

## **Decision of the IBSF Doping Hearing Panel**

in the matters of the provisional suspension of

Elena Nikitina, License number SNRUSWO21119921

Maria Orlova, License number SNRUSW140419881

Olga Potylitsyna, License number SNRUSW170919891

Aleksandr Tretiakov, License number SNRUSM190419851

To: each of the individual Athletes

Bobsleigh Federation of Russia  
President Alexandr Zubkov  
8 Luzhnetskaya Nab.  
119991 Moscow, Russian Federation

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Date: January 6, 2017

## I Introduction

1. The International Bobsleigh & Skeleton Federation ( the "**IBSF**") has sent on December 30, 2016 a notification to Elena Nikitina, License number SNRUSWO21119921, Maria Orlova, License number SNRUSW140419881, Olga Potylitsyna, License number SNRUSW170919891 and Aleksandr Tretiakov, License number SNRUSM190419851, hereinafter collectively referred to as the "**Athletes**".
2. The notification to the Athletes from the IBSF followed a letter of December 22, 2016 the IBSF received from the International Olympic Committee informing that it has opened investigations related to an alleged anti-doping rule violation of the Athletes in connection with the Olympic Winter games 2014 in Sochi, Russia. The alleged anti-doping rule violation has been described in more detail in the IOC Notification letter of December 22, 2016 addressed to each of the Athletes. This letter described the alleged anti-doping rule violation of the Athletes as follows (the letter of one of the aforementioned athletes is cited. Besides the sample numbers and dates the letters to the other athletes are identical):
  - "6. *The McLaren Independent Investigation Report – Part II issued on 9 December 2016 and the supporting documentation indicates that the doping control conducted by the IOC on the occasion of the Olympic Games Sochi 2014 may have been tampered, without limitation, by manipulation of sample(s) in the WADA accredited laboratory in Sochi.*
  7. *Based on the information in our possession, the B-samples n° 2891755 and n° 2890474 notably appear to have been surreptitiously opened and the urine collected on 15 February 2014, respectively 23 February 2014, replaced by a different urine (scratches and marks evidence indicates tampering).*
  8. *At this stage, the alleged anti-doping rule violation is "tampering or attempted tampering with any part of Doping Control" pursuant to Article 2 of The International Olympic*

Committee Anti-Doping Rules applicable to the XXII Olympic Games in Sochi, in 2014 (*hereinafter: "IOC Anti-Doping Rules"*). Further violations which might be brought to light in the course of further investigations are reserved.

9. Pursuant to Rule 59.2.2.4 of the Olympic Charter and Article 6.2.5 of the IOC Anti-Doping Rules, we inform you that Disciplinary Commission has been constituted to investigate and conduct the disciplinary proceedings.
  10. The Disciplinary Commission shall consist of Mr Denis Oswald (Chairman, Switzerland), who is a member of the IOC Legal Affairs Commission, Mr tony Estanguet (France) who is member of the IOS Legal Affairs Commission, and Mr Juan Antonio Samaranch (Spain), who is an IOC Vice-President.
  11. The Disciplinary Commission will first conduct an investigation in order to further determine the circumstances of the potential anti-doping violation(s), notably your role and/or the role of other persons in regard of the alleged anti-doping rule violation.
  12. **As a first step, you are invited to provide any explanation or relevant information you might have in regard of the above mentioned circumstances by email ([legal.antidoping@olympic.org](mailto:legal.antidoping@olympic.org)) or by fax (+41 21 621 63 57) until 9 January 2017."**
3. The IBSF informed each of the Athletes by individual letters on December 30, 2016 that they are provisionally suspended forthwith from that day in accordance with article 7.9 of the IBSF Anti-Doping Rules ("**ADR**"), version January 1, 2015.
  4. The Athletes have requested by email on January 2, 2017 in accordance with article 7.9.3 of the IBSF ADR the opportunity for a Provisional Hearing on a timely basis after imposition of the Provisional Suspension.
  5. The Provisional Hearing took place on January 3, 2017 by means of Skype conference before the Doping Hearing Panel, except for Olga Potylitsyna who was heard in a conference call on the same day. On behalf of the Doping Hearing Panel of the IBSF Dr. Alessia di Gianfrancesco, Dr. Prof. Ian Blackshaw , (chairman) Mr. Dolf Segaar, sports lawyer and Raik Bauerfeind, IBSF Anti-doping officer were present. On behalf of the Athletes a translator and the chairman of the Russian Bobsleigh Federation, Mr Alexandr Zubkov participated as well.
- II. Opinion of the Athletes**
6. Since each of the Athletes provided the Doping Hearing Panel with similar arguments against their provisional suspension, the Doping Hearing Panel considered it appropriate and efficient to combine the current report and decision of each individual matter into one. Each of the

