

# AMERICAN ARBITRATION ASSOCIATION

## Commercial Arbitration Tribunal

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In the Matter of the Arbitration between

Conner Levoff,  
Claimant

and

USA Water Polo, Inc.  
Respondent

and

Wolf Wigo  
Appellee

Re: AAA No. 01-15-0004-4824

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### DECISION AND AWARD OF ARBITRATOR

#### I. SUMMARY

1.1 USA Water Polo, Inc. (hereafter "USAWP") sanctioned Claimant Connor Levoff for sending a whistle blower letter to the University of California Santa Barbara (hereinafter "UCSB") regarding Appellee Wolf Wigo. Wolf Wigo filed a complaint with USAWP about this letter. USAWP established a hearing panel to address Mr. Wigo's Grievance (hereinafter "Hearing Panel").

1.2 The Hearing Panel sanctioned Mr. Levoff with a one year suspension from coaching any USAWP team and placed Mr. Levoff on a five-year probationary period with a lifetime ban if Mr. Levoff were to violate the terms of his probation.

1.3 Mr. Levoff argued that his whistle blower letter was protected under California Civil Code §47(b) which precludes sanctions against individuals complaining about a government actor's misconduct, among other things.

1.4 The Arbitrator finds that Mr. Levoff satisfies all the requirements of Civ. Code §47(b). As a matter of law Mr. Levoff engaged in protected activity and cannot be sanctioned for sending the whistle blower letter.

1.5 The Arbitrator notes that after the Hearing Panel's decision it is likely very few would disclose unethical or unsafe conduct within USAWP. This would be especially the case if

the complaint concerns an individual perceived to have power within the organization. There are serious consequences associated with having no whistle blowers; consequences, as it terms out, that can be life threatening. Unfortunate examples are illustrated by issues in FIFA and USA Swimming.

1.6 This is in no way meant to imply that Mr. Wigo engaged in unethical conduct. I make no finding regarding Mr. Wigo and I would be upset, like Mr. Wigo, if I believed that someone was besmearing my name. However, in the long term it is in the best interest of USAWP, and the Olympic family, to provide robust protection for whistle blowers.

1.7 The Arbitrator noted that under USAWP rules, Mr. Levoff was required to pay the full cost of the arbitration. The record shows that the cost was \$2,350.00. In addition, USAWP rules required that USAWP solely determine the location of the hearing and Mr. Levoff would have to pay for all costs associated with the location of the hearing. The Arbitrator cannot imagine many athletes who could afford such a fee to achieve justice. This is also the case for coaches who make very little money from coaching. The cost of the arbitration is over 5 times the cost it would take claimant to seek justice in a state or federal court. The shifting of the entire cost of the arbitration onto the claimant appears unfair, predatory and designed to frustrate those seeking their day in court. Those interested in protecting the rights of athletes and coaches should look into such predatory practices.

## **II. JURISDICTION**

2.1 The Arbitrator has jurisdiction to hear this dispute pursuant to the Ted Stevens Olympic and Amateur Sport Act (“Stevens Act”) which provides the following:

An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it . . . (4) agrees to submit to binding arbitration in any controversy involving . . . (B) the opportunity of any athlete, coach, trainer, manager, administrator or official to participate in amateur athletic competition, upon demand of the corporation or any aggrieved amateur athlete, coach . . . .

Conducted in accordance with the Commercial Rules of the American Arbitration Association, as modified and provided for in the corporation’s constitution and bylaws, except that if the Athletes’ Advisory Council and National Governing Bodies’ Council do not concur on any modifications to such Rules, and if the corporation’s executive committee is not able to facilitate such concurrence, the Commercial Rules of Arbitration shall apply unless at least two-thirds of the

corporation's board of directors approves modifications to such Rules (Stevens Act §220522)<sup>1</sup>(Emphasis added)

2.2 USA Water Polo has adopted the following arbitration provision:

The sole means of appeal from a decision of a hearing panel shall be by the filing of an arbitration proceeding with the American Arbitration Association, which shall hear the appeal pursuant to its rules for commercial arbitrations as they may then be in effect. Any request for the arbitration of any appeal must be made within 30 days of the date upon which the hearing panel determining the grievance announces its decision on the grievance, after which period of time, the decision of the hearing panel shall become final and not subject to any further appeal. Any arbitration pursuant to this provision shall be conducted in Orange County, California. All costs of the arbitration shall be borne by the party initiating the arbitration, without regard to the outcome of the arbitration. In considering the appeal, the arbitrator shall give due consideration to the expertise of the hearing panel conducting the initial grievance hearing with regard to the standards of conduct that are appropriate in the sport of water polo and their interpretation of USA Water Polo's rules governing the conduct at issue in the grievance hearing.

