

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

Re: AAA Case No. 01-22-0000-1852

)
Jamie Jurak (Claimant))
v.)
U.S. Speedskating (Respondent))
)
With)
Giorgia Birkeland)
Dessie Weigel (Affected Athletes))

AWARD OF ARBITRATOR

I, the undersigned arbitrator (the **Arbitrator**), having been designated by the American Arbitration Association, by agreement of the parties, and in accordance with the Ted Stevens Olympic and Amateur Sports Act (the **Act**) and Section 9 of the United States Olympic and Paralympic Committee (**USOPC**) Bylaws, having been duly sworn, and having duly heard the proofs and allegations of the parties, and conducted a hearing on an expedited basis on January 17, 2022 by videoconference, with Claimant, Respondent and Affected Athletes' legal counsel in attendance and offering argument and evidence, do hereby, **AWARD** as follows:

I. PROCEDURAL BACKGROUND

1. This matter arises as a complaint by Jamie Jurak (**Claimant** or **Jurak**), a Long Track speed skater in the Mass Start event, who asserts that U.S. Speedskating (**USS** or **U.S. Speedskating**) (**Respondent** or [**NGB**]) failed to apply its Athlete Selection Procedures (the **Procedures**) consistently and properly to similarly situated athletes – the Claimant and Affected Athlete Dessie Weigel (**Weigel**). Affected Athlete Giorgia Birkeland (**Birkeland**) was selected to the 2nd position on the Mass Start team for the 2022 Beijing Olympic Winter Games (the **Selection**). Affected Athlete Weigel also asserts that the Selection breached the Procedures by failing to apply them fairly, consistently and properly to similarly situated athletes.

2. Claimant filed her demand for arbitration with the American Arbitration Association (**AAA**) on January 13, 2022, on the Complaint Form used for filing a USOPC Bylaws Section 9 (**Section 9**) complaint. Notice of the preliminary hearing was provided to the parties and the Affected Athletes by the AAA via email on the same day. Claimant and her legal counsel, Paul Greene of Global Sports Advocates, Respondent through its legal counsel, Howard Jacobs of the Law Offices of Howard L. Jacobs and his associate, Katie Freeman and Affected Athlete Weigel through her legal counsel, Mark Morgan participated in a preliminary hearing telephone conference later on January 13, 2022 and they all participated in the nine hour virtual hearing held on January 17, 2022.

3. Present at the hearing as a witness for Claimant and Weigel was their coach, Mitch Whitmore. Attending the hearing as the representative of U.S.Speedskating was Matt Kooreman (**Kooreman**), USS Long Track Program Director, who along with Birkeland was a witness. Both of the Affected Parties also were witnesses at the hearing.
4. Also present at the hearing were USOPC Observers, Kacie Wallace, Sara Pflipsen, Emily Azevedo and Bryce Boarman, and intern at Global Sports Advocates, Ashlyn Hare, and Arent Fox LLP associate Rita Liu.
5. Claimant's request for relief is that the Arbitrator:
 - a. Overturn the selection made by U.S. Speedskating of Giorgia Birkeland to the 2022 U.S. Olympic Team,
 - b. Uphold Ms. Jurak's request to be named the proper selection to the 2022 U.S. Olympic Team,
 - c. In the alternative, remand back to U.S. Speedskating for further review of its improper decision to select Giorgia Birkeland; and
 - d. Order any other relief for Jamie Jurak this Panel deems to be just and equitable.
6. Affected Athlete Weigel's request for relief in her brief filed on January 14, 2022 is:
 - a. Nullification of the selection of Giorgia Birkeland to the 2022 U.S. Olympic Team,
 - b. Naming of Ms. Weigel as the second Mass Start long track athlete,
 - c. Alternatively, remand to the U.S. Speedskating Olympic Selection Task Force for further review of the discretionary criteria.
7. USS's answer filed on January 14, 2022, is to request that USS's selection of Birkeland as the discretionary selection to compete in the mass start event at the 2022 Olympic Winter Games be affirmed.
8. On January 18, 2022, within the deadline requested by the parties, the Arbitrator issued the following Operative Award:
 - A. Respondent did not violate its Long Track Speedskating Selection Procedures (Selection Procedures) in determining that Giorgia Birkeland was to receive the Mass Start discretionary athlete selection for the 2022 Beijing Olympic Winter Games U.S. Speedskating team. U.S. Speedskating followed its published Selection Procedures in its exercise of the review of the criteria specified and consistently applied the criteria as written, with respect to each of the Claimant and Affected Parties' respective records, using its

discretionary judgement exercised in good faith to support its selection.

- B. Neither Claimant Jamie Jurak nor Affected Party Dessie Weigel has sustained her burden of proof that she should have been named to the Mass Start Women's Olympic team and their respective demands for relief are denied;
- C. The parties shall bear their own attorneys' fees and costs associated with this arbitration;
- D. This Award shall be in full and final resolution of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

II. BURDEN OF PROOF, STANDARD OF REVIEW, JURISDICTION AND APPLICABLE LAW

A. Jurisdiction

- 9. The Arbitrator has jurisdiction over this dispute pursuant to the Act, because this is a controversy involving Claimant's opportunity to participate in a "Protected Competition" (defined to include, among others, a "Delegation Event", which includes the Olympic Winter Games), which is required to be resolved by binding arbitration. 36 U.S.C. §220522(4)(B). Section 9.1 of the USOPC Bylaws prohibits an NGB (such as USS) from denying or threatening to deny "any amateur athlete the opportunity to participate in a Protected Competition." Section 9.7 of the USOPC Bylaws provides that "[i]f the complaint [under Section 9.1] is not settled to the athlete's satisfaction the athlete may file a claim with the arbitral organization designated by the [USOPC] Board against the respondent for final and binding arbitration. If an impending competition requires immediate resolution of the complaint, an athlete may file a claim with the arbitral organization simultaneously with the filing of the complaint with the [USOPC]." Sections 9.7 and 9.9 of the USOPC Bylaws permit the arbitration proceeding to be expedited.