Athletes provided the Doping Hearing Panel with a written explanatory note, in which they described the procedure of the doping control(s) they were subject to.

7. The Doping Hearing Panel considers the following relevant with regard to the opinion of each of the Athletes:

- The Athletes are elite athletes already for a number of years.
- During those years none of the Athletes tested positive or were convicted for committing any other anti-doping rule violation. Each of them were tested on various occasions.
- IOC has stated in its letter of December 22, 2016 that the B samples notably appear to have been surreptitiously opened and the urine collected was replaced by a different urine (scratches and marks evidence indicates tampering). Each of the Athletes have confirmed (verbally and in writing) that the doping procedures in 2014 that they were subject to were adequate and according to the rules of testing. All formalities that have to be complied with and all documents that needed to be filled out have been complied with and filled out in good order.
- Each of the Athletes have declared that they have not been confronted with the alleged tampering of their samples before they read about it in the New York Times or through the McLaren Report II of December 9, 2016. Copies of these confirmations have been provided to the Doping Hearing Panel in Russian and in English translations
- Each of the Athletes have offered full support with regard to any investigation into the matter. President Zubkov offered similar support on behalf of the Russian Bobsleigh Federation.

8. The Athletes have emphasized not to be involved in any anti-doping rule violation and not to play or have played any role in the allegations of tampering as mentioned in the McLaren Report II and the notification letter of the IOC. They therefore requested the Doping Hearing Panel to lift the provisional suspension.

### **III. Considerations of the Doping Hearing panel**

#### **A. Applicable Anti-Doping Rules**

9. According to article 20.7 of the ADR 2015 the rules have come into full force and effect on 1 January 2015 (the "Effective Date"). The ADR of the IBSF shall not apply retroactively to matters pending before the Effective Date. Since the current matters relating to the Athletes were not pending before the Effective Date the ADR 2015 of the IBSF will apply here.

## B. McLaren-reports

10. The Doping Hearing Panel has taken strong notice of the systemic Russian doping control manipulation and cover up that is mentioned in the McLaren-reports. The second report even sharpens the picture and confirms the findings of the first report and identifies summer, winter, and Paralympic athletes involved in the doping cover-up and manipulation (p.4 of McLaren Report II).
11. However, the McLaren Report II makes as well very clear that it has not assessed the sufficiency of evidence to prove an anti-doping rule violation of an athlete. The Doping hearing Panel refers to page 35-36 of the McLaren Report II:

*"The IP ("Independent Person") is not a Results Management Authority under the World Anti-Doping Code and therefore does not have the authority to bring forward ADRV cases against individual athletes. Accordingly the IP has not assessed the sufficiency of the evidence to prove an ADRV by any individual athlete. Rather, for each individual Russian athlete, where relevant evidence of possible manipulation to conceal positive tests has been uncovered in the investigation, the IP has identified that evidence and will have provided it to WADA. The different types of evidence provided with respect to any individual athlete are like strands in a cable. It will be up to each Results Management Authority to determine whether the provided strands of evidence, standing alone or together build a sufficiently strong cable to support an ADRV in an individual case. Alternatively, the information may simply provide intelligence of that athlete as "benefiting from alleged manipulations to conceal positive doping tests" and may inform possible future targeted testing by the federation."* (Emphasis by authors).

