

## **DECISION**

issued by the

### **IRISH SPORT ANTI-DOPING APPEAL PANEL**

sitting in the following composition:

Chairperson: Mr. Seamus Woulfe, Senior Counsel

Panel Member: Dr. Mary O'Flynn Flannery

Panel Member: Mr. Warren Deutrom

Secretary to the Panel: Mr. Jonathan Moore, Barrister

in the disciplinary proceedings between

**BRENDAN O'SULLIVAN**

Appellant

and

**GAELIC ATHLETIC ASSOCIATION**  
**(Governing Body)**

Respondent

## A. Introduction

1. By a decision of the 27<sup>th</sup> February 2017, the GAA Anti-Doping Hearing Committee (the "Committee") concluded that Mr. Brendan O'Sullivan, an Athlete engaged in the sport of Gaelic football, committed a violation of Article 2.1 of the Irish Anti-Doping Rules (the "Rules") by reason of the presence of a prohibited substance, namely, Methylhexaneamine ("MHA"), in a sample provided by the Athlete on the 24<sup>th</sup> April 2016. Under Article 10.1.1 of the Rules (2015 version), the sanction for a violation of Article 2.1 is a period of ineligibility. For a violation involving a specified substance (as in this case) which was not intentional, the relevant period of ineligibility is 2 years (Article 10.1.2). The Panel determined that violation in this case was not intentional.
2. In the circumstances of this case, the Athlete argued that the two year period should be reduced on the grounds of "no significant fault or negligence". This is dealt with in Article 10.4 of the Rules. In particular the Athlete relies on the provisions of Article 10.4.1.2 which provides as follows:

### *"Contaminated Products*

*In cases where the Athlete ... 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, 2 years ineligibility, depending on the Athlete's ... degree of fault. Except in the case of a minor, in order to establish no significant fault or negligence for any violation of Article 2.1, the Athlete must also establish how the prohibited substance entered his or her system".*

3. Dealing with the required elements of Article 10.4.1.2 before the Hearing Committee, on the basis of the evidence provided by the Athlete including an expert report from the L.G.C. Laboratory dated the 18<sup>th</sup> July 2016, Sport Ireland and the Governing Body accepted the following matters:
  - (a) The Athlete's explanation as to how the MHA entered his system;
  - (b) That MHA was not disclosed on the label of the supplement which gave rise to the MHA entering the Athlete's system;
  - (c) That a reasonable internet search would not have disclosed that MHA was present in the supplement and that the Athlete established that he carried out a reasonable internet search and that he bears no significant fault or negligence.
4. While it was a matter for the Committee to come to its own conclusions on each of these matters having heard the evidence and considered the papers in the matter, the Committee also accepted each of the above matters. That being so the issue for the Committee was to determine an appropriate sanction pursuant to Article 10.4.1.2, ranging from, at a minimum, a reprimand and no period of ineligibility, and at a maximum 2 years ineligibility. The determination of this issue depended upon the Committee's assessment of the Athlete's degree of fault, in circumstances where there was already a pre-existing finding that any such degree of fault did not amount to significant fault.
5. The Committee determined that the appropriate period of ineligibility should be 6 months (26 weeks). The Athlete having already served 11 weeks of suspension, he was therefore required to serve a further period of 15 weeks, commencing from the date of his last participation in the Kerry County Senior Football team panel.

6. The Athlete filed a Notice of Appeal dated the 16<sup>th</sup> March 2017 against the decision of the Committee, which Notice of Appeal was directed to the Chair of the Irish Sport Anti-Doping Disciplinary Panel.<sup>1</sup> The Chair of the Irish Sport Anti-Doping Disciplinary Panel (Mr. Michael M. Collins S.C.) appointed three members of the Panel to determine the appeal, being Mr. Seamus Woulfe S.C. , Dr. Mary O'Flynn Flannery and Mr. Warren Deutrom.
7. In the Athlete's Notice of Appeal dated the 6<sup>th</sup> March 2017 it was stated that the Athlete did not appeal the Committee's decision that an Anti-Doping Rule violation was committed, but he wished to appeal the consequences of the 6 month suspension imposed by the Committee. By letter dated the 24<sup>th</sup> March 2017 the Athlete's Solicitors, Daly Derham Donnelly, confirmed that the Athlete would not be calling witnesses at the appeal and was satisfied to proceed with an appeal on the record. Written Submissions on behalf of the Governing Body in response to the Athlete's Notice of Appeal were submitted by Reddy Charlton Solicitors dated the 27<sup>th</sup> March 2017.
8. The hearing of the appeal took place on the 30<sup>th</sup> March 2017.

