

**SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE REGLEMENT DES DIFFERENDS SPORTIFS DU CANADA (CRDSC)**

No: SDRCC 21-0495

Between:

Jevon Balfour
Claimant
and

**Wrestling Canada Lutte
("WCL")**
Respondent
and

Jasmit Phulka
Affected Party

Arbitrator: John H. Welbourn

Hearing: via videoconference on April 24, 2021

Appearances:

For the Appellant: Evan MacDonald (representative)
Zachary Rosen (Counsel)
Paul-Erik Veel (Counsel)

For the Respondent: Tamara Medwidsky (representative)
Jordan Goldblatt (Counsel)

For the Affected Party: David McKay (representative)
Kate Scallion (Counsel)

SDRCC Observer: Kirsten Whelan (case manager)

Reasons

These Reasons follow the Decision of April 26, 2021 and are delivered as required by subsection 6.12(a) of the *2021 Canadian Sport Dispute Resolution Code*.

Issue:

1. Mr. Balfour appeals from the April 12, 2021 decision of WCL's internal appeal panel dismissing his appeal from WCL's decision not to consider his wrestle-off results against Mr. Phulka in determining final rankings in the 74 kg weight class for the right to represent Canada at remaining 2020 Olympic Games qualifying events.

Preliminary Matters:

2. I was appointed arbitrator on April 20, 2021 and held a preliminary meeting with the parties the following day.
3. At that meeting, the parties agreed that:
 - a. SDRCC had jurisdiction in the matter;
 - b. No witnesses would be called. The evidence was substantially uncontested;
 - c. The parties would file written submissions prior to the hearing;
 - d. The hearing would not be formally recorded.
4. The hearing consisted of Counsels' oral argument and Mr. MacDonald's representations.

Facts:

5. The facts are as stated in Arbitrator Hugh Fraser's Award dated April 12, 2021 and a prior SDRCC decision of Arbitrator Yves Fortier dated March 30, 2020. Arbitrator Fraser's Award is the decision which is the subject of this appeal. Arbitrator Fortier's decision determined issues between these same parties.
6. Mr. Balfour and Mr. Phulka are wrestlers who compete in the 74 kg category. Both have represented Canada in international competitions.
7. In 2019, Mr. Balfour suffered a detached retina in his right eye. The injury was not wrestling-related. Due to the injury Mr. Balfour was not able to compete in the Canadian wrestling team trials in December, 2019 where Mr. Phulka won the freestyle 74 kg weight class event and the opportunity to represent Canada at the remaining 2020 Olympic Games qualifying events.
8. Mr. Balfour was entitled to and requested a "wrestle-off" with Mr. Phulka under WCL's *Internal Nomination Procedures: 2020 Olympic Games* (the "Nomination Policy").
9. At that time, Mr. Balfour's vitreoretinal surgeon diagnosed him as monocular - he had vision in one eye only - and recommended that Mr. Balfour wear protective eye goggles when wrestling.
10. Mr. Balfour requested approval from WCL to wear goggles while wrestling. WCL's medical director advised WCL that he could not clear Mr. Balfour to compete unless he wore goggles because he was concerned that Mr. Balfour would be at risk of permanent blindness if he injured his good eye.
11. On January 21, 2020, WCL requested that United World Wrestling ("UWW") approve Mr. Balfour's use of goggles while competing. UWW is the international governing body for wrestling. UWW's rules prohibit wrestlers from wearing "any object that might cause injury to the opponent, such as rings, bracelets, prosthesis, piercing, etc." UWW rejected WCL's request on February 4, 2020.
12. WCL advised Mr. Balfour of UWW's decision on February 5, 2020 and also advised him that it would appeal the ruling.

13. The wrestle-off was held on February 8, 2020. Mr. Balfour wore goggles and won the matches against Mr. Phulka. In winning the wrestle-off Mr. Balfour became the number one ranked wrestler in the 74 kg weight class and eligible to compete in the 2020 Olympic Wrestling Pan American Qualification Tournament to be held March 13 - 15, 2020.