12. The Doping Hearing Panel has concluded from the above in combination with the letter of IOC of December 22, 2016 that the evidence that has been brought forward to WADA by the Independent Person is not (yet) sufficient evidence to bring forward already an Anti-Doping Rule Violation in the current matters of the Athletes:

*"At this stage the alleged anti-doping rule violation is "tampering or attempted tampering with any part of Doping Control pursuant to Article 2 of the International Olympic Committee Anti-Doping Rules applicable to the XXII Olympic Games in Sochi 2014 (...). Further violations which might be brought to light in the course of further investigations are reserved."*

*(...)*

*"The Disciplinary Commission will first conduct an investigation in order to further determine the circumstances of the potential anti-doping violation(s), notably your role and/or the role of other persons in regard of the alleged anti-doping rule violation."*

The Doping Hearing Panel has not received any information of the IOC that support IOC's conclusion that already at this stage there is sufficient evidence to determine an anti-doping rule violation by the Athletes. According to the Doping Hearing Panel the IOC implicitly acknowledges with its letter of December 22, 2016 that sufficient evidence is still lacking where the Disciplinary Committee does not act on an alleged violation, but instead first conducts further investigation.

### **C. IBSF ADR on Provisional Suspension**

13. Article 7.9.2 of the ADR of the IBSF provides the opportunity to the IBSF Anti-Doping Administrator or its delegate to impose a Provisional Suspension on the Athletes or other Person against whom the anti-doping rule violation is asserted.

14. In this respect also article 3.1 of the IBSF ADR is relevant, which says:

#### **3.1 Burdens and Standards of Proof**

*"IBSF shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether IBSF 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."*

15. On the one hand McLaren Report II makes crystal clear that athletes of all kind of sports in Russia were involved in the doping cover up and manipulation. On the other hand it made clear as well that it has not assessed the sufficiency of the evidence in each individual case.

16. The Doping Hearing Panel has analyzed the letter of the IOC of December 22, 2016 as such that the evidence in the cases of the Athletes is not (yet) sufficient to come to the conclusion already now that the Athletes committed an anti-doping rule violation.

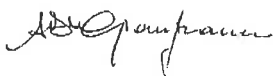
The IOC refers to article 2 of the IOC Anti-Doping Rules, applicable in Sochi and claims the alleged anti-doping rule violation to be "tampering or attempted tampering of any Doping Control". Nevertheless the Doping Hearing Panel has not received any evidence of the involvement of the Athletes with that violation. Whereas the Doping Hearing Panel has to comply with the standard of proof provision of article 3.1 of the IBSF ADR, mentioned in paragraph 14 above, the sole conclusion in the letter of IOC is not sufficient to come to the establishment of an anti-doping rule violation of the Athletes that would support the current provisional suspension. Again, the fact that IOC itself concluded to conduct further investigations before following up on the alleged anti-doping rule violation, supports the above view of the Doping Hearing Panel.

#### IV Decision


17. Article 6 of the European Convention on Human Rights protects the right to a fair trial and, in particular, guarantees the presumption of innocence until proved guilty. Article 3.1 of the ADR of the IBSF as cited above in paragraph 14 places in that context the burden of proof on the IBSF. In cases as the subject where there are no Adverse Analytical Findings other means of evidence are needed to prove an anti-doping rule violation.
18. The Doping Hearing Panel comes to the conclusion that McLaren Report II provides sufficient reason to conduct further investigation by both the IOC and the IBSF into the role of the Athletes in "tampering or attempted tampering of any Doping Control", as being in line with article 3.1 of the ADR of the IBSF, but at the same time it comes to the conclusion that at this very moment there is not (yet) sufficient evidence against the Athletes that would justify the provisional suspension. The Doping Hearing Panel invites the IOC to share any outcome of its investigation with the IBSF in order to potentially reconsider the position of the Athletes in this respect.
19. The Doping Hearing Panel of the IBSF concludes therefore to lift the provisional suspension of Elena Nikitina, Maria Orlova, Olga Potylitsyna, and Aleksandr Tretiakov, with immediate effect as of the date of signing of this decision, with reference to article 7.9.3 sub 2(c) of the ADR of the IBSF. This Decision of the Panel is entirely without prejudice to the pending investigation of the IOC (referred to above) and does not, in any way whatsoever, preempt the outcome of such investigation.
20. Parties did not request for any compensation of costs.

#### IBSF Doping Hearing Panel, January 6, 2017

Dr. Alessia di Gianfrancesco



Prof. Dr. Ian Blackshaw



Dolf Segaar