

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between

United States Anti-Doping Agency,

Claimant

and

Mark Jelks,

Respondent

Re: AAA No. 77 190 00074 12

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR (the “Arbitrator”), having been designated by the above-named parties, and having been duly sworn and having duly heard the proofs, arguments, and allegations of the parties, and, after an evidentiary hearing held by telephone conference call on April 18, 2012, (the “Hearing”) and declared closed on April 30, 2012, does hereby render this reasoned award pursuant to the undertaking to do so by May 30, 2012.

1. PARTIES

1.1 Claimant, United States Anti-Doping Agency (“USADA”), is the independent anti-doping agency for Olympic sports in the United States and is responsible for conducting drug testing and any adjudication of positive test results pursuant to the United States Anti-Doping Agency Protocol for Olympic and Paralympic Movement Testing, effective as revised January 1, 2009 (“USADA Protocol”).

1.2 Respondent, Mark Jelks, is a 28-year-old elite track & field athlete registered with USA Track & Field (“USATF”) and the International Association of Athletics Federation (“IAAF”). He has been in the Registered Testing Pool (“RTP”) for international athletes since 2005. He appeared to submit his evidence to the Arbitrator.

1.3 At the Hearing, Claimant was represented by William Bock and C. Onye Ikwuakor of USADA, 5555 Tech Center Drive, Suite 200, Colorado Springs, CO 80919.

1.4 At the Hearing, Respondent was represented by Michael Straubel, Esq., Director, Valparaiso University Sports Law Clinic, 510 Freeman Street, Heritage Hall, Valparaiso, IN 46383, and Brenda Ambrosius, Robert Holub, and Lisa Hurdle, third year law students at Valparaiso University permitted under Indiana law to provide supervised client representation.

1.5 The Arbitrator commends counsel for both parties for their briefing and oral presentations. He was particularly impressed with the research undertaken, and the examination of witnesses conducted by the Valparaiso University law students. The Arbitrator appreciates the forthright manner in which the Respondent appeared and provided his testimony. Lastly, the Arbitrator found the testimony of all the witnesses informative and credible, and thanks each of them for their participation in the Hearing.

2. **JURISDICTION**

2.1 The Arbitrator's jurisdiction over this dispute is pursuant to an undated Arbitration Agreement between Claimant and Respondent whereby the parties agreed to submit this matter to arbitration. A recitation of the Arbitration Agreement may be found at Section 5. There was no objection made to the hearing of this matter by USATF, IAAF or the World Anti-Doping Agency ("WADA").

2.2 Upon agreeing to arbitrate, this matter was deemed to fall under the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §220501, *et seq.* (the "Act"), because this is a controversy involving Respondent's opportunity to participate in national and international competition representing the United States.¹

¹ 36 U.S.C. §220521, *et. seq.*

2.3 Under its authority to recognize a National Governing Body (“NGB”)², the United States Olympic Committee (“USOC”) established its National Anti-Doping Policies,³ the latest version of which is effective January 1, 2009 (“USOC Policies”), which, in part, provide:

. . . NGBs shall not have any anti-doping rule which is inconsistent with these policies or the USADA Protocol, and NGB compliance with these policies and the USADA Protocol shall be a condition of USOC funding and recognition.⁴

2.4 Regarding athletes, the USOC Policies provide:

. . .By virtue of their membership in an NGB or participation in a competition organized or sanctioned by an NGB, Participants agree to be bound by the USOC National Anti-doping Policies and the USADA Protocol.⁵

2.5 In compliance with the Act, Section 15a. of the USADA Protocol provides that hearings regarding doping disputes “will take place in the United States before the American Arbitration Association (“AAA”) using the Supplementary Procedures.”⁶

3. **PROCEDURAL MATTERS**

3.1 The Arbitrator and the parties held a Preliminary Hearing by telephone conference call on March 26, 2012, to consider various evidentiary and procedural stipulations. The Arbitrator issued an order on March 26, 2012 establishing the briefing schedule, the Hearing date and location, and addressing certain matters related to the Hearing.

² 36 U.S.C. §220505(c)(4).

³ The USOC has adopted the WADA Code.

⁴ *USOC Policies*, ¶12.

⁵ *Id.* at ¶11.

⁶ The supplementary procedures refer to the American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes, as approved by the USOC’s Athletes’ Advisory Council and NGB Council. 36 U.S.C. §220522.

3.2 The parties entered into a Stipulation of Uncontested Facts and Issues between USADA and Mark Jelks dated April 3, 2012, a recitation of which may be found at Section 5.

3.3 The evidentiary Hearing was conducted on April 18, 2012, via conference telephone call.

3.4 The following individuals testified via telephone at the Hearing on behalf of the Respondent: Mark Jelks, Albert Hobson, Tonya Jelks and Amanda Gaiton.

3.5 All exhibits filed with the parties' pre-hearing briefs were admitted into evidence. The parties made opening statements, closing arguments, and examined the Respondent and witnesses. The parties and witnesses responded to the questions of the Arbitrator. The parties provided in a timely manner the Post Hearing Supplemental Briefs requested by the Arbitrator and the Hearing was closed on April 30, 2012.

4. **RULES APPLICABLE TO THIS DISPUTE**

The rules related to the outstanding issues in this case are as follows:

4.1 Applicable provisions of the World Anti-Doping Code (2009 Version) ("WADA Code"):

Article 2.4: Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing, including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the Athlete shall constitute an anti-doping rule violation.

Article 3.1: *Burdens and Standards of Proof:* The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified

facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Article 10.4 and 10.6 where the Athlete must satisfy a higher burden of proof.

Article 10.3.3: For violations of Article 2.4 (Whereabouts Filing Failures and/or Missed Tests), the period of Ineligibility shall be at a minimum one (1) year and at a maximum two (2) years based on the Athlete's degree of fault.

Article 10.5: Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances.

10.5.1: *No Fault or Negligence:* If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.

