

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

AAA CASE NO. 77 190E 00144 11 JENF

In the Matter of the Arbitration between

Charlotte Craig, Claimant

and

USA Taekwondo, Inc. and Affected Athletes, Respondents

AWARD AND REASONED DECISION OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been duly designated by the American Arbitration Association, by agreement of the parties, and in accordance with the Ted Stevens Olympic Sports Act of 1978 and Section 9 of the United States Olympic Committee Bylaws, having been duly sworn, and having duly heard the proofs and allegations of the parties on an expedited basis, as permitted by the rules and agreed to by the parties, does hereby award as follows:

1.0 THE PARTIES AND FACTUAL SUMMARY

1.1 This complaint arises out of a decision of a committee the national governing body for the sport of Taekwondo, USA Taekwondo, Inc. (“USA Taekwondo”) to select one weight class over another to participate further in the selection process for US athletes to be nominated to the United States Olympic Committee (“USOC”) to compete for the United States in the Olympic Games in 2012 in London.

1.2 The Claimant, Charlotte Craig, is an Olympian in the sport of Taekwondo. Seeking the chance to qualify for the 2012 Olympic Games in the women’s Fin/Fly weight division. Claimant was represented by her counsel Edward Williams of Stewart Occhipinti, LLC.

1.3 Respondent USA Taekwondo is the USOC-recognized National Governing Body (“NGB”) for the sport of taekwondo in the United States. USA Taekwondo was represented by David Askinas, its CEO, who, though an attorney, claimed to perform in the proceedings not as a

lawyer for USA Taekwondo but as an individual party representative in his capacity as CEO. He was also a witness in the proceeding.¹

1.4 Certain affected athletes related to this proceeding were duly identified by USA Taekwondo as required under the relevant rules and at least two (Paige McPherson and Sanaz Shahbazi, seeking to qualify for the 2012 Olympic Games in the women's Light/Welter weight divisions) were represented by their own counsel, Steve Smith, Esq. and Onye Ikwuakor, Esq., both of Holme, Roberts & Owen.²

1.5 The facts are, for the most part, not in dispute here. In summary, under the rules of the international federation for the sport of taekwondo, only 2 men and 2 women may represent each country at the 2012 Olympic Games, even though there are 4 weight classes for each gender. USA Taekwondo has a multi-level process for selecting nominees to the US Olympic Team for 2012. If two men and two women do not qualify using certain objective criteria, then the USOC-approved USA Taekwondo Athlete Selection Procedures for the Olympic Games ("Selection Procedures") establish a USA Taekwondo Olympic Games Discretionary Selection Committee ("Selection Committee") to determine the weight class from which the remaining nominee(s) would be chosen through a fight-off. The Selection Committee was required to select one of the women's weight classes for a fight-off.

1.6 USA Taekwondo National Team Head Coach Juan Moreno was one of the individuals named to the Selection Committee. As the personal coach for several of the athletes who stood to gain from the outcome of the proceedings of the Selection Committee, Mr. Moreno disclosed his conflict to the Selection Committee and recused himself from the vote on the issue of selecting the weight class for the fight off. At the request of the USOC, and in light of his role as National Team Head Coach, Mr. Moreno provided his views on the various weight classes and the likelihood of success of the US in those weight classes given the athletes who were participating. It does not appear from the evidence that Mr. Moreno lobbied for the participation of any athlete or weight class over another, but he did provide his views as requested. Ultimately, by a vote of 4-3 the Selection Committee determined that the Olympic Light/Welter weight division should be the subject of the fight off. Claimant Ms. Craig was not in that weight class.

¹ The arbitrator has serious concerns about the viability of a practice such as this for representation of NGBs in future cases. Mr. Askinas insisted that while he was an attorney and a witness he was appearing as party representative of the NGB and not as counsel for the NGB. For all intents and purposes, though, Mr. Askinas conducted himself as counsel for the NGB here, asking questions on direct and cross examination, making oral argument and opening and closing statements, submitting objections, and otherwise conducting himself as you might expect of a lawyer. In the same proceeding, Mr. Askinas conducted his own "direct examination" of himself by basically testifying narratively on the subjects for which he offered himself as a witness. While the AAA Commercial Rules permit a party to be represented by a non-attorney, frankly this was an awkward situation that made presentation of the evidence more difficult, and could be easily remedied by having a corporate representative in this kind of arbitration not be the same person who was also a witness who participated in the underlying decision and was also the CEO of the company being represented.

