez is liable for Possession under ADMC Program Rule 3214(a). The Consequences were imposed in accordance with ADMC Program Rule 3223 and Rule 3214(a) and rationally connected to the relevant evidence.

Therefore, the sanctions should be affirmed.

[1] Final Decision, October 9, 2023, Appeal Book of HISA **("HAB")**, Tab 1.

I. Procedural History

On June 13, 2023, Dr. Perez was issued a Notice of Alleged Anti-Doping Rule Violation for the Possession of Banned Substance (Thyro-L) ("**Notice Letter**") and imposed a Provisional Suspension effective as of June 14, 2023.[2]

On June 17, 2023, Dr. Perez responded to HIWU's Notice Letter. In his written reply, Dr. Perez admitted his Possession of Thyro-L, stating "[f]or this failure I accept full responsibility. My offense though was not intentional."[3] He explained that the Thyro-L had been ordered prior to the implementation of the ADMC Program and had not been used in six months, but that he had forgotten about the Banned Substance's presence and did not remove it from his trailer.

On June 26, 2023 the Agency charged Dr. Perez with Possession of a Banned Substance ("**Charge Letter**"). The Charge Letter advised that Dr. Perez' explanation of the circumstances leading to the alleged violation did not satisfy his burden to establish a "compelling justification" that would excuse Possession of the Banned Substance as required by Rule 3214(a).[4]

On July 10, 2023, counsel to Dr. Perez sent a letter to HIWU advising of his involvement in the matter and acknowledging that (1) Dr. Perez had admitted to the anti-doping violation charged, and (2) Dr. Perez sought to agree to mitigated Consequences with HIWU, failing which the sanction would be disputed at a contested hearing.

On July 25, 2023, JAMS Issued a Notice of Commencement of Arbitration and Notice of Appointment of Provisional Hearing Arbitrator ("**Commencement Letter**") to all parties.[5]

[2] EAD Notice Letter to Dr. Perez, HAB, Tab 9, pp. 104-110.
[3] Perez HIWU Response Letter, HAB, Tab 9, pp.112-14.
[4] ADRV Charge Letter, HAB, Tab 9, pp. 116-25.
[5] Commencement Letter, HAB, Tab 16.

On August 3, 2023, the Agency submitted a letter to the Arbitrator, jointly on behalf of the parties advising that Dr. Perez had admitted to unintentionally committing an ADRV. With that admission, the parties agreed to proceed to a hearing on the Consequences arising from the ADRV.[6]

On August 25, 2023, Dr. Perez filed his submissions for the arbitration, and for the first time sought to withdraw his clear and repeated admissions,[7] arguing instead that he was in "lawful possession" of the Thyro-L, in other words, that he had a "compelling justification" for possessing it.

In the Final Decision, the Arbitrator rejected Appellant's argument, including because his contention that he possessed the Thyro-L for use on Non-Covered Horses was only "a theoretical justification raised by his counsel, after the fact."[8] Of particular note, the evidence tendered by Dr. Perez did not establish that he had a compelling justification for his Possession of Thyro-L.

On October 10, 2023, HIWU issued a Notice of Final Civil Sanctions under the ADMC Program ("**HIWU Sanctions Notice**") to Dr. Perez. On October 11, 2023, HISA filed a HISA Civil Sanction Notice with the Secretary of the FTC. On November 9, 2023, Dr. Perez filed a Notice of Appeal and Application for Review on a *de novo* basis to the FTC appealing the Final Decision. Dr. Perez's Notice of Appeal challenged the Final Decision on two grounds, (1) that the ADMC Program and the provisions governing Possession of a Banned Substance therein are "vague as well as being arbitrary and capricious," and (2) that Dr. Perez had been provided insufficient due process.