10.5.2: *No Significant Fault or Negligence:* If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility may be reduced, 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 Article may be no less than eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1(Presence of a Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

4.2 Applicable provisions of the IAAF Anti-Doping Regulations (2011 Edition)

Results Management of Whereabouts Failures

6.1 The results management process in respect of an apparent Filing Failure shall be as follows:

- (a) If it appears that all of the requirements in paragraph 2.25 relating to Filing Failures are satisfied, then no later than 14 (fourteen) days after the date of discovery of the apparent Filing Failure the IAAF (or other responsible Anti-Doping Organization) must send notice to the Athlete in question of the apparent Filing Failure, inviting a response within 14 (fourteen) days of receipt of the notice. In the notice, the IAAF (or other responsible Anti-Doping Organization) should warn the Athlete:

- (i) that, unless the Athlete persuades the IAAF (or other responsible Anti-Doping Organization) that there has not been any Filing Failure, then (subject to the remainder of the results management process set out below) an alleged Whereabouts Failure will be recorded against the Athlete; and
- (ii) of the consequences to the Athlete if a hearing panel upholds the alleged Whereabouts Failure.
- (b) Where the Athlete disputes the apparent Filing Failure, the IAAF (or other responsible Anti-Doping Organization) must re-assess whether all of the paragraph 2.25 requirements are met. The IAAF (or other responsible Anti-Doping Organization) must advise the Athlete, by letter sent no later than 14 (fourteen) days after receipt of the Athlete's response, whether or not it maintains there has been a Filing Failure.
- (c) If no response is received from the Athlete by the relevant deadline, or if the IAAF (or other responsible Anti-Doping Organization) maintains (notwithstanding the Athlete's response) that there has been a Filing Failure, the IAAF (or other responsible Anti-Doping Organization) shall send notice to the Athlete that an alleged Filing Failure is to be recorded against him. The IAAF (or other responsible Anti-Doping Organization) shall at the same time advise the Athlete that he has the right to an administrative review of that decision;
- (d) Where it is requested by the Athlete, such administrative review shall be conducted by the IAAF Anti-Doping Administrator (or his designee) who will not have been involved in the previous assessment of the alleged Filing Failure. The review shall be based on written submissions only, and shall consider whether all of the requirements of paragraph 2.25 are met. If necessary, the Athlete may be asked to provide further information to the IAAF Anti-Doping Administrator (or his designee). The decision of the IAAF Anti-Doping Administrator (or his designee) as to whether a Filing Failure is maintained shall be notified to the Athlete within 21 (twenty-one) days of receipt of the Athlete's complete written submission or of any further information to be provided by the Athlete, whichever is the later;
- (e) If it appears, upon such review, that the requirements of paragraph 2.25 have not been met, then the alleged Filing Failure shall not be treated as a Whereabouts Failure for any purpose; and
- (f) If the Athlete does not request an administrative review of the alleged Filing Failure by the relevant deadline, or if the administrative review leads to the conclusion that all of the requirements of paragraph 2.25 have been met, then the IAAF (or other responsible Anti-Doping Organization) shall record an alleged Filing Failure against the Athlete and shall notify the Athlete and (on a confidential basis), his National Federation, WADA and all other

relevant ADOs (including the IAAF if the Filing Failure is recorded by another ADO) of that alleged Filing Failure and the date of its occurrence.

6.2 The results management process in the case of an apparent Missed Test shall be as follows:

- (a) The DCO shall file an Unsuccessful Attempt Report with the IAAF (or other Testing authority), setting out the details of the attempted Sample collection, including the date of the attempt, the location visited, the exact arrival and departure times at the location, the step(s) taken at the location to try to find the Athlete, including details of any contact made with third parties, and any other relevant details about the attempted Sample collection.
- (b) If it appears that all of the paragraph 2.28 requirements relating to Missed Tests are satisfied, then no later than 14 (fourteen) days from the date of receipt of the Unsuccessful Attempt Report, the IAAF (or other responsible Anti-Doping Organization) must send notice to the Athlete of the unsuccessful attempt, inviting a response within 14 (fourteen) days of receipt of the notice. In the notice, the IAAF (or other responsible Anti-Doping Organization) should warn the Athlete:
 - (i) that, unless the Athlete persuades the IAAF (or other responsible Anti-Doping Organization) that there has not been any Missed Test, then (subject to the remainder of the results management process set out below) an alleged Missed Test will be recorded against the Athlete; and
 - (ii) of the consequences to the Athlete if a hearing panel upholds the alleged Missed Test.
- (c) Where the Athlete disputes the apparent Missed Test, the IAAF (or other responsible Anti-Doping Organization) must re-assess whether all of the paragraph 2.28 requirements are met. The IAAF (or other responsible Anti-Doping Organization) must advise the Athlete, by letter sent no later than 14 (fourteen) days after receipt of the Athlete's response, whether or not it maintains that there has been a Missed Test.

4.3 Applicable provision of the USADA Protocol

Section 11e.

Within ten (10) days following the date of such notice [i.e., notice of alleged violation and sanction sought], the Athlete or other Person must notify USADA in writing if he or she desires a hearing to contest the sanction sought by USADA. The Athlete or other Person shall be entitled to a five (5) day extension if requested within such ten (10) day period. If the sanction is not contested in writing within such ten (10) or fifteen (15)

day period, then the sanction shall be communicated by USADA to the Athlete or other Person, USOC, the applicable NGB, IF and WADA and thereafter imposed by the NGB. Such sanction shall not be reopened or be subject to appeal unless the Athlete or other Person can demonstrate by a preponderance of the evidence in a subsequent appeal to the Court of Arbitration for Sport (“CAS”) that he or she did not receive either actual or constructive notice of the opportunity to contest the sanction. The Athlete or other person may also elect to avoid the necessity for a hearing by accepting the sanction imposed by USADA. If the sanction is contested by the Athlete or other person, then a hearing shall be conducted pursuant to the procedures set forth below in Sections 14 and 15.

5. FACTS

5.1 Claimant, USADA, is the independent anti-doping agency for Olympic Movement sports in the United States and as such is responsible for adjudication of potential Whereabouts Filing Failures.

5.2 Respondent, Mark Jelks, is a member of the USA Track & Field and the International Association of Athletics Federation. Currently, Mr. Jelks resides in Kansas City, Kansas with his fiancée, Amanda Gaiton, and his two-year-old son, Gabriel. He is currently training with his coach, Al Hobson, and training partner, Dexter Faulk, at Kansas City Kansas Community College. He has been in the Registered Testing Pool for international athletes since 2005. Mr. Jelks had consistently complied with the United States Anti-Doping Agency (USADA) Whereabouts Filing policy from 2005 until his first missed filing in 2009.

5.3. Prior to the Hearing, the parties executed an Arbitration Agreement and a Stipulation of Uncontested Facts and Issues between the United States Anti-Doping Agency and Mark Jelks, the text of both which follows:

Arbitration Agreement

Mark Jelks received an anti-doping rule violation for three whereabouts failures within an eighteen (18) month period. Mr. Jelks did not respond to USADA’s written communications concerning his rule violation. Accordingly, on August 30, 2010, USADA announced that Mr. Jelks had been suspended for a period of two years commencing on August 23, 2010.

