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FINA Doping Panel 02/20

FINA Doping Panel

comprised of

Robert Fox (SUI) Chairman
David Lech (CAN) Member
Toshiro Ueyanagi (JPN) Member

In the proceedings against

the athlete **Veronika HRYSHKO**
affiliated to Ukrainian Swimming Federation (USF)

Unrepresented by legal counsel

1. THE PARTIES

1.1 The FEDERATION INTERNATIONALE de NATATION (FINA) is the International Federation governing the sport of Aquatics. FINA has established and is carrying out, *inter alia*, a doping control program, both for in-competition as well as out-of-competition testing.

1.2 The USF is a member of FINA. USF is required to recognize and comply with FINA's anti-doping rules which are set out in the FINA Doping Control Rules ("FINA DC"). The FINA DC is directly applicable and must be followed by Athletes, Athlete Support Personnel, coaches, physicians, team leaders, and club representatives under the jurisdiction of the USF.

1.3 The Athlete is a member of the USF and thus is subject to the jurisdiction of the FINA DC. The Athlete competes in the sport of artistic swimming and was not a minor at the time of the sample collection.

2. NATURE OF THE CASE

2.1 On October 30, 2019, the Athlete provided out-of-competition urine and blood samples at her home in Kharkiv, Ukraine. The sample collection was authorized by FINA as the testing and results management authority. IDTM was the sample collection authority.

2.2 The Athlete's urine sample was sent to the World Anti-Doping Agency ("WADA") accredited laboratory in Seiborsdorf. On December 3, 2019, the Seiborsdorf laboratory reported in an "A" Certificate that the Athlete's urine sample returned an adverse analytical finding ("AAF") for the presence of Furosemide, a specified substance listed under Class S.5 (Diuretic and Masking Agent) of the WADA Prohibited List, 2019. Furosemide is banned at all times.

2.3 By letter dated December 13, 2019, the Athlete and other relevant parties were properly notified by FINA regarding the AAF reported in the “A” Certificate. This letter erroneously purports to be a Notice of Charge and proposes a four year sanction. In fact, it is an Initial Review letter reporting on the AAF. The Athlete promptly waived her right to the “B” sample analysis. In addition, the Athlete admitted the fact of the violation and signed a Voluntary Provisional Suspension on December 23, 2019.

2.4 On January 8, 2020, FINA formally asserted in a Notice of Charge that the Athlete had committed an anti-doping rule violation (“ADRV”) involving the Presence of Furosemide. All confirmatory documents were sent by FINA to the Athlete.

2.5 On January 31, 2020, in response to the Notice of Charge, the Athlete requested a hearing by way of documentary review to determine the sanction, if any, that should apply to her as a result of her admitted ADRV. The Athlete was not able to travel to Lausanne to participate in person but did wish to provide to the Doping Panel her explanations and evidence regarding the ADRV.

2.6 Mr. Robert Fox, Chairman of the FINA Doping Panel, thereafter confirmed the composition of the Doping Panel which would conduct the requested hearing by way of documentary review. The Athlete accepted the proposed composition of the FINA Doping Panel.

3. JURISDICTION AND APPLICABLE RULES

3.1 The jurisdiction of the FINA Doping Panel arises out of the provisions of the FINA Rules C 22.8, C22.9 and FINA DC 8.1.

3.2 The applicable Rules in this case are the FINA Doping Control Rule (DC) in effect since 1st January 2015.

4. MOTIONS AND CONTENTIONS

4.1 The Athlete filed a Defense Brief with explanations and corroborating documents. A summary of the Athlete’s position is set out below. Details of the Athlete’s actual medical condition have been intentionally excluded as they are not relevant to this decision. As will be seen, FINA does not dispute in any significant way the Athlete’s factual account of what caused the ADRV. The Athlete has admitted the ADRV. The issues the Doping Panel must address are: (i) was the Athlete’s conduct intentional, (ii) what are the proper consequences of the admitted ADRV considering the Athlete’s degree of fault, and (iii) is the Athlete entitled to a determination that she acted with No Fault or Negligence?

4.2 In summary, the Athlete’s explanation for the AAF is that she suddenly fell ill and was injected with medicine, including Furosemide, at a local hospital as part of the required medical treatment. Specifically, on October 29, 2019 the Athlete suddenly felt poorly while at her home. She experienced sudden pain and a high fever. The Athlete was very concerned and promptly attended at a local hospital in Kharkiv

where she saw a doctor who was on duty. This doctor correctly diagnosed the Athlete's ailment. The medical diagnosis prepared by the doctor was duly filed.

