

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

Re: 71 190 E 00406 12 JENF

Casey Tibbs, Claimant,

and

United States Paralympics, Respondent

and

Affected Athletes: Jarryd Wallace, Ellexis Gillette, Scott Winkler, Dennis Ogbe, Steven Toyoji, Erik Hightower, Brandon Pelletier, and Gianfranco Iannotta.

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated by the American Arbitration Association, and in accordance with the Ted Stevens Olympic and Amateur Sports Act and Section 9 of the United States Olympic Committee Bylaws, having been duly sworn, and having fully considered the proofs and arguments of the Claimant, Respondent, and the Affected Athletes, do hereby, AWARD, as follows:

INTRODUCTION

This dispute between Casey Tibbs and United States Paralympics (“USP”) arises out of the International Paralympic Committee (“IPC”)’s limits on the maximum number of athletes each national Paralympic committee may enter in the Paralympic Games and the IPC’s use of the Raza points system to measure relative athletic performances among athletes competing in combined events with different types or relative severity of impairment and to allocate medals during the Paralympic Games. Unlike the selection of members of the U.S. Olympic team, selection of U.S. Paralympic team members from a large group of diverse athletes with different disabilities and severities of impairment, especially those who would compete in combined events, is not based solely or even primarily on the results of head-to-head competition among U.S. Paralympic athletes in the same classification for a particular sport or one’s world ranking in a single classification event.

For the 2012 Paralympic Games, the IPC allocated only 35 slots for U.S. male track and field athletes (including one slot that must be filled only by a relay specialist) to participate in

172 track and field events during the Games.¹ To comply with its responsibility under the Ted Stevens Olympic and Amateur Sports Act (“ASA”) to obtain for the United States “the most competent amateur representation possible” in the Paralympic Games (36 U.S.C. §220503(4)) by selecting the most medal-capable athletes for the maximum number of slots allocated by the IPC, USP promulgated “U.S. Paralympics Athlete/Guide Selection Procedures 2012 Paralympic Games” for track and field (September 7, 2011, amended on November 29, 2011 and April 12, 2012) (“Athlete Selection Procedures”). The Athlete Selection Procedures establish a U.S. National Team “A” Standard for each track and field event. For field events, it is the denominator in a formula used in determining Track and Field selection points, which constitute objective criteria for measuring and comparing relative athletic performances among Paralympic athletes with different disabilities who compete in different sports as well as athletes with different types or relative severity of impairment who compete in combined athletic events. In order to treat all U.S. Paralympic athletes fairly and consistently, USP uses the current IPC Raza points, which are adjusted annually, in establishing U.S. National Team “A” Standard. The Athlete Selection Procedures provide USP with the authority to fill no more than 15% of the allocated slots for the 2012 Paralympic Games U.S. track and field team with discretionary selections based on an individual athlete’s medal potential, which requires the exercise of its expert professional judgment regarding both the appropriate number of and specific athletes chosen as discretionary selections. USP’s discretionary selections are required to be made before the other team members are selected based solely on their Track and Field selection points.

Unfortunately, the IPC’s allocation of a maximum number of athletes that national Paralympic governing bodies may enter in the Paralympic Games for track and field events, combined with the USP’s federal statutory obligation to select the most medal-capable athletes for these limited slots, necessarily results in some world-class athletes (including those who have medaled in prior Paralympic Games) not being selected for the 2012 U.S. Paralympic track and field team.

THE PARTIES AND SUMMARY OF THEIR ARGUMENTS

Claimant Casey Tibbs, is an outstanding, world-class Paralympic track and field athlete who was represented by Scott M. DeWolf, Rochelle McCullough LLP, Dallas, Texas. Mr. Tibbs contends he satisfied the original Athlete Selection Procedures (dated September 7, 2011) that were in effect prior to their April 12, 2012 amendment, which established 6.61 meters as the National Team “A” Standard in the F44 long jump based on the IPC’s 2011 Raza points rating system. By long jumping 6.64 meters in an IPC-sanctioned track and field meet on June 7, 2012, being ranked number 1 in the world in the F44 long jump (as of July 10, 2012), and winning the F44 long jump competition during the United States Paralympic Trials in Indianapolis, Indiana, on June 29-July 1, 2012, he claims that USP abused its discretion by not selecting him as a

¹ There are 61 track events and 42 field events in which athletes in various disability classes, including the visually impaired, intellectually impaired, those with cerebral palsy/traumatic brain injury, amputees (legs or arms), those in wheelchairs with spinal cord injuries, and dwarfs will compete.

member of the U.S. track and field team to compete in the combined F42/44 long jump competition at the 2012 Paralympic Games in London, England.