[6] Joint Letter to Arbitrator Reeves, HAB, Tab 7; Also see Correspondence among counsel confirming the content of the Joint Letter, HAB, Tab 6.
[7] August 25, 2023 Submissions of Dr. Perez, HAB, Tab 5.
[8] Final Decision, at para. 7.15, HAB, Tab 1, p. 32.

On November 17, 2023, HISA filed a response to the Notice of Appeal, asserting, *inter alia*, that Dr. Perez failed to identify any material facts in dispute and that an evidentiary hearing was unnecessary.

On November 30, 2023, the FTC issued an order directing Dr. Perez to submit a statement of the facts found by the Arbitrator that he sought to contest in the requested evidentiary hearing, by December 4, 2023. Dr. Perez failed to do so, and on December 9, 2023 withdrew his request for an evidentiary hearing.

On December 14, 2023, Justice D. Michael Chappell of the Commission issued an Order setting the briefing schedule in this matter. In his Order, Justice Chappell declared that as a result of submissions by the parties and Dr. Perez's failure to identify any material contested facts, the factual record as it stands is sufficient to adjudicate the merits of the review proceeding, and an evidentiary hearing is unnecessary. Therefore, the appeal is limited to "briefing by the parties on the issue of the civil sanctions."

II. Applicable ADMC Program Rules

The Authority was created pursuant to the federal *Horseracing Integrity and Safety Act of 2020*, as amended (the "**Act**")[9] to implement a national, uniform set of integrity and safety rules that are applied consistently to every Thoroughbred racing participant and racetrack facility in the United States.[10] The Agency was established in 2022 as a specialized agency to administer the rules and enforcement mechanisms of the ADMC Program, which was created pursuant to the Act, approved by the Federal Trade Commission on March 27, 2023, and went into effect on May 22, 2023. [11]

[9] 15 U.S.C. 3051–3060.
[10] ADMC Program Rule 3010(a).
[11] ADMC Program Rules 3010(b) and 3010(e)(1).

Dr. Perez is a veterinarian and Person engaged in the care and treatment of Covered Horses. Dr. Perez is therefore a Covered Person under Rule 3020(a)(3).

Rule 3070(b) of the ADMC Program sets-out the applicable law for the purpose of interpreting and applying the ADMC Program. That Rule provides that the ADMC Program "shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes." Rule 3070(d) further provides that the World-Anti Doping Code ("**WADC**") and jurisprudence interpreting its provisions may be considered when interpreting and applying the ADMC Protocol (*i.e.*, Rule 3000 series of the ADMC Program, which sets out the substantive equine anti-doping rules).

The Final Decision below concerned an Anti-Doping Rule Violation ("**ADRV**") for Possession of a Banned Substance in breach of Rule 3214(a). It is unclear from the Appellant's Notice of Appeal if he contests his liability for Possession, or only seeks to dispute whether the Consequences were arbitrary, capricious, an abuse of discretion prejudicial, or otherwise not in accordance with law.[12]

Under Rule 3223, the required sanction for a violation of Rule 3214(a) is a period of Ineligibility of 2 years, a fine of up to $25,000, and payment of some or all of the adjudication costs and the Agency's legal costs. The Agency did not, however, seek any of its legal costs in this case, and the Arbitrator did not require Appellant to pay any portion of the Agency's adjudication costs.

Where an ADRV is established, a Covered Person *may* be entitled to mitigation of the above noted sanctions, where he establishes on a balance of probabilities that he acted with

[12] Having withdrawn his position for an evidentiary hearing, the ALJ established that only the issue of civil sanctions is relevant to this appeal (*i.e.*, "that the penalty assessed was arbitrary, capricious, an abuse of direction, prejudicial, or otherwise not in accordance with law"). However, aiming to anticipate Appellant's potential arguments, the Arbitrator's finding on liability is also addressed in this Brief.

either No Fault or Negligence (Rule 3224), or No Significant Fault or Negligence (Rule 3225). The ADMC Program provides that assessment of Fault is a specific and focused exercise which is concerned only with the Covered Person's actions leading up to the ADRV. Corollary considerations such as the economic impact of the imposed sanctions after the fact, are not considered as relevant factors in reducing potential ineligibility based on degree of Fault.[13]