4.3 Immediately after the diagnosis was provided, the Athlete was told by the doctor that she needed urgent treatment. The Athlete wrote in her Defense Brief that she was told; "...otherwise the consequences may be very bad. I felt really bad and was very scared for my health. I was afraid that if I do not receive immediate cure, I may have complications with my health that can deprive me of an opportunity to continue my sports career. That is why I agreed to take the medicines that the doctor told me to take." The Athlete was given Furosemide 2.0 ml by intravenous at the hospital on October 29, 2019. In addition, she was prescribed various medications including Furosemide 20 mg one time per month.

4.4 The Athlete told the doctor treating her that she participated in elite sports, was subject to strict anti-doping rules and she could not take certain prohibited substances. The doctor was not a specialist in sports medicine. The doctor replied that the medicines he wished to administer were absolutely necessary for her treatment and would not improve her general fitness nor would they enhance her sport performance. As the Athlete was a day patient in the hospital she did not have easy access to a device or the internet to conduct an online search of the proposed medicines. The Athlete knew a search for prohibited substances in whatever she was given was her duty and responsibility as an elite athlete. Instead, as she was sick, worried and vulnerable the Athlete trusted the doctor's assurances that the medicine he was giving her was (i) a proper treatment for her condition and, critically, (ii) the medicine would not breach the strict anti-doping rules she was subject to. The Athlete accepted the proposed treatments.

4.5 On October 30, 2019, the Athlete still felt unwell but had left the hospital. The blood and urine samples were collected from the Athlete at her home that morning.

4.6 The Athlete acknowledges that she received Furosemide at the hospital as part of her emergency medical treatment. However, she insists that she did not cheat nor did she engage in doping. She maintains that she did not intend to enhance her sport performance but, to the contrary, merely wished to protect her health in the medical emergency she faced. The Athlete was ill and was frightened when she trusted the doctor's assurances. For this reason she did not insist on checking the composition of the medicine she was given.

4.7 The Athlete does not blame anyone else for her situation and is regretful for what has happened. The Athlete frankly acknowledges that it was her responsibility to check the composition of all medicine she takes. In the result, the Athlete seeks a sanction of a warning involving no period of ineligibility for the admitted ADRV as she submits she has No Fault or Negligence for the ADRV. Alternatively, if a period of ineligibility is required, the Athlete believes a very short sanction in the range of four months is appropriate.

4.8 FINA was provide with the Athlete's Defense Brief and was invited to respond. FINA filed a Brief outlining its position. FINA agreed that the cause of the AAF was the Furosemide provided to the Athlete at the hospital to treat an urgent medical condition – all as explained by the Athlete. FINA accepts that the concentration of

Furosemide reported in the sample is fully consistent with the application of a 20 ml dose of Furosemide the day prior to the test. FINA also accepts, after consulting with independent third party medical experts, that the treatment the Athlete received was required and was fully appropriate for the diagnosis confirmed by the treating doctor. FINA accepts how the Furosemide entered the Athlete's system.

4.9 Despite the Initial Review correspondence proposing a four year sanction for an ADRV involving a specified substance, no evidence regarding the Athlete's intent was filed by FINA. FINA did not seek to prove that the Athlete acted with intent. Further, FINA accepted in its Brief that the Athlete's fault was not significant with regard to the admitted ADRV (so a sanction below two years is possible). However, FINA submits that an assessment of the Athlete's degree of fault should result in the imposition of a sanction lying on the lower end of the applicable Fault scale, in the range of three to six months of ineligibility.

4.10 FINA submitted in its written Brief that a finding of No Fault or Negligence was not appropriate in this case. FINA submits that the Athlete must receive more than a reprimand for her conduct. FINA raised the following issues with respect to the Athlete's degree of fault:

- Despite her young age the Athlete is an experienced international competitor. She has participated on National teams at major Championships where she has won medals and has been subject to the FINA doping rules for some time.
- The Athlete failed completely to mention the medications she was given at the hospital on the Doping Control Form despite receiving them the day prior to the test - yet she remembered to include other supplements and vitamins she was consuming.
- At no time did the Athlete reach out to FINA or any other expert to fulfil her responsibility to check the composition of all substances entering her body.
- The Athlete failed to apply for a Therapeutic Use Exemption ("TUE").

5. LEGAL DISCUSSION

A. THE FACTS

5.1 The Doping Panel accepts that the underlying cause of the ADRV was precisely as described by the Athlete. The Athlete has provided a credible and believable explanation with all her claims supported by corroborating documentation. FINA agrees with the factual explanation for the ADRV provided by the Athlete and accepts that the treatment the Athlete received was proper and necessary. As a result, no factual matters are in dispute. The Doping Panel is left to determine the appropriate sanction.