Specifically, he claims that, on April 12, 2012, USP arbitrarily and capriciously increased the 2012 National Team “A” Standard in the F44 long jump to 6.85 meters (a distance that only one athlete in the F42/44 classification has ever jumped), which reduced his 2012 Paralympics Track and Field selection points from 100.45 points ($6.64 \div 6.61 \times 100$) to 96.93 points ($6.64 \div 6.85 \times 100$) and placed him 38th among the ranked U.S. men’s track and field athletes. He asserts it was an abuse of discretion for USP to increase this standard from 6.61 meters after the Athlete Selection Procedures were published on September 7, 2011 (i.e., it should not have been changed regardless of whether the 2012 Raza point values were changed because the IPC did not change its minimum A standards for the 2012 Paralympic Games). If the pre-amendment National Team “A” Standard had been used by USP, Mr. Tibbs contends he would have been ranked among the top 32 men’s track and field athletes automatically selected for the 2012 Paralympics team based solely on Track and Field selection points. He also contends that USP’s failure to consider and choose him as one of its three discretionary athlete selections for 2012 Paralympics men’s track and field was arbitrary and capricious. He requests “an award compelling [USP] to nominate [him] as a member of the 2012 U.S. Paralympic Team.” (Claimant’s Demand for Arbitration, page 7).

Respondent USP, a division of the United States Olympic Committee (“USOC”), governs Paralympic sports in the U.S. and selects members of the U.S. team that compete in the Paralympic Games. USP essentially functions as the national governing body (“NGB”) for Paralympic sports in the U.S. USP was represented by Gary L. Johansen, Associate General Counsel for the USOC, and Stephen A. Hess, Sherman & Howard, LLC, Colorado Springs, Colorado. In defense of Mr. Tibbs’ claims, USP contends that its duly approved and published Athlete Selection Procedures for the 2012 Paralympic track and field team as amended on April 12, 2012 provide a fair and effective process for selecting athletes in accordance with its responsibilities under the ASA and USOC Bylaws. Specifically, increasing or decreasing the 2012 National Team “A” Standard for all Paralympic combined track and field events consistent with the IPC’s 2012 adjusted Raza points is the best method for determining U.S. Paralympic athletes’ relative medal potential for the 2012 Paralympic Games. USP asserts that its Selection Committee followed these procedures and did not abuse its discretion in selecting the 35 athletes for the 2012 Paralympic men’s track and field team in accordance with this process, including Jarryd Wallace, Ellexis Gillette, Scott Winkler as its three discretionary selections. USP argues that “an Arbitrator should not substitute his or her judgment for that of US Paralympics and its Selection Committee, who are experienced and knowledgeable concerning Paralympic track and field and the attributes needed for selection to the 2012 Paralympic Track and Field Team.” (Prehearing Brief, page 10). In addition, USP asserts that Mr. Tibbs effectively waived any claim to participate in the 2012 Paralympic Games by failing to comply with a requirement of the Athlete Selection Procedures that all athletes participate in a mandatory training camp and

competition at the “Boiling Point” meet in Windsor, Ontario from July 11-15, 2012 as a condition of eligibility for the 2012 U.S. Paralympic track and field team.²

The Affected Athletes, Jarryd Wallace, Ellexis Gillette, Scott Winkler, Dennis Ogbe, Steven Toyoji, Erik Hightower, Brandon Pelletier, and Gianfranco Iannotta, are U.S. Paralympic track and field athletes. Messrs. Wallace, Gillette, and Winkler were chosen by USP as its three discretionary selections for the 2012 Paralympic men’s track and field team. Messrs. Ogbe, Toyoji, Hightower, Pelletier, and Iannotta each individually accumulated Track and Field selection points, which ranked them 33th, 34th, 35th, 36th, and 37th, respectively, that exceeded Mr. Tibbs’ selection points. Mr. Wallace was represented by Jim Matthews, Blasingame Burch Garrard Ashley P.C., Athens, Georgia. Mr. Gillette was represented by Michael Huff, University of Michigan Law School, Ann Arbor, Michigan, and Cameron Evans, Honigman Miller Schwartz and Cohn LLP, Ann Arbor, Michigan. Mr. Ogbe was represented by Erin Berry, Preti, Flaherty, Beliveau & Pachios, LLP, Portland, Maine. The other athletes were not represented by counsel.

Mr. Wallace asserts that he met or exceeded all of USP’s criteria to be a discretionary selection for the 2012 Paralympic team, and that it was reasonable for the Selection Committee to choose him as the team’s relay specialist because he is the 4th fastest U.S. men’s sprinter after the three athletes who qualified to compete in the 100 meters at the 2012 Paralympic Games.

Mr. Gillette asserts that his strong medal potential makes him well-qualified to be a discretionary selection because he is the current world record holder in the long jump for his class (which will not be combined with another class during the 2012 Paralympic Games) and points out that his selection was not specifically challenged by Mr. Tibbs during the hearing.

Mr. Winkler asserts that USP’s establishment of a formula for determining the National Team “A” Standard, which incorporates the IPC’s annual Raza point adjustments, to determine objective Track and Field selection points is the only fair system for selecting Paralympic athletes who compete in combined classes.

Mr. Ogbe, who qualified for the 2012 Paralympic team as the athlete with the 33rd highest total of Track and Field selection points when another athlete became ineligible to compete, contends that USP’s changing of the 2012 National Team “A” Standard consistent with the IPC’s 2012 Raza points adjustments is a rational means of determining U.S. Paralympic track and field athletes’ relative medal potential rather than an abuse of discretion.

² Based on my determination that USP did not abuse its discretion or otherwise violate Mr. Tibbs’ legal rights by not selecting him for the 2012 Paralympic track and field team, it is not necessary for me to rule on the merits of this defense.

