

**AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal**

In the Matter of the Arbitration between

Re: 01-15-0004-1998

Nicholas Marable (**Claimant**)
and
USA Wrestling Association (**Respondent**)

with
James Green (**Affected Athlete**)

AWARD OF ARBITRATOR¹

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 Committee Bylaws, and having been duly sworn, and having duly heard the proofs and allegations of the parties, and conducted a hearing on an expedited basis on July 16, 2015 by telephone, with Claimant, Respondent and Affected Athlete legal counsel in attendance and offering argument and evidence, do hereby, AWARD as follows:

A. Procedural Background

1. This matter arises as a complaint by Nicholas Marable (**Claimant** or **Marable**), the number one ranked wrestler, and 2015 U.S. Open champion in the men's freestyle 70 kg weight division, whose request for a delay in the final wrestle-off scheduled during the Trials Tournament held in Madison, Wisconsin was denied by USA Wrestling Association (**Respondent** or **USA Wrestling**) (the **Decision**). This request was made in accordance with the procedures established by USA Wrestling as "World Team Trials Procedures" and "2015 World Team Trials Qualification & Procedures Men's Freestyle" (**Selection Criteria**). James Green (**Affected Athlete** or **Green**) as the winner of the Trials Tournament would have been Marable's opponent in the final wrestle-off and was named to the 2015 World Team as a result of the Decision, in accordance with the Selection Criteria.
2. Claimant filed his demand for arbitration with the American Arbitration Association on July 9, 2015, on the Complaint Form used for filing a United States Olympic Committee (**USOC**) Bylaws Section 9 (**Section 9**) complaint.

¹ This Award is a corrected version of the original.

Claimant, Respondent and Affected Athlete through his legal counsel participated in a preliminary hearing telephone conference on July 15, 2015 and in the 5 hour telephonic hearing which was held on July 16, 2015.

3. Claimant was represented at the hearing by Howard L. Jacobs, of the Law Offices of Howard L. Jacobs. Also present as a witness for Claimant was his coach, Sammie Henson. Respondent was represented by Thomas M. James, of the Law Office of Thomas M. James, P.C.. Attending the hearing as representatives of USA Wrestling were Les Gutches, Associate Director and Greg Strobel, Chairman of USA Wrestling's Freestyle Sport Committee, and a witness. Affected Athlete was represented by Juan C. Fernandez and Leslie Lombardy of O'Toole Fernandez Weiner Van Lieu, LLC, and Bryan Snyder of the University of Nebraska attended on his behalf. Sara Clark, Gary Johansen and Kacie Wallace of the USOC attended most of the hearing as observers.
4. Claimant's request for relief is:

That the Arbitrator order that the final wrestle-off be conducted as contemplated by the Selection Criteria. Whoever wins the final wrestle-off should be named to the World Championships team, precisely as set forth in the Selection Criteria.
5. USA Wrestling's reply is to request that Claimant's request be denied.
6. Affected Athlete's reply is to request that Claimant's request be denied.

B. Standard of Review, Burden of Proof and Applicable Law

7. The accepted standard of review for an eligibility case under the Act, is for the Arbitrator to defer to USA Wrestling's decision unless it applied its Selection 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 USA Wrestling which has no rational basis, i.e. is unreasonable, arbitrary or capricious, will not meet the Act's requirements.
8. The burden of proving that USA Wrestling failed to apply its Selection Criteria consistently, or to act in a reasonable or rational way or acted in an arbitrary or capricious fashion is to be borne by Claimant.
9. The applicable USA Wrestling 2015 World Team Trials Procedures (the **Selection Criteria**), IV.A. provide:

If, in any weight class or style, the athlete earning an automatic berth into the Final wrestle-off is unable to compete in the final wrestle-off due to injury or illness, the

wrestler may request of the style specific Sport Committee a delay of competition. The Sport Committee shall determine whether or not the delay shall be granted. The injury or illness must be certified in writing by a medical doctor approved by USA Wrestling. USA Wrestling approval of a medical doctor will not be unreasonably withheld. If a request for delay of the final wrestle-off is made within 18 hours of the weigh-in, the athlete will be required to weigh-in and make weight at the qualified weight and have the illness or injury certified in writing by a medical doctor approved by USA Wrestling; provided, however, that the Sport Committee may excuse this weigh-in requirement if the basis for delay is determined by the Sport Committee to be due to unforeseen or extenuating circumstances. The date and place of wrestle-off will be established by the National Coach with agreement of the athletes involved. If agreement cannot be reached, then the date and place of the wrestle-off will be determined by the appropriate Sport Committee.