B. THE LAW

FINA DC 2.1.1.

It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part

be demonstrated in order to establish an anti-doping rule violation under DC 2.1.

[Comment to DC 2.1.1: An anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as "Strict Liability". An Athlete's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under DC 10. This principle has consistently been upheld by CAS.]

FINA DC 10.2

Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method

The period of Ineligibility imposed for a first violation of DC 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension of sanction pursuant to DC 10.4, 10.5 or 10.6:

DC 10.2.1 The period of Ineligibility shall be four years where:

DC 10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

DC 10.2.1.2 The anti-doping rule violation involves a Specified Substance and FINA or the Member Federation can establish that the anti-doping rule violation was intentional.

DC 10.2.2 If DC 10.2.1 does not apply, the period of Ineligibility shall be two years.

DC 10.2.3 As used in DC 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

FINA DC 10.5

DC 10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

DC 10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of DC 2.1, 2.2 or 2.6.

DC 10.5.1.1 Specified Substances

Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

DC 10.5.1.2 Contaminated Products

In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault. DC 10.5.2 Application of No Significant Fault or Negligence beyond the Application of DC 10.5.1.

If an Athlete or other Person establishes in an individual case where DC 10.5.1 is not applicable that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in DC 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this rule may be no less than eight years.

FINA DC 10.8

Disqualification of Results in Events subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation

In addition to the automatic Disqualification of the results in the Event which produced the positive Sample under DC 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.

[Comment to DC 10.8: Nothing in these Anti-Doping Rules precludes clean Athletes or other Persons who have been damaged by the actions of a Person who has committed an anti-doping rule violation from pursuing any right which they would otherwise have to seek damages from such Person.]

FINA DC Appendix 1:

Fault: *Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as disability, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the*

Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.

[Comment: The criteria for assessing an Athlete's degree of Fault is the same under all Articles where Fault is to be considered. However, under DC 10.5.2, no reduction of sanction is appropriate unless, when the degree of Fault is assessed, the conclusion is that No Significant Fault or Negligence on the part of the Athlete or other Person was involved.]

No Fault or Negligence: *The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of DC 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system*

No Significant Fault or Negligence: *The Athlete or other Person's establishing that his or her Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of DC 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.*

[Comment: For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance.]

C. SANCTION

5.2 The sanction for the presence of Furosemide pursuant to FINA DC 10.2 is a two-year period of ineligibility, unless FINA can establish that the ADRV for the specified substance was caused by the Athlete's intentional conduct. FINA now agrees that the Athlete did not act with intent. FINA accepts that the Athlete did not know that accepting the medical treatment on October 29, 2019 would lead to the ADRV nor was she willfully blind in this regard. This conclusion sets the presumptive sanction at two years pursuant to FINA DC 10.2.2. The potential for a further reduction in sanction is discussed below.

5.3 In this case (which does not involve a minor), the Athlete must prove how the Furosemide entered her system to be at No Significant Fault or Negligence or with No Fault or Negligence for the ADRV. This mandatory requirement is contained in the definitions found in the FINA DC. This legal onus rests on the Athlete.

5.4 The Doping Panel is satisfied that the Athlete has satisfied her onus to prove how the Furosemide entered her system. All parties accept that the Furosemide detected in the Athlete's urine sample was given to the Athlete as part of a valid medical treatment received in hospital on October 29, 2019.

5.5 Further, the Doping Panel is satisfied that the Athlete has satisfied her onus to prove that she is not at Significant Fault or Negligence for the ADRV. The Doping Panel finds that while the Athlete was to a small degree careless in the fulfillment of her anti-doping responsibilities – due to the sudden health crisis – her fault is not significant in relation to the admitted ADRV. FINA does not contest this determination. In consequence, a sanction below two years is possible. What sanction should be imposed?

5.6 While the Doping Panel is sympathetic to the circumstances that faced the Athlete on October 29, 2019, the facts presented and accepted by both the Athlete and FINA do not support a finding that the Athlete was at No Fault or Negligence for the ADRV. A finding of No Fault or Negligence requires that an athlete "did not know or suspect and could not have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered" (emphasis added) the prohibited substance Furosemide. Such a finding is not warranted in this case. The Doping Panel accepts that the Athlete did not know when she agreed to receive the proposed treatment in hospital that doing so would lead directly to her ADRV. However, the Doping Panel is not prepared to find that the Athlete could not have known in the exercise of "utmost caution" that when she was given Furosemide, a prohibited substance, that this would, if she was later tested, result in an ADRV.