III. The Final Decision

The Arbitrator found that Dr. Perez was in Possession of Thyro-L pursuant to the definition of Possession under the ADMC Program, and that there was no "compelling justification" for such Possession. Although this determination is not properly at issue on Appeal, it is noted that the Arbitrator relied on jurisprudence from the Court of Arbitration for Sport (**"CAS"**) interpreting the substantively identical provisions of the WADC to inform his interpretation and application of the ADMC Program Rules in this case. The finding of Possession, without "compelling justification," was appropriately reasoned and well within the legal framework of the ADMC Program.

The Arbitrator correctly held that "[t]here is no dispute that Dr. Perez was in possession of two one-pound tubs of a substance known as Levothyroxine ("Thyro-L") in his Trailer #6, on June 9, 2023, after the implementation of the ADMC Program on May 22, 2023."[14] The Arbitrator further found that Mr. Perez committed a Possession ADRV because he failed to establish "compelling justification" for his possession of the Thyro-L,[15] which would obviate Possession under Rule 3214(a).

[13] This is established in the definition of Fault in the AMDC Program: In assessing the Covered Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Covered Person's departure from the expected standard of behavior. Thus, for example, the fact that the Covered Person would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Covered Person or Covered Horse only has a short time left in a career, or the timing of the horseracing calendar, would not be relevant factors to be considered in reducing the period of Ineligibility based on degree of Fault.
[14] Final Decision, at para. 7.2, HAB, Tab 1, p. 30.
[15] Final Decision, at para. 7.14-16, HAB, Tab 1, pp. 31-32.

The Arbitrator ultimately held that that Dr. Perez's "conduct demonstrates that he objectively falls into the moderate or middle range of objective fault,"[16] and imposed a period of Ineligibility of 14 months and a fine of $5,000.[17]

The Arbitrator's determination was grounded in the following evidence (none of which is or can be challenged on Appeal):

a) Thyro-L is a Banned Substance under the ADMC Program;

b) The Thyro-L product was purchased by Dr. Perez at a time when it was not a Banned Substance and before the implementation of the ADMC Program;

c) On March 21, 2023, Dr. Perez attended a presentation by Dr. Mary Scollay, HIWU's Chief of Science, at Belmont Park, where Dr. Scollay discussed the pending implementation of the ADMC Program and specifically mentioned that Thyro-L would become a Banned Substance under the Program;

d) Dr. Perez therefore knew that Thyro-L would become a Banned Substance upon implementation of the ADMC Program on May 22, 2023 and that it was a Banned Substance as of the date that it was found in his trailer;

e) Dr. Perez admitted that he learned that Thyro-L was specifically banned under the new rules, that all Covered Persons were advised to undertake a "spring cleaning" of the medications and other substances in their trailers, offices, or barns before the implementation of the ADMC Program, and that he did not do so; and

[16] Final Decision, at para. 7.26, HAB, Tab 1, pp. 33-34.
[17] Final Decision, at para. 8.1, HAB, Tab 1, p. 35.

f) There was no evidence that the reason Dr. Perez possessed the Thyro-L on June 9, 2023, after it became a Banned Substance, was because he was administering or intending to administer it to Non-Covered Horses.[18]

On the evidence provided, the Arbitrator found that Dr. Perez was in Possession of Thyro-L.[19] On the issue of applicable Consequences flowing from the ADRV, the Arbitrator held that having determined that Dr. Perez was in Possession of a Banned Substance, she next had to assess whether the two-year period of Ineligibility should be reduced.[20]

The Arbitrator found that "Dr. Perez's admission that he did not clean out his trailer following HIWU seminar, establishes sufficient negligence to preclude the Arbitrator from finding No Fault or Negligence."[21] The Arbitrator then considered whether the applicable sanctions should be reduced based on Dr. Perez establishing No Significant Fault or Negligence.