B. Burden of Proof

- 10. In a case arising under Section 9 of the USOPC Bylaws, claimants have the burden of proving their claims by a preponderance of the evidence. *Tibbs v. United States Paralympics*, AAA Case No. 71 190 E 00406 12 (August 28, 2012) at 14; *Beckom v. U.S. Bobsled and Skeleton Federation*, AAA Case No. 77 190 E 00105 JENF (February 12, 2010); *Nieto v. USA Track & Field*, AAA Case No. 77 190 E 00275 08 JENF (July 19, 2008); *Ruckman v. United States Rowing Ass'n*, AAA Case No. 77 190 E 00189 08 JENF (May 29, 2008); *Cameron Booth v. United States Rowing Ass'n*, AAA Case No. 30 190 259 07 (March 16, 2008); *Gault v. United States Bobsled & Skeleton Federation*, AAA Case No. 72 E 190 0002 92 (January 11, 1992). "Section 9 jurisprudence requires [the athlete] to prove [the NGB] breached its approved and published Athlete Selection Procedures for the [Olympic Games], applied them inconsistently to athletes similarly situated, acted in bad faith towards or with bias against [her], and/or violated applicable federal or state laws (e.g., Ted Stevens Olympic and Amateur Sports Act)." *Tibbs v. United*

States Paralympics, AAA Case No. 71 190 E 00406 12 at 14 (August 28, 2012) (citing several prior Section 9 awards). See also *Komanski v. USA Cycling*. Thus, the burden of proving that the NGB applied its procedures inconsistently, acted in bad faith and/or violated applicable federal or state laws is on the Claimant.

C. The Standard of Review

11. The standard of review applicable to a Section 9 case involving team selection was exhaustively explained in *Rahimi v. USA Taekwondo* (AAA No. 01-20-0000-5425):

Although not expressly incorporated or referenced therein, “[i]t is well accepted that the [arbitral] standard of review for cases arising under Section 9 of the USOC Bylaws is de novo.” *Komanski* at 5. In exercising de novo review in a team selection dispute, the arbitrator ensures that: 1) the athlete is given adequate procedural due process by providing a full and fair opportunity to be heard regarding his claims; and 2) the merits of an NGB’s challenged decision comply with the foregoing requirements of the law of private associations by analyzing whether its athlete selection procedures are valid; were followed and applied consistently; its discretionary decision was rational/reasonable (i.e., not arbitrary or capricious) and in good faith (i.e., without any bad faith or bias); and complies with applicable federal and state laws.

Komanski states that “Section 9 proceedings are not appeals of NGB decisions and there is no requirement for an arbitrator in these proceedings to give deference to any prior decision and, in fact, it would be incorrect to do so.” *Id.* at 5. (quoting *Craig v. USA Taekwondo, Inc.* AAA Case No. 77 190E 00144 11 (August 21, 2011)). Despite this language, in practical application and effect, an arbitrator’s de novo review in a team selection dispute generally is deferential to an NGB’s professional judgment regarding how to satisfy its USOC-delegated legal duty under the ASA “to obtain for the United States . . . the most competent amateur representation possible” if the NGB complies with the law of private associations.

In a Section 9 team selection dispute, “[a]rbitrators are not ombudsmen; they are authorized to resolve disputes under contracts and rules, not to declare how the world should work in the large.” *Lindland v U.S Wrestling Ass’n, Inc.*, 227 F.3d 1000, 1004 (7th Cir. 2000). Therefore, the scope of my de novo review of [an NGB’s] discretionary selection of [an athlete other than the Claimant athlete] is limited as follows:

[The arbitrator has] authority only to determine whether [Claimant] had a fair opportunity to compete for a position on the [team that will compete in a protected competition] and whether [an NGB’s]

Team Selection Committee used and rationally applied [its] published [Athlete Selection Procedures]. [The arbitrator's role] is not to determine whether [an NGB] "chose the best process for selecting teams" *Cameron Booth* at 19, or to substitute [his or her] judgment for the expert professional judgment of [an NGB] in establishing selection criteria or the Team Selection Committee in applying the criteria to individual [athletes]." *Beckom and USBSF*, AAA Case No. 77 190 E 00105 10 (February 10, 2010) at 8. See also *Komanski* at 5 ("In the context of selections cases, that review is not one that substitutes the arbitrator's assessment of performance for that of the NGB experts who are involved in the decision making."). In the immediately following sentence, *Komanski* states "Rather, it is a de novo review, with no deference, of the application of the published selection procedures to the facts of the individual case." This statement, however, appears to conflict with its foregoing sentence and the generally applied standard of review for athlete selection cases.

12. The arbitrator must determine whether USS breached the approved and published Selection Criteria, applied the Criteria inconsistently to athletes similarly situated, acted in bad faith towards or with bias against the athlete, and/or violated applicable federal or state laws. *Craig v. USA Taekwondo, Inc.*, AAA Case No. 77 190E 00144 11 JENF at 5 (August 21, 2011). This has also been stated in multiple selection arbitrations under the Act to mean that a decision by USS which has no rational basis, i.e. is unreasonable, arbitrary or capricious, will not meet the Act's requirements. In some cases the standard has been stated to be clear error or impropriety (as in *Viola v. USA Diving*, AAA Case No. 30 190 008 2805 (August 1, 2005).
13. USS has "the responsibility to athletes and others to make the rules clear, transparent, and easy to apply without confusion.... Athletes are entitled to know what standard they have to meet and precisely how such selections will be made." *McConneloug and USA Cycling*, AAA 30 190 00750 04 (July 20, 2004) at 7.

D. Applicable Law

14. The Act, 36 U.S.C. § 220523(a)(6) provides: "a national governing body may . . . recommend to the [USOPC] individuals and teams to represent the United States in the Olympic Games . . ."
15. The Act's requirements for an NGB's selection procedures are listed in the Act itself and the USOPC Bylaws Section 8.4.1.d ii as follows: "establish clear athlete, team, and team official selection procedures approved by a Designated Committee (as that term is defined in Section 8.5.1 below) and by the [USOPC], for Delegation Event teams as applicable, and timely disseminate such procedures to the athletes and team officials"
16. The applicable "U.S. Speedskating Athlete Selection Procedures 2022 Winter Olympic Games Long Track Speedskating" (the Procedures) provide in relevant part:

Section 1.3: The 2022 U.S. Olympic Team will be selected based on the following methods:

A. 2021 Fall World Cup Trials (Mass Start #1 and #2)

The results of the Mass Start #1 and the Mass Start #2 events at the 2021 Fall World Cup Qualifier will be combined with the results of the 2022 U.S. Olympic Trials Mass Start Event #3 to complete the series and award the first start position per gender on 2022 Olympic Mass Start Team (pending qualification within the SOQC). The second start position (per gender pending qualification within the SOQC) will be determined by the Olympic Long Track Selection Task Force (referred to as OLTSTF moving forward) based on the selection criteria outlined in section 2.2.3. The points system and how overall results will be determined is detailed in the 2021-22 U.S. Long Track Rules and Regulations (www.usspeedskating.org).