Subsequent to the deadline for appealing his anti-doping rule violation and after more than one half of his period of ineligibility had been served, Mr. Jelks contacted USADA requesting a reduction in his period of ineligibility and providing an explanation of exigent circumstances that, if timely raised, might have led USADA to seek less than two years ineligibility for Mr. Jelks' rule violation.

In order to allow Mr. Jelks' factual and legal claims for a reduction in his period of ineligibility to be evaluated by a single arbitrator in a cost-effective manner USADA and Mr. Jelks have agreed as follows:

1. Mr. Jelks does not contest his anti-doping rule violation commencing on August 23, 2010, due to three whereabouts failures and will not challenge the violation or the initial one year period of ineligibility served by Mr. Jelks.

2. Mr. Jelks' request for a reduction in his period of ineligibility shall be heard in a telephonic hearing consisting of no more than 3 hours for Mr. Jelks' case in chief for the sole purpose of the single arbitrator determining whether a factual and legal basis exists for reducing Mr. Jelks' period of ineligibility for his anti-doping rule violation. Cross-examination shall not count against said three hours.

3. The sole arbitrator to hear this matter has been agreed by the parties to be Paul George.

4. USADA does not concede that either a factual or legal basis exists for reducing Mr. Jelks' period of ineligibility.

5. Any award issued by Mr. George is not appealable to the Court of Arbitration for Sport by Mr. Jelks or USADA but may be appealed by the International Association of Athletics Federations ("IAAF") or the World Anti-Doping Agency ("WADA") as if this matter arose under the USADA Protocol.

6. In terms of substantive law and procedural rules, this matter shall be governed by the USADA Protocol and Annexes thereto and by the IAAF rules.

Stipulation of Uncontested Facts and Issues Between the United States
Anti-Doping Agency and Mark Jelks

The United States Anti-Doping Agency ("USADA") and Mr. Mark Jelks stipulate and agree, for purposes of all proceedings involving the sanction that Mr. Jelks Received for having three whereabouts failures within an eighteen (18) month period, the following:

1. That the rules applicable to this matter are the mandatory provisions of the World Anti-doping Code, the IAAF Anti-Doping Rules, and the USADA Protocol for Olympic and Paralympic Movement Testing ("Protocol");

2. That USADA properly followed the World Anti-Doping Code rules applicable to “whereabouts” filing requirements in that its notice of missed filing to Mr. Jelks and its notice of an opportunity to challenge his three whereabouts failures in an eighteen month period were properly done;

3. That under section 11e. of the USADA Protocol, USADA was permitted to impose a sanction against Mr. Jelks when he failed to contest the sanction sought by USADA;

4. That in other “3 Whereabouts Failures” cases, it has been USADA’s practice, when an athlete responds to such a charge, to impose a one (1) year suspension;

5. That the Arbitrator only has the jurisdiction to consider whether to reduce Mr. Jelks’ period of ineligibility because both USADA and Mr. Jelks have agreed to this process due to the unique circumstances of this case.

5.4 Mr. Jelks grew up in Merrillville, Indiana, with his mother and three siblings. Mr. Jelks competed in track and field throughout high school and after his graduation in 2004 was recruited by Coach Hobson to train and compete at Kansas City Kansas Community College. In addition to coaching, Coach Hobson acted as a father-figure to Mark and assisted him when he turned professional in 2005. At the 2005 Texas Relays, Mark ran his personal best in the 100 meters and was signed by Nike, Inc. to a representation contract.

5.5 In 2007, Mr. Jelks qualified to represent the United States in the World Championships in Osaka, Japan. While warming up for the 100 meter race on the first day of competition, Mr. Jelks caught a spike in the track and broke his shin in three places and tore his syndesmosis ligament, which connects the knee to the ankle. Not realizing how badly he was injured, Mr. Jelks ran the race while in excruciating pain, and was then taken to the hospital to have his leg set. Mr. Jelks received a bonus from his Nike contract for competing on a National Team in the World Championships. With the income received from Nike, he purchased a condominium in Mission, Kansas. Mr. Jelks was advised that a purchase of this kind would be good for tax purposes, so he bought the condominium, apparently without a full understanding of the implications of such a purchase.

5.6 Over the next couple of years, Mr. Jelks rehabilitated his shin and continued to work out and train. However, the rehabilitation took a toll on Mr. Jelks' training and his results in 2008 suffered. He went from consistently running the 100 meters in 10.03 to 10.13 seconds in 2007, to running times of 10.24 to 10.35 seconds in 2008. As a result of these performances, on January 1, 2009, Nike declined to renew his contract, which left Mr. Jelks with no income. Shortly after learning that he would no longer be representing Nike, Mr. Jelks was notified that his condominium was facing foreclosure due to lack of timely payments.

5.7 Mr. Jelks had a mentor and friend, Mr. Frank Brown Jr., who acted as a father figure throughout a significant portion of Mr. Jelks' life, starting while he was in high school (Mr. Jelks' parents divorced when he was young and he grew up without a father in his life). Mr. Brown taught Mr. Jelks that it is important to use the gifts and talents you have been given to set an example for others. Mr. Jelks considered Mr. Brown to be a very important and influential part of his life. On January 20, 2009, Mr. Brown suddenly passed away in his sleep. Mr. Jelks found it difficult to deal with his grief and he struggled to focus on common, daily tasks.

5.8 Mr. Jelks continued to live in Kansas City and early in 2009, he met Amanda Gaiton while cashing a check at a bank. The two dated for approximately six months and spent much of their time together during that period. In July 2009, Mr. Jelks found himself with little money (he had been unable to replace his Nike contract) and struggled to keep his phone in working order, which made it difficult for him to communicate with anyone. Along with the inability to keep his phone on, Mr. Jelks began to withdraw from those around him.

After failing to qualify for the 2009 World Championships, Mr. Jelks traveled to Europe in hopes of making some money by competing in track & field events. When he left for Europe, he did not inform friends or family, including Amanda, about where he was going. In fact, Mr. Jelks

left his condominium without telling his roommate and training partner, Dexter, that he was leaving or that the condominium was being foreclosed. Mr. Jelks was making enough money to survive while running in Europe, but he was still struggling to earn a decent living.

5.9 Mr. Jelks returned from Europe in September 2009 and was informed that he had to vacate his condominium immediately due to foreclosure. At that same time, Mr. Jelks learned that his girlfriend, Amanda, was pregnant. Still struggling for money and not sure how to handle his problems, Mr. Jelks decided to move to Edmond, Oklahoma that September to live with his ex-girlfriend, Mary Carr, who is the mother of Mr. Jelks' first son.