In this respect, the Arbitrator referred to precedent from the CAS interpreting and applying substantively identical provision under the WADC. The Arbitrator specifically noted that there was a broad range for the period of Ineligibility under No Significant Fault or Negligence (from three months to twenty-four months) and that it was useful to divide that range into three groups.[22]

The Arbitrator referred to the CAS decision in *Cilic v. International Tennis Federation*,[23] where the CAS Panel determined that broad Fault ranges can be broken down

[18] Final Decision, at paras. 7.1-715, HAB, Tab 1, pp. 30-32. Dr. Perez conceded that he had not used Thyro-L in months. Thyro-L is not an emergency medicine, rather, it is administered to horses after a diagnosis, further undercutting any argument that Appellant has a "compelling justification for keeping a stock of Thyro-L." Final Decision, at paras. 6.7, 6.14, HAB, Tab 1, pp. 28, 29.

[19] Final Decision, at para. 7.19, HAB, Tab 1, p. 32.

[20] Final Decision, at para 7.19, HAB, Tab 1, pp. 32-33.

[21] Final Decision, at para 7.22, HAB, Tab 1, p. 32.

[22] Final Decision, at para 7.23, HAB, Tab 1, p. 33.

[23] *Marin Cilic v. International Tennis Federation (ITF),* CAS 2013/A/3327 at paras 69-73, HAB, Tab 10, p. 312.

into categories of month ranges based on the degree of Fault of the individual Covered Person. Drawing on *Cilic*, the Arbitrator broke down "the twenty-one months of possible periods of Ineligibility into roughly three seven-month ranges of objective fault: slight or insignificant: three to ten months; moderate: ten to seventeen months; significant: seventeen to twenty-four months."[24] The Arbitrator applied an analysis that first determined the objective level of fault and then assessed subjective factors of fault.

Considering these objective ranges of Fault, the Arbitrator concluded that Dr. Perez's conduct demonstrates that he fell into the moderate degree of significant Fault.[25] The Arbitrator then assessed subjective factors that "operate somewhat in Dr. Perez's favor,"[26] including that there was no evidence of Dr. Perez having used the Thyro-L after the implementation of the ADMC Program. This justified a slight reduction from what normally would have been 17 months of Ineligibility to the 14 months imposed on Appellant.

The Arbitrator acknowledged that some amount of fine is mandatory under Rule 3223(b) but lowered the potential $25,000 fine to $5,000 in recognition of Dr. Perez's inexperience with the ADMC Program, limited training, and Possession, rather than use, of Thyro-L.[27] Despite HIWU's request that Dr. Perez be ordered to pay a portion of the adjudication costs, the Arbitrator did not require him to many any such contribution.[28]

IV. The Standard of Review

Pursuant to 15 U.S.C. § 3058(b)(1)-(2), whether Appellant was in Possession of a Banned Substance in violation of Rule 3214(a) is a determination made *de novo* by the ALJ.

[24] Final Decision, at para 7.25, HAB, Tab 1, p. 33.
[25] Final Decision, at para 7.29, HAB, Tab 1, p. 34.
[26] Final Decision, at para 7.27, HAB, Tab 1, p. 34.
[27] Final Decision, at para 7.32, HAB, Tab 1, p. 35.
[28] Final Decision, at para 7.33, HAB, Tab 1, p. 35.

Where no facts are sought to be supplemented or contested, such determination is made on the basis of the existing factual record.

