

SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)

NO: SDRCC 15-0278

HILARY STELLINGWERFF

(CLAIMANT)

AND

ATHLETICS CANADA

(RESPONDENT)

AND

NOELLE MONTCALM

(AFFECTED PARTY)

DECISION

Submissions:

On behalf of the Claimant: Hilary Stellingwerff

On behalf of the Respondent: Jared MacLeod, Operations Manager

On behalf of the Affected Party
Noelle Montcalm:

Shane Kelly

1. On November 17, 2015, I was selected by the parties under Section 6.8 (b) of the Canadian Sport Dispute Resolution (SDRCC) Code (the “Code”) to hear Hilary Stellingwerff’s request for arbitration.
2. Ms. Stellingwerff appeals a decision of Athletics Canada (“AC”) denying her application for an injury card. AC seeks to have the appeal dismissed.
3. This decision is based on the written submissions of the parties as agreed to in a telephone conference call on November 23, 2015.

BACKGROUND

4. AC is the sport governing body for track and field in Canada. A corporate entity, AC establishes rules and policies governing the sport, including rules relating to competition, national team selection, eligibility and appeals.
5. Ms. Stellingwerff is a middle distance runner who competed for Canada in the 1500 metre event at the 2012 Summer Olympics.
6. As a national sport organization, AC is mandated by Sport Canada to nominate athletes to receive financial assistance (also known as “carding”) through the Athlete Assistance Program (“AAP”).

The Policy

7. AC’s 2015-2016 AAP Policy (the “Policy”) provides that, to be eligible to be considered for a carding nomination, an athlete must meet a number of requirements, including the following:
 - ...
 - * Must have participated in the 2015 National Outdoor Track and Field Championships unless a request for an exemption due to injury, illness, or other exceptional circumstances is approved...
 -
 - * Must otherwise comply with all eligibility requirements set out by Sport Canada in “Athlete Assistance Program (AAP) Policies and Procedures.”
8. Section 3 of the Policy states that AC does not make decisions to grant carding to athletes, but rather submits a list of nominations for carding that Sport Canada ultimately approves, but notes that AC staff will apply the criteria contained in the policy to recommend athletes for carding nomination to the National Team Committee (“NTC”).
9. Section 4 of the Policy sets out the basis for the allocation of cards, and states that the breakdown of AC’s allotted funds for the 2015-2016 carding cycle is at the sole discretion of the NTC in consultation with AC technical staff. Appendix

1 sets out additional details about the different categories of cards (Senior Cards, Development Cards, NCAA Cards and Medical/Injury Cards) and specifies further requirements that must be fulfilled by athletes nominated in those categories, in addition to the eligibility requirements set out in Section 2 (reproduced in part in paragraph 4 above).

10. Section 5 of the Policy outlines the process of carding, which sets out a two-phase approach to the nomination process:

Phase 1 - General Carding Pool

An athlete must first be in the General Carding Pool to be considered for carding, but this does not guarantee nomination. Phase 1 is simply a list of the athletes who will be considered in the process outlined in Phase 2.

The following athletes will be admitted to the General Carding Pool provided they submit a completed and signed Application Form [...] and training and competition plan by the deadline date:

...

* Athletes who are currently carded and who have submitted a "Notification of Injury, Illness or Pregnancy" form to maintain their carding status during the carding cycle, and who have otherwise fulfilled all requirements to be considered for a Medical card.

Phase 2 - Nomination to Sport Canada

In the fall of 2015, the NTC will meet to consider the athletes in the General Carding Pool, and to decide which athletes should be nominated for carding. In making its decisions, the NTC will consider athletes by proceeding through the following five steps in sequential order:

....

11. Appendix 1 sets out the policy relating to Medical/Injury Cards:

- *Athletes who are currently carded and who become ill, injured or pregnant must immediately submit a "Notification of Injury, Illness or Pregnancy" form to maintain their carding status during the carding cycle.*
- *To renew their carding, the athlete must submit a medical doctor's diagnosis and prognosis for the athlete's return to high performance training and competition, and must include a rehabilitation and training program prepared by the athlete, coach and coordinating therapist which is acceptable to AC's medical personnel.*
- *[...] Athletes may be nominated for Medical/Injury cards at the sole discretion of the NTC based on the number of cards available, the nature and details of the diagnosis and prognosis, the documentation provided, the quality of the*

athlete's rehabilitation and training plan, the advice of medical experts, and the realistic expectation that the athlete can continue to progress towards World Top 16, Top 8 or Top 3, as the case may be.

