Arbitration CAS 2013/A/3151 Jonathon Millar v. Fédération Equestre Internationale (FEI), award of 7 October 2013 (operative part of 18 July 2013)

Panel: Ms Maidie Oliveau (USA), President; Mr Christopher Campbell (USA); Prof. Richard McLaren (Canada)

Equestrian
Doping (DHEA)
Beginning of the period of ineligibility

According to Art. 10.9.2 of the FEI Anti-Doping Rules for Human Athletes based on the World Anti-Doping Code, where the athlete promptly admits the anti-doping rule violation after being confronted with it, the Panel has discretion to decide that the period of ineligibility may start as early as the date of sample collection or the date on which another anti-doping rule violation last occurred and to fix the length of this period, provided that the athlete has served at least half of it going forward from the date he accepted the imposition of a sanction, the date of a hearing decision imposing a sanction or the date of the sanction is otherwise imposed.

I. PARTIES

1. Jonathon Millar (hereinafter, the "Appellant" or "Mr Millar") is a Canadian national who participates in international show-jumping events at an elite level, including representing Canada in international competition.

2. Fédération Equestre Internationale (FEI) (hereinafter, the "Respondent") is the international governing body for equestrian sport disciplines, including show-jumping, and is based in Lausanne, Switzerland.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the main relevant facts and allegations based on the parties' written submissions, their pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows.

Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in this proceeding, it refers in its Award only to the submissions and evidence it considers essential.

4. This case arises from a random in-competition doping control on 30 June 2011, the result of which was Mr Millar's urine sample was found by IRMS analysis at the Laboratoire de contrôle du dopage – Montréal, to contain exogenous DHEA, a prohibited substance according to the 2011 Prohibited List of the World Anti-Doping Agency (WADA). FEI notified Mr Millar of this Anti-Doping Rule Violation (ADRV) pursuant to the FEI's Anti Doping Rules for Human Athletes based upon the 2009 World Anti-Doping Code, revised 1 January 2011, updated 1 January 2013 (ADRHA) by letter of 24 August 2011.

5. Mr Millar has been provisionally suspended from 24 August 2011 through the date of the decision of the FEI Tribunal of 28 March 2013, at which point, the FEI Tribunal gave him a permanent suspension through 23 August 2013. It is this decision which is the subject of this appeal.

6. Mr Millar was born on 25 September 1974 and has been competing at the international level in equestrian sport since 1992. In 2007, when Mr Millar was 33, his mother was diagnosed with stage 4 cancer. Mr Millar was severely affected by his mother's diagnosis and his health began to deteriorate, both mentally and physically.

7. Mr Millar's mother passed away on 6 March 2008. Her dying wish was that Mr Millar, his sister and father, do whatever was necessary to address his health problems which included constant exhaustion and fatigue. Mr Millar could not sleep and every muscle and joint in his body hurt, often in the extreme. His memory failed him and he felt depressed. He was also dealing with a heart condition which included elevated blood pressure.

8. An October 15, 2008, medical test conducted by Lifelabs Medical Laboratory Services confirmed that Mr Millar had low DHEA production, a potentially serious medical condition. His nutritional doctor, R. P. Knipping, diagnosed Mr Millar with 'DHEA deficiency syndrome' and prescribed 25mg of DHEA-s drops to be taken daily. As a result of the doctor's prescription, Mr Millar inquired with the Canadian Center for Ethics in Sport (CCES), the Canadian national anti-doping organization, and received an email response on 9 September 2008 advising him that DHEA-s was a prohibited substance and its use required that the athlete apply for and obtain a Standard Therapeutic Use Exemption (TUE). Mr Millar immediately started taking the DHEA-s as prescribed, knowing it was an ADRV, because he wanted to follow the doctor's advice, in keeping with his promise to his mother.

9. On 29 October 2008, he applied to CCES for a TUE. CCES's response by letter dated 14 November 2008 asked that he submit documentation from a specialist in endocrinology and also compare alternative treatments in order to consider the application. Mr Millar then consulted an endocrinologist referred to him by Dr Knipping who confirmed the diagnosis and treatment. At Mr Millar's request, the endocrinologist sent a statement to CCES dated 11 December 2008 so stating. The letter also included the following statements: *"He is really*

otherwise healthy and denies any other major medical problems. […] He has been started on DHEAS 25 mg daily in the form of oral drops".

10. On 21 May 2009, CCES by letter denied the TUE application and identified numerous areas where the evidence to support the application was lacking and invited Mr Millar to submit a new TUE application with such information. This letter was sent to an old email address of Mr Millar's, no longer used and it was established at the hearing that it was not even accessible to Mr Millar and the letter was never received.

11. On 12 June 2009, Dr Knipping sent a fax to the Millar home, advising that the TUE had been rejected and stating:

> *"If you wish to proceed safely, then I would advise stopping the DHEA-s now and starting again with the provisions that they are requiring. Naturally, as the doctor involved, I am not happy with the fact that you cannot be treated for a condition that can cause memory loss, bone loss, fatigue etc. At the same time, it is unlikely that the lack of DHEA-s will result in serious, unrelenting disease as well".*

During this time, the Millar family was away at competitions and the fax was filed by the family's secretary in the TUE application file but not seen by any of them.

12. In September 2009, at the Spruce Meadows competition, Mr Millar's father, Ian Millar, inquired of Ms Karen Hendry-Ouellette, director of show-jumping at Equine Canada, the Millars' national federation, what the status of the TUE application was. He requested that she speak with Mr Millar about submitting the documents and following up.

13. During this time, Mr Millar continued to compete in national competitions with great mental and physical effort.

14. Ms Hendry-Ouellette upon returning to the office contacted Mr Millar, confirmed that he was still taking the DHEA-s and wanted to proceed with an application for a TUE with the FEI, as required. Mr Millar then had his office send the previous TUE application file on his behalf to Ms Hendry-Ouellette. Mr Millar did not review the file sent nor did he confirm its contents. An email in his name went to Ms Hendry-Ouellette on 23 October 2009, with the 2008 TUE application file attached. Its receipt was acknowledged by Ms Hendry-Ouellette on 24 October 2009.