Pursuant to 15 U.S.C. § 3058(b)(3), a HISA civil sanction is subject to *de novo* review by an Administrative Law Judge of the Commission; however, the review is limited to a determination of whether "the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[29] Despite the fact that the ALJ conducts an independent review of the record,[30] a decision or sanction will not be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law where (i) the decision abides by the applicable rules,[31] and (ii) the sanction is rationally connected to the facts.[32] Similarly, to find an abuse of discretion, the record must reveal a clear error of judgment.[33] This standard of review has been confirmed in the recent FTC appeal from a HISA civil sanction, *In Re Jeffrey Poole*.[34]

V. Scope of Appeal

As Appellant's position has changed since filing his November 9, 2023 Notice of Appeal, the Authority notes that a number of issues raised therein are no longer relevant, and in any case are outside the scope of the appellate review permitted under 15 U.S.C. § 3058 and 16 C.F.R. § 1.145. This includes any argument as to HISA's jurisdiction or the constitutionality of the ADMC Program or the Act, HISA's enabling statute. This forum is not the appropriate one for any constitutional challenge to these pieces of legislation. What remains in issue on appeal is only Appellant's ill-defined challenge to the final sanctions imposed on him by HISA.

[29] 15 U.S.C. § 3058(b)(2)(A)(iii).
[30] *Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002).
[31] *Guier v. Teton County Hosp. Dist.,* 2011 WY 31, 248 P.3d 623 (Wyo. 2011).
[32] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).
[33] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,* 422 F.3d 782, 798 (9th Cir. 2005).
[34] Docket No. 9417, November 13, 2023.

VI. Appellant Cannot Satisfy his Burden to Prove "Compelling Justification" Such That Liability is Avoided

As noted, the fact of Appellant's being in possession of Thyro-L was not disputed before the Arbitrator. Rather, the key issue was whether Dr. Perez's evidence could establish a "compelling justification" that would excuse the Possession of the Banned Substance as required by Rule 3214(a), which reads:

> The following acts and omissions constitute Anti-Doping Rule Violations by the Covered Person(s) in question: . . . Possession of a Banned Substance or a Banned Method, unless there is compelling justification for such Possession.

The Arbitrator rightly held that no such compelling justification could be made out, as Appellant's sole theory, that he possessed the Thyro-L for use on and treatment of Non-Covered Horses, was an "after the fact," "theoretical justification."[35]

The Arbitrator applied the appropriate test for demonstrating "compelling justification." Dr. Perez had a high hurdle to clear in order to establish a compelling justification. The *lex sportiva* has held that unless the relevant party can establish an "acceptable justification,"[36] possession of the Banned Substance constitutes in itself an ADRV,[37] as confirmed by the ADMC Program itself. The onus to establish a compelling justification is on the Covered Person and the CAS has held that the bar to establish a "compelling justification" is at a "substantial height." In *Klein v. ASADA*, sole arbitrator Bruce

[35] Final Decision, at para 7.15, HAB, Tab 1, p. 32.

[36] For the purposes of clarity in this proceeding, "acceptable justification" is the language as it is used under the WADA regime and in applicable CAS law, it is considered as synonymous with, if not a less stringent standard than "compelling justification," the language used in the ADMC Program.

[37] *Diethart v IOC*, CAS 2007/A/1290, at para 40 (where the Panel held unless an athlete establishes that the possession is pursuant to a therapeutic use exemption granted or "other acceptable justification", "the possession of these items, i.e. materials which can be used to monitor and artificially reduce haemoglobin values, constitutes in itself an anti-doping rules violation since these devices can be used for blood doping…"), HAB, Tab 10, p. 287.

Collins considered the words "compelling justification" and the resulting burden on an athlete, holding as follows:

> …The word "justification" means in the present context, that the person advancing the circumstances which are said to be "justifiable" must show good reason why he or she did such a thing. The presence of good reasons must be demonstrated to the satisfaction of the Sole Arbitrator. Justification is the state of being justified. So that in the present case a justification is a demonstration that the circumstances advanced were just, right or valid...The Sole Arbitrator accepts that the word "compelling" qualifies the word "justification." Furthermore the word compelling must be given its ordinary natural meaning of forcing, driving or constraining. These are powerful qualifiers of the word "justifiable." As a matter of language the two words in combination set the bar at a substantial height for the Athlete to clear.[38]

It was Dr. Perez's burden before the Arbitrator to demonstrate a compelling justification on the evidence. It is not sufficient to simply assert that the Thyro-L was potentially for use on a non-Covered Horse; rather, he needed to have adduced specific evidence on this point.