10. The parties agreed this hearing was a *de novo* hearing with respect to Claimant's request for a delay of the final wrestle-off under the Selection Criteria, IV.A..

C. Findings of Fact

11. The 2015 Senior World Team Trials were held on June 12-14, 2015 in Madison, Wisconsin. The winner of the wrestle-off in Madison Wisconsin was to be named to the 2015 World Team. In the men's freestyle 70 kg weight division, the two athletes who would be competing for a spot on the 2015 World Team were Claimant, who earned an automatic berth by virtue of being the number one wrestler in his weight class, and Affected Athlete, who earned his berth by way of the Trials Tournament. Wrestlers competing in the Trials Tournament were required to register on June 12, between 1:00 and 2:30 p.m. The weigh-in for the men's freestyle 70 kg weight division was scheduled for June 12 at 2:30 to 3:00 p.m. The Selection Criteria state that "if the athlete earning the automatic berth fails to make weight, the winner of the Trials Tournament is the USA World Team Member." (II.C.(4)(ii)). As applied to these wrestlers, if Marable did not make weight, Green would be the USA Wrestling World Team Member.
12. On June 12, 2015 at or about 1:20 p.m., according to the hospital records, Marable arrived at the Emergency Room of Meriter Hospital in Madison, Wisconsin. Marable testified that he had been running on a treadmill in a gym in Madison, to cut weight, and he tripped on his feet or on a drawstring around the bottoms of the legs of his sweatpants, and fell from the treadmill. His coach, Sammie Hanson ("**Hanson**") testified that he did not see Marable fall but heard a thump and when he got to Marable, he was unconscious. Marable was taken to the locker room, and regained consciousness, then vomited and then was taken to the hospital by taxi. Marable was escorted by Hanson and another coach throughout his visit to the hospital.

13. Marable was released from the hospital, went straight to his hotel room, packed and went home that day. He did not go to the registration or weigh-in.
14. The formal request to the Sport Committee for the delay was made at the request of Hanson and on Marable's behalf as they were heading to the hospital by email from Zeke Jones to USA Wrestling on June 12, 2015. There is no controversy with respect to the receipt of the request by USA Wrestling.
15. According to Greg Strobel (**Strobel**), Chairman of the Sport Committee, the Decision was based on this testimony of Marable at the Committee hearing. The Sport Committee did not question this statement of facts. Marable submitted a note from the attending doctor at Meriter Hospital stating that Marable had arrived at 1:20pm and been seen in the emergency department. The note said he was diagnosed with a concussion and prescribed no exertion and not to return to sport until cleared by a physician. During the Sport Committee hearing, Marable told the Committee that he had been 1 lb. from making weight when he fell.
16. It is the custom and practice of the Sport Committee to include both the wrestler making the request and the affected athlete in their hearings, so during the Sport Committee telephonic hearing, Marable and his witness, Hanson were in attendance, as well as Green and his coach, Mark Manning. They all provided the Committee with their views over a 30-45 minute period. Marable testified that he spoke for 10-14 minutes during the Sport Committee hearing. He was asked about his weight and told them he was no more than 1 lb. over weight when the accident happened. He did not provide any information about the total weight he had needed to cut to make weight, but according to Strobel, the committee members would have known Marable's "walking around" weight because they would have been at Trials and seen him. Marable testified at this arbitration that he arrived at Trials on June 11, the day before the fall and concussion and at that point needed to lose 5 lbs. His walking around weight is 170 lbs and the required weigh-in weight for the 70 kg weight class is 155 lbs. Marable had previously competed in the 74kg weight class, and since switching to the 70 kg weight class, Marable has always made weight.
17. The Committee members then deliberated and voted on the motion to grant Marable's requested delay, which was voted down by the Committee, with no rationale discussed among the members for this exercise of the Committee's discretion under Selection Criteria, IV.A.
18. Strobel testified that the Committee believed Marable. The Committee members did not identify the specific reason for their denial but Strobel felt it was because the precipitating cause of Marable's fall was due to improper weight management leading up to that day. The Committee members are very experienced in wrestling, they know what people do to make weight and Strobel thought that perhaps they believed this type of accident was foreseeable based on Marable's weight management practices. There was however no specific discussion that this was the reason for the decision nor was the rationale formalized in any writing. The Committee simply judged that the circumstances did not merit the requested delay.