² The arbitrator wishes to acknowledge the excellent briefing and arguments, and overall grasp and communication of the subject matter, by the counsel for both parties in this case. This made it easier to address this matter on an expedited basis.

2.0 JURISDICTION

2.1 This arbitrator has jurisdiction over this dispute pursuant to the Ted Stevens Olympic and Amateur Sports Act (“Act”) 36 U.S.C. §220501, *et seq.*, because this is a controversy involving Respondent’s opportunity to participate in national and international competition representing the United States. The Act states that:

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. . .³

2.2 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. . . .

2.3 Under USOC Bylaws Section 1.3(u), “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 [*sic*] or PSO in its selection procedure and publicly announced in advance as a competition or event directly qualifying each successful competitor

³ 36 U.S.C. §220521.

as an athlete representing the United States in a protected competition as defined in 1) above.

2.4 USOC Bylaws Section 9.7 provides that, “If 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.” Under both Sections 9.7 and 9.9 of the USOC Bylaws, the arbitration proceeding may be expedited at the request of the athlete.

2.5 Counsel for the affected athletes argued in their hearing brief that this case was extraordinary in its seeking of relief before an arbitrator of a “core policy decision of the membership organization” that is the NGB. Similarly, the affected athletes also argued for the application of a line of cases in various state courts generally limiting the intervention of judicial officers in the affairs of nonprofit associations/organizations. The arbitrator specifically rejects these arguments, which seem jurisdictional in nature. It is well settled in the cases arising under the Ted Stevens Olympic and Amateur Sports Act as well as under Section 9 of the USOC Bylaws, and expressly stated in the above-referenced authorities as well as in the USOC-approved Olympic Selection Procedures, that an athlete has the right to challenge decisions relating to the Olympic selection process before a duly appointed AAA panel.

3.0 PROCEDURE

3.1 The parties agreed to expedite this matter.

3.2 On or about May 25, 2011, the parties jointly agreed to appoint the arbitrator as the single arbitrator in this case.

3.3 A preliminary hearing was held by telephone on May 27, 2011.

3.4 The hearing in this matter was held by telephone from 6am PT until 815am PT and then again from 6pm PT until 1115pm PT on June 1, 2011.

3.5 On June 1, 2011, in accordance with the agreement of the parties, the arbitrator issued a summary decision reading as follows:

“SUMMARY DECISION OF ARBITRATOR

TO THE PARTIES, COUNSEL, AND AFFECTED ATHLETES:

The arbitrator in the above-referenced case, having heard and considered all of the evidence presented by the parties and their expert and well-prepared counsel, and their opening and closing statements and arguments, and the evidence and arguments presented in the case through 9 hours of hearing and on a preliminary hearing call, and in accordance with the agreement and request of the appearing parties and their counsel to render a summary decision immediately with a reasoned award to follow, hereby renders the arbitrator's summary decision in full and final resolution of all claims as follows:

The claim of the claimant Charlotte Craig is hereby denied and the decision of the respondent USA Taekwondo, Inc.'s Selection Committee stands.

The reasoned award will determine the issue of costs as raised by the Claimant.

Sincerely,
Jeff Benz
Arbitrator”

3.6 The parties agreed that this reasoned award would follow the above-referenced summary decision.

4.0 BURDEN OF PROOF

4.1 It is well accepted that the standard of review for cases arising under Section 9 of the USOC Bylaws is *de novo*. Section 9 proceedings are not appeals of NGB decisions and there is no requirement for an arbitrator in these proceedings to give deference to any prior decision and in fact it would be incorrect to do so.