2.3 The term "coach" is not defined in the Stevens Act. However, the Stevens Act defines an "amateur athlete" as follows: ". . . an athlete who meets the eligibility standards established by the national governing body . . . in which the athlete competes." (Stevens Act §220501 (b)(1).) Therefore the Arbitrator finds that the term "coach" is an individual who meets the eligibility standards established by USA Waterpolo for coaches.

2.4 The Steven Act defines "amateur athletic competition" as follows: ". . . a contest, game, meet, match, tournament, regatta, or other event in which amateur athletes compete."

2.5 It is undisputed that Mr. Levoff is a member of USA Water Polo as a coach. It is undisputed that his team competes in amateur athletic competition. It is undisputed that USA Water polo has prohibited Mr. Levoff from coaching in certain amateur athletic competitions for a period of one year. As a result, the Arbitrator finds that Mr. Levoff's status as a coach under USA Water polo rules satisfies the requirement for his jurisdiction in this case.

### **III. PROCEDURAL BACKGROUND**

3.1 On April 14, 2015, Appellee, Wolf Wigo filed his grievance against Mr. Connor Levoff and Mrs. Cathy Neushul. Following this filing, USAWP's CEO appointed the three

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<sup>1</sup> The term "corporation" refers to the United States Olympic Committee. Stevens Act §220501 (4).

member Hearing Panel. On July 20, 2015, the Hearing Panel sanctioned Mr. Levoff and Mrs. Neushul as more fully described below.

3.2 On August 4, 2015 Mr. Levoff filed his claim with the American Arbitration Association. The filing fee was \$3,250.00. On August 20, 2015 USAWP answered the claim. On August 26, 2015 Mr. Wigo made his notice of appearance.

3.3 A Preliminary Hearing took place on September 27, 2015. Attending the hearing on behalf of Mr. Levoff was his counsel, Steven L. Simas. Attending the hearing were as follows: Steven Simas, Esq. on behalf of Mr. Levoff, Richard Esterkin, Esq. on behalf of USAWP, and Timothy B. Broderick, Esq. on behalf of Mr. Wigo.

3.4 At this hearing, Mr. Simas stated he would be filing a United States Olympic Committee ("USOC") Bylaw Section 9 Complaint. As a result the issue arose regarding whether the arbitration should be stayed or dismissed. The arbitrator heard the arguments of the parties. The Arbitrator ruled the arbitration would be stayed to allow the filing of the Section 9 Complaint.

3.5 The parties unanimously agreed to continue the September 27, 2015 hearing until September 30, 2015 to allow Mr. Levoff the opportunity to file a Section 9 Complaint with the USOC.

3.6 The parties attending the September 30, 2015 Preliminary Hearing were as follows: Steven Simas, Esq. on behalf of Mr. Levoff, Richard Esterkin, Esq. on behalf of USAWP, and Timothy B. Broderick, Esq. on behalf of Mr. Wigo.

3.7 The Arbitrator also ordered USAWP to provide the arbitrator with Mr. Wigo's grievance letter. In addition, given the parties initial submissions, the Arbitrator also requested that the parties file briefs on two issues: (1) standard of review: de novo or abuse of discretion and burden of proof.

3.8 Another hearing was scheduled for October 30, 2015 to determine the following: (1) whether there will be an evidentiary hearing, (2) the date and time of the evidentiary hearing if one was to take place, and (3) exhibits filed in this matter.

3.9 On October 7, 2015, Mr. Levoff filed his Section 9 Complaint with the USOC and his Statement of Claims with the AAA. On October 12, 2015 the USOC acknowledged receipt of Mr. Levoff's complaint.

3.10 On October 19, 2015, USAWP filed its Response to Connor Levoff's Statement of Claims. On October 20, 2015, Mr. Levoff and Mr. Wigo through counsel filed their briefs on the Standard of Review and Burden of proof.

3.11 On October 27, 2015, the Arbitrator ruled that the standard of review was de novo and USAWP had the burden to prove by clear and convincing evidence that Mr. Levoff violated USAWP rules.

3.12 On October 29, 2015, Mr. Levoff requested a stay of USA Water Polo's suspension of Mr. Levoff and that Cathy Neushul's Section 9 Complaint be consolidated with Mr. Levoff's.

3.13 The Arbitrator ruled that he did not have the authority to consolidate the cases. Further, the Arbitrator ruled that any request to lift the suspension had to be done by noticed motion with sworn affidavits. As the motion would request an act similar to an injunction, the motion would have to comply with the standards for obtaining an injunction under California law.

3.14 The Scheduling Conference was held on October 30, 2015. Appearing on behalf of Conner Levoff was Steven L. Simas, Esq.; appearing on behalf of USA Water Polo was Richard W. Esterkin, Esq.; and appearing on behalf of Mr. Wigo was Tim Broderick, Esq.