JURISDICTION

All parties and their counsel agree that I have jurisdiction over this dispute pursuant to the Ted Stevens Olympic and Amateur Sports Act (“the Act”), 36 U.S.C. §220501, et seq., and the USOC Bylaws. This is a controversy involving Claimant’s opportunity to participate in the Paralympic Games, which is required to be resolved by final and binding arbitration in accordance with the Commercial Rules of the American Arbitration Association (“AAA”). 36 U.S.C. §§220522(a)(4)(B). Section 9.1 of the USOC Bylaws prohibits an NGB from denying or threatening to deny “any amateur athlete the opportunity to participate in the Olympic Games.” Section 9.7 of the USOC Bylaws 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.” Sections 9.7 and 9.9 of the USOC Bylaws permit this arbitration proceeding to be expedited.

PROCEDURE

On July 25, 2012, Claimant Casey Tibbs filed a demand for arbitration of this dispute.

On July 30, 2012, I was appointed as the arbitrator in this proceeding.

On August 1, 2012, I conducted a preliminary hearing by telephone at 7am MDT, in which the following persons participated: Mr. DeWolf, counsel for Mr. Tibbs; Stephen A. Hess and Gary L. Johansen, counsel for USP; and Mr. Wallace, Mr. Gillette, and Mr. Winkler, Affected Athletes. After hearing the differing views of the parties’ counsel, I determined that Dennis Ogbe, Steven Toyoji, Erik Hightower, Brandon Pelletier, and Gianfranco Iannotta are Affected Athletes under USOC Bylaw 9.8 who are required to receive notice of this proceeding, which Mr. Hess provided to them by email on August 1, 2012. The Hearing in this matter was set for 8:30am MDT on August 4, 2012 at the law offices of Sherman and Howard, LLC, Denver, Colorado.

The hearing began at 8:30am MDT on August 4, 2012 and continued until approximately 2:30pm.³ The following individuals were present: Mr. Tibbs and Mr. DeWolf; Cathy Sellers (USOC Director, High Performance, Paralympic Track and Field), Tina Kauffman-Cain (USP National Team Manager for Paralympic Track and Field), and Mr. Hess; Sarah Clark (USOC employee); and Brett Hirsch (USOC legal intern). The following individuals participated by telephone: Mr. Johansen; Messrs. Wallace and Matthews; Messrs. Gillette, Evans, and Huff; Mr. Winkler; Mr. Ogbe and Ms. Berry; Julie O’Neill (Team Leader, USOC Sport Performance, Paralympic Track and Field); and Ryan Fann (Athlete Representative, Field Events, Selection

³ I express my gratitude to the parties’ counsel for submitting a set of joint exhibits and identifying their respective witnesses in an expeditious manner as well as for their focused and fine advocacy during the hearing, which significantly facilitated my ability to adjudicate this dispute on an expedited basis.

Committee for U.S. Track and Field Paralympic team). Despite being notified of the hearing date and time, Steven Toyoji, Erik Hightower, Brandon Pelletier, and Gianfranco Iannotta did not participate in the hearing. During the hearing, the following persons were called to testify: 1) by *Claimant*—Mr. Tibbs, Mr. Fann, Ms. Sellers; 2) by *USP*—Ms. O’Neill, Ms. Kauffman-Cain, and Ms. Sellers; and 3) Mr. Ogbe. At the conclusion of the hearing all parties and their counsel agreed they were given a full and fair opportunity to be heard.

Having duly heard and carefully considered all of the parties’ witnesses and arguments of their respective counsel along with the documentary evidence presented during the hearing, I issued an Interim Award on August 5, 2012 at approximately 12pm MDT, and ruled that “I have jurisdiction over this matter and the authority to render a final and binding award” and that “Mr. Tibbs has not satisfied his burden of proving that USP abused its discretion in determining the best means of complying with its legal obligations under the Ted Stevens Olympic and Amateur Sports Act to obtain for the United States ‘the most competent amateur representation possible’ in the Paralympic Games (36 U.S.C. §220503(4)) and under the USOC Bylaws to establish a written procedure ‘to fairly select athletes’ for the Paralympic Games (USOC Bylaws Section 8.7(f)).” My reasoning is incorporated into this award. In accordance with the August 1, 2012 Preliminary Hearing Report, I agreed to issue a reasoned award by September 3, 2012.

FINDINGS OF FACT

Pursuant to the ASA, USP has both the valid authority and responsibility to obtain for the United States “the most competent amateur representation possible” in the Paralympic Games, 36 U.S.C. §220503(4), and to recommend “individuals and teams to represent the United States in . . . the Paralympic Games.” 36 U.S.C. §220523(a)(6).

The USOC’s Bylaws require USP to establish a written procedure “to fairly select athletes” for the Paralympic Games. USOC Bylaws Section 8.7(f). In accordance with this requirement, USP promulgated Athlete Selection Procedures for track and field athletes for the 2012 Paralympic Games, which were duly approved by its Team Selection Working Group, which were published on September 7, 2011 and subsequently amended on November 29, 2011 and April 12, 2012. The Athlete Selection Procedures are reasonable and consistent with USP’s responsibilities under the ASA.