....

C. 2022 U.S. Olympic Team Trials – Long Track Speedskating (Individual Distances, Mass Start #3)

The Final Rankings from the 2022 U.S. Olympic Team Trials – Long Track Speedskating will be used to fill SOQC earned quota spots in each event/gender and the first position in the Mass Start series (Mass Start #1 & #2 from the Fall World Cup Trials & Mass Start #3 from the U.S. Olympic Team Trials) unless the Medal Contender Clause is invoked as stipulated in Section 2.2.1, or the total team entry quota is met as explained in the Reduction or Addition Procedure below (1.3.1.3).

The second Mass Start nomination (pending qualification within the SOQC) will be determined by the OLTSTF with selection criteria outlined in section 2.2.3.

...

Section 2. DISCRETIONARY SELECTION (if applicable)

2.1 Provide rationale for utilizing discretionary selection (if any):

There are five situations in which discretionary selection may be used: (1) Olympic Team Medal Contender Clause, (2) Team Pursuit Specialist(s) selection, (3) the 2nd position in the Mass Start, (4) COVID-19 Implications, and (5) 2022 U.S. Olympic Team Trials – Long Track Speedskating event cancellation.

...

2.2 List the discretionary criteria and explain how they will be used (if any):

...

3. Mass Start Discretionary Selection:

A Mass Start discretionary selection may be used to maximize the team's performance with a skater that is essential for the team-based events where the U.S. Speedskating Program Director and the Games Coaching Staff have devised a race strategy that may designate one athlete as a medal probable athlete, and another athlete's contribution may assist the medal probable athlete in achieving a top performance. For example, even though the Mass Start event is scored individually, athletes who sacrifice their own individual result to execute a team strategy for the purpose of aiding a medal potential athlete and having a profound impact on the ability of a medal potential athlete to achieve a top performance. This selection is also essential in assembling a team that will likely produce the best possible performance.

A Mass Start discretionary athlete may be selected to play a specific role within the race, based on their demonstrated physical capacities, skill set and experience fulfilling their roles. **The coaches' judgement, supported as much as possible by objective data described below, will be used to differentiate between athletes being recommended for the Mass Start Team.** [emphasis added]

Criteria that will be reviewed for the Mass Start Discretionary Selection are as follows:

- i. ISU World Cup and World Championship Mass Start results from the last 3 seasons.
- ii. National Mass Start results from the last 3 seasons
- iii. Individual Distance results from the current season
- iv. A Subjective evaluation of willingness and a proven commitment to teamwork in the mass start

III. FINDINGS OF FACT

Below is a summary of the facts based on the parties' written and oral submissions, which are relevant to this Arbitrator's reasoning. The parties submitted other additional facts and evidence which was also considered by the Arbitrator.

17. The parties considered that the Procedures were the applicable principles to be used for the selection of the Discretionary Selection at issue and that a 2.2.3. Mass Start Discretionary Selection was at issue.
18. Pursuant to the Procedures, U.S. Speedskating named an Olympic Selection Task Force (the **Selection Committee**) composed of five individuals as set out in the Procedures, in addition to the Athlete Representatives for the USS Board and the USOPC: Ted Morris (USS Executive Director); Matt Kooreman (USS Long Track Program Director); Shane Domer (USS High Performance Chair); Thomas Hong (Athlete Representative for USS) and Jonathan Garcia (Athlete Representative on the LT Task Force) (see Procedures at par. 2.3).
19. By virtue of the combined results of the three selection events, Mia Kilburg (**Kilburg**) earned the automatic qualification spot for the women's mass start event at the 2022 Olympic Winter Games. This fact is not in dispute.
20. Following the Olympic Trials, the Selection Committee met via Zoom on January 9, 2022. The minutes of that meeting (**Minutes**), as pertaining to this issue, detail the following:
 - “**Ladies TP** [this is a typo, and should be **Mass Start** instead of “TP”]:
 - Criteria Reviewed
 - International World Cup World Championship Results
 - National Results
 - Individual Distance Results
 - Teamwork
 - Reviewed International Results
 - Dessie qualified to finals in 2 of 3 World Cups
 - Giorgia finished 8th at junior worlds two years ago
 - Jamie competed in 4-Continents
 - General conclusion was that all 3 had very limited international experience to reference. Dessie stood out as the top athlete in this category because she was able to do 3 World Cups this season.
 - Reviewed Results from all three selection events

- Giorgia put on the wrong transponders in race #1 of the mass start selection series. She was disqualified for this and lost her placement points. However, no advantage was gained by wearing the wrong transponders, so the task force used this race and its results without the DQ as factors in the decision.
- Giorgia finished ahead of Dessie in 2 out of the 3 races except when she stood up early in race #2 misunderstanding the lap count. This is Giorgia's fault and Dessie should be acknowledged as beating Giorgia in this race.
- Giorgia finished ahead of Jamie Jurak in all 3 selection races.
 - General conclusion was that Giorgia had the better performances at the 3 selection events.
- Reviewed Individual results
 - Task force gave priority to mass start results over other TT events

Giorgia

500m 41,04 6 March 2020 Salt Lake City (USA)

1000m 1.19,70 23 October 2021 Salt Lake City (USA)

1500m 2.02,22 22 October 2021 Salt Lake City (USA)

3000m 4.20,89 5 January 2022 Milwaukee (USA)

5000m 7.46,00 7 March 2021 Salt Lake City (USA)

Dessie

500m 41,48 5 March 2021 Salt Lake City (USA)