Dr. Perez – as found by the Arbitrator and not open to challenge on appeal – was unable to provide evidence to substantiate his claim that his possession of Thyro-L was justified by its purported use on a Non-Covered Horse. He did not provide a name of the Non-Covered Horse on which he had purportedly intended to use the Thyro-L, did not provide a reason for its use, and did not provide a concrete explanation for having failed to comply with HIWU's explicit and clear guidance to Covered Persons, particularly veterinarians, to conduct an inventory of their medications in advance of the implementation of the ADMC Program. This is explicitly acknowledged by the Arbitrator at para. 7.15:

> Dr. Perez did not submit evidence that the reason he possessed the Thyro-L on June 9, 2023, after it became a Banned Substance, was because he was administering or intending to administer it to Non-Covered Horses. **That explanation is a theoretical justification raised by his counsel, after the fact. Dr. Perez produced no evidence that he responsibly cleaned out his trailers to comply with implementation of the**

[38] *Klein v ASADA*, CAS A4/2016, at paras. 127-131, HAB, Tab 10, p. 351.

ADMC Program, and originally admitted that he had forgotten that the Thyro-L was in his trailer.

Dr. Perez posits in his Notice of Appeal that HIWU "fails to provide the necessary due process protections" for veterinarians administering Banned Substances to Non-Covered Horses. On the contrary, and notwithstanding the irrelevance of due process claims to this appeal, HIWU readily admitted before the Arbitrator that "a veterinarian might establish a compelling justification if he could show that he was treating a specific horse, evidenced by veterinary records including the diagnosis and prescription for the medication."[39] This exclusion is written into the Rules of the ADMC Program.

Dr. Perez's complaint is not that compelling justification is unavailable as a defense to Possession, but that he was unable to make it out in his specific circumstances, having failed to provide any corroborating records demonstrating the use or intended use of Thyro-L on a Non-Covered Horse, despite the Agency's formal request that he do so.[40] Without such evidence, Dr. Perez was unable to meet his evidentiary burden to establish a compelling justification and instead rested his case on a baseless hypothesis that, if it had been accepted, would enable a Covered Person to escape liability for Possession under ADMC Rule 3214(a), rendering the provision a dead letter.

VII. The Consequences Were Imposed in Accordance With the ADMC Program

Having found that Appellant had violated Rule 3214(a), the Arbitrator acknowledged that under Rule 3223 the stipulated sanction for a Possession ADRV is a period of Ineligibility of 2 years and a fine of up to $25,000. The Arbitrator specifically followed the requirements of the ADMC Program, which permit a reduction in sanction where the Covered Person

[39] Final Decision, at para 6.8, HAB, Tab 1, p. 28.
[40] See September 5, 2023 HIWU Request for Production of Records, HAB, Tab 22, p. 622.

Establishes No Fault or Negligence or No Significant Fault or Negligence under Rule 3225(a) and applied a reasoned and fair reduction in this case.[41]

Appellant points to no fact or argument that the Arbitrator disregarded in establishing his level of Fault, because no such omissions were made. Conversely, the Arbitrator canvassed objective and subjective factors accruing to Appellant's favor, as detailed below. There is no reasonable basis on which to suggest that the Arbitrator did not consider, apply, and follow the ADMC Program Rules, or that she did not consider the universe of relevant factors in assessing Appellant's liability, degree of fault, or resulting sanction.