3.15 On November 2, 2015 USAWP filed its Statement of Charges. This Statement of Charges expanded the rule violations that USAWP alleged Mr. Levoff violated.<sup>2</sup>

3.16 On November 3, 2015, Mr. Levoff filed his motion to stay his suspension. On November 6, 2015 Mr. Esterkin and Mr. Broderick filed their briefs opposing Mr. Levoff's stay request.

3.17 On November 6, 2015, the Arbitrator stayed Mr. Levoff's sanction. On November 10, 2015 USAWP filed a Request for Reconsideration.

3.18 On November 30, 2015 the parties held an additional hearing regarding scheduling of the case. At this hearing, the parties requested that the arbitrator rule on Mr. Levoff's California Civil Code §47(b) litigation privilege argument as that issue could be dispositive.

3.19 The Arbitrator then requested that the parties also address the University of California Santa Barbara's ("UCSB") Whistle Blower Policy, effective June 2012 (hereafter referred to as the "Policy") and whether the Policy applied in this case. The Arbitrator also notified the parties that he would reconsider his due process ruling that stayed the sanctioned against Mr. Levoff. The parties agreed to schedule oral arguments for these issues on January 8, 2016.

3.20 On December 15, 2015 Mr. Levoff filed his brief and affidavits on the three issues. On January 7, 2016 USAWP filed its brief with affidavits. Mr. Wigo did not file a brief as they relied upon USAWP's brief. The parties held oral arguments on January 15, 2016. Mr.

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<sup>2</sup> While this hearing is de novo that fact did not allow USAWP to add more rule violations. However, given this decision that issue is moot.

Simas, Esterkin and Mr. Broderick appeared on behalf of their clients. At the conclusion of oral arguments all parties acknowledged that they were given a fair opportunity to present their case.

#### **IV. FACTUAL BACKGROUND**

4.1 On April 15, 2014, Peter Trabucco, the father of a women on UCSB's Water Polo team sent a letter via email to Athletic Director Mark Massari outlining his concerns regarding UCSB's commitment to Woman's water polo. (Declaration of Peter Trabucco in Support of Stay/Temporary Restraining Order of USA Water Polo Suspension dated November 2015 (hereafter referred to as the "Trabucco Declaration") ¶2.) That letter explained how his daughter was devastated and confused by the firing of the women's Water Polo coach Cathy Neushul. (*Id.*)

4.2 On the day he sent the letter his daughter called Mr. Trabucco and stated that Coach Wigo screamed at the team for 45 minutes talking about "f---ing parents" who are writing emails to the Athletic Director and making him look bad. (Trabucco Declaration ¶3.) His daughter stated that Coach Wigo claimed to know the parents. He claimed the parents were "f---ing liars. (*Id.*)

4.3 Mr. Trabucco's daughter and some of her teammates were very concerned that Coach Wigo would retaliate against them. (Trabucco Declaration ¶4.) **Significantly, Mr. Trabucco's daughter asked Mr. Trabucco not to speak out any more.** (*Id.*)

4.4 As a result, on April 16, 2014, Mr. Trabucco emailed Mr. Massari and Kelly Barsky, assistant to the Athletic Director, and blind copied Peter Neushal, the husband of Cathy Neushul. (Trabucco Declaration ¶5.) This email (hereinafter referred to as the "Trabucco Email") stated the following:

I had hoped, and maybe naively assumed, that my email to Mr. Massari would have remained confidential. Yesterday at practice Wolf made it very clear that the contents of my email were shared with him. In a profanity laced, emotional tantrum, Wolf spent over 30 minutes berating the "f...ing parents" who wrote emails to the AD making him look bad. He claimed to know who these parents were and that they were "f...ing liars." Prior to what happened yesterday, we had intended to meet with Wolf after the season was over and sort out our options. We're not sure what we are going to do now. My daughter is now deeply concerned about retribution by Wolf. In my opinion, Coach Wigo has heard many of these complaints before – it's obvious that something struck a nerve yesterday. (*Id.*)

4.5 Unknown to Mr. Trabucco at the time, Peter Neushul shared the email with Claimant, Connor Levoff. (*Id.*) Mr. Neushul also then incorporated the contents of Mr. Trabucco's email to an *alleged* generic parent letter that he forwarded to Mr. Levoff to provide

to UCSB. (Declaration of Peter Neushul in Support of Stay/Temporary Restraining Order of USA Water Polo Suspension dated November 3, 2015 (hereafter referred to as the “Neushul Declaration”) ¶8.) Mr. Neushul did not want to send the email under his name because his wife had a pending lawsuit against UCSB because of her termination. (Neushul Declaration ¶7.)

