

SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIF DU CANADA (CRDSC)

June 22, 2023

No: SDRCC 23-0644

NICOLAS POULIQUEN
(Claimant)

AND

CANADIAN FENCING FEDERATION (CFF)
(Respondent)

AND

SAMUEL GALLAGHER-PELLETIER
(Affected Party)

Before: J.J. McIntyre (Sole Arbitrator)

Representatives for the Claimant: Elliot Saccucci
Alessia Grossi

Representatives for the Respondent: Will Russell
David Howes

Representative for the Affected Party: Self

DECISION

1. This is a team selection dispute. The Claimant is an athlete in the sport of fencing in the discipline of épée. He is contesting the failure of the Respondent to name him to the Men's Épée team chosen to compete for Canada in the Individual and Team events at the 2023 Senior Pan American Championships scheduled to take place in Lima, Peru June 14 - 21, 2023 (the "Pan-Ams").
2. I was appointed by the SDRCC to decide the matter on an urgent basis. No issue was taken by the parties with my appointment. The parties agreed to the appeal taking place by way of a documentary review supplemented with an oral hearing which took place on June 8, 2023.
3. Acting under strict time constraints, pursuant to the Canadian Sport Dispute Resolution Code which came into effect on January 1, 2021 (the "Code") a decision was rendered by me on June 9, 2023 dismissing the Claimant's appeal with full reasons to follow. These are those reasons.

4. At the hearing, the Claimant was represented by his counsel Elliot Saccucci and Alessia Grossi. The Respondent was represented by its counsel Will Russell and the Executive Director of the CFF, David Howes. The Affected Party briefly attended the hearing and gave evidence. David Howes and the Claimant also gave evidence.
5. The Respondent selected the team for the Pan-Ams on May 26 and advised the athletes selected by email on the same date. The Claimant did not find out about his non-selection until later on that date when a chosen athlete forwarded a copy of the email notification. An official posting on the CFF website did not take place until June 2, 2023.
6. Mr. Howes admitted the CFF dropped the ball on notification of the athletes. Normally, the National Coach for épée, (Victor Gantsevich) would discuss the selections with the athletes. Unfortunately his wife was ill and subsequently passed away. That appears to have been a contributing factor to the failure to communicate the selection/non-selection in a timely manner.
7. There is no issue about the timeliness of this Appeal. Given the urgency of the matter the parties agreed to forego the internal appeal process of the CFF and go directly to the SDRCC.
8. Team selection disputes account for the majority of the disputes that come before the SDRCC. So much so, that the SDRCC has devoted web pages to discussing the issue and published a brochure entitled *Selection Criteria for Major Events in Sport: Guidelines and Tips* for policy makers to design team selection criteria to reduce the risk of disputes.
9. Team selection disputes are governed by Section 6.10 of the Code which sets out the onus of proof in these disputes as follows:

If an athlete is a Claimant in a team selection or carding dispute, the onus will be on the Respondent to demonstrate that the criteria were appropriately established and that the disputed decision was made in accordance with such criteria. Once that has been established, the onus shall be on the Claimant to demonstrate that the Claimant should have been selected or nominated to carding in accordance with the approved criteria. Each onus shall be determined on a balance of probabilities.
10. Section 6.11(a) of the Code provides that the Panel (me) “once appointed, shall have the full power to review the facts and apply the law. In particular the Panel may substitute its decision for the decision that gave rise to the dispute.”
11. Section 6.11(c) of the Code provides that “[no] deference need be given by the Panel to any discretion exercised by the Person whose decision is being appealed, unless the Party seeking such deference can demonstrate that Person’s relevant expertise.”

12. The National Team Selection criteria for the Pan-Ams were published by the Respondent in August 2022 (the "Criteria") and communicated to the athletes by way of a National Team Selection Booklet (the "Booklet"). The Booklet was updated in March 2023 and was available on the CFF website. The Claimant was aware of the Criteria.
13. According to the Booklet, May 24, 2023 was to be the selection date to select four athletes for the Pan-Ams. Nothing turns on the fact that the selection did not take place until May 26, 2023.
14. The Criteria specified the relevant minimum criteria that athletes had to achieve for team selection including:

1. Top 25% placement in two FIE (Fédération Internationale d'Esgrime) World Cup or Grand Prix events. Or top 25% placement in one FIE World Cup or Grand Prix event and Top 8 placement at one DIV 1 "designated" NAC;

Or:

2. Top 30 FIE Ranking at the time of the selection date...(May 24, 2023)

- In the event that more than four athletes achieve this criteria, the selection will be based on HP points accumulated in qualifying events as described in the points grid.*
 - In the event that only four athletes achieve this criteria, these athletes will be selected, irrespective of their HP ranking.*
 - In the event that only three athletes achieve this criteria, these three athletes will be selected and the fourth athlete will be selected by the selection panel.*
 - In the event that only two athletes achieve this criteria, these two athletes will be selected and the other two athletes will be selected by the selection panel (my emphasis).*
 - In the event that only one athlete achieves this criteria, this athlete will be selected and the other three athletes will be selected by the selection panel.*
 - In the event that no athlete achieves this criteria, the athlete with the most HP points accumulated during the season will be selected and the other three athletes will be selected by the selection panel.*
15. Two athletes met the top 25% placement standard and were automatically selected, leaving two athletes to be selected by the selection panel. The Criteria provides for that circumstance as follows:

In all cases where the selection panel will determine which athletes qualify for a tournament, the following criteria will be used in no particular order:

- *Performance potential (eg next gen athletes may be prioritized)*
- *Training commitment (eg Evidence of following a 20 hour per week training schedule)*
- *Designated National Team training camp commitment and participation*
- *Tournament Commitment (eg number of events attended, tournament readiness)*
- *Contribution to Team results*
- *Working relationship with national team program and coaches*
- *Disciplinary issues*
- *Past performance (eg consistently improving results over the athletes' career or maintaining high standards - world cup finals)*

16. The Booklet specifies that it is the High Performance Selection Panel (“HPSP”) that is to make the initial selections for the Pan-Ams, to be comprised of:

- *The High Performance Director (Chair) [“HPD”]*
- *The national coach (or designate) for the appropriate weapon.*
- *The Executive Director of the CFF.*
- *The President of the CFF or a representative of the CFF Board of Directors designated by the President of the CFF.*
- *One HPAC [High Performance Advisory Committee] representative excluding the above mentioned members.*

Decisions of the High Performance Selection Panel will be made by majority vote.

In the event of a perceived conflict of interest (for instance where an athlete under consideration for selection is a family member, personal student or member of the same club as a panel member) the panel member will be substituted as follows:

The HPD will be replaced by someone appointed by the CFF Executive Director.

*The National coach will be replaced with someone appointed by the HPD.
The President of the Board will be replaced with another board representative appointed by the Board.*

The CFF Executive Director will be replaced by someone appointed by the President.

17. There is no dispute in this case that the Criteria were appropriately established. What is in issue is the application by the HPSP of the Criteria when choosing the balance of the men’s team for the Pan-Ams.

18. The High Performance Director (Igor Gantsevich), the National Coach for épée (Victor Gantsevich), and the four athletes actually chosen for the Pan-Ams, including the Affected Party, are all coaches and athletes affiliated with the same

Dynamo Fencing Club, in Vancouver. The Claimant also trains at the same club one or more times a month but is a resident of Seattle.

19. Given their connections to the athletes, both the HPD and the National Coach recused themselves from the HPSP and were replaced. The HPD however in consultation with the National Coach by email on May 25, 2023 made recommendations to the persons chosen for the HPSP for the men's épée team selection for the Pan-Ams. First he referred the HPSP to the Criteria. He provided the HP points total for the top 6 athletes to be considered. Following the automatic selection of the two athletes who met the minimum criteria, the recommendation was for the third HP ranked épée athlete to be selected for the Individual and the Team competition and the 5th ranked épée athlete, the Affected Party, to be selected for the Individual competition and provisionally for the Team competition. The coaches wanted to leave open the option of substituting the 6th HP ranked athlete for the Affected Party as the 4th member for the Team competition depending on how the Individual events transpired in Lima as the 6th ranked athlete was going to be in Lima in any event as his sister had been selected for the Women's competition. An excel spreadsheet was attached setting out for each of the six athletes their results in competitions over the last year.
20. The Team competition in fencing involves three athletes from a country fencing against three from another country. The bouts are 5 hits or three minutes each. There could be up to 9 rounds to determine a winner. A 4th athlete chosen for the team may be substituted for another athlete in the case of injury or for tactical reasons. The 4th member of the team may not get to fence in the Team competition.
21. The HPSP ended up being comprised of experts in the fencing disciplines: Jean-Marie Banos, a four-time Olympian and former national coach; Sherrain Schalm, a four-time Olympian and current women's épée national coach; David Howes, a former women's épée national coach, who coached at the Rio Olympics; Kelleigh Ryan - a member of the women's foil team that finished fifth in the Tokyo Olympics; and Yann Bernard a former member of the men's épée national team.
22. Two of the HPSP committee members, Banos and Schalm agreed with the HPD's recommendation, thought it was a good tactical decision as to the choice of the Affected Party and in compliance with the Criteria.
23. David Howes requested further input from the HPD as to the factors the HPSP were to consider when making the team selections. That further input was provided by the HPD at 3:09 pm on May 25 commenting on and comparing for the Claimant, the Affected Party and the 6th ranked athlete their respective: Performance potential, Training commitment, Designated National Team training camp commitment, Contribution to team results, Working relationship with the national team program and coaches, Disciplinary issues and Past Performance.