14. On February 10, 2020, WCL requested UWW reconsider its ruling on the basis of further information. Two days later, WCL's High Performance Director provided further information to UWW on the type of goggles proposed to be worn by Mr. Balfour.

15. Also on February 10, 2020, WCL was advised by its medical director that he would not clear Mr. Balfour to compete without eye protection which WCL immediately communicated to Mr. Balfour.

16. On February 20, 2020, WCL's High Performance Director advised Mr. Balfour that if UWW did not clear Mr. Balfour to compete wearing goggles, WCL would be forced to reconsider Mr. Balfour's nomination to participate in the Pan American Qualification Tournament.

17. UWW rejected WCL's second request for approval on March 3, 2020. WCL notified Mr. Balfour of UWW's decision later that day.

18. Thereafter, WCL advised Mr. Balfour that by reason of the UWW decision and his lack of medical clearance to compete, he was no longer eligible to compete domestically or internationally. Further, WCL would not consider the results of the wrestle-off for ranking for Olympic team selection and carding. WCL based its decision on the Nomination Policy which specified that athletes comply with all relevant UWW and IOC requirements in order to be considered for nomination to the Canadian Olympic Committee for team selection.

19. Mr. Balfour appealed WCL's decision. WCL's case manager upheld the decision which Mr. Balfour then appealed to the SDRCC.

20. Meanwhile WCL sought UWW's approval to allow Mr. Balfour to wrestle if he provided a waiver of liability. UWW refused that request also.

21. Mr. Balfour's appeal to the SDRCC was heard by Arbitrator Fortier who dismissed the appeal on March 30, 2020. Mr. Balfour did not appeal that decision.

22. Mr. Phulka competed at the Pan American Qualification Tournament held March 13 - 15, 2020.

23. Later in March, the 2020 Olympic Games were postponed to 2021 due to the COVID-19 pandemic.

24. On May 15, 2020, Mr. Balfour's legal counsel wrote to WCL's High Performance Director providing a note dated May 14, 2020 from Mr. Balfour's vitreoretinal surgeon stating that Mr. Balfour's good eye was healthy and stable, and that he was not at higher risk of injury than any other wrestler. Counsel requested that WCL:

- a. Confirm that Mr. Balfour was eligible for and meets the criteria of the 2020-21 Carded Athlete Program;
- b. Confirm that Mr. Balfour is eligible for nomination in the Olympic qualification process per the Nomination Policy;

- c. Restore Mr. Balfour's wrestle-off results for consideration in the final ranking for team selection and carding.

25. WCL's medical director subsequently contacted Mr. Balfour's vitreoretinal surgeon who confirmed that he still classified Mr. Balfour as monocular.

26. On June 12, 2020, WCL's High Performance Director advised Mr. Balfour's legal counsel that Arbitrator Fortier's decision would remain binding in the absence of new medical evidence. This was reiterated by WCL's High Performance Director on June 24, 2020.

27. On July 21, 2020, Mr. Balfour's legal counsel wrote to WCL's High Performance Director advising that Mr. Balfour was in fact binocular and provided letters from 3 physicians in support. Counsel requested that Mr. Balfour's eligibility for carding be restored. WCL undertook to have its medical director review the information and also requested an independent expert medical opinion.

28. On October 28, 2020, WCL's legal counsel wrote to Mr. Balfour's legal counsel advising that Mr. Balfour was cleared to train and compete without restriction effective immediately subject to 4 conditions. Those conditions were:

- a. Mr. Balfour, along with his counsel if requested, shall participate in a discussion with the Chief Medical Officer of WCL for the purpose of [...] explaining to Mr. Balfour the risk of injury to his eye, and confirming that Mr. Balfour understands the risk of same.

- b. WCL, and Mr. Balfour, must ensure they can obtain insurance, which may require that Mr. Balfour sign an appropriate release and/or indemnity. If Mr. Balfour, or WCL, cannot obtain insurance, then WCL will not be able to permit Mr. Balfour to return to training and/or competition.