In relevant part, the Athlete Selection Procedures provide as follows:

1. SELECTION SYSTEM

1.1 . . . [M]inimum eligibility requirements for an athlete to be considered for nomination to the Team:

1.1.1 Citizenship: Prior to the commencement of the 2012 U.S. Paralympics Track and Field Trials (“Trials”) an athlete must be a citizen of the United States. . . .

1.1.2 Minimum International Federation (IF) standards for participation (if any):

To be eligible for selection by an NPC [National Paralympic Committee], an athlete must:

Hold an active IPC Athletics Athlete License for the 2012 season. . . . Athletes must be licensed for performances to count toward the Minimum Qualification Standard (MQS) . . .

Have achieved an MQS at an IPC Athletics Recognized Competition . . .

Note: Athletes must achieve the MQS in the event for which he/she is nominated to the team between 1 December 2010-1 July 2012. . . .

1.1.3. Other requirements (if any):

Only athletes who compete at the 2012 U.S. Paralympics Track and Field Trials will be considered for Team Selection (with the exception of Discretionary Selection and the Marathon). . . .

1.3 . . . comprehensive, step-by-step description of the method that explains how athletes will go through the selection process to become Team nominees . . .

General provisions as established by the IPC:

The qualification slots are scheduled to be allocated to each NPC (U.S. Paralympics) by 22 June-2012. . . .

Discretionary Selection

Following the conclusion of the 2012 U.S. Paralympic Track and Field Trials and prior to the objective selection process (Ranking list below), up to a maximum of 15% of the total Team slots may be filled according to Discretionary Selection (Section 2).

Ranking List

Following the conclusion of Discretionary Selection, athletes will be ranked using qualifying results from IPC Athletics Approved Events held

during the qualifying period (December 1, 2010 through July 1, 2012) according to the following system.

All 100m, 200m, Long Jump and Triple Jump results must meet legal wind readings.

The best result in each event for each athlete will be given a percentage score. The score is calculated by comparing the athlete result to the National Team A [standard] for each event using the following formula.

Track events: $(\text{National Team A [standard]}/\text{result}) \times 100$

Field events: $(\text{result}/\text{National Team A [standard]}) \times 100$

The percentage will be provided two decimal points with the high percentage compared to the National Team A [standard] being the better result.

Team slots and start rights will be filled in order of the ranking list . . . (highest to lowest percentage for the medal events to be contested at these Games . . .

2. DISCRETIONARY SYSTEM (if applicable)

2.1 Provide rationale for utilizing discretionary selection (if any):

A minimum of 85% of the athletes nominated to the Team will qualify themselves for the Team by the objective selection (times and distances) from results obtained from IPC Athletics Approved Events during the qualifying period (December 1, 2010 through July 1, 2012). With a fixed allocation of Team slots and start rights for each event, U.S. Paralympics sees benefit to the entire U.S. delegation and overall and medal performance in nominating top performing athletes to the Team before objective selection.

2.2 List the discretionary criteria and explain how they will be used (if any):

The Discretionary Selection Committee will consider all input and recommendations from the assistant/discipline coaches and will make discretionary selections from among all eligible athletes up to a maximum of 15% of the total Team Slots. Each athlete selected by discretion will be assigned one or more start rights in individual events at the time of selection. The Discretionary Selection Committee will consider the following performance-related factors:

If the athlete experienced an injury or illness that impeded maximal performance during the 2012 U.S. Paralympics Track and Field Trials;

If the athlete was subject to equipment failure, weather, interference, or other external factors, either natural or caused by others, that impeded what otherwise likely would have been a qualifying performance;

If the athlete has achieved the MQS (London AQS or BQS) at an IPC Athletics Approved Event during the qualifying period (December 1, 2010 through July 1, 2012) and is ranked in the top 8 in their event on the IPC Athletics Minimum Qualifying Ranking List for the 2012 Paralympic Games as on the IPC Athletics website at the time of nomination;

If the athlete has achieved the MQS (London AQS or BQS) at an IPC Athletics Approved Event during the qualifying period (December 1, 2010 through July 1, 2012) and was unable to compete at the 2012 U.S. Paralympics Track and Field Trials due to unforeseen circumstances to be determined by the Discretionary Selection Committee;

The athlete's likelihood of winning a medal or medals at the 2012 Paralympic Games whether individual or on a relay.

- 2.3 Provide the name of the committee that will be responsible for making discretionary selections, along with a complete list of the members currently serving on the committee and their titles:

Julie O'Neill, Team Leader, Sports Performance, USOC
Cathy Sellers, Director, High Performance, Paralympic Track and Field, USOC
Tina Kauffman-Cain, Manager, National Teams, USOC
Cheri Blauwet, Athlete Representative (Track Events)
Ed Cockrell, Athlete Representative (Field Events)⁴

...

13. INTERNATIONAL DISCLAIMER

These procedures are based on IPC rules and regulations as presently known and understood. Any change in the selection procedures caused by a change in IPC rules and regulations will be distributed to the affected athletes immediately. The selection criteria are based on the latest information available to U.S. Paralympics. However, the selections

⁴ Prior to the 2012 Paralympics Track and Field Trials, Ryan Fann replaced Mr. Cockrell when he was unable to serve on the committee.

are always subject to unforeseen, intervening circumstances, and realistically may not have accounted for every possible contingency.