4.6 Mr. Levoff stated that Peter Neushul drafted the letter. He did not change anything in the letter except for adding cc’s to the letter before sending it to UCSB personnel he believed would be in the position to investigate and address the problem. (Declaration of Connor Levoff in Support of Stay/Temporary Restraining Order of USA Water Polo Suspension dated November 3, 2015 (hereafter referred to as the “Levoff Declaration”) ¶¶9 and 10.)

4.7 The letter was copied to UCSB employees (hereafter the “Massari Letter”). While the letter was sent anonymously, it was titled a “Mad Parent” and stated the following:

Dear Mr. Massari:

My daughter plays water polo at UCSB. I spoke to her at noon today about a team meeting that took place this morning. Head Coach Wolf Wigo screamed at the team for almost an hour about ‘F---king parents’ who are “writing emails to the AD that are making me look bad.” Wigo informed the women that the emails are ‘all lies,’ and that he “sees the parents talking about him huddling together.”

Wigo then rambled on about how smart he is, how he graduated from Stanford, and how he made a lot of money on Wall Street. Apparently Wigo only coaches ‘only because I love it.’ At some point in this tirade Wigo began to weep in front of the team.

Wigo’s violent, paranoid, and irrational behavior is intimidating my daughter and her teammates. I demand that [you] remove this man immediately and investigate his behavior as I am concerned he is a threat [to] the young women on this team. My foremost fear is that Wigo will continue to retaliate against team members. It appears he may be in need of counseling. I am concerned that his psychotic behavior may be a threat to my daughter’s health.

My daughter is afraid of this man. Frankly, this is the last thing I expected from an instructor at the University of California. This must stop immediately. As one of the ‘F---king parents’ I am not giving you my name. Indeed, if I learn that you are passing parent names to Coach Wigo there will be further consequences. (Grievance of Wolf Wigo dated April 14, 2015 attached document (hereafter Wigo Grievance.)

4.8 On June 29, 2015, Robert Tarsia, Director of Audit and Advisory Services issued a letter to Mr. Wigo stating the following:

This is to confirm that we opened a Whistleblower case in October 2014 to investigate reported allegations involving you, and advised you of the outcome on April 30, 2015. Consistent with the UC Whistleblower Policy, you would have been advised to limit discussion of this matter with other parties. Our standard notification letter includes the following advisement.

*Because of the retaliation policy, for your own protection, please do not try to identify or discuss this matter with anyone you might think is the whistleblower. Confidentiality is important to all involved. You have a responsibility to maintain confidentiality, and to not withhold, destroy, or tamper with evidence; no attempt should be made to influence, coach, or intimidate any possible witnesses.*

4.9 On July 15, 2015, apparently Mr. Wigo hired Calforensics to investigate who wrote the Massari Email. This investigation pointed to Mrs. Neushul as the author and identified that it was last saved by Mr. Levoff.

4.10 On April 14, 2015, Mr. Wolf Wigo filed a grievance against Connor Levoff and Cathy Neushul. This grievance clearly stated that Mr. Levoff and Ms. Neushul libeled Mr. Wigo by sending the Massari Letter. Mr. Wigo stated, "They wrote the [Massari] document together and sent [it] to members of our club team in BCC form as well as UCSB." Mr. Wigo alleges, among other things, that Mr. Levoff and Ms. Neushul "wrote many other letters like this; however I cannot prove they wrote those as they did not use a word document for those but only pasted into a fake email address."

4.11 In July of 2015, the Hearing Panel held a hearing on this matter. Mr. Levoff objected to this hearing on a number of grounds that will not be addressed because a de novo hearing essentially resolved those issues.

4.12 The Hearing Panel acknowledged that the grievance, "arises from a letter dated April 16, 2014 that was delivered to officials of the University of California, Santa Barbara . . . and copied to an unknown number of the members of the Santa Barbara area water polo community." (USA Water Polo – Wigo Grievance Decision dated July 20, 2015 (hereafter referred to as the "Grievance Decision").) The Hearing Panel sanctioned Mr. Levoff by banning him from coaching any US Water polo team for one year and placed him on probation for five years. (hereafter referred to as the "Grievance Decision")