19. The Decision of the Committee was communicated to Marable first orally and then at his request in writing on June 19, as follows:

“As per USA Wrestling’s 2015 General World Team Trial Procedures, an athlete who has earned automatic berth to the final wrestle-off may request a delay of competition if he or she is unable to compete because of illness or injury. The illness or injury must be certified in writing by a medical doctor approved by USA Wrestling. Furthermore, if the request for delay is made within 18 hours of the weigh-in, the athlete is required to make weight at the qualified weight. The style-specific Sport Committee may excuse the weigh-in requirement if the delay is due to unforeseen or extenuating circumstances. In this case, your request was within 18 hours of the weigh-in and the weigh-in requirement was in effect. The Sport Committee decided not to waive the weigh-in requirement because it felt the information and explanation provided by you was not persuasive to support unforeseen or extenuating circumstances.”

20. On July 7, Claimant appealed the above Decision by filing the demand for this arbitration. In preparation for his case, he requested the Meriter Hospital records, which were provided to all parties as part of this arbitration.

D. Arguments

CLAIMANT

21. Claimant argues that he has met his burden of proof to show that USA Wrestling failed to appropriately apply its Selection Criteria to the facts at issue. This is a *de novo* process and there is no need for the arbitrator to give deference to the decision made by the Sport Committee.
22. In *Viola v. USA Diving* (AAA. 30 190 00828-05 at para. 28), the arbitrator explained the requirements for “discretionary factors” in selection criteria to be valid under the Act and the Bylaws: “While it is acceptable for USA Diving to include discretionary factors in the Team selection process, such factors must have an objective basis in order to comply with USOC Guidelines. Having an objective basis does not mean that there are objective reasons for including them as selection criteria. Rather, it means that the Selectors’ evaluations of athletes on these factors must be supported by objective facts to ensure that these factors are applied fairly. Additionally, given the critical requirement of communicating understandable selection criteria to the athletes, the discretionary factors – like all factors in the selection process – need to be clearly defined. Clearly defined criteria are necessary to provide guidance to “competitive athletes, who ... use enumerated criteria to evaluate their training and performance.” Partial Award

¶37. Such criteria also ensure that the Selectors share a common understanding of what the criteria mean and how they are applied.”

23. Here, the Selection Criteria are largely objective: the winner of the Trials Tournament will have a final wrestle-off against the wrestler who has obtained an automatic berth into that final wrestle-off. The subjective criteria relate to USA Wrestling’s Sport Committee’s decision on a request by athlete earning an automatic berth into the final wrestle-off to delay that final wrestle-off due to injury or illness: in such a situation, the Sport Committee has the discretion (i) to grant the request, and (ii) to waive the requirement of “making weight” if the request is made within 18 hours of the weigh-in.
24. The discretionary portion of this Selection Criteria (as summarized above) does not provide a sufficient objective basis for its application. For example, while the discretionary criteria do provide that the wrestler making such a request must obtain written certification of the illness or injury by a medical doctor approved by USA Wrestling, it provides no objective criteria to be followed by the Sport Committee in deciding whether or not to grant the request for delay. Similarly, while the discretionary criteria do provide that the Sport Committee can waive the requirement of “making weight” if the request is made within 18 hours of the weigh-in for “unforeseen or extenuating circumstances,” the criteria provide no objective criteria to be followed by the Sport Committee in deciding whether such “unforeseen or extenuating circumstances” exist.
25. The lack of any objective basis for the application of these discretionary criteria by the Sport Committee must be taken in the context of the history of how USA Wrestling has applied this rule: between 1988 and 2014, 24 wrestlers requested a delay in the final wrestle-off due to illness or injury, and all 24 received the requested delay.
26. Claimant contends it cannot be disputed that Marable’s diagnosed concussion constituted an illness or injury which made him unable to participate in the final wrestle-off on June 13, 2015. Also based on the documentation submitted, Claimant argues it cannot be disputed that Marable’s diagnosed concussion was an unforeseen and/or extenuating circumstance which occurred within 18 hours of the June 12, 2015 weigh-in.
27. Based on the evidence at the hearing of this arbitration, the reasons for the Decision are still unknown to Claimant. This makes it difficult for the Arbitrator to determine if the Decision had a reasonable basis, as there is no basis for the Decision. The Committee chair, Strobel, seems to be stating that the accident Marable had may have been foreseen due to weight management techniques but also that the accident was an extenuating circumstance. Based on the Selection Criteria, only one of these two circumstances need to exist as the basis for the Committee decision to grant the request. Both are not required. Thus, using Strobel’s own opinion only, the qualifier for the Committee to exercise its discretion in granting the delay was met by Claimant. This however is not necessarily the actual rationale for the Committee’s decision but just Strobel’s opinion.

