

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

AAA Case No. 01-16-003-9993

In the Matter of the Arbitration between

KWANG JAE LEE, Claimant

and

U.S. SPEEDSKATING, INC., Respondent.

AWARD AND REASONED DECISION

I, THE UNDERSIGNED ARBITRATOR, having been designated by the American Arbitration Association ("AAA"), and in accordance with the Ted Stevens Olympic and Amateur Sports Act ("ASA") and Section 9 of the United States Olympic Committee ("USOC") Bylaws, having been duly sworn, and having fully considered the Claimant's Section 9 Demand for Arbitration, Respondent's Answer, and their respective exhibits and briefs as well as their oral arguments during a January 19, 2017 telephonic hearing (at the conclusion of which counsel for both parties agreed they had a full and fair opportunity to be heard) do hereby, AWARD, as follows:

On September 16, 2016, Claimant Kwang Jae Lee¹ filed this Section 9 arbitration demand challenging the refusal of Respondent U.S. Speedskating, Inc.² to reconsider its Appeals Commission's July 16, 2012 imposition of a lifetime ban on him for violating its Code of Ethics. In accordance with the Arbitrator's November 11, 2016 Order issued pursuant to R-33 of the AAA's Commercial Arbitration Rules and Mediation Procedures (AAA Commercial Arbitration Rules"), Respondent filed a November 21, 2016 motion to dismiss his arbitration demand with prejudice on the ground it is untimely and inadmissible pursuant to Section 9.10 of the USOC Bylaws. In his December 12, 2016 response, Claimant asserts that this motion should be denied because Respondent's "null and void prior judgments" resulting in his lifetime ban render

¹ Claimant was represented by Bruce Fein and W. Bruce DeValle, Fein & DeValle PLC, Washington, D.C.

² Respondent was represented by Steven B. Smith and Suzanne A. Crespo, Bryan Cave LLP, Colorado Springs, Colorado.

Section 9.10 inapplicable and that his arbitration claims should not be dismissed “because of a technicality that has caused no prejudice to Respondent.”

UNDISPUTED MATERIAL FACTS

U.S. Speedskating, Inc. is the national governing body (“NGB”) for the sport of speedskating in the United States, which is recognized by the USOC.

Mr. Lee, a speedskating coach who is a Korean immigrant, was a member of U.S. Speedskating from 2005 until July 16, 2012. Section 9 Demand for Arbitration, Exhibit 2 (May 16, 2016 Affidavit of Kwang Jae Lee (“Lee Affidavit”) at ¶3). He coached U.S. Speedskating members and was the head coach of the Pittsburgh Speedskating Club (“PSC”) from May 2006 until January 30, 2012. Claimant’s Memorandum In Opposition To Respondent’s Motion To Dismiss Claimant’s Demand For Arbitration (“Claimant’s Memorandum”) at ¶9 a and b.

From approximately November 2011 until January 2012, Mr. Lee allegedly had a romantic relationship with Ms. Aileen Song, a 16-year old female speedskater from Toronto, Ontario, Canada, who was living with the host family of Alan Burkholder, the former president of PSC. He contends any such romantic relationship with Ms. Song was encouraged by her as well as being consensual and legal. Claimant’s Memorandum at ¶9 d and e; Claimant’s Arbitration Demand, Exhibit 2 at ¶¶19 and 20.

Mr. Burkholder filed a complaint with U.S. Speedskating regarding Mr. Lee’s relationship with Ms. Song. Claimant’s Memorandum at ¶9 f and g. U.S. Speedskating’s president, Mr. Frank, brought disciplinary charges against Mr. Lee alleging that he had violated its Code of Ethics, specifically Section 2 (d), which prohibits “any sexual conduct . . . directed towards an athlete by a coach, official, trainer, or other person who, in the context of speed skating, is in a position of authority over that athlete.” Claimant’s Memorandum at ¶9 k.