After an argument with Mary in mid-October 2009, Mr. Jelks was kicked out of the house he was residing in and was forced to stay in cheap, run-down motels while continuing to train with Dana Boone, the coach of the women's team at Oklahoma University. In November 2009, Mr. Jelks learned that his father was ill and in the hospital. Mr. Jelks' father had never been around during his childhood and Mr. Jelks felt that he didn't really know him. However, he returned to Merrillville, Indiana to be with his family for the Thanksgiving holiday and to see his father.

5.10 While Mr. Jelks was traveling to Indiana, he learned that his father was doing better and had left the hospital. Mr. Jelks planned to spend his last day in Indiana, November 29, 2009, with his father to enhance their relationship. However, Mr. Jelks' father passed away unexpectedly on November 28th. He had to plan his father's funeral and help pay for the services, which depleted the last of the money he had earned in Europe. Mr. Jelks also spent much of that week phoning relatives and friends of his father to inform them of the death.

5.11 Mr. Jelks returned to Europe in early 2010 to again enter track and field meets in hopes of earning some income. While in Europe, Mr. Jelks still did not have a phone and his agent communicated with him through other athletes regarding meets and travel arrangements. He was

able to enter a few meets in the months he was in Europe. Amanda Gaiton gave birth to Mr. Jelks' second son, Gabriel, in February 2010, while he was still in Europe. Mr. Jelks then returned to the United States and continued to try to find meets to complete in. One such meet was the USATF Indoor Championships in Albuquerque, New Mexico, where he hoped to defend his 60 meter title. Because Mr. Jelks did not have a coach or anyone else at that time to help him register for competitions, he did not correctly register for the Indoor Championships and was not allowed to compete. Mr. Jelks was very disappointed, with doubts growing about his future in the sport.

5.12 In April 2010, Mr. Jelks entered a few meets where he ran the 100 meters. At a meet held at the University of Arkansas, he pulled a groin muscle and again had to spend time recovering from injury. He then returned to Merrillville, Indiana, to live with his mother. Mr. Jelks learned at the end of April of his third Whereabouts Failure in the eighteen month period and that USADA intended to pursue a sanction against him.

At about the same time USADA notified him of his Whereabouts Violation, Mr. Jelks received some money from his mother to have his phone turned back on. He received a call from Melissa Beasley at USATF informing him of his right to request an Administrative Review Panel (ARP) hearing and advising him that it would be in his best interest to do so. On May 25, 2010, Mr. Jelks requested the ARP, without truly understanding what the purpose of the process was or how it worked. Mr. Jelks was under the impression that the ARP hearing would "take care" of the problem. Shortly after this, Mr. Jelks received a letter from USADA stating that the ARP had upheld his missed Whereabouts Filings. Mr. Jelks claims that he did not fully read the letter, nor did he understand the magnitude of the decision. Mr. Jelks abruptly decided to move back to Kansas City. He later learned that USADA had sent multiple Charging Letters and had imposed a two-year sanction for his rules violation, beginning in August 2010.

5.13 As set forth in Article 11.1.3 of the World Anti-Doping Code International Standard for Testing (“IST”), Respondent’s inclusion in the USADA RTP required him to submit a Quarterly Whereabouts Filing to USADA that provided accurate and complete information about his whereabouts during the forthcoming quarter so that he could be located for testing at any time during that quarter. Under Article 2.4 of the WADA Code, individuals in the USADA RTP must comply with the requirements concerning athlete availability for out-of-competition testing, including meeting all whereabouts filing obligations. The WADA Code further provides that any combination of three missed tests and/or filing failures within an eighteen-month period as determined by the Anti-Doping Organization with jurisdiction over the athlete shall constitute an anti-doping rule violation. For violations of this provision, the period of ineligibility shall be at a minimum one (1) year and at a maximum two (2) years, based on the athlete’s degree of fault.

USADA determined that Mr. Jelks violated Article 2.4 of the Code by failing to provide USADA with accurate whereabouts information for out-of-competition testing on three separate occasions between January of 2009 and April of 2010. Mr. Jelks does not dispute USADA’s determination that he failed to submit accurate whereabouts information on three separate occasions during an 18-month period and has stipulated that USADA adhered to the provisions of the Code by properly providing him with notice of and an opportunity to challenge the anti-doping rules violation that resulted in the two-year period of ineligibility at issue in the present case.

5.14 From August 2010 until February 2012, Mr. Jelks did not contest the sanction imposed by USADA, claiming that he suffered from severe depression. It took a discussion with his brother, Steven Jelks, in the summer of 2011, to make him realize that he wanted to keep competing in track and field. His brother reminded Mr. Jelks that his talent in track was a gift from God and a talent that would be wasted if he did not continue to pursue his goals. Mr. Jelks

realized that he had the ability to be a role model to his own sons as well as to others in the community. Due to his extended period of seclusion, Mr. Jelks did not spend much time with his new son, Gabriel, in Kansas City. He also learned that his first son, Elijah, had been diagnosed with autism. He decided that he needed to take responsibility and do what he could to be there for his children. Mr. Jelks' goal has been to make the Olympic Team; he therefore decided to contest the sanction attempt to qualify for the 2012 Olympic Team.

5.15 USADA gave Mr. Jelks full opportunity to request a hearing prior to imposing the sanction, first by extending the original response deadline by 20 days and then enlisting the assistance of USATF to obtain a response from him. [*See*, by way of example, letter from USADA to Mark Jelks, August 11, 2010; and letter from USADA to USATF, August 11, 2010.] Nonetheless, despite USADA's efforts to engage Mr. Jelks in the process prior to the sanction going into effect, almost 16 months elapsed before Mr. Jelks took an active role in his case by contacting USADA to request a reduction in the length of his period of ineligibility. [*See*, email from Mark Jelks to USADA, December 15, 2011.]

6. PARTIES' ARGUMENTS

Respondent's Arguments

6.1 Mr. Jelks' principal argument is that his default judgment should be reopened based on general principals of law and in the interest of justice.

The WADA Code states that "any Person who is asserted to have committed an anti-doping rule violation," shall be afforded the right to a hearing. WADA Code Article 8.1. This right includes the opportunity to present evidence and respond to the asserted violation. The purpose of this rule is to provide basic principles of fairness to athletes who have been accused of committing an offense under the WADA Code. Although the WADA Code also asserts that the right to a

hearing may be waived by the Athlete's failure to challenge the assertion of the anti-doping rule violation, this rule should not be strictly applied to prevent the reopening of a default judgment based on exceptional circumstances.

Mr. Jelks acknowledged that USADA followed normal protocol and all necessary steps in issuing a sanction against him for his Whereabouts Failures. He is requesting, however, that the default judgment against him be reopened so he may present evidence of the exceptional circumstances that prevented him from properly responding to the notices from USADA and the Charging Letters.