15. This file was forwarded internally to her colleague, Ms Sandra de Graaff, who was responsible for anti-doping at Equine Canada on 4 December 2009. The email said: *"Please find the documentation for Jonathon Millar. This is a medical issue that requires medication that is no [sic] allowed by CCES, we need to try a little hard to get an exemption or approval"*. The request and the file were then forwarded to FEI on the same day by Ms de Graaff. The email to FEI requests its requirements *"from Mr Millar in order to ensure he does not receive a positive test if he were to be tested in the future"*. The 2008 file sent to CCES was attached, along with the final letter from Dr Knipping instructing Mr Millar to cease taking the DHEA-s.

16. In a conversation just before Christmas 2009, Ms Hendry-Ouellette told Mr Millar that she was in contact with the FEI and that they had been sent the whole file. Mr Millar also told Ms Hendry-Ouellette around this time that he was taking DHEA-s.

17. The TUE application file was submitted to the FEI Medical Committee on 15 February 2010 after some email exchanges between Equine Canada and the FEI about the dates on the application. The members of the FEI Medical Committee requested a new complete application with clear medical support, which request was emailed on 16 February 2010 to Equine Canada. An email from Ms De Graaff at Equine Canada of 16 February 2010 to FEI asked whether the previously supplied endocrinologist's letter from 11 December 2008 along with the October 2008 lab test results would be adequate support for the new TUE application. Ms De Graaff additionally queried whether the committee had *"any recommendations for what Jonathon should do in case he were to be randomly selected for testing while we are still in the process for submitting his TUE?"*.

18. On 19 February 2010, the FEI provided the FEI Medical Committee's comments to Equine Canada advising that the documents provided in support of Mr Millar's TUE application were inadequate and *"if he is tested while taking this medication; it will be considered a positive test and he will be subject to sanctions"*.

19. On 21 February 2010, in an email to Mr Millar (again to the incorrect email address) Ms Hendry-Ouellette forwarded the FEI email and advised him of the same. In that email she says: *"if you are currently taking the medication and should you be tested, it could produce a positive result"*.

20. FEI followed up with Equine Canada on the subject on 10 May 2010 and Equine Canada advised they would verify the situation with Mr Millar; and again on 9 August 2010 stating that the TUE request made was no longer valid and Mr Millar would need *"to submit a new one with adequate medical statement"*. Equine Canada responded on the same day that it would inform Mr Millar. FEI according to its policy did not deal directly with Mr Millar. Rather, FEI delegated the communication with athletes to its national federation members, Equine Canada in this case.

21. Subsequent to the ADRV charge of 24 August 2011, Ms Hendry-Ouellette sent an email to the FEI in response to its inquiry, dated 11 January 2013 stating:

> *"It was very important to the Millar family as well as Jonathon, that everyone knew he was taking medically prescribed medication. I believe the documents where [sic] communicated to Jonathon. I had very few, brief and short communications with him. It was obvious there was something very wrong, it was like he was in a cloud, there was a definite disconnect. In all fairness, he was suffering and as the Millar Family is very private, I did not want to pry"*.

Ms Hendry-Ouellette did not have any daily knowledge of when or if Mr Millar was taking DHEA-s nor did she have any reason to believe he had stopped doing so. She also knew he did not receive approval to take it.

22. From December 2009 to 24 August 2011, when Mr Millar was advised by the FEI that he had tested positive for DHEA-s, he did not inquire of Ms Hendry-Ouellette about whether the TUE had been granted or what its status was. He did not make a new TUE application.

23. During the period from November 2008 through at least 24 August 2011, Mr Millar continued to take DHEA-s on and off based on how he was feeling. During 2008, everything was difficult for him. As time went on, he said there was some healing, and when he was not worn down, his body had a chance to recover. He is not sure on what days, weeks or months he did not take DHEA-s, but he had a break before the 2010 World Equestrian Games and knows he did not take it during that time period. He submitted to a doping control in July 2010 and his sample was negative for any prohibited substances.

24. Mr Millar started taking DHEA-s again in 2011 because of a gruelling competition schedule and work with students and customers, which wore him down. As he started to feel symptoms and get worn down, he needed to help his body recover and continue on the DHEA-s. Because DHEA-s is not a prescription medication in the USA, where he was in the winter of 2011, he decided on his own (at the suggestion of the Canadian pharmacist), to switch from the oral drops to taking the DHEA-s with a multivitamin supplement he purchased in Florida.

25. At the time of the in-competition doping control on 30 June 2011, at Spruce Meadows, Canada, Mr Millar was asked to disclose any medications or supplements that he had taken in the previous ten days. He listed eight items (each taken from separate containers) including Multivitamin (that contained DHEA-s, but he did not separately list DHEA-s) on the Doping Control Form. The sample he provided then tested positive for synthetic DHEA.

26. Upon receiving notice of the positive test result, Mr Millar started to investigate the possibility of obtaining a retroactive TUE and consulted several top and highly recommended endocrinologists to comply with the FEI requirements for the TUE. This ultimately confirmed a medical problem associated with a sub-optimal cortisol response for which Mr Millar is currently being treated but which is not treated by DHEA-s. He did not, as he was entitled to do under the ADRHA, request his provisional suspension be lifted or request an expedited hearing. Rather, he focused on his health problems and resolving them.