Mr. Lee “did not respond to President Frank’s disciplinary charges. He was then traumatized by estrangement from his wife. He was also misadvised by his immigration lawyer to ignore U.S. Speed Skating disciplinary allegations. Complainant, nevertheless, accepts full legal and moral responsibility for failing to respond.” Claimant’s Memorandum at ¶9 m. Mr. Lee states he “was not sophisticated enough at the time to understand that his instruction to ignore U.S. Speedskating . . . was very bad legal advice.” Lee Affidavit at ¶21. He did not appear before or present any evidence to U.S. Speedskating’s Appeals Commission, which considered the disciplinary charges against him on July 16, 2012. Claimant’s Memorandum at ¶9 n.

On July 16, 2012, U.S. Speedskating’s Appeals Commission permanently expelled Mr. Lee from membership in U.S. Speedskating. Section 9 Demand for Arbitration, Exhibit 2 (Memorandum in Support of USOC Sections 9 and 10 Grievance and Complaint (“USOC Sections 9 and 10 Memorandum”) at ¶ 2).

No later than early August, 2015, Mr. Lee admittedly knew about the Appeals Commission's decision to permanently expel him from membership in U.S. Speedskating. Lee Affidavit at ¶¶ 25 and 48.

On or around October 29, 2015, Mr. Lee submitted a "Grievance/Complaint for Reinstatement of Kwang Jae Lee" to U.S. Speedskating, which requested immediate reinstatement as a member in good standing, expungement of his disciplinary record, and commutation of his expulsion to time served. USOC Sections 9 and 10 Memorandum at ¶¶ 3-4.

In a November 23, 2015 letter, U.S. Speedskating, through its counsel, responded to Mr. Lee's October 29, 2015 Grievance/Complaint stating, *inter alia*, as follows:

"Mr. Lee's current grievance is an attempt to gain a rehearing of, or otherwise appeal, US Speedskating's disciplinary action against him. However, Mr. Lee received notice of the disciplinary charges and hearing, he chose not to attend the hearing or otherwise participate in the proceedings, and he presents no new facts or arguments which were not available to him at the time of the original hearing. The decision of the US Speedskating hearing panel was final and not subject to internal appeal under US Speedskating's Bylaws. Accordingly, US Speedskating declines to entertain Mr. Lee's grievance absent a showing that new evidence has been discovered that he would not and could not have known at the time of the hearing."

Section 9 Demand for Arbitration, Exhibit 2 (November 23, 2015 letter). Mr. Lee acknowledges that this communication "cannot be considered a determination or denial for purposes of initiation of the statute of limitations or 'repose clock'" of Section 9.10 of the USOC Bylaws. Claimant's Memorandum at ¶14.

On May 19, 2016, Mr. Lee filed a Section 9 Complaint with the USOC and accompanying memorandum titled "Grievance and Complaint for Reinstatement of Kwang Jae Lee and Expungement of Disciplinary Record Pursuant to Sections 9 and 10 of the Bylaws of the United States Olympic Committee and the Ted Stevens Olympic and Amateur Sports Act." He requested immediate reinstatement as a member of U.S. Speedskating and full expungement of his prior expulsion; alternatively, he sought a U.S. Speedskating hearing regarding his October 29, 2015 grievance/complaint for reinstatement.

On September 1, 2016, the USOC Hearing Panel dismissed Mr. Lee's Section 10 Complaint because "there is no jurisdiction to hear Lee's Complaint because it fails to state a claim on which relief can be granted. Further, even if Lee were to restyle his Complaint in an attempt to overcome this deficiency, the Hearing Panel finds that Lee has not exhausted his administrative remedies." ¶19. It also made the following comment: "Lee filed a joint Section 9 and Section 10 Complaint. The Hearing Panel makes no ruling on the Section 9 Complaint,

in which Lee seeks to be reinstated as a member of USS, as that matter is not within the jurisdiction of the Hearing Panel. Lee is left to pursue his request for reinstatement under Section 9 as he sees fit. USS may respond to any such action as it determines appropriate.” ¶20.