1000m 1.21,00 7 March 2021 Salt Lake City (USA)

1500m 2.01,05 20 November 2021 Salt Lake City (USA)

3000m 4.06,85 10 December 2021 Calgary (CAN)

5000m 7.18,29 23 October 2021 Salt Lake City (USA)

Jamie

500m 41,46 27 February 2021 Salt Lake City (USA)

1000m 1.19,65 27 February 2021 Salt Lake City (USA)

1500m 2.01,89 16 December 2021 Calgary (CAN)

3000m 4.11,47 3 December 2021 Salt Lake City (USA)

5000m 7.16,75 23 October 2021 Salt Lake City (USA)

- Teamwork
 - All three ladies could contribute to a team effort in the mass start.
 - Giorgia however has been skating and training with Mia Kilburg everyday for the last two years and seem to be very comfortable skating together.
 - General conclusion was this aspect is not a deciding factor – we continue to look at the performances in the 3 selection races and believe Giorgia was the better performer.”

Fall World Cup Qualifier Women's Mass Start - Point Total (Giorgia given finishing points in Race #1)

Rank:	Name:	Race #1		Race #2		Race #3		Total AmCup Points
		Race Points	AmCup Points	Race Points	AmCup Points	Race Points	AmCup Points	
1	Mia Kilburg	86	60	110	60	64	54	174
2	Giorgia Birkeland	40	54		43	102	60	157
3	Jamie Jurak	31	48	24	48	26	48	144
4	Dessie Weigel	28	43	46	54	16	43	140
5	Paige Schwartzburg	12	38	16	40	10	40	118
6	Rebecca Simmons	6	34		38	10	38	110
7	Darian O'neil	7	36	6	36		32	104
8	Greta Myers		31		32	3	36	99
9	Piper Yde		30		31		34	95
10	Sarah Warren	18	40		30			70
11	Lindsey Woodbury		32	3	34			66
12	Sydney Terpening		28				29	57
13	Ilsa Shobe						30	30
14	Abigail Sorenson		29					29

2022 U.S. Olympic Team Trials - Women's Mass Start - Point Total

January 9th, 2022

Rank:	Name:	Race #1	Race #1	Race #2	Race #2	Race #3	Race #3	Total	AmCup Points
1	Mia Kilburg	86	60	110	60	64	54	174	
2	Jamie Jurak	31	54	24	48	26	48	150	
3	Dessie Weigel	28	48	46	54	16	43	145	
4	Giorgia Birkeland		28	20	43	102	60	131	
5	Paige Schwartzburg	12	40	16	40	10	40	120	
6	Rebecca Simmons	6	36	8	38	10	38	112	
7	Darian O'Neil	10	38	6	36		32	106	
8	Greta Myers		32		32	3	36	100	
9	Lindsey Woodbury		34	3	34		31	99	
10	Piper Yde		31		31		34	96	
11	Sarah Warren	18	43		30			73	
12	Sydney Terpening		29				29	58	
13	Ilsa Shobe						30	30	
14	Abigail Sorenson		30					30	

Task Force unanimously concluded that Giorgia should be nominated for the 2nd MS start position at the 2022 Olympic Winter Games.”

21. In accordance with the strategy stated at par. 2.2.3. of the Procedures, the Selection Committee’s goal was to utilize the discretionary selection for the mass start event and select a “domestique” who could support Kilburg, who USS determined was “medal capable”.
22. The two charts reproduced above from the Minutes required some explanation by Matt Kooreman, the Selection Committee member who testified at the hearing, as the headings to each chart should be the same, i.e. “2022 U.S. Olympic Team Trials - Women’s Mass Start”. So the heading on the first chart should be the same as the second chart, except that the first chart also shows the points each skater would have gotten had Birkeland not been disqualified in Race #1 due to her wearing the wrong transponder. The first chart does not show the published results, but rather results used to evaluate the skaters’ performances.

IV. SUBMISSIONS OF THE PARTIES

A. Claimant

The following are the submissions of the Claimant:

23. In its review of the first criteria, international mass start results, USS mentioned only that Jurak competed in the ISU Four Continents Championship December 17, 2021 in Calgary. USS did not mention that Ms. Jurak finished second at the event (with 45 points) ahead of Weigel (with 23 points). The ISU Four Continents Championship second place finish was the highest ever international mass start finish of the three skaters up for consideration (Jurak, Birkeland, and Weigel). Jurak’s top finish in an international mass start race was the first objective data point that differentiated Jurak from Birkeland (and Weigel).

24. USS improperly went beyond one of the discretionary criteria: instead of considering only actual race results from national mass start races, as was required, USS inexplicably “gave” Birkeland 40 imaginary points in a race where Birkeland was disqualified and received no points. It was only through this arbitrary and capricious decision to award 40 phantom points that Birkeland could be considered “ahead” of Jurak. In reality, Jurak finished 2nd in the combined results of the 3 national mass start races, and Birkeland finished 4th.
25. “Results” for mass start races are determined solely by the total points earned by a skater in a race. Points are earned for sprint bonuses during the race and for order of place at the end. A skater who is disqualified earns zero points in a race.
26. With respect to Race 2, USS improperly weighted in Birkeland’s favor that she “crossed the finish line ahead of Jurak in all 3 selection races” including Race 2. This too was improper because “who crosses the finish line first” in a mass start race is not part of the results, which is the only thing that USS could consider. The results only correlate to the total number of points a skater earns during the mass start race. In fact, Jurak (with 24 points) finished ahead of Birkeland (with 20 points) in the Race 2 results because of points earned during the race.
27. USS’s “general conclusion” that Birkeland was stronger than Jurak in “all 3 races” is belied by the results (and the reality of what occurred) in two of the three races.
28. In Race 3, Birkeland only finished first (as opposed to second) and received the extra first place points because Kilburg let her win in violation of 2021-22 U.S. Long Track Rules and Regulations, USS Rule of Competition Q (“All athletes are expected to maintain their skating position and skate with 100% effort through the finishing line.”) Kilburg obviously yielded to Birkeland at the finish and even said she “big-sistered” her during the post-race interview.
29. Jurak’s 2nd place finish in the 3 national mass start races was the second objective data point that differentiated Jurak from Birkeland (who finished 4th) and Weigel (who finished 3rd).
30. USS improperly accorded no weight to a mandatory criterion - the individual distance results from the current season. If properly considered, Jurak was undeniably much faster than Birkeland. Jurak was 30 seconds faster than Birkeland in the 5000-meter race (7:16 v. 7:46) and 9 seconds faster than her in the 3000-meter race (4:11 v. 4:20). This indisputable edge for Jurak was completely ignored by USS.
31. While USS had discretion to select the second female mass start skater to represent Team USA in the upcoming Olympic Games, USS did not have “unbridled discretion.” USS was obligated under applicable precedent to apply the Procedures as they were written, which USS did not do.
32. As the Panel in *Komanski* wrote in a decision that overturned an improper discretionary selection made by USA Cycling:

The difficulty of the task does not permit ignorance of any portion of the criteria written and published in advance and relied upon by athletes in making decisions about their own training and competitive efforts. Athletes, like Ms. Komanski, come to rely upon the published selection criteria in setting their training and competitive schedules as they endeavor to qualify to compete at the highest levels to represent their country in their sport. [I]n many ways this is very much like promissory estoppel in the common law of contracts . . . Athletes are required to perform at the highest level to meet the requirements of the selection criteria for their sport. NGBs should be held to a similar high standard in promulgating and applying their selection criteria; to proceed otherwise potentially jeopardizes the overall long-term high performance athletic success of US sport.

33. Here, by artificially manipulating some results to favor Birkeland and improperly ignoring other results to disfavor Jurak, USS, like USA Cycling in the *Komanski* case, has made an improper discretionary selection that must be overturned.

B. Affected Athlete Weigel

The following are the submissions of the Affected Athlete Weigel:

34. U.S. Speedskating adopted formal written procedures for the selection of Long Track Speedskating athletes to the 2022 Olympic Winter Games that include four specific criteria to be applied to the selection of the 2nd position athlete selected for the Mass Start event. The language adopted states that four criteria “will be reviewed”. This language does not give the Selection Committee discretion in the application of the four criteria. Discretionary language such as “may” or “should” is absent in the Procedures, so it is indisputable that all four criteria must be considered.

(1) *International Mass Start Race experience*

35. Among the three similarly situated athletes, Weigel is only athlete with World Cup experience and a World Cup Ranking. The World Cup is the most elite and competitive non-Olympic event in international long track speedskating. From World Cup #1 through World Cup #3 she was ranked 12th in overall 2021 World Cup standings. She finished the 2021 World Cup season tied for 16th in World Cup rankings. Weigel participated in five international Mass Start World Cup races, finishing 5th and 6th in two consecutive semifinal races which qualified her for two World Cup final races. These finishes were against the fastest long track speedskaters in the world, who will be competing in the 2022 Olympic Winter Games. She is the only athlete in consideration for the discretionary spot who has any World Cup Mass Start racing experience.
36. Weigel also participated in the much less competitive Four Continents Mass Start race in December 2021, a race where no 2022 Olympic medal contenders participated. After

suffering a fall caused by the much less experienced international field, Weigel was able to close the gap on the field and finish 3rd, just behind Jurak.

37. U.S. Speedskating's selection has no international Long Track Mass Start experience, no Senior World Cup experience and no World Cup Ranking.
38. Weigel is the only athlete with elite international experience. Jurak has only participated in a single "B" level international event (the ISU Four Continents Cup). Birkeland has never competed in a senior level elite international race. Among the three similarly situated athletes, Weigel is the only athlete to have lined up and raced with the same women from around the world who will be racing at the 2022 Olympic Winter Games. That unique experience was required to be considered by U.S. Speedskating but it was completely disregarded.

(2) *National Race Results*

39. Weigel's results from National Mass Start races for the past three seasons rank her 3rd, ahead of Birkeland who finished 4th. Birkeland's fourth place ranking is tainted and unreliable for two reasons. First, she received significant and controversial assistance during the races from medal contender Kilburg. In video recordings of the national events, Kilburg can be seen pushing and then assisting Birkeland to the finish line, giving Birkeland unearned and undeserved points. She can also be seen standing up and coasting to allow Birkeland to finish ahead of her. These recordings were admitted into evidence in this proceeding. Kilburg acknowledged her assistance to Birkeland in a post-race interview on NBC Live saying she "big-sistered" Birkeland. Second, U.S. Speedskating arbitrarily, inexplicably, and unexpectedly awarded "ghost points" effectively reversing a disqualification of Birkeland and artificially elevating her national point ranking, all in direct violation of U.S. Speedskating rules.
40. At the time of the Olympic Trials Mass Start event, Weigel and her coach had no way to know that U.S. Speedskating would ultimately discount or ignore Birkeland's disqualification in an earlier national event during the selection process. Therefore, they had determined that only Weigel or Jurak could end up with second place total points behind Kilburg. Weigel's race strategy was based on this determination and her efforts were focused only on the athletes still in contention. Had Weigel and her coach been informed that there was any possibility that U.S. Speedskating would reverse Birkeland's earlier disqualification as a part of the selection process, their race strategy would have included the entire field of athletes.
41. This appears to be the single criteria considered by U.S. Speedskating. Unfortunately, these results for Birkeland are irreparably tainted and unreliable because of Birkeland's reliance on assistance from Kilburg to achieve her results. Further, U.S. Speedskating's undisclosed "ghost point" theory could not be predicted and as a result, the race strategies of Weigel and Jurak at the Olympic Trials were unknowingly and unfairly flawed. U.S. Speedskating's failures in the evaluation of national race results cannot be allowed to operate to the detriment of Weigel and the benefit of Birkeland.

(3) ***Individual Distance Results***

42. The Mass Start event is unique in long track speedskating in that it is the only event where positions, strategy, and drafting are factors. Among the individual events there is a historical and well known correlation between success in the Mass Start event and individual performance in the 1500-meter and the 3000-meter events. Weigel's personal best times in these two events are significantly faster than both Birkeland and Jurak.