4.13 In reaching the Grievance Decision, the Hearing Panel found that the differences between the Trabucco Email and the Massari Letter evidenced retaliation by Mr. Levoff because of his termination from being a coach for UCSB's Water Polo team. (*Id.*) The Hearing Panel held that because the letter purported to be from a parent, it "materially misrepresented the



identity of the party sending the letter and, because the letter was sent anonymously, prevented the UCSB officials who received the letter from questioning the motivation of its author.”(*Id.*) The Hearing Panel found that Mr. Levoff did not attempt to verify the statements in the Trabucco Email, which the Hearing Panel ruled he had an obligation to do. The Hearing Panel stated that Mr. Levoff and Mrs. Neushul did not produce the testimony of Mr. Trabucco or his daughter concerning the letter. It is noted here that Mr. Levoff claims he had requested a continuance of the hearing because, among other reasons, Mr. Trabucco and his daughter were traveling by air during the hearing date. The Hearing Panel found Mr. Levoff at fault because the Massari Letter was sent anonymously and sent to persons other than UCSB administrators. The Hearing Panel stated, “in light off UCSB’s whistleblower policy, there was no reason to send the [Massari Letter] anonymously.” Further, there was no reason to distribute the Massari Letter widely.

4.14 The decision also put Mrs. Neushul on probation for five years while it cited no evidence that Mrs. Neushul took any part in writing or sending the Massari Letter. (*Id.*) The decision did state that Mr. Neushul composed the letter on Mrs. Neushul’s computer and Mrs. Neushul knew this was taking place and did nothing to stop it. The Grievance Decision stated that Mrs. Neushal did not question the veracity of the allegations in the Massari Letter and did not prevent it from being sent.

4.15 The Hearing Panel found that Mr. Levoff and Mrs. Neushul violated USAWP’s bullying rule, by “spreading false rumors or making false derogatory statements about another.” No other rule violation was alleged.

## V. LEGAL ANALYSIS

### A. Civ. Code §47 Protects Mr. Levoff from actions taken against him for filing the Massari Letter

5.1 California Code of Civil Code §47, subd. (b) states the following:

A privileged publication or broadcast is one made . . . (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure . . .

#### 1. Mr. Levoff arguments in favor of Civ. Code §47(b)

5.2 Citing California Civil Code §47 (b), Mr. Levoff argues that the Massari Letter is privileged as a matter of law. To support this position, Mr. Levoff points to the case of *Wise v. Thrifty, Inc.* (2000) 83 Cal. App. 4<sup>th</sup> 1296 for the proposition that Civil Code §47(b) was enacted as an “absolute privilege . . . to protect citizens from the threat of litigation for communications

to government agencies whose function it is to investigate and remedy wrongdoing.” (*Thrifty*, 83 Cal. App. 4<sup>th</sup> at 1303.)

5.3 Mr. Levoff argues that the language in the Massari Letter is identical to the issues presented in the *Lee v. Fick* (2005) 135 Cal. App. 4<sup>th</sup> 89 in that the Plaintiff complained of defamation and not a violation of USA Water Polo Rules (Mr. Wigo used the term “libeled”).

5.4 Second, while Mr. Levoff disputes that he sent the Massari Letter to members of the ‘club team’ outside of UCSB, the *Fick* case would have allowed such dissemination. (*Fick*, 135 Cal. App. 4<sup>th</sup> at 97.)

5.5 Third, as in this case, the letter to the school district in *Fick* was actually sent by a third party like Mr. Levoff.

2. *USAWP arguments against the application of Civ. Code §47(b)*

5.6 USAWP argues that Civ. Code §47(b) provides a defense to tort actions and does not prevent a private organization from enforcing its rules. It also argues that Civ. Code §47(b) is preempted by the Stevens Act.

5.7 Further, USAWP argues that even if Civ. Code §47(b) applies; Mr. Levoff’s conduct is not protected because he distributed the Massari Letter to parties other than UCSB. It further argues this alleged distribution is a question of fact which requires a hearing.

5.8 USAWP argues that the Arbitrator should not interfere with the decisions of a private organization in its disciplining of its members. It argues the Arbitrator does not have the knowledge of the Water Polo sport to make such a determination over the Hearing Panel. In essence USAWP argues that the Arbitrator should give deference to USAWP’s Hearing Panel’s Grievance Decision.

3. *Civ Code §47(b) applies to Mr. Levoff*

5.9 There is a two part test under a Civ. Code §47(b) analysis. First, the Arbitrator must determine whether Mr. Levoff meets the threshold showing that he engaged protected activity. (*Fick*, 135 Cal. App. 4<sup>th</sup> at 95.) After Mr. Levoff makes this showing, the Arbitrator must then determine whether USAWP has demonstrated a probability of prevailing on the claim. (*Id.*) In this regard, USAWP must show the complaint is sufficient and supported by facts sufficient to sustain a judgment in USAWP’s favor. (*Id.*) The Arbitrator does not weigh the competing evidence. Instead, the Arbitrator should decide the matter in Mr. Levoff’s favor if, as a matter of law, Mr. Levoff’s motion defeats USAWP’s attempt to establish evidentiary support for its claim against Mr. Levoff. (*Id.*)

*a. Mr. Levoff has meet his burden to show that he engaged in protected activity*

5.10 The facts of this case are not dissimilar from *Fick*. In *Fick* parents of a high school coach wrote a letter to school officials complaining about the coach. (*Fick*, 135 Cal. App. 4<sup>th</sup> at 92 and 93.) The complaint made allegations similar to the Massari Letter. The coach sued the parents for libel, slander, conspiracy to interfere with prospective economic advantage, and intentional interference with prospective economic advantage. The parents brought a special motion to strike pursuant to Code of Civil Procedure § 425.16. The trial court granted the motion to strike for the libel cause of action, but denied the parents' motion to strike on the other causes of action.