VIII. The Consequences Are Rationally Connected to the Evidence

The CAS has interpreted the definition of No Significant Fault or Negligence under the substantively identical provisions of the WADC and held that No Significant Fault arises in cases where there is justification for a deviation from the expected standard of exercising "utmost caution." In *Maria Sharapova v. ITF*, the CAS panel held that: "A period of ineligibility can be reduced based on NSF only in cases where the circumstances justifying a deviation from the duty of exercising the "utmost caution" are truly exceptional, and not in the vast majority of cases. However… the "bar" should not be set too high for a finding of NSF. In other words, a claim of NSF is (by definition) consistent with the existence of some degree of fault and cannot be excluded simply because the athlete left some "stones unturned."[42]

The Consequences are rationally connected to the evidence. In this regard, the Arbitrator considered and relied on a host of factors, both aggravating and mitigating, in support of her finding that Dr. Perez bore a moderate degree of Fault.

[41] Final Decision, at para 7.19 – 7. 29, HAB, Tab 1, at pp. 32-34.
[42] *Maria Sharapova v ITF*, CAS 2016/A/4643, at para. 84, HAB, Tab 10, p. 404.

The evidence supporting a significant departure from the applicable standard of care includes:

a) Dr. Perez knew that the ADMC Program was new and that it would regulate the use and possession of certain substances that may have previously been permitted;

b) Dr. Perez admitted that he did not clean out his trailer following a HIWU seminar that advised him to do so in advance of the implementation of the ADMC Program;

c) Dr. Perez did nothing to get rid of the Thyro-L despite knowing that it was a Banned Substance as of May 22, 2023;

d) Dr. Perez originally admitted that he had simply forgotten about the Thyro-L;

e) Dr. Perez's trailers were "disorganized, unsafe, and unsanitary," and "he did not know, nor make efforts to keep inventory of, the controlled substances he was possessing";

f) The controlled substances in Dr. Perez's trailers were not properly stored or labelled;

g) Dr. Perez was on notice from HIWU that, if he continued to possess Banned Substances, he would need to provide justification for such possession, which could include evidence of their administration to a Non-Covered Horse.[43]

[43] Final Decision, at paras. 7-4-7.9, 7.26, HAB, Tab 1, pp. 30-31, 33-34.

The Arbitrator found that "Dr. Perez's admission that he did not clean out his trailer following HIWU seminar, establishes sufficient negligence to preclude the Arbitrator from finding No Fault or Negligence."[44] The evidence, however, also included objective factors that the Arbitrator rationally relied on to reduce Dr. Perez's degree of Fault to moderate, and subjective factors that lessened his period of Ineligibility from 17 to 14 months:

a) The ADMC Program was new and no veterinarians, including Dr. Perez, had experience under it;

b) HIWU informed veterinarians that they could possess Thyro-L "if there is justification for them to be in Possession of a Banned Substance and certainly a practice that incorporates Non-Covered Horses," but did not specify that the justification must be "compelling;"

c) As of June 9, 2023, the date of the Thyro-L being found in Dr. Perez's trailer, HIWU had given only one educational presentation at Belmont Park, Dr. Perez's home track; and

d) Dr. Perez came into Possession of the Thyro-L when it was lawful to do so, and there was no evidence that Dr. Perez kept the Thyro-L in his Possession for any improper purpose or used it on a Covered Horse after the implementation of the ADMC Program.

Similarly, in assessing the quantum of fine and contribution toward arbitration costs, the Arbitrator considered relevant factors accruing to Dr. Perez's favor in the exercise of her discretion to set the quantum of the fine. Specifically, the Arbitrator reduced the quantum from a potential fine of $25,000 to only $5,000 in light of "the inexperience of Dr. Perez with the

[44] Final Decision, at para 7.22, HAB, Tab 1, pp. 33.

ADMC Program, the limited training he received, the Agency's lack of clarity, and the absence of any impermissible use of the substance in question or any violation other than the Possession itself."[45] This was a reasonable, rational, and fair conclusion on the evidence, and in fact operated to lessen the sanction that Dr. Perez might have received.