5.7 Regardless of her pain and her valid concerns about the state of her health, receiving medication in a hospital to treat a significant medical condition must be the brightest of all 'warning flags' for the Athlete. The starting point should have been the assumption that potent drugs were being provided to her as medical treatment. While the assurances of the diagnosing doctor were well meaning, they were ultimately misguided. The Athlete must not rely on the assurances of third parties – even highly trained professionals.

5.8 In the exercise of "utmost caution" (a high standard indeed) other inquiries could and should have been made by the Athlete before agreeing to accept the proposed treatment. It was not hidden or a secret what medicines were being proposed to treat the Athlete. There was certainly access to digital devices and internet connections at the hospital. A phone was available. A call or email or text to a team doctor, a coach, a trainer, or an informed sport or anti-doping official could have facilitated a fast search and an easy discovery that Furosemide was prohibited for elite athletes at all times. This is a well-known fact. As a result, a finding that the Athlete was at No Fault or Negligence for the ADRV is precluded.

5.9 Despite not being at No Fault or Negligence, the Doping Panel is satisfied that the Athlete's degree of fault for the ADRV is low. FINA's list of issues set out in 4.10 (with the exception of not applying for a TUE – more on that below) have merit. This Athlete, despite being young, is highly experienced and should know that she must take every reasonable step to determine what is going into her system – at all times. In fact, that Athlete accepts this responsibility and freely acknowledges that her conduct was a deviation from the expected standard of behaviour. She has sincerely apologized for this.

5.10 The Doping Panel accepts that forgetting to list on the Doping Control Form the medication she received the day before the sample was collected was likely caused by the ongoing pain, stress and confusion arising from her attendance at the hospital. The Doping Panel does not infer that this inadvertence was an attempt to hide doping conduct. In addition, the Athlete relied to her detriment on a medical professional in a highly stressful situation, which is understandable. On October 29, 2019, the Athlete was in pain and was concerned regarding her health. It is accepted by FINA that the treatment provided (including the Furosemide) was fully appropriate for the Athlete's medical condition.

5.11 Without undertaking a full *Cilic* analysis of the Athlete's degree of fault and the various subjective and objective factors involved, the Doping Panel notes that both FINA and the Athlete have suggested in written submissions that a sanction of four months of ineligibility is a suitable outcome. The Doping Panel agrees. The Athlete's fault is certainly low and her conduct, while careless, can easily be understood within the full context of the hospital visit and her valid health concerns.

5.12 One final point must be raised. It remains unclear to the Doping Panel why a TUE was never applied for. The Furosemide was given to the Athlete in the course of an emergency medical intervention. Especially so as the sample collection leading to the ADRV was the following day – with no reasonable time to acquire a valid TUE. The facts submitted by the Athlete and accepted by FINA as accurate cry out for a TUE application by the Athlete with retroactive effect. The only conclusion to draw is that the Athlete was very poorly advised and/or perhaps never knew that such relief with a TUE was even possible.

5.13 While every TUE application must be judged on its merits by the relevant TUE Committee, a successful TUE application with retroactive effect (if granted) would have eliminated the Athlete's ADRV and sanctions. Why was a TUE never sought? It seems a significant failure in either education or process (or both) to the great detriment of the Athlete. Unfortunately, the Doping Panel is not authorized to make determinations of TUEs (or evaluate at this hearing what might have been decided if a TUE application had been submitted).

5.14 The Doping Panel's concern, and thus our desire to comment, is based on our assessment that we have been asked to impose a sanction for an ADRV that could perhaps have been totally avoided. It is very unfortunate indeed that no person or entity stepped forward to assist a young and unrepresented athlete to navigate through the complexities of the FINA DC.

6. CONCLUSION

6.1 Ms. Veronika HRYSHKO is found to have committed an ADRV under FINA DC 2.1, presence of a prohibited substance Furosemide in an athlete's sample (Class S5 of the WADA Prohibited List, 2019 – Diuretic and Masking Agents).

6.2 Ms. Veronika HRYSHKO is sanctioned with **a four month ineligibility period** in accordance with FINA DC 10.5.1.1. The sanction starts on 23 December 2019, the day her voluntary provisional suspension commenced and ends on 24 April 2020.

6.3 All results obtained by Ms. Veronika HRYSHKO from 30 October 2019, shall be annulled together with the consequences thereof which shall include the forfeiture of any medals, points, prizes or the reimbursement of prize-money.

6.4 All costs of this case shall be borne by the Ukrainian Swimming Federation in accordance with FINA DC 12.3.

6.5 Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland not later than twenty one (21) days after receipt of the complete and reasoned judgement (FINA Rule C 12.11.4 and DC 13).

FINA Doping Panel Chairman

A handwritten signature in black ink, appearing to read 'R. Fox', with a stylized, cursive script.

Robert Fox