- *Athletes may only receive a Medical Card once.*
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12. Ms. Stellingwerff applied for, and received, a medical/injury card for the 2014-2015 carding cycle due to her pregnancy, and gave birth on June 29, 2014.
13. On June 19, 2015, Ms. Stellingwerff was diagnosed with a stress fracture and applied for a medical/ injury card to maintain her carding status.
14. On October 2, 2015, the NTC met to select the athletes to be nominated to Sport Canada for 2015-2016 AAP carding and denied Ms. Stellingwerff's application on the basis that an athlete may only receive a medical card once.
15. On October 20, 2015, Ms. Stellingwerff appealed the NTC's decision to deny her application for a medical/injury card contending that it was both unfair and discriminatory to consider pregnancy an injury and, on that basis, deny her a medical/injury card for her stress fracture.
16. In a decision issued October 28, 2015, LeeAnn Cupido, a designated official under AC's appeal policy, concluded that Ms. Stellingwerff's appeal lacked sufficient grounds to proceed.
17. Ms. Cupido determined that Ms. Stellingwerff had not met the requirements of Appendix 1 as she had previously received a medical/injury card, and was therefore prohibited from filing an appeal. Ms. Cupido further decided that, even if Ms. Stellingwerff was eligible to file an appeal, she was out of time to do so. In arriving at this conclusion, Ms. Cupido determined that Ms. Stellingwerff ought to have appealed the fairness of the AAP policy when it was made available to the athletes in May, 2015. Ms. Cupido concluded that the NTC had not erred in applying the policy and that there were no grounds for appeal.
18. Ms. Cupido's decision was communicated to Ms. Stellingwerff by e-mail on October 29, 2015.
19. Ms. Stellingwerff contends that AC's policy of considering pregnancy as an injury is discriminatory towards her and all female athletes, and undermines a mother's return to elite competition.
20. AC contends that if Ms. Stellingwerff was concerned about the discriminatory implications of the policy, she should have appealed the decision to award her an injury card for the 2014/2015 AAP carding year. It says that Ms. Stellingwerff was aware at that time that pregnancy and injury were treated similarly and that

athletes were only able to receive a medical card on one occasion. AC asserts that, by accepting the carding funds and signing the carding agreement in 2014, Ms. Stellingwerff agreed to the carding terms that categorized pregnancy as an injury.

21. Ms. Stellingwerff says that she was unable to appeal the injury card criteria until she received the decision to deny her a card in October. She said that she had no decision to appeal before that date. Ms. Stellingwerff also asserts that the NTC Chair informed her husband/coach that the issue of her using an injury card for pregnancy was a Sport Canada issue rather than an AC issue, leading her to believe that any appeal would have been to Sport Canada rather than AC.
22. AC says that the medical policy was instituted after certain athletes took advantage of multiple medical cards with no intention of returning to training. AC agrees that the policy should change and will pursue that change for the upcoming carding year.
23. Ms. Montcalm submits that because Ms. Stellingwerff received a medical card in 2014, she is ineligible, under AC's carding criteria, to be evaluated for carding in 2015. She argues that, even if AC decides to change the policy for future years, any change should not affect the decisions made for the 2015-2016 carding cycle.

RELEVANT PROVISIONS

24. AC's Appeals Policy (Rule 140.03) provides any member of AC who has been affected by a decision of the Board of Directors, any committee of the Board of Directors, or anyone who has been delegated the authority to make decisions on behalf of the Board, with a right to appeal that decision.
25. Rule 140.04 provides that AC members who wish to appeal a decision have 15 days from the date on which they received notice of the decision to do so.
26. Rule 140.05 provides that not all decisions may be appealed, and that appeals are limited to procedural grounds.
27. Those procedural grounds are limited to AC
 - (1) Making a decision for which it did not have authority or jurisdiction as set out in governing documents;
 - (2) Failing to follow procedures as laid out in the bylaws or approved policies of Athletics Canada;
 - (3) Making a decision that was influenced by bias...
 - (4) Exercising its discretion for an improper purpose; or
 - (5) Making a decision that is grossly unreasonable or unfair.

ANALYSIS AND DECISION

Timeliness

28. Ms. Stellingwerff says, and AC did not dispute, that she was never notified in writing that she would not be re-nominated for carding until she received a copy of Ms. Cupido's decision to deny her appeal of her injury card application. Ms. Stellingwerff's appeal to AC was made on October 20, 2015 after she was informed during a conversation with AC's head coach that her application for an injury card had been denied. Sport Canada's AAP policy provides that sport organizations must inform athletes in writing, that he or she has not been re-nominated and that the reasons for that decision must be included in the notice (Section 6.2). AC did not inform Ms. Stellingwerff at any time in writing about its decision not to award her a card. Consequently, I find that Ms. Stellingwerff's appeal is timely.

Is the Policy Discriminatory?