15. NGB/PSO SIGNATURES

I certify that I have read and understand the standards/criteria set by our IF and/or CF (PAG/PPAG only) and incorporated these standards/criteria into our Selection Procedures. I further certify that the information provided herein regarding Athlete Selection Procedures represents the method approved by U.S. Paralympics.

Attachment A of the Athlete Selection Procedures lists the London 2012 Paralympic Games Medal Events List as determined by the IPC, which includes the men's F42/44 combined long jump. Athletes with above the knee amputations (which is a more significant impairment for the long jump) are in the F42 class, and those with below the knee amputations are in the F44 class. The IPC combines classes for some track and field events as it determines necessary to limit the total number of events at the Paralympic Games.

Attachment B of Athlete Selection Procedures lists the IPC's minimum A standard for F44 long jumpers competing in the combined F42/44 long jump at the 2012 Paralympic Games as 5.80 meters. It also lists the U.S. National Team "A" Standard for each track and field event. Prior to its April 12, 2012 amendment, the published National Team "A" Standard for the men's F44 long jump was 6.61 meters. On April 12, 2012, this standard was increased to 6.85 meters.

Attachment C of the Athlete Selection Procedures sets forth the USOC Code of Conduct for U.S. Paralympic National Teams and U.S. Paralympic Programs as well as the Athlete Pledge and Agreement, which states in relevant part "I hereby promise and agree that I will abide by all rules related to the Team selection procedures as approved by the USOC."

The following persons signed the Athlete Selection Procedures on the following respective dates: Charlie Huebner, NGB/PSO President or CEO/Executive Director, 12/13/11; Cathy Sellers, National Team Coach, Head Coach, or National Program Director, 12/12/11; and Derek Arneaud, USOC Athletes' Advisory Council ("AAC") Representative, 12/28/11.

The signature page of the Athlete Selection Procedures states "*Signature by the AAC Representative constitutes that he/she has read and understands the Selection Procedures and certifies that the Selection Procedures submitted represent the method approved by the NGB/PSO. If the AAC Representative reads and does not agree with the Athlete Selection Procedures being submitted by the NGB/PSO, he/she may submit those reasons in writing to his/her Sports Performance Team." There is no contention by any party (or any evidence) that Mr. Arneaud objected to any of the provisions of the Athlete Selection Procedures as originally promulgated on April 12, 2012, or as amended on November 29, 2011, and April 12, 2012.

As a member of the U.S. Paralympic National Team at all times relevant for the purposes of this dispute, Mr. Tibbs is subject to the provisions of the Athlete Selection Procedures, including its attachments, and he has the contractual obligations and rights set forth therein. He is a Chief Petty Officer in the United States Navy and an outstanding, world class Paralympic track and field athlete who currently competes primarily in the F44 long jump. Mr. Tibbs won a gold medal as a member of the men's 4 x 100 meter (T42-46) relay team and a silver medal in the pentathlon (P44) during the 2004 Paralympic Games in Athens, Greece. He also won a gold medal as a member of the men's 4 x 100 meter (T42-46) relay team and a bronze medal in the F44 long jump during the 2008 Paralympic Games in Beijing, China. Mr. Tibbs has not competed in any F42/44 combined long jump events or in any track sprint events nationally or internationally since 2008.

On September 24, 2011 (which was after the primary international outdoor track and field season ended), USP (specifically, Ms. Sellers in her role as High Performance Director for Paralympic Track and Field) determined the original 2012 U.S. National Team "A" standard for each Paralympic track and field event based on the third best performance in the world for that event during the 2011 track and field season, which was set forth in Attachment B of Athlete Selection Procedures. The original 2012 U.S. National Team "A" Standard for the F44 long jump was 6.61 meters.

On February 9, 2012, IPC changed the Raza points for track and field events with combined classifications, but it did not increase its minimum A standards for the 2012 Paralympic Games. The Raza points system converts athletic performance results to points, which are used to compare the relative performance of athletes competing in combined events with different severities of impairment (e.g. F42/44 long jump) and to determine medals in combined events.

On February 9, 2012, Ms. Sellers emailed Mr. Tibbs to inform him that the IPC had updated its Raza point values. This email contains the following ambiguous statement: "The LJ for the 42/44 does not change as it would have increased the distance, which I promised not to do." Consistent with her following February 23, 2012 email to all athletes, Ms. Sellers testified that this statement meant only that the National Team A standard would not be changed for funding purposes, which I find to be credible. I reject Mr. Tibbs' contention that this statement constitutes a promise by Ms. Sellers that the National Team "A" Standard for the F44 long jump would not be increased.

On February 23, 2012, Ms. Sellers provided notice by email to U.S. track and field athletes, including Mr. Tibbs who acknowledged receiving this email, that U.S. National Team "A" Standard for combined class events would be changed as a result of the IPC's Raza point changes:

Combined Class with points

On February 9th, the IPC made adjustments to the Raza Points system. US Paralympics Track and Field has incorporated those changes into the standards. Some events dropped in standards which is reflected with a * symbol. If the standard lowered the National Team A and B standard also lowered. In cases where the standard increased, the decision was made not to adjust the National Team A standard for funding purposes, but to use the increase for team selection to be consistent with all classes and events.