The only argument regarding sanctions that can be discerned from Appellant's Notice of Appeal is a poorly articulated complaint that a veterinarian cannot administer a Banned Substance to a Non-Covered Horse without being subject to sanctions under the ADMC Program. However, as explained by the Authority, and as Dr. Mary Scollay, Chief of Science of the HIWU, confirmed on numerous occasions, including at a seminar on which Appellant relied in his submissions, under ADMC Program Rules, "a veterinarian could be in possession of a Banned Substance 'if there is a justification for them to be in Possession of a Banned Substance' for administration to a Non-Covered Horse(s)."[46] The "compelling justification"[47] for Possession of a Banned Substance may include the administration of the substance to a Non-Covered Horse.

It was not challenged before the Arbitrator that Dr. Perez had attended Dr. Scollay's presentation on March 21, 2023, wherein it was specifically stated that Thyro-L would become a Banned Substance following the implementation of the ADMC Program in May 2023. In fact, Dr. Perez relied before the Arbitrator on an online recording of a similar program held March 24, 2023, where an attendee is heard asking Dr. Scollay about the administration of Banned Substances to a Non-Covered Horse. Dr. Scollay is heard replying:

> But at the end of the day if someone is practicing out in the country, we don't have the authority to control the medications they administer or carry for Non-Covered Horses… **the regulation addresses if there is justification for them to be in**

[45] Final Decision, at para 7.32, HAB, Tab 1, p. 35.
[46] Final Decision at paras. 7.10-7.13, HAB, Tab 1, p. 31, citing ADMC Program Rule 3214(a).
[47] ADMC Program Rule 3214(a).

Possession of a Banned Substance and certainly a practice that incorporates Non-Covered Horses.

There is thus no basis to argue that the situation that Appellant is concerned with was not both written into the ADMC Program and proactively explained to veterinarians by HIWU in advance of the Program's coming into effect.

Nonetheless, the Arbitrator acknowledged that Dr. Scollay had not orally qualified during her presentation that the justification for possession a Banned Substance must be "compelling," *i.e.*, she did not convey the precise wording of Rule 3214(a), or the burden applicable to Covered Persons thereunder.[48] This was a fact relied on by the Arbitrator to find that Dr. Perez bore moderate, rather than significant, Fault.[49]

In summary, the Consequences imposed by the Arbitrator are clearly and demonstrably reasonable and certainly rationally connected to the facts, in fact, the Consequences are as favorable as possible to Dr. Perez under the available evidence. The unchallenged facts demonstrate that Dr. Perez was aware that Thyro-L would become a Banned Substance upon implementation of the ADMC Program, that he was advised to clean his trailer prior to that occurrence, and that the use of Thyro-L on a Non-Covered Horse would potentially serve as a justification to his possession of Thyro-L. Nevertheless, Dr. Perez failed to undertake any kind of cleaning, inventory, or disposal of the medications in his disorganized trailers, and failed to adduce any cogent evidence that would provide proof of his administering or intending to administer Thyro-L to a Non-Covered Horse.

[48] Final Decision at paras. 7.12, HAB, Tab 1, p. 31.
[49] Final Decision at paras. 7.17, HAB, Tab 1, p. 32. This concession to Appellant's degree of Fault was made despite that fact that Dr. Perez, as a Covered Person, has an independent obligation under the ADMC Program be knowledgeable of and comply with the ADMC Program. See ADMC Program Rule 3040(a)(1).

Conclusion

The Final Decision considered and applied the ADMC Program in imposing liability for Possession under Rule 3214(a) and civil sanctions of a 14-month suspension and a $5,000 fine in accordance with ADMC Program Rule 3225(a) and 3223(b). The Consequences are rationally connected to the evidence, and were made on reasonable grounds, with adequate consideration of the circumstances. The Appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY OF JANUARY 2024

/s/*Bryan H. Beauman*

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