4.2 The burden of proof is not as clearly defined in the USOC Bylaws or the Act, although a line of cases has developed making the determination of the burden of proof in Section 9 cases turn on whether the case involves a disciplinary proceeding or a selection/eligibility issue. The parties’ counsel agreed that because this case involves an athlete selection issue, the burden of proof rests with the athlete to demonstrate that the NGB failed to appropriately apply its rules to the facts at issue. As a result, the athlete claimant was required to present her case first and she was able to provide rebuttal evidence and argument.

5.0 ANALYSIS

5.1 The chief argument of the Claimant here was that the participation of USAT National Team Head Coach Juan Moreno in giving input to the Selection Committee on the appropriate weight class from which to select female athletes to nominate to the USOC to compete in the 2012 Olympic Games representing the US invalidated the Selection Committee’s decision.

5.2 The Selection Procedures, at Section II.C., provide for the Selection Committee that:

“Any member of the committee for whom a direct conflict of interest arises (to include, but not be limited to, a competing athlete, a personal coach or a family member of a competing athlete being considered for nomination to the 2012 Olympic Team), will recuse him/herself from any decisions that could affect nomination of the competing athlete.”

5.3 The above-referenced provision follows the naming of the 9-member “Olympic Games Discretionary Selection Committee”, whereby all 9 members of the Selection Committee are specifically identified, 7 by name and 2 by title as their names apparently were not available at the time of publication of the Selection Procedures (their titles are listed with the “Name” column indicating “To be determined”).

5.4 Juan Moreno is specifically identified in the Selection Procedures by name and by his title as National Team Head Coach.

5.5 Claimant’s argument was that in his private coaching Mr. Moreno coached Paige McPherson, one of the affected athletes who was in a different weight class than the Claimant, and ultimately in the weight class that was selected by the Selection Committee. Claimant argued as a result Mr. Moreno had a direct conflict of interest and sought to have Ms. McPherson have the possibility of making the US Olympic Team to further his own personal, financial, and professional interests. Mr. Moreno was alleged to have no high level athlete in the same weight class as Claimant. Mr. Moreno was apparently asked to co-lead the Selection Committee discussion, along with co-National Team Head Coach Jean Lopez, on the selection of the appropriate weight class from which to select the US Olympic Team nominees based on a review of all involved athletes’ records, and to make recommendations thereon to the Selections Committee.

5.6 The Arbitrator is obligated to apply the Selection Procedures as written. Here, the Selection Procedures, in the operative conflict of interest language, uses the term “direct” in describing the type of conflict of interest that gives rise to its recusal requirement. In further description of the kinds of “direct” conflicts of interest with which this provision concerns itself, the following examples are listed “a competing athlete, a personal coach or a family member of a competing athlete being considered for nomination to the 2012 Olympic Team”. Interestingly, the USAT Code of Ethics defines a conflict of interest as follows: “USAT defines a conflict of interest as any personal or financial relationship that could influence, or be perceived to influence your objectivity when representing or conducting business for, or on behalf of USAT.” This USAT Code of Ethics provision should be contrasted with the Selection Procedures’ requirement for recusal based only on a “direct conflict.” Obviously, what is required in the Selection Procedures is a conflict that is different and seemingly narrower than the kind of conflict described in the USAT Code of Ethics.

5.7 The Selection Procedures’ conflict of interest recusal provision then goes on to require that a conflicted individual simply “recuse him/herself from any decision that could affect nomination of the competing athlete.” This instruction does not define what action is required should a “direct” conflict arise. Does recuse mean do not vote? Does it mean do not discuss? Does it mean do not answer questions put to you in your subject matter expertise by the individuals who have hired you? Does it mean do not be in the meeting room when a subject is discussed by the committee of which you are a designated member? No guidance on how to answer these questions is provided by the Selection Procedures. Resort to dictionary meanings for “recuse” outside the context of a judicial officer offer no guidance. The Arbitrator takes no guidance from the provisions of the Colorado nonprofit corporation statutes that were raised.