B. Proceedings before the FEI Tribunal

27. Mr Millar filed a response to the charge for the first time on 7 November 2012, admitting the ADRV along with a request for a hearing before the FEI Tribunal. In this submission, he did not argue that he had made a voluntary admission but submitted other arguments. Then on 6 December 2012, Mr Millar argued for the first time that the comment in the endocrinologist's letter of 11 December 2008 that he had been started on DHEA-s amounted to a voluntary admission within the meaning of ADRHA Article 10.5.4. The FEI Tribunal held a hearing on 12 February 2013 in London (UK), almost 18 months after Mr Millar had been provisionally suspended by the FEI.

28. The FEI Tribunal rendered its decision on 28 March 2013, finding that sufficient proof of an ADRV under Article 2.1 of the ADRHA was established; that Mr Millar had not met his burden of proof under Article 10.5.2 of the ADRHA for it to find he had "No Significant Fault or Negligence"; and that he had not made an "admission" according to Article 10.5.4 of the ADHRA.

29. The FEI Tribunal imposed a period of ineligibility of two years effective from the date of the provisional suspension through 23 August 2013.

30. In accordance with Article 169 of the General Regulations of the FEI, the FEI Tribunal also fined Mr Millar CHF 2,000 and ordered that he contribute CHF 4,000 towards the legal costs of the FEI's judicial procedure.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

31. In accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (2013 edition) (the "Code"), on 24 April 2013, the Appellant filed his statement of appeal and an "Application for Stay".

32. In his statement of appeal, the Appellant requested that the following relief be granted by the CAS Panel:

a. An order staying the execution of the decision appealed against and the provisional suspension in place prior thereto.

b. An order declaring that the FEI Tribunal is without jurisdiction to adjudicate on doping matters.

c. An order setting aside the decision of the FEI Tribunal in whole or in part.

d. An order confirming that Jonathon Millar made a voluntary admission pursuant to Article 10.5.4 of the *ADRHA* and that the period of ineligibility be reduced by one-half.

e. An order confirming that Jonathon Millar bore no significant fault or negligence pursuant to Article 10.5.2 of the *ADRHA* and that the period of ineligibility be reduced by one-half.

f. An order confirming that the FEI Tribunal failed to apply the doctrines of *contra proferentem* (an ambiguous provision must be construed most strongly against the person who selected the language), *in dubio contra stipulatorem* (in case of ambiguity, the interpretation unfavourable to the author has to be adopted for he has it in his power to make his meaning plain) and *ubi lex voluit dixit, ubi noluit tacuit* (a judging body must adhere to what is in the text and draw no material consequences from the regulation's silence).

g. An order confirming that the FEI Tribunal failed to apply the jurisprudence in *CCES v. Zimmerman-Cryer*, SDRCC DT 10-0121; *UK Anti-Doping Limited v. Offiah*, July 20, 2012; CAS 2007/A/1219; CAS 2006/A/1152; and *International Rugby Board v. Telea,* August 18, 2010.

h. An order confirming that there was an appearance of bias and unfairness on the part of the Tribunal in adjudicating this matter and that Jonathon Millar was denied a fair trial and natural justice.

i. An order that the sanction imposed on the Appellant, including the fine and cost order, was harsh, unjust and disproportionate.

j. Costs.

k. Such further and other relief as counsel may advise and the CAS Panel may permit.

33. In response to the Appellant's application for provisional measures, Respondent filed a submission of 3 May 2013, opposing the Appellant's request for relief.

34. By letter dated 17 May 2013, the Appellant advised the CAS Court Office that Mr Millar's "Application for Stay" dated 24 April 2013 was not intended to be the submission on the stay, but rather notice of same. The parties were advised that no ruling would be made on the Appellant's application for a stay until receipt of his written submission.

35. In accordance with Article R51 of the Code, on 31 May 2013, the Appellant filed his appeal brief and requested the following relief:

a. The decision of the FEI Tribunal be stayed along with the suspension and period of ineligibility;

b. There be a finding that Jonathon Millar made a voluntary admission within the meaning of Article 10.5.4, entitling him to a 50% reduction in his suspension and period of ineligibility.

36. In his appeal brief, the Appellant set out his arguments in support of his request for provisional measures.

37. On 14 June 2013, the Respondent commented on the Appellant's application for a stay.

38. In accordance with Article R55 of the Code, on 24 June 2013, the Respondent filed its Answer. In its Answer, the Respondent requested that:

a. The appeal should be dismissed and the Decision of the FEI Tribunal should be left undisturbed.

b. Costs be awarded to the FEI if and to the extent deemed appropriate by the CAS panel.

c. The CAS Panel reject the Appellant's application for a costs award against the FEI.

39. By letter dated 14 June 2013, the parties were advised that the Panel had been constituted as follows:

President:	Ms Maidie Oliveau, Attorney-at-law in Los Angeles, USA
Arbitrators:	Mr Christopher Campbell, Attorney-at-law in Fairfax (CA), USA
	Prof. Richard H. McLaren, Barrister in London, Ontario, Canada

40. Neither party objected to the constitution of the Panel.

41. By letter dated 26 June 2013, the parties were advised that having considered the Appellant's application for interim measures, together with his request for oral submissions via telephone conference on his application, and taking into account the fact that Mr Millar's period of ineligibility runs through 23 August 2013, the Panel considered that the best way to proceed was to offer the parties a hearing on all aspects of the appeal as soon as possible. The parties were further advised that the Panel was available to hold the hearing in New York on 11 July 2013.

42. The parties confirmed their availability for the hearing on the date proposed by the Panel. Pursuant to Article R57 of the Code, the Panel called the parties to a hearing, held at Arent Fox LLP's office in New York, USA, on 11 July 2013. The Panel was assisted at the hearing by Ms Louise Reilly, Managing Counsel and Head of CAS Mediation.

43. The Appellant was present in person at the hearing and was assisted by Mr Timothy S.B. Danson and Ms Marjan Delavar of Danson Recht LLP in Toronto, Canada.