5.11 On appeal the court confirmed the motion to strike the libel portion of the trial court's order and overturned the trial court on the other causes of action, i.e., slande and interference with prospective economic advantage.

5.12 In so ruling, the appeals court confirmed that under Civ. Code §47(b) complaints to school authorities about a teacher or principal in the performance of their duty are privileged. (*Fick*, 135 Cal. App. 4<sup>th</sup> at 96.) This privilege is designed to provide "the most freedom of communication between citizens and public authorities whose responsibility is to investigate wrongdoing." (*Id*; *See also Wise v. Thrifty Payless, Inc.* (2000) 83 Cal. App. 4<sup>th</sup> 1296—absolute privilege to protect citizens from threat of litigation for communications to government agencies whose function it is to investigate and remedy wrongdoing.) The appeal court held that the privilege under Civ. Code §47(b) is absolute and the lack of malice is irrelevant. (*Fick*, 135 Cal. App. 4<sup>th</sup> at 98; *Accord Rothman v. Jackson* 49 Cal. App. 4<sup>th</sup> 1134, 1144 – application "does not depend upon speaker's motives, morals, ethics, or intent.")

5.13 It is undisputed that the Massari Letter was sent to UCSB officials complaining about Mr. Wigo's conduct towards their students. As a result, the Arbitrator finds that Mr. Levoff engaged in protected activity.

*b. USAWP does not have a probability of prevailing on its claim.*

5.14 In this case, USAWP is attempting to sanction Mr. Levoff regarding the protected activity he engaged in. USAWP has proffered several reasons why Civ. Code §47(b) does not apply in this case.

5.15 First, USAWP argues that Civ. Code §47(b) does not apply to private organization's discipline of its members because this sanction is not a tort action. In fact, Mr. Wigo has brought a libel cause of action against Mr. Levoff within USAWP. Should USAWP entertain this tort action, they must comply with Civ. Code §47(b). But for the Stevens Act's arbitration clause, Mr. Levoff could have brought his appeal in state court. Had he done so, the state court would have applied Civ. Code §47(b) to USAWP. Given this fact, the Arbitrator is

under the opinion that the Stevens Act's arbitration provision was not written to limit the laws USAWP must comply with.

5.16 Further, Mr. Wigo is an employee of UCSB and has been expressly warned not to take any action against the whistle blower(s). As Mr. Wigo has used USAWP to take action against Mr. Levoff, a court would certainly find jurisdiction over USAWP in this case. After all, USAWP is a California corporation.

5.17 Second, USAWP argues that the Arbitrator should, in essence, trust the expertise of USAWP in disciplining its members. While in many cases this may be true, the argument defeats the very purpose of providing a fair and unbiased hearing under the Stevens Act. In AAA arbitrations, all parties are promised a fair and unbiased determination of their dispute. Should the Arbitrator in this type of case give more weight to USAWP's arguments over Mr. Levoff's arguments that would fit the very definition of biased.

5.18 Further, the arbitrator should approach a whistle blower case with an open mind given the political nature of sport organizations.

5.19 On the other hand, the Hearing Panel found that the Massari Letter was sent in retaliation for the termination of Mrs. Neushul and Mr. Levoff from UCSB's Water Polo Team. There was evidence of a highly charged political situation with UCSB, Mrs. Neushul, Mr. Levoff, Mr. Wigo and local club teams. No doubt there is plenty of blame to go around.

5.20 Nevertheless, the protection of Civ. Code §47(b) is absolute and motive is not considered. To the extent we want our sport organizations to function with integrity, the rights of whistle blowers must be vigorously protected and good people who dare to complain should not be run off. That protection starts with a fair and unbiased, de novo review of whistle blower cases.

