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MEMORANDUM

To: Bob Bennett, Executive Director
Nevada State Athletic Commission

From: Edward L. Magaw, Senior Deputy Attorney General
Gaming Division

Date: June 28, 2021

Subject: Declassifying Cannabis as a Prohibited Substance for the
Purpose of Activities Under the Jurisdiction of the Nevada State
Athletic Commission

CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION

You asked our office to research whether the Nevada State Athletic Commission (Commission) has the authority to change its policy regarding the use and possession of cannabis by unarmed combatants. Specifically, whether it has the authority to declassify cannabis as a prohibited substance for purposes of its anti-doping statutes and regulations. This memorandum provides the results of our research.

Question: Can the Commission declassify cannabis as a prohibited substance for purposes of its anti-doping statutes and regulations?

Short Answer: Yes. It is within the Commission's full discretion to determine what substances are prohibited under its anti-doping statutes and regulations. Thus, the Commission can change its current policy and no longer classify cannabis as a prohibited substance.

ANALYSIS

A. Anti-Doping Provisions

The Commission has been vested with “the sole direction, management, control and jurisdiction over all contests or exhibitions of unarmed combat to be conducted, held or given within the State of Nevada” NRS 467.070(1). The broad authority includes the Commission’s ability to set the anti-doping policy and requirements for unarmed combat in this State. *Id.*

The only requirement set by the Nevada State Legislature (Legislature) is that the Commission is required to perform drug testing on amateur and professional unarmed combatants. NRS 467.153. The applicable statute reads as follows:

NRS 467.153 Drug testing. The Commission shall perform drug testing of amateur and professional unarmed combatants. Such drug testing may take place at any time, including, without limitation, during any period of training.

Other than the requirement to perform drug testing, the Legislature has left it to the Commission to set the specifics of its anti-doping policy, including the determination as to what substances are considered prohibited.

As part of its anti-doping program, the Commission has adopted, by reference, the *Prohibited List* published by the World Anti-Doping Agency (WADA), which lists the substances WADA has deemed to be prohibited, including cannabis. NAC 467.011(1). This regulation reads as follows:

NAC 467.011 Adoption by reference of publications related to program of drug testing and anti-doping. (NRS 467.030, 467.153)

1. The Commission hereby adopts by reference the most recent version of the:

(a) *Prohibited List* published by the World Anti-Doping Agency.

(b) *International Standard for Laboratories* published by the World Anti-Doping Agency.

(c) *Decision Limits for the Confirmatory Quantification of Threshold Substances*, WADA Technical Document - TD2014DL, published by the World Anti-Doping Agency.

2. A copy of the publications adopted by reference pursuant to subsection 1 is available, free of charge, at the Internet address www.wada-ama.org.

3. If a publication adopted by reference pursuant to subsection 1 is revised, the Commission will review the revision to ensure its suitability for this State. If the Commission determines that the revision is not suitable for this State, the Commission will hold a public hearing to review its determination within 6 months after the date of publication of the revision and give notice of that hearing within 30 days after the date of the publication of the revision. If, after the hearing, the Commission does not revise its determination, the Commission will give notice that the revision is not suitable for this State within 30 days after the hearing. If the Commission does not give such notice, the revision becomes part of the pertinent publication adopted by reference pursuant to subsection 1.

It is clear from subsection 3 of NAC 467.011, that it was contemplated the Commission may want to deviate from the WADA list on a case-by-case basis. *See* NAC 467.011(3). While subsection 3 applies to prospective changes to the WADA list, logically, the Commission should have the same ability regarding a substance currently on the list it no longer considers a prohibited substance – including cannabis. Otherwise, the Commission’s broad authority to regulate unarmed combat in the State of Nevada would be significantly hindered.

The Commission has additional authority to declassify cannabis as a prohibited substance by exercising its waiver authority found in NAC 467.008.

B. Waiver Authority

Nevada Administrative Code 467.008(1) grants the Commission authority to waive any provision of Chapter 467 of NAC for any reason it deems sufficient. That subsection reads as follows:

NAC 467.008 Waiver of requirements; alteration of period of time required for action; designation of Commissioner to perform duties of Chair. (NRS 467.030)

1. The Commission may, at its sole discretion, waive a requirement set forth in this chapter for any cause deemed sufficient by the Commission.

Under this authority, if the Commission determines sufficient cause exists, it could waive the requirement that cannabis be considered a prohibited substance for purposes of its anti-doping program. Were such waiver to be granted, the Executive Director of the Commission would no longer be required to test unarmed combatants for cannabis, nor would the Executive Director be required to discipline unarmed combatants for the use or possession of cannabis.

To accomplish this, the Commission must agendaize the matter for consideration and possible action at a properly noticed meeting.¹ At the meeting, the Commissioners would vote on whether to institute such waiver. If the waiver is approved, cannabis would no longer be considered a prohibited substance for purposes of the Commission's anti-doping policy.

C. Sufficient Cause for Change

As stated above, the Legislature vested the Commission with plenary authority over unarmed combat in the State of Nevada. While the Commission has adopted the WADA list of prohibited substances, it possesses independent authority (as discussed above) to determine which substances should be prohibited under its anti-doping policy. It has not yielded or delegated its authority to WADA (nor can it).

¹ The meeting may be a regularly scheduled meeting of the Commission, or may be a special meeting, provided the meeting complies with Nevada's Open Meeting Law.

Since there is no legal impediment that prohibits the Commission from removing cannabis from its list of prohibited substances, the Commission only needs to make a finding that sufficient cause exists to institute a waiver.

The following factors may assist the Commission in determining whether sufficient cause exists:

- Nevada voters and the Nevada Legislature have approved the medical and recreational possession and use of cannabis. There is no longer a basis under Nevada criminal law to prohibit an unarmed combatant for using or possessing cannabis.
- WADA itself treats “out-of-competition” (*i.e.*, the period up to 11:59 pm on the day prior to the competition) use of cannabis as a “substance of abuse” if the athlete can prove its use was unrelated to sport performance. *See* WADA Code 10.2.4. If the athlete can prove this, WADA may recommend a lesser penalty than it would for the use of other prohibited substances on its list. *See id.* According to WADA, a substance, such as cannabis, is considered a “substance of abuse” because it is frequently abused in society outside the context of sport. *See* WADA Code 4.2.3. This implies that WADA does not consider the effects of cannabis to be performance enhancing.
- WADA recognizes that cannabis use by unarmed combatants is frequently for social reasons and the substance is not known as a performance enhancer. *See* WADA Code 4.2.3. Yet, under the Commission’s current anti-doping policy, the reason behind the use of any prohibited substance, including cannabis, is irrelevant to the determination as to whether a violation of its anti-doping policy has occurred (*i.e.*, strict liability). This could result in an unarmed combatant, who otherwise legally used cannabis for purely recreational purposes, facing the same penalties as someone who used a prohibited substance specifically for performance enhancement. This, in turn, could result in a significant penalty, both financially and otherwise, that might be considered overly harsh for the nature of the violation.

CONCLUSION

For the reasons set forth above, the Commission has the legal authority to declassify cannabis as a prohibited substance for purposes of its anti-doping policies. The Commission may declassify cannabis by first making a finding that sufficient cause exists to exclude cannabis from the prohibited substances list, and then relying upon that finding to issue a waiver pursuant to NAC 467.008.

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