<i>Distance</i>	<i>1500 Meter</i>	<i>3000 Meter</i>
Ms. Weigel	2:01.05	4:06.85
Ms. Birkeland	2:02.22 (+1.17)	4:20.89 (+14.04)
Ms. Jurak	2:01.89 (+.84)	4:11.47 (+4.62)

43. U.S. Speedskating has admitted they completely ignored individual results. As demonstrated in the chart above, had these results been considered as required, Weigel is the clear objective choice for the 2nd Position on the Mass Start team. Weigel outperforms Birkeland by as much as 14 seconds in a 4-minute race.

(4) ***Subjective Criteria***

44. The 4th criterion for Mass Start Discretionary Selection is a subjective evaluation of an athlete's willingness and proven commitment to teamwork in the Mass Start. U.S. Speedskating has established an uneven playing field for this criterion having never questioned, cultivated, offered, or provided the opportunity for Weigel or Jurak to demonstrate their willingness and commitment to teamwork. Instead, U.S. Speedskating, though its relationship with the U.S. National Team, has only provided that opportunity to Birkeland. Weigel is an experienced international speedskater who, given the opportunity, is not only willing and able to support Kilburg's medal efforts, but she is also objectively the most qualified athlete to do so.
45. It is clear that this criterion has the meaningful purpose to allow the selection of an athlete who can best help a medal contender win a medal when, and only when, the objective results found in the first three criteria interact with each other in a way that do not clearly establish who should make the team. Among the three athletes considered, Weigel is the only athlete with true international experience, her individual performances are significantly faster, and although the results are tainted, her national results are still at the same level as the other athletes.
46. The selection of Birkeland is improper because U.S. Speedskating used unbridled discretion and ignored the mandatory objective criteria.
47. Birkeland's selection is in complete contradiction to the goals of U.S. Speedskating which are that when the U.S. Speedskating Program Director and the Games Coaching Staff have a race strategy that designates one athlete as a medal probable athlete, and another athlete's contribution may assist the medal effort, discretion can be used if all other objective standards do not identify the second athlete. When the written Procedures for selection are

applied fairly, correctly and without bias, Weigel is the clear and obvious selection for the 2nd position on the Mass Start team.

C. Respondent

The following are the submissions of USS:

48. The Procedures start with the exercise of the coaches' judgment and this approach cannot be written out of the rules. The weight to give to specific criteria is completely dependent on the Selection Committee, as specified in the Procedures: "The coaches' judgment, supported as much as possible by objective data described below, will be used to differentiate between athletes being recommended for the Mass Start Team." The Procedures are distinct from those used for the 2018 Olympic Games, when the top 2 point scorers in selection races qualified. The skaters all accepted that the 2nd position was to be in a support role (i.e. similar to a "domestique" in cycling), based on the Selection Committee's required "review" of the criteria.
49. The Procedures do not specify, as is seen in other such selection procedures, that the objective criteria will be equally weighted, or that they are to be given specified priorities, as is seen in others. The Procedures specify all are to be considered, as determined by the Selection Committee.
50. The four criteria identified for consideration are as follows: (1) ISU World Cup and World Championship Mass Start results from the last 3 seasons; (2) National Mass Start results from the last 3 seasons; (3) Individual Distance results from the current season and; (4) Subjective evaluation of willingness and a proven commitment to teamwork in the mass start.
51. As Selection Committee member Kooreman testified, the overriding concern for the Selection Committee was selecting the strongest mass start skater to support Kilburg (as the medal capable athlete). The Selection Committee considered all four criteria, and weighted them according to its sport specific expertise to nominate Birkeland for the discretionary selection.
52. Regarding (1) ISU World Cup and World Championship Mass Start results from the last 3 seasons
 - a. Weigel claims this was completely disregarded. However, the Minutes specify that international experience was in her favor. She submits that the Selection Committee did not give enough weight to this, as did her coach in his testimony. The weight to be given to this international experience is however not the arbitrator's decision or the lawyers' decision, but rather the Selection Committee's.
 - b. Jurak asserts that USS improperly ignored her second-place finish in the Four Continents Mass Start race in December 2021. That Four Continents Mass Start race is not an ISU World Cup/World Championship Mass Start result, it is not a National Mass Start result and it is not an individual distance result from the current season. As such, USS was not explicitly required to consider it under any of the

four criteria identified in the Procedures. Nevertheless, Jurak's result was considered as evidenced by the Minutes; and the Claimant's assertion that USS ignored this result is false. The Selection Committee considered it a B level race and did not give it a lot of weight.

53. With respect to (2) National Mass Start results from the last 3 seasons, these are the U.S. Olympic Team Trial Results listed in the 2 charts.
- a. These charts show that the results were analyzed both ways, with and without the points assigned to Birkeland in Race #1. Kooreman testified that even considering those results without the points for Birkeland's disqualified race, the Selection Committee would have selected her, as she had the best performance in all 3 selection races. She also finished ahead of Jurak (except in Race #2 when she stood up and that was her mistake). Kooreman explained the importance of the finish line place, as the sprint points are much less significant in international races.
 - b. Jurak erroneously claims that it was only through the arbitrary and capricious decision to award 40 phantom points to Birkeland that Birkeland could be considered 'ahead' of Jurak in the national mass start results. However, as Selection Committee member Kooreman testified, the selection of Birkeland was not based on point total, which is not the deciding factor in the Selection Procedures. The selection criteria do not award the second Olympic nomination in the Mass Start to the athlete with the second-highest point total. It is a discretionary selection taking numerous factors into account, for the purpose of selecting a "domestique" to support the medal capable athlete's efforts in what is effectively a "team" event. The selection was not made on the basis of "awarding imaginary points" to her, there was no requirement to do so, nor any need for Birkeland to be ahead of either Jurak or Weigel on total points for the Selection Committee to pick her.
 - c. Another argument made by both Jurak and Weigel was that Birkeland's 1st place finish in Race #3 should be discounted because a rule was violated by Kilburg. That alleged violation is with respect to a field of play rule, there was an opportunity to protest any violations that may have been committed, but no protests were filed at the time of the race. The same applies to the contention that Birkeland was pushed/assisted by Kilburg in Race #1. These field of play issues are not reviewable in the context of this arbitration.
 - d. In addition, the argument that those points should be discounted based on the field of play violations alleged also undercuts Weigel and Jurak's argument that "points are points". They cannot contend that the points Birkeland earned for her results should be discounted based on this field of play issue and at the same time deny the Selection Committee the exercise of the discretion in evaluating the performance, not just based on the points officially given.
 - e. There is no requirement that only points be considered. In a similar vein, there has been no argument that, for the individual results (the third criterion), only the place will be considered, rather than the time achieved. Results mean more than one

thing. Results can also include who had the best performance on that day. If the requirement in the Procedures had been to require the highest number of points, then the criteria would have been the same as 4 years ago. That is not however what they require.