On September 16, 2016, Mr. Lee filed this Section 9 Demand for Arbitration with AAA to appeal the Appeals Commission’s July 16, 2012 decision to permanently expel him from membership in U.S. Speedskating, seeking immediate reinstatement as a member of U.S. Speedskating in good standing, expungement of his expulsion, and a commutation of his expulsion to time served. He is not appealing the USOC Hearing Panel’s dismissal of his Section 10 Complaint in this arbitration proceeding.

DISCUSSION

Mr. Lee’s procedural and substantive rights as well as the requirements he must satisfy regarding arbitral appeal of the Appeals Commission’s July 16, 2012 disciplinary action against him (which occurred when he was a member of U.S. Speedskating) are established by the ASA, USOC Bylaws, U.S. Speedskating Bylaws, and the AAA Commercial Arbitration Rules. Because an NGB is a private association that is not a “state actor” (*Behagen v. Amateur Basketball Ass’n of the United States*, 884 F.2d 524 (10th Cir. 1989)), U.S. Speedskating is not subject to the requirements of the United States Constitution (e.g., 14th Amendment due process requirements) in its dealings with its members, including coaches.

The ASA requires the USOC to “establish and maintain provisions in its constitution and bylaws for the swift and equitable resolution of disputes involving any of its members [e.g., an NGB such as U.S. Speedskating] and relating to the opportunity of [a] coach . . . to participate in the Olympic Games, the Paralympic Games, the Pan-American Games, world championship competition, or other protected competition as defined in [its] constitution and bylaws.” 36 U.S.C. §220509(a). In accordance with this mandate, Section 9 of the USOC Bylaws creates a comprehensive and detailed procedure for resolving a dispute arising out of an NGB’s alleged denial of a coach’s “opportunity to participate in the Olympic Games, the Pan American Games, the Paralympic Games, a World Championship competition, or other such protected competition as defined in Section 1.3 of these Bylaws.” Section 9.1. The Appeals Commission’s July 16, 2012 decision to permanently expel Mr. Lee from membership in U.S. Speedskating effectively constitutes a denial of his opportunity to participate in any of those competitions and all others under the auspices of U.S. Speedskating as a coach or otherwise. This decision by U.S. Speedskating is the underlying basis of his May 19, 2016 Section 9 Complaint filed with the USOC under Section 9.2, which provides that a coach who alleges “he or she has been denied by [an NGB] an opportunity to participate as established by Section 9.1 . . . may seek to protect his or her opportunity to participate by filing a complaint with the [USOC].”

Pursuant to Section 9.7 of the USOC Bylaws, a coach whose Section 9 Complaint is not resolved to his satisfaction “may file a claim with the AAA against the respondent [e.g., an NGB] for final and binding arbitration.” As a condition of being recognized by the USOC as the NGB for the sport of speedskating in the United States, U.S. Speedskating has agreed “to submit to binding arbitration in any controversy involving . . . the opportunity of any . . . coach . . . to participate in any amateur athletic competition in speedskating, upon demand of . . . any . . . coach . . . conducted in accordance with the Commercial Rules of the [AAA].” U.S. Speedskating Bylaws, Article 3.1 (C).

Section 9.10 of the USOC Bylaws establishes a statute of limitations for the filing of a Section 9 arbitration demand: “Time Bar. A claim against a respondent shall be prohibited unless filed with the AAA not later than six (6) months after the alleged date of denial.” The Appeals Commission permanently expelled Mr. Lee from membership in U.S. Speedskating on July 16, 2012, which is the “date of denial” of his opportunity to participate in any protected competitions or amateur athletic competition in speedskating for purposes of 36 U.S.C. §220509(a), Section 9.1 of the USOC Bylaws, and U.S. Speedskating Bylaws, Article 3.1 (C). Therefore, the Section 9.10 six month statute of limitations period applicable to his Section 9 Demand for Arbitration began to run on July 16, 2012. It is undisputed that Mr. Lee filed his Section 9 Demand for Arbitration with AAA on September 16, 2016, which is more than four years after U.S. Speedskating’s July 16, 2012 “date of denial” of his opportunity to participate as a coach or otherwise in any protected competitions or amateur athletic competition in speedskating.