**B. Factual Background**

9. The factual findings made by the Committee are not in dispute to any great extent, and are set out fully in the Committee's decision. They may be briefly summarised as follows.
- 9.01 The Athlete in these proceedings is Mr Brendan O'Sullivan. He is a member of the Gaelic Athletic Association who plays Gaelic football for

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<sup>1</sup> Pursuant to Article 13.2.9 of the Rules.

his Club, Valentia Young Irelanders, who are a 4<sup>th</sup> Division team in South West Kerry. It appears that in 2015 he came to the attention of the Kerry County Senior Team Selectors because of his performances for South Kerry in the Kerry County Championship. He was selected to play in a McGrath Cup game for Kerry against Clare on 10 January 2016. He made a sufficient impression that he remained in the squad throughout that competition and the ensuing National League. He played in all of the League games up to the Final (primarily as a substitute). He also gave evidence in the course of the Hearing that he played freshers football for UCC and played at Sigerson level for 4 years with Cork Institute of Technology ('CIT') where he completed a Master's Degree in Marketing, having taken a Primary Degree in Business.

- 9.2 The Athlete confirmed that on joining the Kerry team he was provided with a Supplement regime by the Kerry Nutritionist, Mr Kevin Beasley. He was told that all the products provided and supplied had been checked for contaminated products or prohibited substances.
- 9.3 One of the nutrients provided was a caffeine gel. He said that the gel did not agree with him because of the taste and he was rarely able to finish a full sachet.
- 9.4 In the run-up to the National League Final, a casual friend whom he knew from attending a gym suggested to him that he purchase a caffeine tablet, a product which turned out to be known as Falcon Labs Oxy Burn Pro. In the week before the Final, he purchased a container of these tablets in a vitamin shop in Cork which sells a range of fitness supplements. In his further evidence to the Appeal Panel the Athlete stated that he went to the vitamin shop and saw the container of caffeine tablets up on the shelf and read the label, and asked the person in the shop was this a caffeine tablet, and asked him is it okay and he said it's okay. After buying the product he conducted an Internet search. He

went on Google, typed in the name of the company, typed in the product and typed in all of the ingredients. Nothing in the search flagged any concern about the contents so he presumed it was safe to take. As far as he was concerned, he said it was like substituting a caffeine tablet for caffeine gel. As regards the finding that the Athlete established that he carried out a reasonable internet search, which finding was accepted by the Committee, the Appeal Panel would add the following comment. In his further evidence to the Appeal Panel the Athlete stated that he didn't know what he expected to find when he googled each one of the list of ingredients individually. He presumed the google search would have said that a particular ingredient was a prohibited substance under WADA Rules. However he was not sure whether the google search would tell him something was prohibited but he supposed it could have.

- 9.5 On the day of the game, he confirmed that he took some caffeine gel and Pre-fuel before the start of the match. He also gave evidence that he took a caffeine tablet from the product he had purchased both before the game and at half time.
- 9.6 When he was asked to provide a sample after the game, he made a declaration of medication/supplements he had taken in the past 14 days. He listed one medication and eight supplements as follows:-

- Augmentin
- Whey Protein
- Pharmaton
- Pre-fuel
- Caffeine Tablets
- Caffeine Gel
- Vitamin C
- Krill Oil
- Magnesium

The caffeine tablet was in fact the Oxyburn Pro and it is accepted that this was the source of the MHA.

- 9.7 When asked about the remaining items, he indicated that he had been prescribed Augmentin by his General Practitioner because of a cold he had prior to the Semi-final which was either one or two weeks prior to the Final. Because the cold had not fully abated, he took the Augmentin which is an antibiotic. He indicated that caffeine gel, the Pre-fuel and the Pharmaton had been nutrients provided by the Kerry Nutritionist but that he had been taking some of the vitamins, namely, Vitamin C, Krill Oil and Magnesium on his own account and had been familiar with these prior to joining the Kerry team. Indeed when pressed he seemed to indicate that he had been taking Krill Oil, Magnesium, Vitamin D and Pharmaton before he had joined the Kerry set up and the main new nutrient was in fact the caffeine.