44. In his Appeal Brief, the Appellant called the following witness to give evidence (by telephone): Mr Ian Millar.

45. At the hearing, with the permission of the Panel and the absence of any objection from the Respondent, the Appellant called the following witness to give evidence (by telephone): Ms Karen Hendry-Ouellette.

46. The Respondent was represented at the hearing by Ms Lisa Lazarus, FEI General Counsel. The Respondent did not call any witnesses.

47. After the examination of the witnesses, counsel for the parties made their closing statements and, upon closure, both parties expressly stated that their right to be heard had been respected and they had been granted equality of treatment.

IV. SUBMISSIONS OF THE PARTIES

48. The following outline of the parties' positions is illustrative only and does not necessarily detail every contention of the parties. The Panel has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

A. Appellant's Submissions Summary

49. Mr Millar has met the specific requirements of the actual provisions of ADRHA Article 10.5.4, in that Mr Millar: (1) has made a voluntary admission of the commission of an ADRV; (2) before having received notice of a *Sample* collection which could establish an ADRV; and (3) that admission is the only reliable evidence of the violation at the time of admission.

a. The voluntary admission was made on Mr Millar's behalf and at his request when the endocrinologist sent in for the TUE application the letter of 11 December 2008 including the following statement: *"He has been started on DHEAS 25 mg daily in the form of oral drops"*; again, in September 2009, when Ian Millar requested that Ms Hendry-Ouellette speak with Mr Millar about submitting the documents and following up. Ms Hendry-Ouellette confirmed this conversation and that she was aware of the family situation, that Ian Millar did tell her in this conversation (on his son's behalf) that Mr Millar was taking DHEA-s upon the doctor's advice and that Mr Millar was depressed and Ian was concerned about his son's health. Mr Millar also told the national federation when he spoke in October 2009 to Ms Hendry-Ouellette who confirms that she was then told he was taking DHEA-s; and when the entire file was forwarded to the FEI on 4 December 2009, the FEI was informed by virtue of the same letter being included in the TUE application and was told orally by Equine Canada.

b. Ian Millar testified that it was very important for Mr Millar to be honest about his taking DHEA-s, because it was also equally important to Equine Canada (if he got in trouble, the whole team did) and he felt honesty was the best approach. Mr Millar also expressed that it was extremely important that the national federation knew he was taking the prohibited substance. Yet, the national federation and the FEI did nothing. The admission was made in 2008 and then again in 2009, which were both long before there had been any notice of a *Sample* collection which could establish an ADRV.

c. At the time of the admission, the admission was the only evidence of the ADRV.

50. The FEI as the author of the rules cannot now say that there is some sort of temporal requirement in the rule, or that the admission must be made in a specific way, or that there must be a "causal connection" between the ADRV and the admission, as those are not required under Article 10.5.4. In addition, the rule does not state that the athlete must stop taking the prohibited substance or adopt a repentant position after the admission. There are no such requirements in the rule. It is untenable to say that the three criteria in Article 10.5.4

are met, but because of a subsequent passage of time, what was once a voluntary admission within the meaning of Article 10.5.4, is no longer. Mr Millar posits that these are factors that might be considered in determining the reduction in the sanction, but not to determine whether there was a voluntary admission. If there is any ambiguity, it has to be interpreted against the drafter and resolved in favor of the athlete.

51. Mr Millar also argues that whether he did or not did not see Dr Knipping's letter advising him to cease taking the DHEA-s based on the CCES denial of the TUE or the 21 May 2009 denial of the TUE application by CCES is irrelevant to a determination under Article 10.5.4.

52. Based on Mr Millar having met the conditions of Article 10.5.4, the factors for the Panel to examine with respect to how much to reduce the two year period of ineligibility are that: Mr Millar was motivated by honesty, integrity and professionalism in making the disclosures; he wanted to do the right thing and as such, it was really important that the authorities knew he was taking DHEA-s; Mr Millar knew he was committing an ADRV; he was in a time of tremendous grief and diminished thinking; his father felt he was depressed and could only manage to compete because his reflexes took over; he was taking the DHEA-s as a result of very unique and exceptional circumstances related to his health (which circumstances still require further medical care) and not for performance enhancing.

53. Further, Mr Millar argues that he turned to the authorities for help with his condition and need for treatment and yet the federation dropped the ball. Mr Millar argues that at no time did Equine Canada advise Mr Millar to stop taking the DHEA-s. Ian Millar testified that they had made mistakes, and trusted the federation, thinking if Mr Millar's taking of the DHEA-s was a problem, the federation would advise him that he was committing a doping infraction. Informing his national federation and the CCES has to be enough to be an admission under the provisions of Article 10.5.4. Ms Hendry-Ouellette testified that she was not sure if she told Ms De Graaff that she was aware that Mr Millar was taking DHEA-s but was certain that Ms De Graaff and FEI were aware that Mr Millar was taking it. The "temporal" issue arose by reason of the FEI's failure to take immediate action upon learning of the commission of an ADRV. Had they done their jobs, Mr Millar would not be in this situation today. The FEI and Equine Canada have to be held to the same high standard as the athletes. Upon being informed, there is a mandatory non-discretionary duty to vigorously take action in accordance with the ADRHA Articles 7.4 and 20.3.9. In this case, there was human error in that the federations did not do the job imposed on them. Had they done their jobs, there would not have been the gap in time between the admission and ultimately, the sample testing positive.

54. There also was no communication directly between the FEI and Mr Millar, but rather all communication was through Equine Canada, the national federation. The system of notification regarding the TUE application failed and such failure is attributable to the FEI as well as Equine Canada. It is their system, not that of the athlete. Mr Millar argues the system does not comply with the World Anti-Doping Code. He argues that the FEI must be held strictly liable for its failure to take immediate action upon learning of a potential ADRV through the December 2009 TUE application which included the Dr Knipping letter of December 2008.

55. In accordance with the provisions of ADRHA Article 10.9.2, since Mr Millar did admit the ADRV after being confronted with the positive result by the FEI, the Panel can also determine that the start date of the period of ineligibility starts as early as the date of sample collection, which is 30 June 2011.