6.2 Mr. Jelks argues that the WADA Code is silent in regards to whether a default judgment can be reopened. Further, CAS Rules, AAA Rules, the USADA Protocol, IAAF Regulations, and USATF Rules are also silent as to the reopening of a default judgment. When the rules that govern the sanction are silent as to the procedures for reopening a judgment, Mr. Jelks argues that we should look to general principles of law. See *The Gibraltar Football Association v. Union des Associates des Européennes de Football ("UEFA")*, CAS 2002/O/410 (stating that the Panel may apply general principles of law for sports regardless of their explicit presence in IF rules).

6.3 Mr. Jelks also argues that, pursuant to the Federal Rules of Civil Procedure, it is within a Court's discretion to vacate an entry of default for "good cause shown" and in the interest of justice. FRCP 55(c); FRCP 60(b). A judgment may be reopened due to excusable neglect on the part of the defaulting party. *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 393 (1993). A default judgment may be set aside if it is found: (1) that the non-defaulting party will not be prejudiced by the reopening; (2) that the defaulting party has a meritorious defense; and (3) that the default was not the result of inexcusable neglect or

willful act. *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970). Additionally, “the opening of default judgments should be viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached.” *Morales v. Santiago*, 526 A.2d 266, 269 (N.J. Super. Ct. App. Div. 1987).

A meritorious defense, as required by the second prong of the test stated above, must be supported by factual allegations. It is argued that such a defense exists, namely, Mr. Jelks’ exceptional circumstances argument and the fact that USADA has frequently issued one-year sanctions in Whereabouts Failure cases. Following the 2009 revision of the USADA Rules involving Whereabouts Filings, it is argued that USADA has never given a sanction greater than one-year in a Whereabouts Rule Violation case.

6.4 Mr. Jelks argues that his case is one in which the common sanction of one year would have been imposed had he requested the hearing as provided in USADA’s Charging Letter. Due to the exceptional circumstances of his case, however, he did not request such a hearing and was unable to understand the magnitude of this neglect. His defense in this case is in the nature of excusable neglect; had the request for a hearing been made, Mr. Jelks would have likely received only a one-year suspension.

In determining whether a default judgment may be reopened, excusable neglect must be shown. Excusable neglect is not limited to cases where the failure to act is due to circumstances beyond the defaulting party’s control. *Pioneer Investment Services Company*, 507 U.S. at 386. A party may show “extraordinary circumstances” suggesting that the party was faultless in the delay. *Id.* at 393. A party’s conduct constitutes excusable neglect when the surrounding circumstances would cause a reasonable person to similarly neglect a duty. *Goodman Assocs., LLC*, 222 P.3d at 319. Additionally, courts have characterized excusable neglect as “unforeseen circumstances

which would cause a reasonably prudent person to overlook a required act in the performance of some responsibility.” *Id.*

6.5 Mr. Jelks alleges that he encountered many unforeseen and exceptional circumstances during the time period that he failed to file proper Whereabouts with USADA and to respond to the Charging Letters. These include Mr. Jelks losing his mentor, who was very close to him, his father passing away, losing his means of income, losing his house, being kicked out of his place of residence, and having a child with his girlfriend. Due to these circumstances, Mr. Jelks claims that he was unable to think and act as a reasonable person would. He asserts that a reasonable person suffering from similar circumstances would react similarly, causing a delay in filings. Due to these circumstances, Mr. Jelks argues that his neglect in requesting a hearing and responding to USADA correspondence should be seen as excusable neglect. Based on the above cited precedent, along with the exceptional circumstances which show excusable neglect, Mr. Jelks requests that the default judgment be reopened and a reduction in his sanction be considered.

6.6 Mr. Jelks argues that Article 10.5 of the WADA Code allows for a reduction of an athlete’s suspension if he can show that the violation occurred because of no fault or negligence or no significant fault or negligence. The Comments to Article 10.5, as well as the title “Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances,” indicate that it applies to those situations that are out of the ordinary and are “truly exceptional”.

To be more specific, Article 10.5.1 states, “If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated.” And Article 10.5.2 provides, “If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the otherwise

applicable period of Ineligibility may be reduced, but the reduced period of ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable.”

Mr. Jelks argues that he qualifies for a reduction under Article 10.5 because of the extraordinary chain of events that took place from January 2009 to August 2010, and the subsequent depression that resulted while dealing with these events. Starting with the loss of his income in 2009 as the result of Nike cancelling his contract, Mr. Jelks began on a path of misfortune and emotional distress. During the eighteen-month period when his Whereabouts Failures occurred, Mr. Jelks claims that he had to deal with income losses, the loss of his condominium, the death of two important people in his life, the birth of a son, and the diagnosis of his other son with autism. These events affected Mr. Jelks’ mental state and his ability to cope with normal responsibilities. Mr. Jelks argues, therefore, that these exceptional circumstances warrant a reduction in suspension for the missed Whereabouts Failures as stated in WADA Code Article 10.5.2. Also, the USADA stipulation confirms that a Whereabouts Failure normally results in a one-year suspension and Mr. Jelks has already served more than this standard period of Ineligibility, having served twenty months of suspension as of April 2012.

6.7 Mr. Jelks also argues that the facts and circumstances surrounding his case confirm that he would have qualified for a reduction in sanction of his Whereabouts Filing Violation under WADA Code Article 10.3.3 based on the previously described exceptional circumstances.

6.8 Mr. Jelks claims that he was suffering from severe depression. According to the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Illness, Clinical Depression, or Major Depressive Disorder is defined as a combination of depressive symptoms which result in a change from previous functioning and include either a depressed mood or a loss of interest or pleasure. American Psychiatric Association, *Diagnostic and Statistical Manual of*

Mental Disorders 356 (4th Ed. 2000). People who suffer from depression often show the following symptoms: (1) depressed mood, nearly every day during most of the day; (2) marked diminished interest or pleasure in almost all activities; (3) significant weight loss (when not dieting), weight gain, or a change in appetite; (4) insomnia or hypersomnia (excess sleep); (5) psychomotor agitation (a type of restlessness caused by mental tension) or psychomotor retardation (a slowing down of the thought process or physical ability); (6) fatigue or loss of energy; (7) feelings of worthlessness or inappropriate guilt; and (9) recurrent thoughts of death, recurrent suicidal ideation without a specific plan. *Id.* Mr. Jelks submits that he showed many of these symptoms throughout the eighteen months when he was dealing with the exceptional circumstances of his life.