**C. The Decision of the GAA Anti-Doping Hearing Committee**

10. At the start of their Ruling the Committee set out the definition of "fault" contained in the Appendix to the Rules. Fault is defined as follows:

*"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 circumstances such as impairment; 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 standards of behaviour. Thus, for example, the fact that an athlete would lose the opportunity to earn large sums of money during a period of ineligibility, the fact that the athlete only has a short time left in his/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 10.4.1 or 10.4.2"*

11. In coming to a final conclusion on the Athlete's degree of fault, the Committee stated (at paragraph 7.12) that it took the following matters into account in favour of the Athlete.

- He did not intend to take a prohibited substance
- There clearly was an element of confusion about the extent to which the Kerry County Board provided education to the Athlete
- This was only his first year as a senior county player. We do not pay significant weight to this factor but we consider it relevant having regard to the confusion to which we referred above which may have contributed to the Athlete's lack of care.
- After purchasing the relevant tablets, the Athlete carried out a reasonable internet search which did not disclose any prohibited substance thereby complying with his minimum obligation under 1.4.6
- The Athlete admitted his offence and engaged with Sport Ireland



- He has satisfied us as to how the prohibited substance came to be ingested.

12. The Committee then went on to state (at paragraph 7.13) that these positive factors have to be balanced against the following negative factors:

- The Athlete is a highly educated, intelligent and mature man. Even if not aware of the details of Anti-doping Rules, he was aware of their existence.
- He was also aware of an obligation to check nutrients that had not been provided or cleared by the Kerry County Board
- He was obviously someone very familiar and accustomed with the use of nutrients as evidenced by the fact that he used them before joining the Kerry panel and by the number of nutrients disclosed in his Anti-doping Form. The range of nutrients taken by the Athlete could only be described as an example of poly-pharmacy.
- He chose to act on the recommendation of a casual friend with no purported expertise and accept her recommendation to purchase Oxy Burn Pro.
- He did not heed the warning on the container that it was mandatory to consult a physician before using the product.
- He did not consult with or check with the Kerry Team Nutritionist before ingesting the tablet.

- He did not seek the advice of his own General Practitioner whom he had seen within 2 weeks of the test, the pharmacist who provided him with Augmentin or with his Kerry Team doctor.

13. In all of the circumstances the Committee considered that the minimum appropriate period of ineligibility should be one of 6 months, which they rounded off to 26 weeks. They pointed out that on the relevant scale this was a quarter of the maximum penalty when no significant fault or negligence had been established.

**D. The Hearing on the 30<sup>th</sup> March 2017**

(a) Parties present:

14. The hearing took place on the 30<sup>th</sup> March 2017. The composition of the Appeal Panel at the hearing was Mr. Seamus Woulfe S.C., (the Chair of the Panel), Dr. Mary O'Flynn Flannery (Medical Practitioner) and Mr. Warren Deutrom (Sports Administrator). Mr. Paul Derham of Daly Derham Donnelly Solicitors appeared on behalf of the Athlete, Mr. O'Sullivan. Mr. Paul Keane of Reddy Charlton Solicitors appeared on behalf of the Governing Body, accompanied by Ms. Laura Graham and Mr. William Tarrant. Mr. Fergal McGill and Mr. Gearoid Devitt also appeared on behalf of the Governing Body. Ms. Siobhan Leonard attended on behalf of Sport Ireland. Mr. Jonathan Moore B.L. attended as Secretary to the Appeal Panel.

(b) Evidence and Submissions:

15. At an early stage of the hearing it was noted by the Chair that it had been agreed in principle between the parties that this would be an appeal on the record. However, the Appeal Panel requested that Mr. O'Sullivan

might give some limited further oral evidence by way of clarification on a couple of issues. In due course Mr. O'Sullivan did give some further unsworn evidence, particularly in relation to the circumstances surrounding his purchase of the caffeine tablets.

16. Mr. Derham and Mr. Keane made various detailed and helpful submissions about the appropriateness or otherwise of the consequences imposed by the Hearing Committee, and the Appeal Panel has given very careful consideration to all of these Submissions. These Submissions include reference to a body of existing cases dealing with the issues arising, and the Panel was grateful for the helpful Submissions on the relevant precedents, but ultimately the Panel was of the view that the determination of this Appeal turned very much on the facts of this specific case, and the previous cases were ultimately of limited value.