56. Appellant looks to the following cases to provide guidance to this Panel:

a. IBAF v. Ponson, independent tribunal decision dated 8 July 2009. In that case, the athlete was taking phentermine on medical advice, but did not have a TUE to do so. When he was given notice that he had to provide a sample for drug testing, he told the testing personnel that he was taking phentermine on the advice of his doctor, and he disclosed his use of phentermine on the doping control form, not knowing it was an ADRV. The tribunal held that this did not amount to a voluntary admission of the commission of an ADRV for purposes of Article 10.5.4, because he was not at that time making an "admission" in the true sense of that word. The tribunal considered that "admission" in Article 10.5.4 means *"an admission, in terms, of liability for commission of an anti-doping rule violation, not an acknowledgement (for other purposes) of facts that together reflect the commission of an anti-doping rule violation"* (IBAF v. Ponson, para 8.5.2). Appellant considers that statement to be *obiter dicta* which mentions Article 10.5.4 and inserts a requirement of knowledge which is wrong. In addition, the Ponson case can be distinguished from Mr Millar's case in that he knew he was committing an ADRV by taking the DHEA-s.

b. UK Anti-Doping v Offiah, NADP decision dated 20 July 2012. In that case, an athlete played in a match in the name of another and pretended when asked to give a sample that he was the other (non-present) athlete. When the captain was interviewed as part of the subsequent investigation, he admitted that, when asked as part of the drug test to confirm the identity of the athlete who had been notified, he had falsely stated that it was the athlete who was actually not present. The captain was charged with and admitted to tampering with the doping control process. The hearing panel decided that his admissions in the interview as part of the subsequent investigation amounted to a voluntary admission of an ADRV for purposes of Article 10.5.4. The panel held: *"He admitted mis-identifying the player tested. He thereby admitted to the facts constituting the offence. It is not necessary for him to have knowledge of whether the facts admitted constituted a doping offence on the true construction of the rules. It is only necessary for him to admit the fact or facts constituting the offence"* (Para 4.34). Thus, the Appellant argues that the panel looked to the 3 requirements of the rule only, as this Panel should.

c. CCES v. Zimmerman-Cryer, SDRCC DT decision dated 20 August 2010. The athlete used a steroid for three days to increase his strength and enhance his performance, but then thought better of it, stopped that use, confessed to his coach and apologized and repented publicly. The hearing panel decided that he should get the full benefit of the discretion allowed to the panel by Article 10.5.4, i.e. a 12 month period of ineligibility because he *"has shown courage and honesty by these quick and forthright admissions to the university authorities which allow for the maximum possible reduction permitted… Mr Zimmerman-Cryer also filled out and signed an "Admission of Violation" form"*. He also apologized in writing to the

authorities. The Appellant argues that these considerations were cited by the panel with respect to determining the amount by which to reduce the sanction, rather than in determining whether the conditions for meeting the three requirements of Article 10.5.4 for a voluntary admission had been met. Those same sympathetic considerations apply for Mr Millar as he had a genuine medical condition, he did not take the DHEA-s for performance enhancement but rather upon the doctor's advice and he did disclose it in his TUE applications and in other conversations with his national federation. The panel did not find there is a condition of repentance to meet the test for whether there has been a voluntary admission, nor should this Panel.

d. IRB v Telea, Board Judicial Committee decision dated 18 August 2010. The athlete, a doctor, had admitted in testimony in a case against another athlete that he had brought asthma medication to games for himself but had also given it to fellow athletes who needed it. The IRB charged him with possession, use and trafficking based on those admissions, and the panel upheld those charges. The IRB argued (*inter alia*) that he could not rely on Article 10.5.4 because when he gave that testimony, he was not fully aware that he was admitting ADRVs. The panel held that where the athlete makes his voluntary admission before he receives notice of his entitlement to a hearing (in a non-sample case), he has complied with the rule (para 33). The panel did not find any need to go beyond the wording of the actual rule, as urged by the anti-doping authorities and by the WADA comment with the rule. This Panel should do the same.

e. Doping Authority Netherlands v. N. (CAS 2009/A/2012) is the only CAS case to address Article 10.5.4, in *obiter dicta,* in a case involving a voluntary admission in the proceedings. In that case, the CAS made no effort to read into the rule any new conditions but rather found that the admission came too late.

57. The imposition in its decision by the FEI Tribunal of the payment of costs for the judicial procedure in the amount of CHF 4,000 and a fine of CHF 2,000 were harsh, unjust and disproportionate.

B. FEI's Submissions Summary

58. The FEI in no way challenges the reputation of the Millar family, but approaches this case based on the facts, and what Mr Millar did in contrast to what he was supposed to do.

59. The criteria of Article 10.5.4 have not been met by Appellant. The rule requires that the admission be made before the athlete has received notice of sample collection. The only relevant sample collection would be that which occurred in July 2010. For the sample collection in June 2011, another admission would be required. Further, it is not possible to admit in a letter sent in December 2008, a violation that continued thereafter and was only discovered by testing in June 2011. The 2008 "admission", which Appellant had no actual knowledge was made to the FEI, cannot be a voluntary admission in July 2011, as between those dates, Appellant was not taking DHEA-s. By July 2010, Appellant was no longer taking

DHEA-s nor was he during the September – October 2010 period at the World Equestrian Games.

60. The chronology of events must be examined against the provisions of Article 10.5.4. In 2008, the Appellant sought advice about the taking of DHEA-s, then in his 2008 TUE application, supplemented at the request of CCES, there was one sentence in the endocrinologist's letter on which he relies as an admission. In May 2010, the FEI had informed his national federation that his TUE application was denied. FEI asked whether Equine Canada wanted to submit another application on Mr Millar's behalf but there was no response. It turns out that he was not then taking DHEA-s. He stopped because he was feeling better. He then decided to start taking it again at some point before June 2011, after a significant period of not doing so, but not as oral drops, rather in a multivitamin. It is difficult to accept any excuse for his failure to notify the FEI that he had started to take DHEA-s again and did not have a TUE. His actions in submitting the applications previously indicated he had a clear grasp of the rules requiring a TUE.

