

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

Jessica Lemmons	§	
	§	
v.	§	AAA Case No. 01-19-0000-5250
	§	
United States Equestrian Federation, Inc.	§	

ORDER ON MOTION TO DISMISS

I, the undersigned arbitrator (“**Arbitrator**”), having been designated in accordance with the Ted Stevens Olympic and Amateur Sports Act (“**Act**”) and Section 9 of the United States Olympic Committee (“**USOC**”) Bylaws, having been duly sworn, and having duly reviewed the *Motion to Dismiss* filed by the United States Equestrian Federation, Inc. (“**USEF**”) and the *Response to Motion to Dismiss* filed by Jessica Lemmons (“**Lemmons**”) hereby grants the *Motion to Dismiss* and hereby orders as follows:¹

I. Procedural History

On February 20, 2019, Lemmons filed a demand for arbitration of this dispute by and through the filing of the *Complaint Form: Section 9 of the USOC Bylaws*. On February 21, 2019 and on February 22, 2019, Lemmons filed an amended demand for arbitration along with a *Statement of Facts* and a *Statement of Jurisdiction*.

On February 20, 2019, the Arbitrator was appointed to serve as the arbitrator in this proceeding. During the Preliminary Hearing on February 20, 2019, Lemmons and USEF (collectively the “**Parties**”) confirmed there was no objection to the undersigned serving as the Arbitrator in this matter. No subsequent objection was filed or made.

On February 24, 2019, as per the request of the Parties, the Arbitrator set a briefing schedule for USEF to file the *Motion to Dismiss* and for Lemmons to file a response thereto. The Parties timely filed their briefs in accordance with the provided briefing schedule whereby USEF filed its *Motion to Dismiss* on February 26, 2019 and Lemmons filed her *Response to Motion to Dismiss* on February 28, 2019. In the event necessary, a hearing was scheduled for March 1, 2019 at 1:30 p.m. CT.

On February 28, 2019, the Arbitrator informed the Parties via email that the *Motion to Dismiss* is granted and the previously scheduled hearing would therefore be unnecessary.

II. Factual Background

¹ In this proceeding, Lemmons appeared pro se and the USEF appeared by and through its counsel, Steven B. Smith and Suzanne A. Crespo of Bryan Cave Leighton Paisner, LLP.

Lemmons is an elite and highly ranked endurance rider desiring to be selected to participate on the U.S. Endurance Squad (“**Squad**”) for the World Endurance Championship (“**WEC**”) to be held in or about September 2020. The *USEF Rulebook* defines “Endurance Riding” as:

a competition to test the competitor’s ability to safely manage the stamina and fitness of the horse over an endurance course in a competition against the track, the distance, the climate, the terrain and the clock. Therefore, the most important responsibility of the Organizing Committee (OC) and the Veterinary Commission and ultimately the rider is to ensure the health and welfare of the horse by diligent application of their skill together with a caring, knowledgeable attitude by the rider. To be successful, the competitor must have knowledge of pace and efficient and safe use of the horse across country. In an Endurance Ride any member of the Genus Equus counts as a ‘horse.’

See USEF Rulebook, Endurance Riding Division, Ch. EN § 102(1). Endurance is not an Olympic discipline.

In preparation for the WEC in 2020, on or about August 8, 2018, USEF distributed a memorandum titled “Planned Selection Methods & FEI Certificate of Capability” (“**First Memorandum**”) setting forth proposed criteria and selection procedures for the Squad. The First Memorandum states on the first page “This is preliminary information provided to assist you with your competition and training plans and is subject to change. The final Procedures are subject to approval by the USEF Board of Directors.” *See Memorandum* (Aug. 8, 2018).

Following further discussions on selection procedures and criteria for selection for Squad to compete at the WEC in 2020, on or about December 18, 2018, USEF distributed a second memorandum (“**Second Memorandum**”) updating the selection procedures as a result of meetings of the USEF Endurance Sport Committee (“**Committee**”). The Committee is tasked with developing procedures necessary to select the Squad for competition at the WEC in 2020. Like the First Memorandum, on the first page of the Second Memorandum it states “This is preliminary information provided to assist you with your competition and training plans and is subject to change. The final Procedures are subject to approval by the USEF Board of Directors.” *See Memorandum* (Dec. 18, 2018).