28. For all of the foregoing reasons, Claimant submits that there was no rational basis for USA Wrestling's denial of Marable's request for a delay in the final wrestle-off. Stated another way, Claimant submits that USA Wrestling's denial of Nick Marable's request for a delay in the final wrestle-off was improper, arbitrary and capricious.

RESPONDENT

29. Respondent argues that USA Wrestling believes it did follow its procedures to allow its athletes to be heard and they have not been denied their opportunity to participate as a result.
30. USA Wrestling was attentive and conscientious about the position of the athletes and it acted in good faith in making the Decision. The reasonable and rational basis for the Sport Committee's Decision was based on the extensive experience of the members and that Decision should be upheld.
31. Respondent argues that there was a rational basis for its interpretation of the facts as applied to the Selection Criteria and for the Decision and as such, Claimant has not met his burden of proof.

AFFECTED ATHLETE

32. Claimant has not met his burden of proof as there was no indication of any bad faith by the one individual Committee member who testified. The Committee members have years of experience and deference must be given to the Sport Committee and their application of the Selection Criteria. There was no testimony put forth by Claimant to support any of the requirements of the standard of review.
33. The Arbitrator should not substitute her judgment for that of the sport people with the experience. There is no evidence that the members of the Committee acted in an arbitrary and capricious manner.
34. USA Wrestling provided procedural due process to Claimant: he was heard, he had the opportunity to present his case and was treated fairly. The fact that he does not like the result is not grounds for overturning the Decision. He needed to show more to meet his burden.

E. Analysis

35. The standard of review and the burden of proof have been accepted by all parties: Claimant must prove that USA Wrestling applied its Selection 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. Acting in an arbitrary and capricious manner with no rational basis for the Decision would be bad faith.

36. The parties have all confirmed that if the Arbitrator is to overturn the Decision, the appropriate remedy is for a final wrestle-off to be held under USA Wrestling Selection Criteria at the upcoming Nationals event July 18 – 25 in Fargo, ND.
37. Thus, the only inquiry for this Arbitrator is whether Claimant has met his burden of proof. Based on the facts presented, did USA Wrestling make the Decision in bad faith, i.e. in an arbitrary and capricious manner with no rational basis?
38. Respondent's position that the reasonable and rational basis for the Sport Committee's Decision was based on following its procedures and the extensive experience of the Committee members needs to be analyzed in light of the Act's requirements. The Committee is given full discretion as the Selection Criteria identify the Committee "may" but is not required to grant the delay and then the Selection Criteria identify the basis for the grant, i.e. unforeseen or extenuating circumstances. Those are the only criteria identified by which the Committee is to exercise this discretion. These Selection Criteria do not require the Committee to grant the delay at all, even if they find the unforeseen or extenuating circumstances.
39. The decision to deny a delay when an athlete is unable to attend the weigh-in with the consequence that he will be excluded from the World Team without having had the opportunity to compete in the wrestle-off for that spot is a highly consequential decision. Basing a decision of this magnitude on Selection Criteria which provide unfettered discretion to a Sport Committee is counter to the requirement now established that there must be sufficient clarity to inform the athletes of the basis on which such decisions are made. To qualify that the Decision itself is grounded in the extensive experience of the members of the Committee is a further subjective criterion allowing the Committee unfettered discretion which again denies the athletes the clarity to inform them of the basis on which the Decision is made.
40. The written Decision states that it was based on the Committee feeling the information and explanation provided by Marable was not persuasive to support unforeseen or extenuating circumstances. No details were provided for the doubts that the members had or what information or explanation was lacking. No standards were provided to Marable to be able to persuade the Committee within the Selection Criteria.
41. This type of procedure is exactly what the protections in the Act and the various arbitral decisions on selection are designed to prevent. To safeguard the athletes' opportunity to participate, the applicable Selection Criteria "need to detail as precisely as possible the objective and subjective criteria that will be used for future team selections". (*Viola and USA Diving and Todd Smith*, AAA 30 190 00828-05, at 9) "Basing athlete selections on primarily objective criteria not only safeguards athletes' equality of opportunity to participate in protected competitions, but also provides athletes with clear guidance on what they must do in order to qualify for selection to a team." (*Viola, supra*, at 24)