61. The Appellant's argument that Article 10.5.4 does not have a temporal component is illogical. It would mean in essence, that if a person makes an admission, and the anti-doping authorities fail to take immediate action to stop the activity, that individual remains entitled to the benefit of his or her admission even if they continue to commit the same violation. This interpretation allows the athlete to admit a violation that will happen, not just one that has already happened, which runs contrary to the rule's underlying purpose.

62. Mr Millar was asked by the CCES to provide more justification for the TUE, and so went to an endocrinologist who supplied the letter containing his 'admission'. These steps were taken in pursuit of a TUE, not as an admission. The FEI does not accept that this was a voluntary admission for the purposes of Article 10.5.4. The Appellant never stopped taking DHEA-s after his admission and when his application for a TUE was turned down (twice), he kept taking it, knowing that he was not entitled to a TUE and so was not granted a TUE.

63. He also knew that without a TUE his continuing use of DHEA-s while participating in the sport was an ADRV and nevertheless he continued to take it. When he was tested and asked to declare on the doping control form any medications or supplements, he failed to report the DHEA-s he was taking.

64. The Appellant made no efforts to find out what was happening with his TUE application. He placed no calls to Equine Canada to enquire. He did not ask his home office whether any notices had been received, nor did he send any emails. His failure to take action was highly negligent. There were two documents of which Appellant was unaware: the rejection of the TUE from CCES of 21 May 2009; and Dr Knipping's letter of 12 June 2009 advising him to cease taking the DHEA-s. He saw neither and made no effort to learn of these things, even though Mr Millar knew Dr Knipping socially and apparently had not been told by him of his views after he had sent Mr Millar the letter he did not see.

65. In any event, Mr Millar learned in his conversation with Ms Hendry-Ouellette in October 2009 that his CCES TUE application had been denied and that an application to the FEI was required. Ms. Hendry-Ouellette in her transmittal email to Ms de Graaff at Equine Canada and Ms de Graaff's email to FEI transmitting the same file clearly indicate that Ms Hendry-Ouellette and Ms de Graaff were in no doubt that the Appellant did not have the necessary permission to use DHEA-s.

66. Ms Hendry-Ouellette's contemporaneous actions demonstrate that she did not know Appellant was taking DHEA-s, in spite of her subsequent email of January 2013. No one in the national federation, other than Ms Hendry-Ouellette, knew he was taking DHEA-s. She did not tell the coach, officers of the national federation, or anyone else. Specifically, her email of 21 February 2010, not received by Mr Millar, indicates she did not then know whether he was taking DHEA-s. She asked that he send her the TUE application file for forwarding by Equine Canada to the FEI, whereupon Mr Millar asked his office to send the file to her on his behalf. The file sent to the FEI by Equine Canada which presumably Ms Hendry-Ouellette had reviewed included the final note from Dr Knipping (again not seen by Appellant) advising him to stop taking the DHEA-s. The situation therefore was that Appellant was making a request to be able to take the DHEA-s, by virtue of the TUE application. Nothing in the file indicated he was then taking DHEA-s.

67. In December 2009, the FEI learned for the first time from the emails received from Equine Canada that the Appellant was requesting a TUE to use DHEA-s. The FEI advised Equine Canada that the information Mr Millar had provided was not sufficient to support a TUE and that if he was tested while taking the medication and tested positive, he would face sanctions. Mr Millar does not remember talking to Ms Hendry-Ouellette about this subject after the file was forwarded to the FEI but did testify that he told Ms Hendry-Ouellette in December 2009 that he was currently on a doctor prescribed DHEA program. He testified that Ms Hendry-Ouellette did not tell him the FEI was asking for full medical support for the TUE, did not tell him he could not take DHEA-s or that the TUE was denied. Ms Hendry-Ouellette testified she did not call Mr Millar to follow up as she was under the impression that her colleague, Ms De Graaff was communicating things forward. Mr Millar testified that he was not told of the FEI's following up with Equine Canada on the TUE application in 2010. In any event, the rules are specific that silence does not mean the TUE has been granted.

68. In August 2011, the Appellant received notice that his sample tested positive for a prohibited substance. The FEI gave him the opportunity to request a provisional hearing or an expedited hearing. The Appellant sought a more thorough medical analysis of his condition and in the meantime was provisionally suspended from that date. The argument made by the Appellant was that there was an open TUE application and he wanted to try to get a retroactive TUE. The doctors he consulted over the next several months did not agree with the original diagnosis and it became clear he would not receive the TUE. Only then, 15 months into the case, did counsel argue that Appellant had made a voluntary admission. This long delay is inconsistent with his having made such a disclosure. Logically, one would expect this would have been raised long before the Appellant's provisional suspension had reached 12 months. Instead, this argument appears to have been constructed only after the fact.

69. The FEI communicates with individual athletes through their national federations which are the members of FEI. The athletes are members of the national federations so the national federation has a direct relationship with its athlete members. The 2009 and 2010 ADRHA Article 18.6 provide that *"[N]otice to an Athlete or other Person who is a member of a National Federation may be accomplished by delivery of the notice to the National Federation"*. The TUE application process in particular is assisted by the involvement of the national federation. Since Mr Millar did apply to the FEI for a TUE through his national federation, the FEI respected that choice by responding to him in the same way. Equine Canada assumed the role of being a conduit between Mr Millar and the FEI, communicating with the FEI on his behalf and confirming that it would pass each response from the FEI to Mr Millar. This was all standard procedure. If Mr Millar had contacted the FEI directly, it would have responded directly and copied Equine Canada.