After obtaining feedback from endurance athletes relating to the Second Memorandum, the Committee revised the selection procedures and criteria. On February 9, 2019, USEF distributed the “Draft Athlete Selection Procedures” (“**Draft Procedures**”) to all current USEF members who are also registered riders with the Federation Equestre Internationale (“**FEI**”). The Draft Procedures were distributed to the athletes, including Lemmons, for comment and feedback. The deadline for comments relating to the Draft Procedures was set for February 22, 2019 by USEF. Nine (9) individuals, including Lemmons and her mother, provided comments and feedback on the Draft Procedures.

Now that the athlete comment period has closed, the Committee anticipates soon meeting to review all comments and to consider additions and/or deletions to the Draft Procedures for the purposes of creating final selection procedures and criteria. The final proposed procedures will be forwarded to the USEF Board (“**Board**”), or an Ad Hoc Selection Group approved by the Board,

for consideration and approval at its April 2019 meeting. Final selection procedures and criteria will not be available until following the April 2019 Board meeting, which is approximately seventeen (17) months in advance of the WEC to be held in or about September 2020. Typically, the USEF provides the list of the Squad to FEI, including the horses and riders, approximately four (4) weeks in advance of the WEC.

As of this date, there remain at least three (3) events where Lemmons and her horse(s) may be observed including the FITS (February 27-March 2, 2019), Broxton Bridge (January 23-26, 2020), and FITS (February 26-29, 2020). USEF represented that there may be other events offered for observation in advance of selection for the Squad to accommodate athletes.

III. Jurisdiction

An arbitrator has jurisdiction over disputes if the dispute is protected under the Act, 36 U.S.C. § 220501, *et seq.*, and the controversy involves the opportunity to participate in national and international competition representing the United States. Section § 220522(a)(4) of Act states:

An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it...agrees to submit to binding arbitration in any controversy involving . . .the opportunity of any amateur athlete...to participate in amateur athletic competition, upon demand of...any aggrieved amateur athlete..., conducted in accordance with the Commercial Rules of the American Arbitration Association, as modified and provided for in the corporation's constitution and bylaws...

Additionally, Section § 220522(a)(8) of Act states that a national governing body ("**NGB**") must:

[P]rovide[] an equal opportunity to amateur athletes, coaches, trainers, managers, administrators, and officials to participate in amateur athletic competition, without discrimination on the basis of race, color, religion, sex, age, or national origin, and with fair notice and opportunity for a hearing to any amateur athlete, coach, trainer, manager, administrator, or official before declaring the individual ineligible to participate...

Section 9.1 of the USOC Bylaws provides as follows:

No member of the corporation may deny or threaten to deny any amateur athlete the 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 nor may any member, subsequent to such competition, censure, or otherwise penalize, (i) any such athlete who participates in such competition, or (ii) any organization that the athlete represents. The corporation shall, by all reasonable means, protect the opportunity of an amateur athlete to participate if selected (or to attempt to qualify for selection to participate) as an athlete representing the United States in any of the aforesaid competitions. In determining reasonable means to protect an athlete's opportunity to participate, the corporation shall consider its responsibilities to the individual athlete(s) involved or affected, to its mission, and to its membership.

Under USOC Bylaws Section 1.3(w), “protected competition” means:

1) Any amateur athletic competition between any athlete or athletes officially designated by the appropriate NGB or PSO as representing the United States, either individually or as part of a team, and any athlete or athletes representing any foreign country where (i) the terms of such competition require that the entrants be teams or individuals representing their respective nations and (ii) the athlete or group of athletes representing the United States are organized and sponsored by the appropriate NGB or PSO in accordance with a defined selection or tryout procedure that is open to all and publicly announced in advance, except for domestic amateur athletic competition, which by its terms, requires that entrants be expressly restricted to members of a specific class or amateur athletes such as those referred to in Section 220526(a) of the Act; and 2) any domestic amateur athletic competition or event organized and conducted by an NGB or PSO in its selection procedure and publicly announced in advance as a competition or event directly qualifying each successful competitor as an athlete representing the United States in a protected competition as defined in 1) above.