24. Based on the full input from the HPD, David Howes and the other HPSP committee members agreed with the HPD's recommendation thus making it unanimous by all members of the HPSP as to the Individual and Team selections for the Men's épée event at the Pan-Ams.
25. The Claimant's position is that in the application of the selection criteria, inadequate consideration was given by the HPSP to his higher CFF Selection Ranking than that of the Affected Party. The Claimant's higher ranking for men's épée was achieved as a result of a top 96 result obtained by the Claimant at a Grand Prix event that took place in Cali, Colombia on May 5-7, 2023 when he beat a top-ranked US opponent. The position of the Claimant is that the CFF, over the course of a number of years and competitions has always selected the top ranked athletes for team selections. That position is disputed by the CFF.
26. The evidence before me is that the HPSP does not always fill team selections based on which athlete has the top CFF ranking. I note that if that was the case there would be no need for the HPSP to consider the criteria referred to in paragraph 15 above.
27. I have been urged by the Claimant to consider that his performance in Cali should outweigh all other factors as he had defeated a top-level American opponent and there was no mention of the level of his opponent in the recommendation made by the HPD to the HPSP.
28. The Claimant is also challenging the decision of the HPSP on the basis of bias as it is submitted that the selection committee merely rubber-stamped the input of the HPD and the National Coach who were required to recuse themselves of all involvement in the selection process.
29. The Claimant submits that I should, similarly to what Arbitrator Brunet did in the case of *Beaulieu et al v. Canada Snowboard*, SDRCC 22-0544/45/46/48/49, supplant the decision of the selection committee and substitute the Claimant for the Affected Party.
30. In the *Beaulieu* case Arbitrator Brunet found, based on the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration v. Vavilov*, 2019 SCC 65, that the applicable standard of review of the decision of an administrative body is one of reasonableness,. So, it is here. The standard of review of the decision of the HPSP is one of reasonableness.
31. In *Beaulieu* there was a failure on the part of Canada Snowboard (the "NSO") to adhere to its own selection policy. The selection criteria, although reasonable, were not followed in a predictable manner and applied. This was found to be unreasonable. In the urgent circumstances of the case before him, it was fatal to the decision being appealed by the athletes and justified the Arbitrator in substituting his decision for that of the NSO and placing the five athletes appealing on the 2022 Olympic Winter Games team.

32. In *Richer v. The Canadian Cerebral Palsy Sports Association (including Boccia Canada)*, SDRCC 15-0265, Arbitrator Pound made the following comments regarding selection criteria and bias (at page 11):

Selection criteria need to contain some reasonable flexibility, but at the same time, cannot be entirely arbitrary. Certain sports lend themselves to somewhat easier team selection choice, where objective criteria such as times, point scores, weights and distances can be used. Others can be more or less self-selections, such as eligibility based on the results of qualification tournaments. The more difficult choices occur when there may be some element of judgment required regarding performance standards or a need to produce a team that will function most effectively in competition. The default position in such cases, absent reviewable error or proof of bias, is that those responsible for selection decisions are generally the most knowledgeable and experienced persons available, who attempt in good faith to produce the best possible outcomes in the particular circumstances.

-[...] Litigants should be aware that an allegation of bias is a serious accusation. Arbitrators will not lightly conclude that decisions by sport officials have been so tainted by bias as to require that such decisions be reversed or voided. The seriousness of the accusation of bias is such that the person alleging it must bring forward convincing evidence to support the allegation. The allegation itself is not evidence of bias. Disagreement with an outcome is not evidence of bias. The mere exercise of discretion is not, of and by itself, evidence of bias. Evidence of bias may be direct or circumstantial. It may also lead to inferences and a shifting of onus, but the primary onus clearly rests on the accuser.