70. FEI does not object to the period of ineligibility beginning as early as the date of the sample collection since Mr Millar did accept upon learning of his positive test that his taking DHEA-s was an ADRV.

71. The decisions cited by Appellant revolve around whether the admission of facts that amount to an ADRV is the same as admitting the commission of an ADRV. The rule should be read that the athlete has to admit the commission of an ADRV to fall within Article 10.5.4, but in this case, that is not relevant because of the timeline and there was no actual relevant admission. The CAS case-law *"requires the interpretation of the statutes and rules of sport associations to be objective and always to start with the wording of the rule. It follows that the adjudicating body has to consider the meaning of the rule, looking at the language used, the appropriate grammar and the syntax. The intentions (objectively construed) of the association including any relevant historical background may be taken into consideration"* (CAS 2011/A/2675, para 7.17). This purposive approach is key: in particular, the jurisprudence is clear that the WADA Code and Code-compliant anti-doping rules (such as the ADRHA) must be interpreted and applied by reference to their underlying purposes (which is to ensure that sport is clean of any prohibited substances), and not in a manner that does not promote and pursue that goal. The words of Article 10.5.4 and the Comment clearly reveal the intent behind this Article. It is aimed at protecting clean sport and encouraging athletes who have succumbed to temptation and broken the rules to come forward and admit what they have done. This means you have to come forward and confess your violation and also stop committing that violation. That is why you do not get the benefit of the Article if you would have been discovered anyway, because then you would have been required to stop in any event. To mitigate the offender's sanction if he continues with the violation after supposedly 'coming clean' would be completely contrary to the purpose of the Article (i.e. preserving clean sport). The FEI is not aware of any case, at any level, where Article 10.5.4 has been applied even though the athlete continued to commit the violation after admitting it.

a. FEI cites CCES v Zimmerman-Cryer (*supra*) in support of this proposition as the athlete's regret and repentance were crucial to the tribunal's decision to apply Article 10.5.4. If he had carried on taking the steroid, the outcome would have been very different. This is in contrast to the Appellant, who thought it was a valid therapeutic use

to treat a legitimate medical condition and his statement (made by the endocrinologist) that he was already using DHEA-s was made in support of that application, and not for any other purpose. He did not submit a TUE application in an effort to 'admit an anti-doping rule violation'. To the contrary, he was applying for permission to use DHEA-s for therapeutic reasons. That is why the letter was sent in to the CCES, i.e. to try to address the CCES's concerns by justifying the Appellant's medical need and supporting his application. There was no highlighting of the comment that the treatment had been started. And contradictory to his claim of an admission, the Appellant did not disclose all of the medications and supplements that he had ingested on the doping control form when his sample was taken.

b. Regarding IRB v. Telea (*supra*), the Board Judicial Committee rejected the Article 10.5.4 plea on other grounds, and therefore its ruling on this argument was technically *obiter*, but in any event it rejected the argument by the IRB of an admission requiring a mental state of knowledge that it was an ADRV by holding that the rule is concerned with a voluntary admission of conduct which amounts to an ADRV. This is adding an additional requirement to the rule and thus the FEI disagrees with the decision. Nevertheless, this case is based on very different facts – the athlete was making clear admissions in response to questions asked as part of a formal hearing.

c. Regarding UK Anti-Doping v Offiah (*supra)*, it also involved an admission made clearly as part of a formal investigation and the point was apparently uncontested. Therefore the ruling was made without the benefit of contrary argument, or discussion of the wording of the Article which speaks of 'admission of the commission of an ADRV' (not of 'admission of conduct constituting an ADRV'). There was no discussion of the policy underlying the Article, as reflected in the comment to the Article which refers to the athlete 'coming forward' and admitting the ADRV in circumstances where no one is aware of it.

d. FEI relies on IRB v Ponson (*supra*) where the tribunal held that the player's disclosing his use of phentermine on the doping control form and telling the testing personnel do not amount to a voluntary admission for purposes of Article 10.5.4 because the athlete did not volunteer that information until he had been notified that he was required to provide a sample, and because he was not making an "admission" in the true sense of the word (i.e. an admission, in terms, of liability for commission of an ADRV, not an acknowledgement (for other purposes) of facts that together reflect the commission of an ADRV). The FEI submits that this approach is the right one since it is consistent with the wording of Article 10.5.4.

V. ADMISSIBILITY

72. Article R49 of the Code provides that:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.

73. Article 13.6 of the FEI ADRHA provides for a 30 day deadline for appeals to be filed. In its answer, the Respondent expressly acknowledged that *"the appeal was filed within the 30-day deadline established in FEI ADRHA. The appeal is therefore admissible"*. Accordingly, the Panel is satisfied that the appeal is admissible.

VI. JURISDICTION

74. Article R47 of the Code provides that:

An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.

75. Article 12 of the FEI ADRHA, based upon the 2009 revised Code, effective 1 January 2011, provides for an appeal to CAS. In it Answer, the Respondent acknowledged that *"FEI ADRHA Art. 13 gives the CAS Panel jurisdiction to hear and determine this appeal"*. Accordingly, the Panel is satisfied that it is competent to hear this appeal.

VII. APPLICABLE LAW

76. Article R58 of the Code provides that:

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

77. The parties rely on various provisions of the FEI regulations, including the FEI ADRHA. The Panel considers the FEI regulations to be applicable for the purposes of Article R58 of the Code, and that Swiss law applies subsidiarily.