42. The process by which the Decision was made did indeed include procedural due process as far as it went. Each of the wrestlers was able to be heard and present. But since the objective or subjective criteria applied in the exercise of the Committee's discretion were unknown to each of the wrestlers who presented to the Committee, they had no knowledge of what they needed to present. It appears the Committee may have determined that Marable's accident was preventable if he had followed a different weight management program, but he did not know this was a factor to be considered by the Committee. This was not a basis set forth in the Selection Criteria for the Committee's decision. If the Selection Criteria had specified the criteria to be used by the Committee in its decision, then that due process would have served the wrestlers. Without any known rational basis for the decision to be made, the wrestlers had no idea what to present to the Committee. Neither athlete knew what he needed to do to, or what criteria he needed to meet, to obtain a favorable decision by the Committee. The only standard was a finding of either extenuating or unforeseen circumstances and this standard is somewhat subjective and was not obligatory for the Committee to use.
43. This Arbitrator is not substituting her judgment for that of the Sport Committee. Rather, the Arbitrator is applying the principles of the Act to the Selection Criteria and the Decision in question. The requirements of the Act to use subjective criteria with an objective basis have not been met in this process. The Committee acted in an arbitrary and capricious manner in using unknown subjective criteria to arrive at the Decision.
44. Based on the above, the Claimant did meet his burden to show that the Decision was arbitrary and capricious with no rational basis and as such he was denied the opportunity to participate as protected by the Act. The Decision is therefore set aside.
45. The parties were all of the view that the appropriate remedy if the Arbitrator found that the Decision were to be set aside was to have the Claimant and Affected Athlete compete in a wrestle-off to be scheduled for July 25, 2015 at the Nationals event in Fargo, ND, according to the applicable USA Wrestling regulations for a Final Wrestle-Off.

F. Allocation of Arbitration Fees and Costs

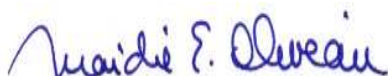
46. Claimant and Respondent each paid half of the arbitration fees and neither made a request for any reallocation of such fees. Under AAA Commercial Rules Section R-50, the arbitrator has discretion to assess and award such fees and costs in the final award.
47. In determining whether to shift the allocation 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 USA Wrestling's Decision. Based on the facts of this case, weighing the relative equities and the conduct of the parties in this matter, it is

noted that Respondent's Sport Committee acted in good faith in interpreting its responsibilities under the Selection Criteria. Nevertheless, Respondent is responsible to adopt Selection Criteria regarding the opportunity to participate that comply with the Act and to implement them in a manner which allows the wrestlers to have clear, understandable and predictable outcomes. Having failed to do so, the administrative fees of the American Arbitration Association totaling \$850.00 shall be borne by Respondent, and the compensation of the arbitrator totaling \$1,500.00 shall be borne by Respondent. Therefore, Respondent shall reimburse the sum of \$850 filing fee already paid to the AAA and the \$750 already paid by Claimant as his one half of the arbitration fees.

Decision

I therefore rule as follows:

48. USA Wrestling's denial of Claimant's request for a delay of competition shall be set aside.
49. The Final Wrestle-Off between Nicholas Marable and James Green in the 70 kg men's freestyle weight class shall take place during the Nationals event to be held July 18 – 25 in Fargo, ND, on July 25, 2015. The winner is to be named to the World Team as set forth in the Selection Criteria.
50. Respondent shall reimburse Claimant the \$850 filing fee and the \$750 already paid by Claimant as its one half of the arbitration fees.
51. This Award is in full settlement of all claims submitted in this Arbitration. All claims not expressly granted are hereby denied.



Maidie E. Oliveau
Sole Arbitrator
Dated: July 17, 2015