USOC Bylaws Section 9.7 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 AAA against the respondent for final and binding arbitration.”

IV. Analysis

In Lemmons’ amended demand for arbitration, she indicated the basis of her complaint is as follows: 1) “USEF is denying the Claimant’s opportunity to be selected to the 2020 WEC Team by not protecting the Claimant’s attempt to qualify for selection to the 2020 WEC by withholding information regarding the selection process for the Observation Event known as FITS;” 2) “USEF is denying the Claimant’s opportunity to be selected to the 2020 WEC Team by not protecting the Claimant’s attempt to qualify for selection to the 2020 WEC by declining to schedule and hold the required post-ride evaluation from the Observation Event known as January Broxton Bridge prior to the second OE known as FITS;” and 3) “The Planned Selection Methods” are impermissibly vague and impermissibly subjective and do not meet the required USOC standards.” *Amended Demand for Arbitration* at pp. 3-5. The *Statement of Facts* further sets forth Lemmons’ assertions. In sum, Lemmons asserts a facial attack on the Draft Procedures and asserts that the Draft Procedures are “contradictory and/or diametrically opposed.” Lemmons further explained that questions she has about the Draft Procedures have been posed to USEF employees and she either did not get a response or did not receive an adequate response. Lemmons confirmed she has not been denied access to any USEF event and has been permitted to compete.

At present, the selection procedures and criteria, as clearly stated on the face of the Draft Procedures, are merely a draft. The final selection procedures and criteria will not be published until after the Board meeting that is to occur in April 2019. As stated in *Booth v. United States Rowing Association*, where the final selection procedures have not been implemented and no athlete has been selected or rejected, a claim under Section 9 of the USOC Bylaws has not been triggered. *Booth v. U.S. Rowing Ass’n*, AAA Case No. 30-190-259-07 at ¶ 50 (Mar. 16,

2008)(stating “because the new Selection Procedures has yet to be implemented this Panel has nothing to determine under a Title IX claim. No athlete has been selected nor rejected.”). In the *Response to the Motion to Dismiss*, Lemmons requested that the Arbitrator “order USEF to rewrite the procedures to be compliant and retain jurisdiction....” *Response to Motion to Dismiss* at p. 8. The procedures at issue are not final and, thus, if the Arbitrator did as requested by Lemmons, the Arbitrator would be intervening in USEF’s process of creating selection policies and criteria before the selection policies and criteria are finalized and approved by the Board. This issue is not ripe for the Arbitrator’s review.

Selection policies and criteria can be the subject of Section 9 disputes, but not under the circumstances presented here.² *McConneloug v. USA Cycling*, AAA Case No. 30-190-00750-04 at p. 7 (July 20, 2004)(stating the governing body 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.”); *Klug v. US Ski & Snowboard Ass’n*, AAA Case No. 30-190-00056-06 at p. 2 (Jan. 27, 2016)(stating “[t]he whole purpose of development of criteria for qualification for [protected competitions] is for the contenders to know how they will be selected and against what criteria they will be judged.”). In support of her position, Lemmons cited distinguishable Section 9 cases relating to selection policies and criteria. In *Lea v. USA Cycling, Inc.*, the claimant argued that the established selection criteria was not appropriately applied when he was not selected for the 2016 Olympic Team. *Lea v. USA Cycling, Inc.*, AAA Case No. 01-16-0000-8307 at ¶ 5.1 (Apr. 15, 2016). In *Viola v. USA Diving*, the arbitrator upheld the selection of the athletes selected by USA Diving in accordance with USA Diving’s selection procedures and criteria, but ordered USA Diving to submit revised selection procedures and criteria based on the arbitrator’s conclusion that USA Diving applied too many discretionary factors. *Viola v. USA Diving*, AAA Case No. 30-190-00828-05 at pp. 14-15 (Aug. 1, 2005).³ These cases all address selection policies and procedures that were final and in place and involved athletes affected by those policies and procedures. USEF correctly asserted that Lemmons has not been denied the opportunity to compete in the WEC to be held in or about September 2020 and may very well be selected for the Squad. It is inappropriate for the Arbitrator to intervene in the drafting of the final selection procedures or order USEF to essentially start over in the drafting of the selection policies and criteria before that criteria is finalized. There is also no basis for the Arbitrator to order USEF to respond to Lemmons’ questions although it appears USEF could have communicated better with Lemmons, which may very well have relieved some of Lemmons’ concerns and the need for this proceeding.