In combined class events with the winner determined by points, the third place finished [sic] was calculated using the Raza Point Calculator found on the IPC website. All performances in the classes combined were given a point score. The third highest point score in the combined classes was used as the basis for National Team A. Using the Raza system, we then calculated the performance that matched the third place points for each of the classes involved for the National A standard. Example: Men's Discus 51/52/53 class- the 3rd place comparing all classes point total was a 52 class athlete with 998 points. We used 998 points to come up with the distance for the National Team A in the 51 and 53 class.

Because the IPC would be using the 2012 Raza point values to allocate medals for combined events during the 2012 Paralympic Games, USP (specifically, Ms. Sellers) adjusted its National Team "A" Standard for combined classification track and field events accordingly. Thirty U.S. National Team "A" Standard were changed; eighteen standards were increased, including the F44 long jump, which increased from 6.61 to 6.85 meters. USP published the revised and duly approved 2012 National Team A standards, which did not change the duly approved Athlete Selection Procedures, as part of Exhibit B to the Athlete Selection Procedures on April 12, 2012. These increased National Team "A" Standard made it more difficult for many athletes, not only Mr. Tibbs, to qualify for selection to the 2012 U.S. Paralympic track and field team. Mr. Tibbs does not contend that USP incorrectly calculated the adjusted 2012 National Team A standard for the F44 long jump.

Mr. Tibbs did not express any objections regarding the increased 2012 National Team "A" Standard for the F44 long jump to 6.85 meters until after he long jumped 6.64 meters in an IPC-sanctioned track and field meet on June 7, 2012, a distance that exceeded the original National Team "A" Standard of 6.61 meters. It is undisputed that, at the time of the 2012 U.S. Paralympic Track and Field Trials, he knew that the National Team "A" Standard for the F44 long jump was 6.85 meters.

Mr. Tibbs won the F44 long jump competition during the 2012 United States Paralympic Trials with a jump of 6.45 meters. He exceeded the IPC's minimum F44 A standard for the combined F42/44 long jump competition at the 2012 Paralympic Games (i.e., 5.80 meters) and satisfied the USP's minimum eligibility requirements to be considered for selection as a member of the U.S. track and field for the 2012 Paralympic Games. As of July 10, 2012, he was ranked

number 1 in the world in the F44 long jump classification.⁵ However, his 2012 Paralympics Track and Field selection points total of 96.93 points (6.64 ÷ 6.85 x 100) placed him 38th among the ranked U.S. men's track and field athletes. He was not one of the 32 men's track and field athletes who were selected for the 2012 Paralympics team based on having the highest number of individual Track and Field selection points. He also was not one of USP's three discretionary selections for the men's track and field team.

Messrs. Wallace, Gillette, and Winkler were the only athletes considered as discretionary selections for the 2012 Paralympic men's track and field team by USP's Discretionary Selection Committee. According to Ms. Sellers, they were the only three athletes with both strong 2012 Paralympic Games medal potential and "extenuating circumstances" precluding their selection for the U.S. men's Paralympics team based on their respective individual Track and Field selection points. Ms. Sellers defined "extenuating circumstances" narrowly, encompassing only the need to fill the IPC's designated relay specialist slot, an injury preventing an athlete from participating in the U.S. Paralympic Track and Field Trials, or a change in the competition rules for a track or field event. Mr. Tibbs was not considered as a potential discretionary selection because athletes whose National Team "A" Standard increased as a result of the IPC's 2012 adjusted Raza points were not viewed as having experienced "extenuating circumstances."

Mr. Wallace was chosen as a discretionary selection to fill the relay specialist slot because he was the 4th fastest U.S. men's sprinter after the three who qualified for the 100 meters in the 2012 Paralympic Games (only three athletes from each country may be entered in an event) and ran the world's fastest time in the 100 meters in 2011. Mr. Wallace's Track and Field selection points (100.27) placed him ahead of Mr. Tibbs' total of 96.93 points in the 2012 Paralympic men's track and field ranking list.

Mr. Gillette was chosen as a discretionary selection because he is the current world record holder in the long jump for his class (which will not be included in a combined event during the 2012 Paralympic Games who was injured and unable to compete in the Paralympics Track and Field Trials. He will be fully recovered and able to compete in the 2012 Paralympic Games. Mr. Gillette's Track and Field selection points (116.44) placed him ahead of Mr. Tibbs' total of 96.93 points in the 2012 Paralympic men's track and field ranking list.

Mr. Winkler was chosen as a discretionary selection because the IPC recently changed the rules for the shot put competition by approving the use of only rigid poles (which wheelchair shot putters use to throw) for the 2012 Paralympic Games. Shot putters previously were permitted to use a flexible pole, which provided a competitive advantage vis-à-vis users of rigid poles because of its spring-like effects. He uses a rigid pole to compete and is ranked second in the world in the formerly combined shot put rankings that included athletes who used either a rigid or flexible pole, which demonstrates his strong medal potential in this event.