- f. Respondent argues that the Selection Committee did consider the mass start results and came to a conclusion with respect to those results. That others would disagree and come to a different conclusion does not mean that the Selection Committee did not follow the Procedures. The Selection Committee is granted discretion, which they exercised and in so doing, looked at results as a number of things: mid-race sprints, who crossed the finish line first, and the overall performance.
54. With respect to (3) the Individual Results criterion, Claimant contends that “USS improperly accorded no weight to a mandatory criterion – the individual distance results from the current season.” As set out in the Minutes, the individual distance results were considered by the Selection Committee. The Selection Committee made the determination that the individual time trial results were not the strongest indicator of who the strongest mass start performer was and weighted this criterion accordingly.
- a. Jurak acknowledged the Selection Committee did not ignore these, but they gave the times less weight than she would have in her opinion. Weigel claimed this criterion was completely ignored but that is also false. The times were considered but given the discretion the Selection Committee exercised, they gave these times less weight. Kooreman testified that if one of the skaters had a world record time for example, that would have been give more weight. There is disagreement with how the Selection Committee weighted this criterion, in the exercise of its discretion.
 - b. If anything, by considering the athletes’ best times ever as opposed to only “individual distance results from *this season*”, the Selection Committee weighted the individual distance results in a manner that was *more favorable* to Jurak than required, not less. Had the Selection Committee only considered this season’s results, then Jurak’s 1000m time of 1:19.65 would not be considered at all, as Jurak had no 1000m time this season.
55. Regarding the final criterion, Teamwork, the Minutes reflect that the Selection Committee determined all three skaters could contribute to a team effort. The Minutes also reflect a fact which is that Birkeland and Kilburg have been skating and training for the last two years and seem to be very comfortable skating together. There is no evidence of bias, but rather this is simply a fact. This aspect was also not a deciding factor, as stated in the Minutes. Weigel asserts that this criterion is only applied if the others do not predominate. That is not what the Selection Procedures state. Rather, the Committee did consider this aspect but exercised its discretion not to give it a lot of weight.
56. In conclusion, the Selection Committee applied all the discretionary criteria, but Jurak and Weigel disagree with how they were analyzed, in the exercise of the Committee’s discretion. Jurak and Weigel’s coach was unable to say which of the two should be selected,

but rather looked at select criteria to identify the strengths of each of his skaters, which demonstrated the disagreement about how the criteria were analyzed. The conclusion that matters was that of the Selection Committee. The Selection Committee's selection was based on the Selection Committee's *unanimous conclusion* that Birkeland would best contribute to the team medal effort after reviewing the objective data.

57. On the basis of the above, Respondent submits that the Claimant and Affected Athlete failed to meet their burden of proof.

V. MERITS

58. Claimant and Affected Athlete Weigel have claimed that USS committed a breach of its obligations by virtue of its failure to follow the Procedures, in the inconsistent application of the criteria by the "arbitrary and capricious decision to award 40 phantom points" to Birkeland, by considering anything more than the points actually earned in the Olympic Trials, by ignoring the claimed assistance Kilburg gave to Birkeland during the Olympic Trials, by improperly weighting the individual distance results, which they argue is a mandatory criterion, and by improperly disregarding the international results of each of them as well as USS not having given Weigel an opportunity to demonstrate her "Teamwork" capability.
59. In reviewing USS's application of its Procedures, this Arbitrator is not substituting my judgment for that of the experts on the properly composed Selection Committee, but rather reviewing *de novo* the application of the Procedures to the facts of this particular case. Specifically, the standard of review is to examine whether the decision by USS has no rational basis, i.e. is unreasonable, arbitrary or capricious, or was inconsistently applied, or made in bad faith, in which event it will not meet the Act's requirements. In some cases the standard has been stated to be clear error or impropriety.
60. As stated above, the standard of review requires that each athlete had a fair opportunity to compete for a position on the Mass Start event. The arbitrator's role is not to determine whether USS "chose the best process for selecting teams" *Cameron Booth* at 19, or to substitute my judgment for the expert professional judgment of USS in establishing selection criteria or for that of the Selection Committee in applying the criteria to individual athletes.
61. The Mass Start Discretionary Selection Procedures specify that they "may be used to maximize the team's performance with a skater that is essential for the team-based events where the U.S. Speedskating Program Director and the Games Coaching Staff have devised a race strategy that may designate one athlete as a medal probable athlete, and another athlete's contribution may assist the medal probable athlete in achieving a top performance." This was accepted by all parties as the strategy that had been adopted for these Games.
62. The same discretionary section of the Procedures specify that "A Mass Start discretionary athlete may be selected to play a specific role within the race, based on their demonstrated physical capacities, skill set and experience fulfilling their roles. **The coaches' judgement,**

supported as much as possible by objective data described below, will be used to differentiate between athletes being recommended for the Mass Start Team.”
[emphasis added]