5.8 Finally, the phrase in the “direct” conflict provision of the Selection Procedures, “could affect the nomination of the competing athlete”, creates substantial issues in this case. For example, the evidence, including the Selection Procedures themselves, made clear that the decision at issue was one of determining the appropriate weight class to designate and not any particular athlete. In addition, if this phrase is read broadly, it could effectively rule out the participation in the voting, and if I were to adopt the reasoning of the Claimant the discussion, on any part of the Selection Procedures process by the Selection Committee member who had any connections with athletes in the mix, a result that simply could not have been intended by the drafters who specifically took care to include a large number of expert coaches on the Selection Committee.

5.8 Several facts were established at the hearing. First, in its deliberations, the Selection Committee relied on Juan Moreno’s input as a National Team Head Coach and an expert in the field. Second, it is well known in the sport that like other NGBs USA Taekwondo cannot afford to pay its National Team Head Coaches enough to work full-time, that the USA Taekwondo National Team Coaches are engaged in other work and in the private practice of coaching, and that to the extent they had highly ranked or nationally ranked athletes that they coached those athletes’ affiliation with the National Team Head Coaches were well-known and indeed these coaches’ success with these athletes formed the basis for these coaches’ designation as National Team Head Coaches. Third, the USAT Board and the USOC specifically approved of the presence and participation of the two National Team Head Coaches on the Selections Committee. Fourth, Juan Moreno did not vote on which weight class to use for selecting athletes for nomination to the US Olympic Team. Noticeably absent from the evidence was any evidence of undue or improper influence by Mr. Moreno to attempt to steer the selection of the weight class in a manner that was against Claimant’s interest for any personal purpose related to Mr. Moreno; from the evidence presented, it appeared that Mr. Moreno simply did the job for which he was hired as National Team Head Coach and attempted to offer his views on the best possible competitive outcome for USA Taekwondo.

5.9 Accordingly, under these facts and circumstances, the Arbitrator determines that Mr. Moreno’s provision of input to the Selections Committee in his role as National Team Head Coach did not violate the requirements of the Selection Procedures. Mr. Moreno did not have a “direct” conflict of interest, he did not participate in voting on the decision at issue, and any potential conflict he may have had was obvious and effectively previously disclosed from his designation as National Team Head Coach. This is not to say that Olympic selection procedures could not benefit from careful consideration of how to address potential conflict issues, whether direct or otherwise, but on the facts specific to this particular case the Arbitrator declines to change the outcome.

5.10 One of the remedies sought here by the Claimant was for the Arbitrator to substitute his judgment for that of the Selection Committee as to the correct weight class to designate for the fight off. Putting aside the fact that the Arbitrator finds that the Selection Criteria as applied here were appropriate, given the Arbitrator’s lack of expertise in the sport of Taekwondo and the lack of evidence before him of the various criteria appropriate for making

such a choice, the Arbitrator respectfully declines to countenance such a request, and it would be rare case indeed in which an arbitrator sitting on a Section 9 case could or would find reasonable a request to substitute his or her knowledge of a particular sport for a NGB. Of course, had the Claimant prevailed on the merits of her claim, it is possible the Arbitrator could have considered a variety of other relief, including setting aside the decision of the Selection Committee and ordering a new Selection Committee process/decision either with the same Selection Committee or with a new one.

6.0 DECISION AND AWARD

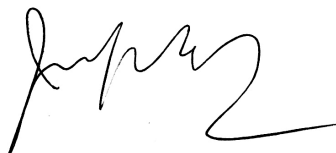
6.1 On the basis of the foregoing facts and legal aspects, this arbitrator renders the following decision:

a. Claimant has failed to show that the Respondent has acted improperly in following the Selection Procedures.

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

c. The Administrative fees and expenses of the American Arbitration Association shall be borne by USA Taekwondo, and the compensation and expenses of the Arbitrator shall be borne by USA Taekwondo.

d. This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied. For purposes of clarity, to the extent this reasoned award is inconsistent with the terms of the summary disposition, the terms of the summary disposition control.



Dated: August 21, 2011.

Jeffrey G. Benz
Arbitrator