⁵ Mr. Tibbs currently is ranked fifth in the world in the F42/44 combined long jump classification, but the evidence at the hearing did not definitely establish his world ranking on this date.

LEGAL ANALYSIS

A claimant has the burden of proving his claim by a preponderance of the evidence in an athlete selection dispute arising under Section 9 of the USOC Bylaws. *Beckom v. U.S. Bobsled and Skeleton Federation*, AAA Case No. 77 190 E 00105 JENF (February 12, 2010); *Nieto v. USA Track & Field*, AAA Case No. 77 190 E 00275 08 JENF (July 19, 2008); *Ruckman v. United States Rowing Ass'n*, AAA Case No. 77 190 E 00189 08 JENF (May 29, 2008); *Cameron Booth v. United States Rowing Ass'n*, AAA Case No. 30 190 259 07 (March 16, 2008); *Gault v. United States Bobsled & Skeleton Federation*, AAA Case No. 72 E 190 0002 92 (January 11, 1992). The parties agree that Mr. Tibbs has the burden of proving, by a preponderance of the evidence, that USP abused its discretion by not selecting him for the 2012 U.S. Paralympics team.

To establish that USP abused its discretion in selecting the 35 U.S. male track and field athletes allotted by the IPC to participate in 172 track and field events during the 2012 Paralympic Games, Section 9 jurisprudence requires Mr. Tibbs to prove USP breached its approved and published Athlete Selection Procedures for the 2012 Paralympic Games, applied them inconsistently to athletes similarly situated, acted in bad faith towards or with bias against him, and/or violated applicable federal or state laws (e.g., Ted Stevens Olympic and Amateur Sports Act). *See, e.g., Morgan v. USA Synchronized Swimming*, AAA Case No. 77 190 E 0050 JENF (March 26, 2012); *Beckom v. U.S. Bobsled and Skeleton Federation*, AAA Case No. 77 190 E 00105 JENF (February 12, 2010); *Booth v. United States Rowing Ass'n*, AAA Case No. 30 190 259 07 (March 16, 2008).

As the appointed arbitrator, I have authority only to determine whether USP violated one or more of the foregoing requirements, thereby depriving Mr. Tibbs of a fair opportunity to compete for selection as a member of the 2012 Paralympics men's track and field team. "My role is not to determine whether USP 'chose the best process for selecting teams,' *Cameron Booth* at 19, or to substitute my lay judgment for the expert professional judgment of [USP] in establishing selection criteria or . . . in applying the criteria to individual . . . athletes." *Beckom, supra*, at 8.

Based on the foregoing findings of fact, I conclude that Mr. Tibbs has not satisfied his burden of proving that USP abused its discretion in determining the best means of complying with its legal obligations under the ASA and the USOC Bylaws. USP's selection criteria and procedures for selecting track and field athletes for the 2012 Paralympics team are reasonable, and USP has rationally and consistently applied them to all men's Paralympic track and field athletes, including Mr. Tibbs. The USP's adjustment of the 2012 National Team "A" Standard for combined track and field events in response to the IPC's adjustment of its 2012 Raza points, which the IPC will use to allocate medals during the 2012 Paralympic Games, was a reasonable

means for the USP to fulfill its responsibility under the ASA to select the most medal capable Paralympic team.

At least as early as February 23, 2012, Mr. Tibbs had at least constructive notice that the U.S. 2012 National Team “A” Standard for F44 long jumpers who sought to be selected by USP to compete in the 2012 Paralympic Games combined F42/44 long jump competition would be 6.85 meters (a significant increase from the U.S. 2011 National Team “A” Standard of 6.61 meters for F44 long jumpers), which provided him with more than four months to adjust his training regime as necessary to facilitate his ability to achieve or exceed this standard before or during the US Paralympics Track and Field Trials on June 29-July 1, 2012. Moreover, the amended Athlete Selection Procedures increasing the U.S. 2012 National Team “A” Standard for F44 long jumpers to 6.85 meters were published on April 12, 2012, prior to on Mr. Tibbs’ June 7, 2012 long jump of 6.64 meters. Thus, this is not a case in which a sport governing body, contrary to an athlete’s legitimate expectations, retroactively changes its objective team selection criteria after the athlete has accrued team selection points by his athletic performance. *Cf. Sullivan, The Judo Federation of Australia, Inc., the Judo Federation of Australia, Inc. Appeal Tribunal, and Raguz, Arbitration CAS 2000/A/284, award of August 14, 2000 in DIGEST OF CAS AWARDS II 1998-2000, at 542. (requiring governing body to comply with and to apply objective criteria in effect at time of athletic events in which athlete’s performance determines team selection points earned).*

Based on Mr. Tibbs’ June 7, 2012 long jump of 6.64 meters (his 2011-2012 best jump in an IPC sanctioned competition) and 2012 National Team “A” Standard of 6.85,⁶ USP correctly and indisputably calculated Mr. Tibbs’ 2012 Paralympics Track and Field selection points as 96.93 points ($6.64 \div 6.85 \times 100$), which placed him 38th among the ranked U.S. men’s track and field athletes. Unfortunately, although he is an outstanding long jumper who won the F44 competition at the United States Paralympic Trials, his point total was not sufficient in relative terms to be a non-discretionary selection for the 2012 Paralympic Games.