² In *Quigley v. Union International de Tir*, the panel, in pertinent part, stated as follows:

Regulations that affect the careers of dedicated athletes should be predictable...and not the product of an obscure process of accretion. Athletes and officials should not be confronted by a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders.

Quigley v. Union International de Tir, CAS 94/129 (Apr. 20, 1995); *but see Blumer v. U.S. Ski & Snowboard Ass’n*, AAA Case No. 30-190-00027-98 (Jan. 30, 1998)(noting “[t]he procedures in place for selection of [the team] and time constraints limit the type of relief that can be granted by the arbitrator”).

³ *Reininger v. US Rowing*, AAA Case No. 72-199-0909-98 (Aug. 30, 1988)(challenging selection procedures as being “fatally flawed” after the final selection camp to select the rowing team); *Piree v. US Rowing*, AAA Case No. 14-E190-0056-92-D/K (Apr. 14, 1992)(alleging not all athletes had an equal opportunity to participate in selection for the Olympics).

In the amended demand for arbitration, Lemmons does not argue that she has been denied an equal opportunity to compete and be selected for the Squad. USEF argued in the *Motion to Dismiss* and in a Preliminary Hearing before the Arbitrator that Lemmons is on the same playing field as other athletes and has been provided the same opportunities to compete and the same selection policies and criteria, including the First Memorandum, Second Memorandum, and Draft Procedures. In the *Response to the Motion to Dismiss*, for the first time, Lemmons argued “[t]he secrecy of the process is affecting all athletes [sic] guarantee of the equal opportunity to attempt to qualify for selection to compete, because luck of the draw with little or no input from the athlete is not equal opportunity.” This comment does not appear in line with all of the evidence that was submitted by Lemmons, including that all athletes were permitted to comment on the Draft Procedures and Lemmons was, in fact, one (1) of the nine (9) athletes who did comment on the Draft Procedures.

Being that Lemmons has not been denied access to any event, has not been denied an equal opportunity to be selected for the Squad, has not been selected or rejected for the Squad, and the selection procedures are not yet final, the Arbitrator does not have jurisdiction under Section 9 of the USOC Bylaws to hear and rule on this dispute. Once the USEF selection policies and criteria are finalized, Lemmons will have sufficient time to compete, qualify, and be selected for the Squad. Or, alternatively, if Lemmons does not believe that the final selection criteria complies with the obligations placed on USEF for fair and clear selection policies and criteria, Lemmons will have sufficient time to challenge those policies and criteria through a properly filed Section 9 case. At this point, however, the issues presented are not ripe for the Arbitrator’s review.

For the reasons set forth herein, the *Motion to Dismiss* is granted and Lemmons’ claims shall be dismissed for lack of jurisdiction as this dispute is not a properly presented dispute under Section 9 of the USOC Bylaws.

V. Decision

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

- 1) USEF’s *Motion to Dismiss* is granted and, therefore, this dispute is dismissed for lack of jurisdiction as this dispute is not a properly presented dispute under Section 9 of the USOC Bylaws.
- 2) The Parties shall bear their own attorneys’ fees and costs associated with this arbitration.
- 3) The administrative fees for AAA and the compensation and expenses of the arbitrator shall be borne as incurred by the Parties.



Christian Dennie, FCI Arb
Arbitrator

Date: March 4, 2019