33. The CFF Appeal Policy, Section 12(c) defines bias as: “a lack of neutrality to such an extent that the decision-maker appears not to have considered other views”.
34. Despite the submissions of the Claimant’s counsel I am unable to find convincing evidence of bias. The input of the HPD sought by Mr. Howes on behalf of the HPSP was necessary and indeed appropriate in order to satisfy him and a majority of the HPSP that all of the Criteria had been duly considered. In providing the requested input, I do not find the comments of the HPD to be tainted by a lack of neutrality. Indeed, the comments appear to be objective and fair comments on the three athletes being considered for the last Individual position on the team for the Pan-Ams.

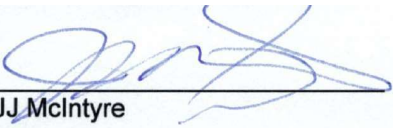
35. I am satisfied that the HPSP was comprised of experts in the fencing arts. It is insulting to suggest that they merely rubber-stamped the recommendation of the HPD. The evidence clearly shows they did not. Further information was requested and provided to satisfy all of the Criteria. The HPSP then made its selection decision.
36. Having reviewed the documents filed by the parties and having considered the oral evidence, I am satisfied that the Respondent has demonstrated not only that the selection criteria for the Pan-Ams were appropriately established but that the disputed decision was made in accordance with such criteria.
37. The onus then shifted to the Claimant to establish on a balance of probabilities that in the application of the Criteria, he ought to have been selected.
38. In choosing the members of the team for the Pan-Ams the HPSP were exercising their discretion. As noted by Arbitrator Roberts in *Pyke v Taekwondo Canada*, SDRCC 16-0296

52. Discretionary decisions must be made in good faith and for a proper purpose. Decision makers must act reasonably and impartially and consider only relevant considerations and ignore irrelevant ones. Absent an abuse of power, a jurisdictional error, bias or procedural irregularity, a decision maker has a right to be wrong.

39. As there was no abuse of power, jurisdictional error, bias or procedural irregularity the selection panel had the right to be wrong. However, I do not find that they were wrong. The evidence before them justifies their decision. This includes the spreadsheet provided by the HPD to the HPSP with the initial recommendation included a summary of the six athletes' competition results for domestic and international events over the last year. Before and after Cali, in every competition in which both the Claimant and the Affected Party participated the Affected Party finished higher in the competition than the Claimant. Further, the Indicators in international competitions, which measures the number of touches scored over those received, for all of the athletes, other than the Claimant were positive whereas the Indicator for the Claimant was negative.
40. Following the Grand Prix event in Cali, the Claimant and the Affected Party both competed in the World Cup in Istanbul, May 19 - 21, 2023. The Claimant placed 251st out of 348 athletes and the Affected Party placed 214th. The Claimant had two victories and 4 defeats in the pools and in the direct elimination ("DE") round of 256 lost by 9 hits. The Affected Party had 3 victories and 3 defeats in the pools and in the DE round of 256 lost by one hit. Opponents are determined in the DE rounds by the athlete's performance in the pools with the highest seeded athletes facing the lowest. Final results are determined by the DE round the athlete went out in, how well the athlete did in the pools and their seeding as a result thereof.

41. In Istanbul, the Team event followed the Individual Event. The Claimant assumed that the coaches, after his result in Cali, might want to see him compete in the Team event. They did not. He was not chosen as the 4th member for the Team competition. The Affected Party was a member of that Team event.
42. The Claimant was unaware of the reason(s) for his non-selection to the team for the Pan-Ams until the documents produced by the CFF in this appeal were filed. That failure in communications is tempered by the fact that in Istanbul he had a conversation with the National Coach who told him at that time that he thought the Affected Party ought to be selected for the Pan-Ams over the Claimant primarily based on the Affected Party's past results. Consequently, the result of the team selections for the Pan-Ams ought not to have been a surprise to him.
43. It is reasonable to conclude, as the HPSP must have done, that one good result in a single competition was not a good indicator of performance potential nor was it a sufficient basis, based on past performance, to say that the Claimant might do better than the Affected Party at the Pan-Ams. The HPSP in exercising their discretion acted in good faith and for a proper purpose. Their decision in the matter, in this Appeal is deserving of some deference.
44. On the whole of the evidence, the decision by the selection committee to choose the Affected Party over the Claimant for the Pan-Ams was reasonable as it was justified, transparent and intelligible and falls within the range of possible, acceptable outcomes that was open to the selection panel to make. Had the Claimant had a better performance outcome than the Affected Party in Istanbul, there would have been a stronger case for his appeal. Such speculation is moot as he did not have such a performance.
45. The Claimant has failed to meet his burden to establish on a balance of probabilities that he ought to have been chosen for the Pan-Ams over the Affected Party.
46. In the circumstances the Appeal of the Claimant is dismissed.

Dated this 22nd day of June, 2023



JJ McIntyre