In response to the Arbitrator’s request, on January 17, 2017, Respondent produced a July 16, 2012 email from Daniel G. Fiorenza, Chairman of the U.S. Speedskating Appeals Commission, addressed to Mr. Kwang Jae Lee and emailed to pghcoachk@gmail.com, which states in relevant part:

“RE: Mr. Kwang Jae Lee-- Appeals Commission Decision

Dear Mr. Lee . . .

After the Hearing today the Appeals Panel discussed the information that was presented. They made a unanimous decision to permanently expel Mr. Lee from U.S. Speedskating.

Please contact me with any concerns or questions as soon as possible.”

Even if Mr. Lee did not previously receive a copy of this email, he admittedly knew about the Appeals Commission’s decision to permanently expel him from membership in U.S. Speedskating by early August, 2015. Assuming without determining that August, 2015 is the appropriate “date of denial” of his opportunity to participate in any protected competitions or amateur athletic competition in speedskating for purposes of Section 9.10, Mr. Lee did not file his Section 9 Demand for Arbitration until September 16, 2016. This is more than one year after

becoming aware of his lifetime ban from membership in U.S. Speedskating, which is clearly outside of Section 9.10's six month statute of limitations.

Mr. Lee contends that Section 9.10 does not bar his AAA appeal of the Appeals Commission's "'death penalty' discipline" because it is invalid and void for several reasons, including lack of personal and subject matter jurisdiction; violation of his due process rights under the ASA, USOC Bylaws, and U.S. Speedskating Bylaws; and that his alleged misconduct did not violate U.S. Speedskating's Code of Conduct or Code of Ethics. . However, he does not cite any provision of the ASA or USOC Bylaws or any other controlling legal authority regarding arbitration proceedings to support his assertion that Section 9.10's six month statute of limitations period is inapplicable under the following circumstances. Mr. Lee admittedly had notice of U.S. Speedskating's disciplinary charges against him, including his alleged romantic relationship with Ms. Song in violation of the Code of Ethics, prior to the July 16, 2012 Appeals Commission hearing. After consulting an attorney, he chose to ignore these disciplinary charges and not to appear at the Appeals Commission hearing or to otherwise present a defense. Although it is unfortunate that he apparently received bad legal advice, Mr. Lee is responsible for his voluntary decisions and the resulting adverse consequences even if he did not fully understand their potential severity at the time. If Mr. Lee had filed a timely Section 9 Demand for Arbitration by January 15, 2013 (or within six months after becoming aware of the Appeals Commission's July 16, 2012 decision in August, 2015 if proven he had no prior notice of it), he would have had the opportunity to assert all of these defenses, to otherwise defend himself, and to be represented by counsel in a *de novo* AAA arbitration proceeding.

Mr. Lee has not identified any provision of the U.S. Speedskating Bylaws providing him with any right to reconsideration of the Appeals Commission's July 16, 2012 disciplinary sanction. He admits that the November 23, 2015 letter from U.S. Speedskating's counsel rejecting his October 29, 2015 request for reconsideration of his lifetime membership ban and commutation of his expulsion to time served is not a "denial" of his opportunity to participate in any protected competitions or amateur athletic competition in speedskating. Even if it was, his September 16, 2016 Demand for Arbitration was filed more than nine months later, which is outside the six month statute of limitations period for such appeals. Because Mr. Lee has not cited any legal authority applicable to an arbitration proceeding between private parties or made any persuasive arguments to support his assertion that requesting "commutation of his discipline to 'time served' . . . in the manner of a prisoner pardon or commutation petition . . . is unsaddled with any limitations periods" (Claimant's Memorandum at page 1), it is rejected by the Arbitrator.