63. The Procedures go on to list the criteria that will be used to support this discretionary selection as much as possible. The Procedures do not specify the weight to be given to any criteria, nor do they list them in any order of priority. The criteria are simply to be used to differentiate between athletes, which presumably requires a review of the athletes in relation to each.
64. There is thus a mix of discretion (or subjectivity) being exercised in the review of the objective results specified. There is no definition of “results”, nor is there any other quantification, guidance or limitations of how the criteria are to be used. Thus, the Selection Committee is left with a wide latitude to evaluate each of the contenders, so long as the criteria are each reviewed.
65. Each of Weigel and Jurak make contentions about how the Selection Committee conducted its review and how they would have weighted the specific data differently, but there is no question based on the Minutes and the testimony that the data listed in each of the criteria were in fact considered by the Selection Committee. Affected Athlete Weigel argued that all four criteria must be considered and they were. The criteria were simply accorded a different importance by the Selection Committee than by the Claimant, Weigel and their coach. Each had a different opinion as to how they should be considered.
66. It is a significant flaw in these Procedures that no guidance whatsoever is given to the skaters in how they might actually be judged and thus plan their training and competition schedules. Weigel and Jurak entered the Olympic Trials, race #3 with the opinion that their point totals in those races would be the deciding factor when the criteria did not identify this as the standard. They each hoped that the other factors would be weighted in their favor but ultimately they were not considered as important by the Selection Committee. There was at that point the possibility that the Selection Committee would weight the other criteria more heavily and thus no basis for the athletes to rely on this interpretation. It would be helpful in the future if the manner in which the objective data is to be used to support the Selection Committee’s decision is made clearer.
67. As argued by Weigel, it would have been good if the Selection Committee had advised them before Race #3 that they would be weighting that race heavily and considering all aspects of the athletes’ previous results. It is however not clear that was known at the time, so the skaters had to consider all possibilities, as the Procedures did not define the weight to be given to the objective data or identify specifically how the data differentiates between athletes.
68. Though the skaters have made numerous arguments about the way the Selection Committee applied the Procedures, they did not argue that they were facially invalid or otherwise not “clear, transparent, and easy to apply without confusion”. See *McConneloug and USA Cycling*. It does seem however that USS could make the discretionary aspect of

their Procedures more elucidating for purposes of the competing skaters, i.e. more clear, transparent and easy to apply without confusion.

69. The Selection Committee did apply its Procedures in a rational manner, as evidenced by the Minutes and the testimony of Kooreman. The Committee reviewed each of the criteria in relation to each of the Claimant and Weigel, thus followed its Procedures as required and did so consistently. Its decisions were not arbitrary or capricious but were exercised in good faith with a rational basis, with the greatest emphasis placed on the finishes/performances of the skaters in the Olympic Trials.
70. The argument that Kilburg assisted Birkeland was of no avail in this proceeding, as that rule violation would have to have been raised at the time of the race itself. This arbitrator will not review a field of play decision but leaves such a decision to the officials at the race itself.
71. All parties defined “results” in a way advantageous to their particular view of the facts, with emphasis on total points (Jurak), or the personal best time in time trials (Weigel), or international results (both Jurak and Weigel) rather than the placement in the individual distance events regardless of points, as did USS. The Selection Committee reasonably looked at performance at these races as the results. There was no arbitrary or capricious exercise of its judgment when it compared the points via the 2 charts that it used to examine the results of the Olympic Trials races. This was a tool used to conduct the required review of the objective data of the “results” which the Selection Committee could use to differentiate between the athletes.
72. Claimant and Affected Athlete Weigel’s argument that the Selection Committee did not properly follow the criteria is based on their preference for how to read the Procedures, but this does not render the process followed by the Selection Committee unfair, irrational or unreasonable. There was no evidence that the Selection Committee manipulated the data when it considered both charts of results. Rather they looked at the impact of the points on the published results, which was an objective view of the data in the absence of any other guidance in the Procedures. Both of Claimant and Affected Athlete Weigel considered the same data but from the view they had whereby they need not consider Birkeland’s performance in the first race. Without guidance in the Procedures, other than the exercise of judgment, the Selection Committee made a reasonable assessment of the basis on which it would exercise its discretion.
73. The Selection Committee did review each and every criterion and did exercise its reasonable judgment with respect to each. This is distinguished from the *Komanski* case where one of the clearly listed prioritized criteria was not reviewed or considered in any way by that committee.
74. Claimant and Affected Athlete Weigel argue that the Selection Committee exercised “unbridled” discretion or its decision was not justified by the results. As already stated, the Selection Committee followed the Procedures as written and applied them consistently and in a reasonable manner, in the exercise of their judgment, as specifically permitted by the Procedures. The Procedures were the only applicable criteria for the Selection Committee

to use and the Selection Committee exercised its discretion appropriately. There was no showing of bias or bad faith, or the exercise of any discretion beyond what is specified in the Procedures.

75. The burden is on the Claimant and Affected Athlete to prove by a preponderance of the evidence that USS failed to follow and fairly apply its Procedures consistently, did not apply the criteria as written with respect to each of the Claimant and Affected Athlete's respective records, or failed to exercise its discretion in good faith to support its selection. Neither met that burden.
76. Claimant and Affected Athlete's requests for relief are therefore denied.

VI. ALLOCATION OF ARBITRATION FEES AND COSTS

Based on the foregoing findings and analysis, the undersigned decides and awards as follows:

77. Claimant paid the filing fee; and she and Respondent each paid half of the arbitration fees and neither made a request for any reallocation of such fees. Under AAA Commercial Rules Section R-50, the arbitrator has discretion to assess and award such fees and costs in the final award.
78. In determining whether to shift the allocation of these fees and costs, as Arbitrator, I look at the conduct that gave rise to the demand for arbitration in this case which was USS's Selection. Based on the facts of this case, weighing the relative equities and the conduct of the parties in this matter, it is noted that USS's Selection Committee acted in good faith and fairly. Thus, there is no basis for reallocating the fees.

Decision

I therefore rule as follows:

- A. Respondent did not violate its Long Track Speedskating Selection Procedures (Selection Procedures) in determining that Giorgia Birkeland was to receive the Mass Start discretionary athlete selection for the 2022 Beijing Olympic Winter Games U.S. Speedskating team. U.S. Speedskating followed its published Selection Procedures in its exercise of the review of the criteria specified and consistently applied the criteria as written, with respect to each of the Claimant and Affected Athletes' respective records, using its discretionary judgement exercised in good faith to support its selection.
- B. Neither Claimant Jamie Jurak nor Affected Athlete Dessie Weigel has sustained her burden of proof that she should have been named to the Mass Start Women's Olympic team and their respective demands for relief are denied;
- C. The parties shall bear their own attorneys' fees and costs associated with this arbitration;
- D. This Award shall be in full and final resolution of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.



Maidie Oliveau
Sole Arbitrator

Dated: January 28, 2022