It was reasonable for USP to choose only three athletes as discretionary selections on July 1, 2012 for the 2012 Paralympic Games U.S. men’s track and field team, which is less than its permissible maximum of no more than 15% of the 35 total allotted slots (i.e., five) and a decision not challenged by Mr. Tibbs. It also was reasonable for USP to determine that Scott Winkler, Jarryd Wallace, and Ellexis Gillette were the only athletes with both strong 2012 Paralympic Games medal potential and extenuating circumstances precluding their selection for the U.S.

⁶ To maintain fairness and consistency, if Mr. Tibbs’ 2012 Track and Field selection points were calculated based on his U.S. National A Team Standard of 6.61 meters prior to its April 12, 2012 upward adjustment by USP, the other 17 athletes whose U.S. National Team “A” Standard was increased would have to be treated similarly (i.e., the appropriate pre-April 12, 2012 National Team “A” Standard would be used in the formula for calculating their respective Track and Field selection points). There was no evidence presented concerning the effects this would have on the ranking of men’s track and field athletes based on their Track and Field selection points.

men's Paralympics team based solely on their Track and Field selection points (or, in the case of Mr. Winkler, a meaningful individualized calculation for purposes of determining his relative medal capability vis-a-vis other U.S. men's Paralympic track and field athletes). During the hearing Mr. Tibbs did not challenge USP's selections of Mr. Winkler (a wheelchair shot putter who uses a rigid pole to compete and is ranked second in the world in the combined shot put, which includes athletes who used a flexible pole that provides a competitive advantage because of its spring; the IPC has approved only rigid poles for the 2012 Paralympic Games, which enhances his medal potential in this event), or Mr. Gillette (the current world record holder in the long jump for his class who was injured and unable to compete in the 2012 US Paralympics Track and Field Trials, but will be fully recovered by the 2012 Paralympic Games). USP's determination that Mr. Wallace (the 4th fastest U.S. men's sprinter after the three who qualified for the 100 meters in the 2012 Paralympic Games who ran the world's fastest time in the 100 meters in 2011 and placed ahead of Mr. Tibbs in the 2012 men's track and field ranking list) is the best athlete to fill the U.S. men's team relay specialist spot (at the time of his July 1, 2012 selection) was rationally based. USP's selection of these athletes does not violate the "Discretionary Selection" criteria set forth in Section 2 of its "U.S. Paralympics Athlete/Guide Selection Procedures 2012 Paralympic Games" for track and field and constitutes an expert professional judgment call by the USP, for which I am not empowered to substitute my layperson's judgment even if I were to disagree with any of USP's decisions.⁷

Mr. Tibbs did not allege or prove that USP's Discretionary Selection Committee was improperly composed or that any of its members had a direct conflict of interest. The Committee treated all similarly situated Paralympic athletes consistently by not characterizing any athletes whose 2012 National Team "A" Standard increased based on the 2012 IPC Raza points changes, including Mr. Tibbs, as having experienced extenuating circumstances sufficient in and of itself to be considered in making its discretionary selections for the 2012 Paralympic Games men's track and field team. This is another exercise of USP's professional judgment and expertise, for which I have no authority to substitute my lay judgment or to invalidate. There is no evidence that the Committee's decision not to use one of its discretionary selections to select Mr. Tibbs for the team was motivated by any bad faith or bias against him.

Despite his understandable and legitimate disappointment with not being selected for the 2012 Paralympic Games men's track and field team, which resulted primarily from adjustments made by the IPC to its 2012 Raza points, Mr. Tibbs has not proven that his legally protected opportunity to participate under Section 9 was violated. Thus, there is no valid legal basis or

⁷ Although Mr. Tibbs satisfied the F44 long jump MQS and was ranked in the top 8 for the F42/44 combined long jump by the IPC at the time discretionary selections were made (which is one of the five performance-related factors listed in 2.2 of the "Discretionary Selection" section of the Team Selection Procedures that the Committee will consider), the Committee did not consider him as a possible discretionary selection. The Committee also did not consider his likelihood of winning a medal(s) at the 2012 Paralympic Games, which is another section 2.2 factor. However, the Committee must be given wide latitude in exercising its professional judgment in selecting the most medal capable U.S. Paralympic athletes. Because the Committee had a rational basis for choosing Messrs. Wallace, Gillette, and Winkler as discretionary selections, it did not violate section 2.2 or otherwise abuse its discretion.

justification for me to order USP to nominate him as a member of the 2012 U.S. Paralympic Team in the F42/44 long jump competition or to grant other any other relief.

DECISION AND AWARD

Based on the foregoing findings of fact and legal analysis, I decide and award as follows:

All of Claimant's claims and requested relief is denied.

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

The administrative fees of the American Arbitration Association totaling \$850.00 and the compensation and expenses of the arbitrator totaling \$2,489.25 shall be borne equally. Therefore, Respondent shall reimburse Claimant the sum of \$425.00, representing that portion of said fees in excess of the apportioned costs previously incurred by Claimant.

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


Matthew J. Mitten, Arbitrator

August 28, 2012