29. It is well settled that arbitration proceedings before the Tribunal take the form of a judicial review of the decision of the national sport organization rather than an appeal *de novo*, and that arbitrators must defer to the experience and expertise of the sport authorities (*Palmer v. Athletics Canada*, SDRCC 08-0080).
30. Where a decision is challenged as a misinterpretation or misapplication of a policy, the standard of review is reasonableness, and the burden is on the athlete to show that the decision was unreasonable. Where a decision is challenged on the basis that the policy itself is obsolete, unwise or otherwise invalid, the standard of review is even more stringent.
31. As Arbitrator Decary noted in *Mehmedovic v. Judo Canada* (SDRCC 12-0191/92):

... when it comes to assessing policy decisions, arbitrators can only intervene in exceptional circumstances, such as where a policy would have been adopted in bad faith or without jurisdiction, would be contrary to law (a discriminatory policy for example), would have been adopted through a biased process, or, at the limit, where it is so vague or so discretionary or arbitrary as to be inapplicable with any kind of certainty. (para. 30)

....

Policy-makers are recognized a quasi-absolute discretion when it comes to making priorities and choices of methods and criteria and arbitrators are expected to stay away from any second-guessing except in such exceptional circumstances as I have described above. (para 33.)

32. Ms. Stellingwerff's challenge falls into the latter category; that is, she says that the policy is invalid, or unlawful.
33. In *Canadian Amateur Softball Association* (SDRCC 08-0076) Arbitrator Picher decided that SDRCC Arbitrators have the jurisdiction to consider whether sport selection, team selection and carding rules, processes and decisions violate human rights legislation.
34. Discrimination occurs when a rule or policy imposes, because of some special characteristic of a group of people, obligations, penalties or restrictive conditions not imposed on other groups of people. (see *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536)
35. The *Ontario Human Rights Code* (R.S.O. 1990 c. H-19) prohibits discrimination based on sex, which includes pregnancy. Pregnancy, which includes all aspects of having a baby, from conception to post-delivery, is a characteristic protected from discrimination. (see also *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219)
36. I find that AC's carding policy is discriminatory. Female athletes who suffer an injury are prohibited from obtaining a medical/injury card in circumstances where they have previously been pregnant. Pregnant female athletes are therefore treated adversely from male athletes based solely on their pregnancy.
37. While AC's medical/injury policy may have been implemented in good faith and for *bona fide* reasons, a lack of intent to discriminate will not save an otherwise discriminatory policy.
38. Although AC appears to concede that its policy is discriminatory given that it has stated that it intends to review that policy for 2016, it argues that because Ms. Stellingwerff received funding and signed the 2014 carding agreement, she cannot now dispute the criteria on which the funding agreement was based.
39. Human rights legislation sets a floor beneath which parties cannot contract out (*Newfoundland Association of Public Employees v Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3). Therefore, AC's argument that Ms. Stellingwerff, having previously accepted carding funding under the policy, cannot now object, is not one that can be sustained.

Remedy

40. Having determined that AC's policy that, in effect, treats pregnancy as an injury or illness and prevents a pregnant athlete from obtaining a medical card after pregnancy is discriminatory, it is now my task to determine the appropriate remedy.

41. AC submits that, should the Tribunal determine that the medical/injury card policy is discriminatory, the matter should be returned to the NTC to evaluate whether Ms. Stellingwerff is entitled to medical/injury card. It says that, in that way, Ms. Stellingwerff can be evaluated in the same manner as other athletes who were awarded medical cards.
42. Ms. Stellingwerff objects to AC's request to return the matter back to the NTC. She contends that it is unfair to her to have the NTC re-evaluate her eligibility and asserts that any evaluation will not fairly assess her return from pregnancy. She contends that AC has had full opportunity to resolve this issue back in October, and that it is in the best interests of athletes for me to decide this matter.
43. While I appreciate Ms. Stellingwerff's concerns about AC's failure to resolve this issue in a timely fashion, in my view, it is for the NTC to evaluate her eligibility for carding according to the AAP Policy, not the SDRCC.

CONCLUSION

44. I conclude that Ms. Stellingwerff has established that the AAP policy of preventing female athletes who have been pregnant from subsequently obtaining a medical card is discriminatory.
45. I refer Ms. Stellingwerff's application for a medical/injury card back to AC to consider under the AAP Policy on a priority basis, giving full effect to this decision.

COSTS

46. Pursuant to Article 6.22 of the Code, I have discretion to award costs. Given AC's concession that Ms. Stellingwerff raised an important issue, my initial inclination is to order each side to bear its own costs. However, I am prepared to consider any submissions on costs.
47. Those submissions should be delivered to the Tribunal in writing no later than 4:00 p.m. (EST) on January 15, 2016.

December 31, 2015, Vancouver, BC



Carol Roberts, Arbitrator