**E. Determination on the Athlete's Degree of Fault**

17. As was the case before the Committee the net issue for the Appeal Panel was to determine an appropriate sanction pursuant to Article 10.4.1.2 ranging from, at a minimum a reprimand and no period of ineligibility, and at a maximum two years ineligibility. The determination of the issue again depends upon our assessment of the Athlete's degree of fault in circumstances where there has already been a significant pre-existing finding that any such degree of fault does not amount to significant fault.
18. The Appeal Panel's assessment of the Athlete's degree of fault depends upon weighing up the type of matters which the Committee took into account in favour of the Athlete as against the type of negative factors which went on balance against the Athlete, as set out at paragraphs 11 and 12 above. The Appeal Panel notes that any positive and negative factors must be seen against the backdrop of the definition of faults set out in the Appendix to the Rules, as previously quoted at paragraph 10

above. This definition states that 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's degree of fault include, for example, the Athlete's experience, and 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. It appears to follow from the second of these factors that if the degree of risk that should have been perceived by the Athlete is held to be relatively low, then the level of care and investigation exercised by the Athlete may also be relatively low in relation to that relatively low perceived level of risk.

19. The Appeal Panel then considered the positive facts taken into account in favour of the Athlete. The Appeal Panel attached particular weight to the following factors. As regards the statement that this was only the Athlete's first year as a Senior County player, this was clearly a factor suggesting a lower degree of fault. As regards the Committee's statement that there clearly was an element of confusion about the extent to which the Kerry County Board provided education to the Athlete, the Appeal Panel felt that this was something of an understatement and that the evidence suggested an inadequate provision of education by the County Board to the Athlete. This was clearly relevant in suggesting a lower degree of risk which should have been perceived by the Athlete, and a consequent lower level of care in investigation by the Athlete in relation to that perceived level of risk. The Appeal Panel also took into account the fact that the Athlete had admitted his offence and engaged with Sport Ireland.
20. As regards the negative factors which were taken into account by the Committee against the Athlete, the Appeal Panel would comment as follows. The Committee stated that the Athlete was aware of an obligation to check nutrients that had not been provided or cleared by the

Kerry County Board, but the Appeal Panel was of the view that this was not clearly established by the evidence. The Committee stated that the Athlete did not seek the advice of his own G.P. whom he had seen within two weeks of the test, the pharmacist who provided him with Augmentin or with his Kerry team doctor. The Appeal Panel was doubtful as to how realistic or reasonable it was for the Athlete to seek such advice and was dubious about whether any or much weight should be attached to this factor.

21. In all of the circumstances the Appeal Panel considered that the Committee may have given slightly too much weight to the negative factors and not quite enough weight to the positive factors in favour of the Athlete. We considered that the period of ineligibility posed by the Committee of 26 weeks should be reduced to 21 weeks. The Athlete was provisionally suspended on the 13<sup>th</sup> May 2016, until that provisional suspension was lifted on the 28<sup>th</sup> July 2016 having served 11 weeks suspension. By the 9<sup>th</sup> April 2017 the Athlete had served a further period of six weeks suspension since the decision of the Committee on the 27<sup>th</sup> February 2017. Accordingly, the Athlete was directed by letter from the Appeal Panel dated the 7<sup>th</sup> April 2017 to serve a further four weeks suspension from Sunday the 9<sup>th</sup> April 2017. In accordance with Article 10.8.2 of the Rules, the Athlete was permitted to return to training with immediate effect.
22. Before concluding the Appeal we wish to comment as follows in relation to the issue of Anti-Doping Education. The Panel is of the opinion that while the level of Athlete knowledge at any level, professional or amateur, should be generally high around the unacceptability of intentional doping offences or missing tests, it is less certain about the level of knowledge of Athletes around unintentional doping offences. Indeed, a recurring theme for the Irish Sport Anti-Doping Disciplinary Panel for sanctions around 'no significant fault' is the level of knowledge

and understanding (or lack thereof) of Athletes around the extent to which they must make **strenuous** efforts not to ingest a prohibited or specified substance unintentionally in order to reduce/eliminate a sanction.

23. Sport Ireland makes significant efforts within its resources to ensure NGBs are well informed about the dangers of doping to enhance performance. However, if there is a lack of awareness around ingesting specified substances by an Athlete from a major team in a major sport with significant sports medicine resources, one wonders of the potential awareness deficit in a lesser team of a minor sport with limited human or financial resources? With both ends of the spectrum subject to the same set of Rules, the Panel believes that this is a matter which Sport Ireland might consider more thoroughly in consultation with NGBs.

**F. Concluding Comments**

24. The Appeal Panel wishes to thank its secretary, Mr. Jonathan Moore B.L., for his great assistance relating to these Appeal proceedings. The Appeal Panel would also thank the parties and participants in the Appeal proceedings for their assistance.

Dated the 31<sup>st</sup> day of May, 2017.



Signed on behalf of the Panel by  
Seamus Woulfe, Chairperson