6.9 Mr. Jelks' argument cites the appeal of Dimitry Vlasov before an ATP Tour Anti-Doping Tribunal. Mr. Vlasov was an athlete who tested positive for a substance relating to medical treatment for depression following a string of events similar to those faced by Mr. Jelks. *Vlasov v. ATP Tour Anti-Doping Tribunal*, March 2005. Vlasov underwent a period where he incurred a physical injury during competition, breached contract relations with his sponsors, and had a deteriorating relationship with his female companion. Although the Vlasov case questions the liability of the athlete's actions for consuming a banned substance, the Tribunal specifically states in §35 of the Tribunal's Reasons, the sanction should hinge upon the athlete's degree of fault under WADA Code 10.3 *Id. at 15*. The Tribunal goes on to state, "There is a proven medical diagnosis of depression. That condition will impact a person's cognitive functioning. His conduct would amount to significant fault were it not for his medical condition probably impairing his personal judgment. Although his judgment would have improved over the course of treatment . . . the line ought to be drawn in favor of the Player to say that there is no significant fault." *Id.*

6.10 Mr. Jelks argues that the most compelling arbitration decision based on diminished capacity of an athlete due to depression symptoms is *USADA v. Cosby*, AAA No. 77 190 00543 09 2010, May 2010. The case involves a twenty-seven year old world class athlete who tested positive for an illegal substance. A two-year period of ineligibility was imposed and later reduced to four months after arbitration. Due to a “rapid succession” of events within the Athlete’s life, including a broken engagement due to an affair by her fiancé, a cancelled wedding, financial burden, loss of a long time coach, and the loss of employment, the athlete experienced symptoms of depression. *Id. at 6*. The Athlete forewent any help from a medically trained person or psychologist for a period of about ten months. *Id. at 16*.

The medical professional in *Cosby* testified to possible symptoms and causes of a depression diagnosis, concluding, “Depression can be triggered by events and that a series of severe losses and stresses can culminate in severe depression,” and continues with, “[S]evere depression has a negative effect on cognitive ability and that it slows down frontal lobe activity.” He added that “severe depression affects one’s ability to understand the consequences of their actions, to use abstract reasoning. *Id. at 17*. Although, *Cosby* differs from the current case in that it deals with an anti-doping violation for an illegal substance, it is similar in that the Arbitration Panel had to determine whether the Athlete’s mental state rendered the Athlete less than fully accountable for her behavior.

The Panel in *Cosby* ultimately gave strong consideration to “[T]he life of this young athlete and her hopes for a future,” and therefore reduced the period of ineligibility to a total of four months. *Id. at 30*. Like Jessica Cosby, Mr. Jelks is a world class athlete of comparable age with the potential to compete at an elite level. Mr. Jelks also suffered a series of traumatic stresses in “rapid succession” which led, in his view, to a state of undiagnosed depression, and subsequent

clouding of his judgment. Thus, these events resulted in a lapse of filing his Whereabouts with USADA. This resulted in a cumulative anti-doping violation, and subsequent appeal of the period of ineligibility once his life and mental state were brought under his own control.

6.11 In conclusion, Mr. Jelks argues that previous cases involving an athlete's anti-doping violation during a period of depression have resulted in a reduced Period of Ineligibility. Under WADA Code 10.5, the circumstances of the case and the athlete's degree of fault, which were correctly applied in the above-mentioned cases, should once again be applied in this matter. The period of time when Mr. Jelks missed three Whereabouts Filings was due in part to a "rapid succession" of stresses and events which debilitated his ability to have a clear mental state and complete the necessary paperwork. Therefore, the facts and cases presented should meet the standard explained in preceding arbitrations to trigger the exceptional circumstances exclusion in WADA Code 10.5 and allow his sanction to be reduced to a period of only twenty months.

Claimant's Arguments

6.12 USADA argues that Mr. Jelks' request for a reduction of his two year period of ineligibility was unusual because the request was made after more than one-half of the period of ineligibility had been served and because it related to a sanction that was imposed after Mr. Jelks failed to respond to numerous notices and charging letters. Mr. Jelks' request was further complicated because the applicable rules do not expressly permit USADA to unilaterally reduce his period of ineligibility once it has gone into effect. USADA could have denied Mr. Jelks' request at the outset due to a lack of timeliness; however, due to the potentially unique circumstances of his situation as alleged by him to USADA, USADA agreed to submit this matter to arbitration for the sole purpose of allowing a single Arbitrator to determine "whether

a factual and legal basis exists for reducing Mr. Jelks' period of ineligibility for his anti-doping rule violation", as described in the Arbitration Agreement set forth in Section 5 hereof.

6.13 The parties have stipulated that the Arbitrator's jurisdiction to consider Mr. Jelks' period of ineligibility is based solely on the parties' agreement to engage in this particular process. Nonetheless, USADA maintains that without its consent, there would be no jurisdictional basis for the Arbitrator to review this matter. Accordingly, given the aforementioned stipulation and the limited scope of these proceedings, it would be inappropriate for the Arbitrator to conclude that any other jurisdictional basis exists for this matter to be reviewed more than 18 months after the imposition of the sanction.

6.14 USADA argues that Mr. Jelks is incorrect in proposing that the applicable rules (including the WADA Code, the USADA Protocol and IAAF Anti-Doping Rules) do not provide a procedure for or prohibit the reopening of a default judgment. USADA maintains, instead, that Section 11e. of the USADA Protocol clearly provides that a "[default judgment] sanction shall not be reopened or be subject to appeal unless the Athlete or other Person can demonstrate by a preponderance of the evidence in a subsequent appeal to the Court of Arbitration for Sport ("CAS") that he or she did not receive either actual or constructive notice of the opportunity to contest the sanction." Mr. Jelks does not dispute that USADA provided proper notice of his opportunity to contest the sanction imposed for his anti-doping violation. Thus, based solely on the provisions of the USADA Protocol, Mr. Jelks' ability to appeal for modification of the default judgment appears to be foreclosed.

7. ANALYSIS AND DISCUSSION

7.1 Mr. Jelks stated in the Arbitration Agreement that he does not contest his anti-doping rule violation due to three Whereabouts Failures or the initial one year of ineligibility

he has already served. He testified that he has been training in recent months, and that he had submitted all Quarterly Whereabouts Filings required of him as a member of the USADA RTP during his time of ineligibility.

7.2 The issues before the Arbitrator are (a) whether there is a legal basis for reducing Mr. Jelks' period of ineligibility to a date determined by the Arbitrator, and (b) whether the facts in this case merit such a reduction. Mr. Jelks has argued both for an unspecified reduction in his period of ineligibility, and alternatively, for a reduction to twenty months of ineligibility starting from August 23, 2010. This matter has posed challenging questions with respect to both the applicable rules and the facts as presented in briefs and by telephonic testimony.