5.21 Third, USAWP argues the Arbitrator cannot determine this case under Civ. Code §47(b) without an evidentiary hearing because the Arbitrator must weigh the evidence. Civil Code §47(b) are ruled on at the motion to strike phase. (*Fick*, 135 Cal. App. 4<sup>th</sup> 89) The case law explicitly states that the Arbitrator does not weigh the evidence at this stage. (*Fick*, 135 Cal. App. 4<sup>th</sup> at 95.) The Arbitrator must rule in favor of Mr. Levoff if, as a matter of law, Mr. Levoff's evidence defeats USAWP's evidentiary support for its claim. (*Id.*)

5.22 Fourth, USAWP argues that applying California law in this case is preempted by the Stevens Act. USAWP cited the following cases in making this argument: *Slaney v. Int'l Amateur Ath. Fed'n*, 244 F. 3d 580 (2001); *Walton-Floyd v. United States Olympic Comm.*, 965 S. W.2d 35 (1998); *Lee v. United States Taekwondo Union*, 331 F. Supp. 2d 1252 (2004).

5.23 All of these cases deal with selections to Olympic teams. Regarding selections to Olympic teams the Stevens Act states:

The purposes of the corporation [USOC] are . . . (3) to exercise exclusive jurisdiction, directly or through constituent members or committees, over--- (A) all matters pertaining to the United States Participation in the Olympic Games, the Paralympic Games, and the Pan-American Games, including representation of the United States in the games; and (B) the organization of the Olympic Games, the Paralympic Games, and the Pan-American Games when held in the United States.

5.24 As a result, the Arbitrator finds that any preemption would have to be associated with the Olympic Games, Paralympic Games or Pan-American Games. This case does not involve any of those competitions thus state law is not preempted in this dispute.

5.25 The Arbitrator's decision is consistent with the published USOC's Code of Conduct, Effective June 30, 2015 (hereinafter the "Code") for all parties associated with the USOC which states that it "applies to all . . . member organizations." (Code, Article II, Applicability.) The Code further states:

You should be alert and sensitive to situations that could result in unethical, illegal or improper actions. You have an obligation to report potential or actual violations of this Code of Conduct . . ." (Code, Article III, Reporting Obligations.)

5.26 The Code deals with whistle blower activity. With respect to USAWP's argument that state law is preempted in this case the Code states: "The USOC requires that you *follow*. . .state and local law as applicable." (Emphasis added) (Code, Article IV, Legal Compliance.) Therefore, USAWP as a National Governing Body ("NGB") is a member organization of the USOC and must comply with all state and local laws regarding whistle blower activity as in this case.

5.27 Fifth, USAWP argues that Mr. Levoff lost the protection of Civ. Code §47(b) when the Massari Letter was submitted to more UCSB individuals than necessary under UCSB Whistle Blower Policy including club water polo teams not associated with UCSB. The Arbitrator first notes that when requested, USAWP produced no evidence that Mr. Levoff provided the Massari Letter to anyone other than UCSB employees.

5.28 Nevertheless, the Arbitrator does not doubt that concerned parents in the water polo community would be interested in these allegations as they have children working with Mr. Wigo. As such, I find that, as a matter of law, these additional individuals would have been "interested parties" to the complaint. Therefore, even if Mr. Levoff had sent the Massari Letter to other water polo members he would not have lost his privilege. (*See Fick*, 135 Cal. App. 4<sup>th</sup> at 97; *Accord Rothman v. Jackson* (1996) 49 Cal. App. 4<sup>th</sup> 1134, 1141—scope of privilege includes any publication that has a reasonable relation to the action .)

5.29 Sixth, as stated in detail below, Mr. Levoff complied with UCSB's Policy therefore USAWP cannot cite to any facts or law that would strip him of the protection afforded by Civ. Code §47(b).

**B. UCSB Whistle Blower Policy applies to Mr. Levoff**

1. Mr. Levoff's arguments for his protection by the UCSB Whistle Blower Policy

5.30 Mr. Levoff did not address UCSB's Whistle Blower Policy in his brief. During oral arguments Mr. Simas stated that he did not include reference to UCSB's Whistle Blower Policy because it did not cover complaints by non-employees. When it was pointed out that UCSB's Policy did cover complaints by non-employees Mr. Levoff argued that the Policy applied in this case and barred USAWP from taking action against Mr. Levoff.

2. USAWP arguments against Mr. Levoff's protection under the UCSB's Whistle Blower Policy

5.31 USAWP essentially made three arguments regarding the Policy. First, USAWP argued that Mr. Levoff failed to follow UCSB's whistleblower policy in that the policy recommended that Mr. Levoff send the Massari Letter to the Locally Designated Officer (hereafter "LDO").

5.32 Second, the Hearing Panel found that because the letter purported to be from a parent, it "materially misrepresented the identity of the party sending the letter and, because the letter was sent anonymously, prevented the UCSB officials who received the letter from questioning the motivation of its author."(*Id.*)<sup>3</sup>

5.33 Third, the Hearing Panel faulted Mr. Levoff because he did not attempt to verify the statements in the Massari Letter.