Applicable provisions of the FEI ADRHA

> **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 violation under Article 2.1.
>
> **4.4.1** *Athletes* with a documented medical condition requiring the use of a *Prohibited Substance* or a *Prohibited Method* must first obtain a Therapeutic Use Exemption (*TUE*).
>
> **13.4** When an *Anti-Doping Organization* fails to take action on a properly submitted therapeutic use exemption application within a reasonable time, the *Anti-doping Organization*'s failure to decide may be considered a denial for purposes of the appeal rights provided in this Article.
>
> **7.6.1** If analysis of an A *Sample* has resulted in an *Adverse Analytical Finding* for a *Prohibited Substance* that is not a Specified Substance, and a review in accordance with Article 7.1.2 does not reveal an applicable *TUE* …, a *Provisional Suspension* shall be imposed promptly after the review and notification described in Article 7.1
>
> **7.6.3** However, a *Provisional Suspension* may not be imposed, whether pursuant to Article 7.6.1 or Article 7.6.2, unless the *Athlete* or other *Person* is given either (a) an opportunity for a *Provisional Hearing* either before imposition of the *Provisional Suspension* or on a timely basis after imposition of the *Provisional Suspension*; or (b) an opportunity for an expedited hearing in accordance with Article 8 (Right to a Fair Hearing) on a timely basis after imposition of a *Provisional Suspension. National Federations* shall impose *Provisional Suspensions* in accordance with the principles set forth in this Article 7.6.
>
> **8.1.2** … If the *Athlete* has been imposed a *Provisional Suspension* as per Article 7.6, the *Athlete* has the right to request that the hearing be conducted on an expedited basis.

10.5.4 Admission of an Anti-Doping Rule Violation in the Absence of Other Evidence

Where an *Athlete* or other *Person* voluntarily admits the commission of an anti-doping rule violation before having received notice of a *Sample* collection which could establish an anti-doping rule violation (or, in the case of an anti-doping rule violation other than Article 2.1, before receiving first notice of the admitted violation pursuant to Article 7) and that admission is the only reliable evidence of the violation at the time of admission, then the period of *Ineligibility* may be reduced, but not below one-half of the period of *Ineligibility* otherwise applicable.

[Comment to Article 10.5.4: This Article is intended to apply when an Athlete or other Person comes forward and admits to an anti-doping rule violation in circumstances where no Anti-Doping Organization is aware that an anti-doping rule violation might have been committed. It is not intended to apply to circumstances where the admission occurs after the Athlete or other Person believes he or she is about to be caught.]

10.9.2 Timely Admission

Where the *Athlete* promptly (which, in all events, means before the *Athlete* competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the *FEI or its National Federations*, the period of *Ineligibility* may start as early as the date of *Sample* collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied, the *Athlete* or other *Person* shall serve at least one-half of the period of *Ineligibility* going forward from the date the *Athlete* or other *Person* accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date of the sanction is otherwise imposed.

7.4 Review of Other Anti-Doping Rule Violations Not Covered by Articles 7.1-7.3

The *Anti-Doping Organization* or other reviewing body established by such organization shall conduct any follow-up investigation into a possible anti-doping rule violation as may be required under applicable anti-doping policies and rules adopted pursuant to the *Code* or which the *Anti-Doping Organization* otherwise considers appropriate. At such time as the *Anti-Doping Organization* is satisfied that an anti-doping rule violation has occurred, it shall promptly give the *Athlete* or other *Person* subject to sanction notice, in the manner set out in its rules, of the anti-doping rule violated, and the basis of the violation…

20.5 Roles and Responsibilities of *National Anti-Doping Organizations*

20.5.6 To vigorously pursue all potential anti-doping rule violations within its jurisdiction including investigation into whether *Athlete Support Personnel* or other *Persons* may have been involved in each case of doping.

20.3 Roles and Responsibilities of International Federations

20.3.9 To vigorously pursue all potential anti-doping rule violations within its jurisdiction including investigation into whether *Athlete Support Personnel* or other *Persons* may have been involved in each case of doping.

VIII. MERITS

78. The Appellant seeks to reduce his period of ineligibility based on his having made an admission in accordance with the provisions of Article 10.5.4. The FEI objects to the characterization of the statements made by the Appellant as admissions in accordance with Article 10.5.4. There is no need to restate the arguments of the parties which are detailed above.

79. The Appellant also seeks to apply the provisions of Article 10.9.2. The Appellant's period of ineligibility as imposed by the FEI Tribunal is due to expire as of 24 August 2013. The Panel finds that in accordance with the provisions of Article 10.9.2, the Appellant had, for purposes of that provision, admitted in November 2012 to an ADRV when confronted by the FEI. Thus, the Panel pursuant to the discretion allowed under Article 10.9.2, rules that Mr Millar's period of ineligibility shall start on 19 July 2011 and expire as of the date of the issuance of this Award. This is within the parameters of Article 10.9.2 since Mr Millar has served at least one-half of his period of ineligibility going forward from the date of the hearing decision imposing the sanction.

80. It is thus unnecessary for the Panel to address the very interesting arguments with respect to the same possible reduction of Mr Millar's period of ineligibility in accordance with Article 10.5.4 and the Panel declines to do so.

81. Having heard the live evidence of the witnesses, which the FEI Tribunal did not hear, the Panel concludes that the FEI Tribunal acted as they thought appropriate based on the facts before them. The Panel also accepts that the Millar family were handling their difficult situation in the manner which they thought was appropriate as they saw fit at the time.

82. Since the appeal has been upheld in part, the Panel exonerates Appellant from the costs of the FEI Tribunal judicial procedure and reduces the fine imposed upon by him by one-half.

83. This decision is with respect to any and all ADRVs consisting of DHEA-s use from October 2008 through the date of the sample collection of 30 June 2011.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Jonathon Millar on 24 April 2013 is upheld in part.

2. The FEI decision of 28 March 2013 is amended as follows:

   - Jonathon Millar's period of ineligibility shall expire as of the date of this Award.
   - The fine imposed on Jonathon Millar is fixed at CHF 1,000.
   - Jonathon Millar is exonerated from the costs of the FEI judicial procedure.

(…).

5. All other motions or prayers for relief are dismissed.