Mr. Jelks petitioned USADA for the right to appeal his two (2) year period of ineligibility, a right that USADA granted by entering into an Arbitration Agreement and a Stipulation setting forth the parameters of arbitration. The Arbitrator has therefore determined that Mr. Jelks, as the appellant, has the burden of proving his case for reduction. Pursuant to WADA Code Article 3.1, the standard of proof for Mr. Jelks "...shall be by a balance of probability..."

7.3 The immediate hurdle to the reopening of his sanction is Section 11e. of the USADA Protocol. This section states that an athlete has a specified time – up to 15 days – to request a hearing to contest a sanction recommended by an independent Anti-Doping Review Board. While Mr. Jelks recites in his brief the WADA Code Article 8.1 provision that states "...any Person who is asserted to have committed an anti-doping rule violation," shall be afforded the right to hearing, he did not seek a hearing nor did he contest in writing his proposed sanction. And he has acknowledged that USADA followed "all necessary steps" in issuing the sanction against him.

7.4 The only basis of appeal under Section 11e. as written is a showing, upon appeal to CAS, that “he or she did not receive actual or constructive notice of the opportunity to contest the sanction.” Mr. Jelks has acknowledged that he received notice of his right to a hearing. In arguing that he should now have a right to appeal the duration of his sanction, he offers several theories -- including his interpretation of the USADA Protocol, equitable arguments from U.S. federal cases, general principles of law, and CAS cases applying WADA Code provisions -- in an effort to overcome the one right of appeal accorded to athletes under Article 11e. of the USADA Protocol.

7.5 Mr. Jelks noted that the WADA Code, USADA Protocol, and the rules of the USATF and IAAF are silent with respect to the re-opening of the duration of a sanction. He asked therefore that general principles of law be considered. *Gibraltar Football Association v. Union des Associations Européennes De Football*, CAS 2002/0/410, was cited by Mr. Jelks for the application of general principles of law (which in the *Gibraltar* case were fairness and good faith). The issue in *Gibraltar* was quite different from the instant case in that it dealt with the fair application of UEFA membership rules. While the Arbitrator is aware of cases where general principles of law -- and equitable remedies -- were applicable, he does not find that such principles are compelling in this instance. Mr. Jelks was not treated unfairly or without due process; he chose to ignore his rights.

7.6 Mr. Jelks presented a series of U.S. federal cases to support an equitable basis for vacating a default judgment. [A default judgment is commonly a judgment handed down by a court or administrative body in the absence of an affirmative defense or appearance.] In *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, et al, 507 U.S. 380 (1993), the U.S. Supreme Court held that the rule authorizing a bankruptcy court to accept a late filing where failure to act is the result of “excusable neglect,” contemplates that courts are

permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as intervening circumstances beyond a party's control. Also cited were the Federal Rules of Civil Procedure (e.g., FRCP 55(c)) for the proposition that an entry of default may be vacated for "good cause shown." And *Toney Gomes v. Ellen L. Williams*, 420 F. 2nd 1364 (10th Cir. 1970) was cited for the notion that a "meritorious defense" may be a basis of setting aside a default judgment.

Do the facts, as presented by brief and by testimony, allow the application of these variously described equitable tests? Not easily, given Mr. Jelks' experience as an elite athlete. He was clearly familiar with drug testing protocol, having been in the Registered Testing Pool since 2005. In fact, he complied with his Whereabouts Filings until 2009, except for the first two quarters of 2007, when he was apparently out of the Pool on a permitted basis. He testified that he competed as an elite athlete in the 2007 IAAF World Championships in Athletics, was under contract to Nike, and won the 60 meter championship at the 2009 USA Track & Field Indoor Championships. All of this indicates that he was knowledgeable about – or extremely likely to be knowledgeable about – anti-doping procedures in and out of competition. Given the attention to doping issues in track and field in recent years, and the educational efforts to reduce them, it would be difficult to claim ignorance.

7.7 In a letter dated June 11, 2010 from USADA to Mr. Jelks, the details of his three Whereabouts Failures were described (no filing – 1st quarter 2009; no filing – 3rd quarter 2009; and missed test – 2nd quarter 2010), together with avenues of appeal and sources of information. It is worth noting that not all quarters were missed in 2009 and 2010, indicating that Mr. Jelks was aware of the filing requirements during this period and that he made some effort to comply. He had also received a telephone call from Melissa Beasley of USATF alerting him to his

Whereabouts difficulties. And particularly significant is the first paragraph of the June 11, 2010 letter that reads as follows: “As you requested, three members of the United States Anti-Doping Agency (“USADA”) Administrative Review Panel (“ARP”) met to review USADA’s decision to declare a Missed Test against you for the 2nd Quarter of 2010. The Panel considered the written information submitted to it and concluded that USADA’s determination of a Whereabouts Failure is upheld” [Emphasis added]. This paragraph indicates that Mr. Jelks not only requested a review of his Missed Test by an Administrative Review Panel, but that written information was submitted to the Panel. All of the foregoing appear to contradict his testimony that he didn’t understand the importance of the hearing offered to him following the determination of three Whereabouts Failures within 18 months, and to preclude a finding of “excusable neglect.”

7.8 There was much testimony about depression brought about by personal losses and challenges (the death of his father, and of a mentor, Frank Brown, Jr.; relationships with two women (Mary Carr and Amanda Gaiton); the birth of a second son with Ms. Gaiton; and the knowledge that his first son was diagnosed with autism). There was also testimony about his being reclusive, distant, and out of touch.

Yet, there were many people he could reach out to, among them his mother, Tonya, his fiancée, Amanda Gaiton, his brother, Stephen, representatives of USATF (e.g., Melissa Beasley) and coach Al Hobson. Moreover, he was an experienced elite athlete in his mid-twenties with some college education. In 2009 and 2010 he found time to train, travel and compete. And while he may have been understandably down after the death of his father and Frank Brown, a different image of his overall demeanor emerged from the testimony of Coach Hobson and his mother, both of whom were thoroughly credible.

Coach Hobson indicated that he had considerable experience in coaching elite track and field athletes. In no nonsense fashion, he described Mr. Jelks as talented, yet “confused and headstrong.” He added that Mr. Jelks has a “mind of his own, a temper.” Coach Hobson described their relationship as having evolved to a more distant, professional one in recent years. He sees little of him away from the track. He testified that he knew about the “Whereabouts problem,” and that he counseled Mr. Jelks to learn to deal with problems.

Mr. Jelks’ mother testified in a thoughtful and kind way, describing her son as “outgoing, pleasant” but “not mature when he went to college.” She described her son as being “quiet” when he came home for Thanksgiving in 2009 (Mr. Jelks’ father was ill at the time).