Mr. Lee contends that the time limit for filing his Section 9 Demand for Arbitration was equitably tolled apparently because he filed his combined Section 9 and 10 Complaint with the USOC on May 19, 2016, which was four days before the expiration of a six month period from U.S. Speedskating's November 23, 2015 rejection of his request for reconsideration of its

imposition of a lifetime membership ban. There is, however, no factual basis or legal authority to support this contention, which the Arbitrator does not accept. He admits that this rejection is not a “denial” of his opportunity to participate in any protected competitions or amateur athletic competition in speedskating. Even assuming U.S. Speedskating’s November 23, 2015 rejection of his request for reconsideration of his July 16, 2012 lifetime expulsion somehow is such a “denial,” it would toll the statute of limitations period only from May 19, 2016 until September 1, 2016, the time period during which his combined Section 9 and 10 Complaint was pending before the USOC Section 10 Hearing Panel. Doing so would require that Mr. Lee’s Section 9 Demand for Arbitration be filed by September 5, 2016. It was not filed until September 16, 2016, which is eleven days later. Mr. Lee provides no supporting authority for his assertion that his May 19, 2016 Section 9 and 10 Complaint “triggered equitable tolling until a reasonable time after the USOC dismissed the appeal without prejudice to the section 9 claim on September 1, 2016.” Claimant’s Memorandum at page 14. Contrary to Mr. Lee’s contention, the USOC Hearing Panel did not refer his Section 9 Complaint to AAA arbitration after determining it had no jurisdiction to consider it. Rather, the USOC Hearing Panel simply stated “Lee is left to pursue his request for reinstatement under Section 9 as he sees fit. USS may respond to any such action as it determines appropriate.”

Neither the USOC Hearing Panel’s September 1, 2016 dismissal of his Section 10 Complaint, which is not being appealed as part of Mr. Lee’s Section 9 Demand for Arbitration, nor its determination that it lacked jurisdiction to consider his Section 9 Complaint constitute a “denial” of his opportunity to participate in any protected competitions or amateur athletic competition in speedskating. This “denial” was caused solely by the Appeals Commission’s July 16, 2012 decision to permanently expel him from membership in U.S. Speedskating.

Compliance with USOC Bylaw Section 9.10’s six month statute of limitations is required for a Section 9 Demand for Arbitration to be timely filed and admissible. It is not a rule that an arbitrator may rewrite or a mere “technicality” that may be disregarded if an NGB would not be prejudiced by considering the merits of a Claimant’s untimely claims (which would not necessarily be the situation in this case). Mr. Lee’s September 16, 2016 Section 9 Demand for Arbitration was not filed with the AAA within six months of the U.S. Speedskating Appeals Commission’s July 16, 2012 lifetime membership ban, which is the “denial” of his opportunity to participate in any protected competitions or amateur athletic competition in speedskating that started Section 9.10’s statute of limitations period. Therefore, the Arbitrator dismisses his arbitration demand with prejudice because it is time-barred and inadmissible.

The Arbitrator expresses no judgment or opinion regarding the Appeals Commission’s July 16, 2012 decision, including whether Mr. Lee violated U.S. Speedskating’s Code of Conduct or Code of Ethics, and if he did, whether its imposition of his lifetime membership ban is an appropriate and reasonable disciplinary sanction under the circumstances.

DECISION AND AWARD

Based on the foregoing undisputed material facts and legal analysis, the Arbitrator decides and awards as follows:

Mr. Lee's September 16, 2016 Section 9 Demand for Arbitration is time-barred, inadmissible, and dismissed with prejudice.

The administrative fees and expenses of the AAA totaling \$750.00 and the compensation of the Arbitrator totaling \$1,500.00 are to be borne by Mr. Lee.

All parties shall bear their own attorney's fees and costs associated with this arbitration.

This Award fully resolves all claims and defenses submitted by the parties to this Arbitration. All claims and defenses not expressly granted herein are hereby denied.



Matthew J. Mitten, Arbitrator

February 13, 2017