3. UCSB Whistle Blower Policy applies to Mr. Levoff

5.34 The Policy allows a whistle blower to file with the LDO or another University official "whom the reporting employee may reasonably expect to have either responsibility over the affected area or the authority to review the alleged improperly government activity on behalf of the University."<sup>4</sup> (Policy, Article II, Making a Whistleblower Report, Technical Revision, June 2012 II (C) and (E); IV, Receiving A Whistleblower Report (A).) As such sending the Massari Letter to other UCSB employees is allowed.

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<sup>3</sup> Further, given Mr. Levoff's omission of the Policy argument in his written submission, the Arbitrator feels that it is appropriate to add the Hearing Panel's arguments regarding the Policy.

<sup>4</sup> The arbitrator reads this to include third parties.

5.35 Second, the Policy explicitly allows the whistle blower to send the Massari Letter anonymously. (Policy, Article Article II, Making a Whistleblower Report, Technical Revision, June 2012 II (B).)

5.36 Third, the Policy explicitly states that the whistle blower should not “conduct any investigative activities.” (Policy, Article III. Content of Whistleblower Report.)

5.37 It appears the Hearing Panel did not read the Policy because most of the alleged wrongdoing was expressly allowed by the Policy.

### **C. Due Process**

5.38 In the Order and Preliminary Injunction dated November 6, 2015, based on an admission, the Arbitrator ruled that USAWP failed to provide Mr. Levoff with adequate notice of the consequences of his rule violations. USAWP argued that the Arbitrator did not have the authority to rule *sua sponte* on this issue as USAWP did not have the opportunity to argue the merits.

5.39 The Arbitrator was well within his authority to *sua sponte* rule on an admission of a party. (*See Slaney v. Int’l Amateur Ath. Fed’n*, 244 F. 3d 580 (2001) – Court is not required to ignore facts alleged in pleadings that undermine a party’s case. ) In this case, USAWP’s moving papers admitted the following: “The Rules do not specify specific penalties for specific rule violations, the penalty for any rule violation being left to the discretion of the hearing panel appointed to hear a grievance.”

5.40 The Arbitrator found that the admission meant USAWP’s procedures were contrary to the notion of adequate due process. “Any disciplinary program requires that individuals subject to that program understand, with reasonable certainty, what results will occur if they breach established rules.” *See National Football League Management Council v. National Football League Players Association*, United States District Court, Civ. No. 15 CIV. 5916 (RMB)(JCF) and 15 Civ. 5982 (RMB)(JCF).

5.41 Nevertheless, the Arbitrator agreed to reconsider the matter to provide USAWP with an opportunity to argue the issue of its admission. It was USAWP’s position that the stated admission was just an error on the part of the drafters of their submissions and that adequate due process was provided. USAWP also produced several NGB’s rules containing the broad language allowing the hearing panels to give any arbitrary penalty without limitation.

5.42 Given the ruling on the merits of this case as it relates to California Civil Code §47(b), this issue is moot and will not be addressed further.

**VI. DECISION**

6.1 The July 20, 2015 USA Water Polo – Wigo Grievance Decision is vacated as a violation of Civ. Code §47(b) and UCSB Whistle Blower Policy.

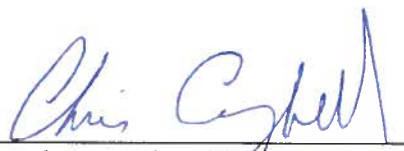
6.2 Mr. Levoff's request for relief is granted.<sup>5</sup> Mr. Levoff's coaching status and membership status with USAWP shall be fully reinstated. USAWP shall take no further action against Mr. Levoff, now or in the future, regarding the issues presented in this case.

6.3 USA Water Polo shall pay Mr. Levoff for all costs associated with this Arbitration pursuant to California Code of Civil Procedure §§1032 and 1033.5. Therefore, the administrative fees of the American Arbitration Association totaling \$850.00 and the compensation of the arbitrator totaling \$1,500.00 which total \$2,350.00 shall be borne by USA Water Polo. The Arbitrator will retain jurisdiction over this matter for the sole purpose of ruling on any disputes regarding these costs.

6.4 This award is in full settlement of all claims submitted to this Arbitrator. All claims not expressly granted herein are hereby denied.

IT IS SO ORDERED

DATE: FEBRUARY 25, 2016

  
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Christopher Lundy Campbell, Esq.

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<sup>5</sup> While Mr. Levoff cited to authorities that could have provided for the payment of his damages as alleged in his declaration and his attorney's fees, the fact that Mr. Levoff did not cite Cal. Civ. Proc. §425.16 and did not request these damages dissuades the Arbitrator from *sua sponte* awarding such relief.