In his brief, Mr. Jelks included information about depression, namely the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, and cited nine symptoms, alleging he exhibited many of them during the period of his Whereabouts Failures. There was also testimony from Mr. Jelks that he had very recently seen, on three occasions, a psychologist, Ms. Eastwood. There was no testimony, however, with respect to Mr. Jelks’ alleged depression from Ms. Eastwood, or from any other person who is a qualified expert in mental health.

Taken as a whole, Mr. Jelks comes across as a young man who, when faced with adversity, has had difficulty coping, more likely from immaturity and carelessness and from being, as Coach Hobson put it, “headstrong.” Based on the testimony and the submissions, there is no way to ascertain, with any level of comfort, that he was suffering from clinical depression. All of which leads again to an inability to find “excusable neglect,” “intervening circumstance beyond a party’s control,” or “good cause shown.”

7.9 The Arbitrator finds no basis for applying WADA Code Article 10.5 -- Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances. The Comments to Articles 10.5.1 [No Fault or Negligence] and 10.5.2 [No Significant Fault or Negligence] are instructive: “Article 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.” And “...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 this Article.”

7.10 WADA Code Article 10.3.3, Ineligibility for Other Anti-Doping Rule Violations [Whereabouts Filing Failures and/or Missed Tests] prescribes the period of Ineligibility applicable to Mr. Jelks case as being “...at a minimum one (1) year and at a maximum two (2) years based on the Athlete’s degree of fault” [Emphasis added]. The Comment to Article 10.3.3 states: “The sanction...shall be two years where all three filing failures or missed tests are inexcusable.” In WADA Code Article 3.2.4 it states that, “The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the Athlete...who is asserted to have committed an anti-doping rule violation based on the Athlete’s...refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing...”

7.11 Mr. Jelks cited two cases involving depression and its bearing on the degree of fault. In *Vlasov v. ATP Tour Anti-Doping Tribunal*, (March 2005) the athlete tested positive for a substance relating to medical treatment for depression. The Tribunal found no significant fault because, “There is a proven medical diagnosis of depression.” In *Vlasov*, there was extensive testimony by way of witness statements from two medical doctors and a professor, indicating a diagnosis and treatment of depression. In Mr. Jelks’ case, there was no independent scientific or clinical corroboration of his alleged depression.

In the other case cited, *USADA v. Jessica Cosby*, AAA No. 77 190 00543 09, the athlete involved was about the same age as Mr. Jelks and apparently had a series of life experiences similar to Mr. Jelks. The Cosby case, however, involved the low level ingestion of a prohibited substance in which the Panel found “no intent to mask.” It was a matter of inadvertence, not the failure to take action after being put on notice of consequences. Moreover, there was expert testimony from a psychiatrist who treated Ms. Cosby as to the nature and extent of her depression. Mr. Jelks provided no such independent evidence. The Panel noted in its opinion that, “We understand that in the effort to rid sport of doping we must not accept a series of excuses for doping violations because almost anyone can fashion an excuse once they have been caught. But this is a case of medically diagnosed severe depression that followed a series of negative events.”

7.12 After considering the well-prepared briefs of the parties, the credible testimony of the witnesses, the cases and rules cited, and the thoughtful and well-presented arguments of counsel for the parties, the Arbitrator nevertheless finds that there is insufficient basis in law or in fact to reduce Mr. Jelks’ period of ineligibility to less than two (2) years from August 23, 2010.

8. OBSERVATIONS

Normally, an Arbitrator offers little in the way of commentary. This case was novel and thus provoked some tangential thoughts.

8.1 USADA stipulated in the Arbitration Agreement: “That in other “3 Whereabouts Failures” cases, it has been USADA’s practice, when an athlete responds to such a charge, to impose a one (1) year suspension.”

At the request of the Arbitrator, USADA provided data on Whereabouts Failures for 2009 (no cases), 2010 (7 cases), and 2011 (no cases). There were, in 2010, five 1 year sanctions, two of which followed a hearing, and two 2 year sanctions, neither of which was the subject of a hearing.

One of the 2 year sanctions was presumably that of Mr. Jelks. While it appears that a hearing is not essential to being given a 1 year period of ineligibility, it seems that a hearing, or at the very least a carefully prepared written submission, is helpful to the athlete. Athletes should also know that an unfavorable inference may be drawn by a failure to respond. At the same time, the anti-doping effort benefits from encouraging athletes to participate because it affords an opportunity to educate athletes about the out-of-competition drug testing procedures. There is already much effort being made by USADA, the USOC Athlete Ombudsman, and NGBs to educate athletes about the WADA Code and other relevant rules. Mr. Jelks does not contest notice of, or his right to, a hearing after his three Whereabouts Failures. That being said, it does illustrate the importance of encouraging athletes generally to participate in hearings proffered after Whereabouts Failures.

8.2 The examination in this case of Article 11e. of the USADA Protocol in concert with the WADA Code, raises the question of whether the Protocol and the WADA Code should be clarified with respect to appeals based on new evidence or extraordinary circumstances. This is not to say that strict timelines should be relaxed in the adjudication process; such timelines are essential to the expeditious and fair disposition of matters. At such time as consideration is given, however, to amendments to the WADA Code, it might be appropriate to discuss the appeal process after sanctions have been imposed so that athletes can better understand the process and the likelihood of being granted an appeal.

8.3 A word about Mr. Jelks: The Arbitrator was impressed by the candor and positive nature of Mr. Jelks' testimony. This was a difficult appeal, both because of the rules and the facts. Having said that, Mr. Jelks should know that he displayed a growing maturity and an increasing awareness of how to cope with annoying, even heartbreaking, set-backs. He has an excellent team in his mother, his fiancée, and Coach Hobson. And he's clearly learned to reach out to them. There

is an expression often heard in Oklahoma: "The turtle doesn't get on top of the fence post without a lot of help." As a mentor, Coach Hobson deserves to be listened to -- his forthright testimony showed much insight and caring -- and by following his advice, the "fence post" won't seem quite so tall.

9. DECISION AND AWARD

On the basis of the foregoing facts and legal considerations, this Arbitrator renders the following decision:

9.1 Mr. Jelks' appeal of his two (2) year period of ineligibility commencing August 23, 2010 is hereby denied.

9.2 The parties shall bear their own attorneys' fees and costs associated with this arbitration.

9.3 The administrative fees and expenses of the American Arbitration Association, and the compensation and expenses of the Arbitrator, shall be borne entirely by USADA and the United States Olympic Committee.

9.4 This Decision is in full settlement of claims and counterclaims submitted by the parties to this Arbitration.

Dated: May 23, 2012


Paul E. George, Arbitrator