- c. WCL [...] is not acquiescing from or reconsidering the matters that were previously determined by Arbitrator Fortier in March, 2020. While Mr. Balfour may agree or disagree with this position, WCL's acceptance of Mr. Balfour being eligible to return to sport must not be construed as WCL's agreement or acknowledgement that the March, 2020 [hearing before Arbitrator Fortier] was incorrectly decided.

- d. WCL reserves the right to reconsider Mr. Balfour's medical clearance to train and compete without restriction should further information become available.

29. WCL's counsel also advised that a revised carding nomination list would be sent to Sport Canada to obtain a Senior Card for Mr. Balfour retroactive to May, 2020. Sport Canada approved the request in or about November, 2020.

30. By letter dated January 11, 2020 (sic) to Mr. Balfour's legal counsel, WCL advised that Mr. Balfour was "cleared to train and compete domestically and internationally without medical restrictions and as such is eligible to participate in WCL sanctioned activities, effective immediately."

31. On January 20, 2021, Mr. Balfour's counsel requested that WCL confirm that the results of the February, 2020 wrestle-off would be restored for the purpose of ranking and team selection, and the Olympic qualification process for the postponed 2020 Olympic

Games.

32. On January 22, 2021, WCL's legal counsel advised that Arbitrator Fortier's March 30, 2020 decision was final and binding and the request was declined.

33. Mr. Balfour appealed the denial of his January 20, 2021 request through WCL's internal appeal policy. The appeal was heard by Arbitrator Fraser whose Award dated April 12, 2021 dismissed the appeal.

Argument and Analysis:

34. Mr. Balfour contends that Arbitrator Fraser was mistaken in his finding that WCL had done everything and exceeded expectations to assist Mr. Balfour in maintaining his eligibility to compete to qualify for the 2020 Olympic Games.

35. Mr. Balfour alleges that he was treated differently by WCL than other injured athletes. He maintains that WCL initially banned him from training and competition due to his injury and that WCL subsequently insisted that he wear goggles to compete safely. Further, WCL led him to believe that UWW would likely approve his use of protective goggles in international competition.

36. There is no evidence that Mr. Balfour has been treated differently. He was not banned from training or competition. The evidence is that WCL's medical officer would not clear him to compete because injury to his good eye might render Mr. Balfour permanently blind. When Mr. Balfour produced medical evidence in July, 2020 that he was not in fact monocular, the medical officer reviewed that evidence and after further investigation unconditionally approved Mr. Balfour for competition.

37. The evidence is that Mr. Balfour first suggested to WCL that he wear protective goggles. After consideration and with the recommendation of Mr. Balfour's vitreoretinal surgeon, WCL allowed Mr. Balfour to compete wearing goggles in the February, 2020 wrestle-off. Mr. Balfour points out that WCL initially indicated that UWW would likely approve his use of goggles. However, WCL also advised Mr. Balfour in advance of the wrestle-off that should UWW not grant permission to wear goggles, his ability to compete internationally would be affected.

38. WCL promptly appealed UWW's first decision issued February 4, 2020. That appeal was refused on March 3, 2020 and WCL immediately advised Mr. Balfour. Shortly thereafter, WCL advised Mr. Balfour that despite his wrestle-off success against Mr. Phulka, he could not represent Canada at the remaining Olympic qualifying events. At that point, Mr. Balfour could not compete internationally in compliance with all relevant UWW requirements as required by the Nomination Policy.

39. The record of emails and correspondence satisfies me that WCL was transparent, forthright and prompt in its communications with Mr. Balfour. Further, WCL was diligent in its effort to obtain UWW's permission allowing Mr. Balfour to compete internationally wearing protective goggles. Finally, WCL was deliberate and careful in considering Mr. Balfour's medical situation and its decisions were made with his safety being the primary consideration.

40. Mr. Balfour argues that Arbitrator Fraser wrongly and repeatedly treated the wrestle-off results as if they had been invalidated or disqualified. Paragraph 115 of Arbitrator

Fraser's Award states:

[...] [WCL] acted in a transparent manner throughout and kept Mr. Balfour apprised of the efforts that they were undertaking with regard to the request for permission to use goggles, as well as the possibility that the request might be denied, thereby invalidating the results of the Wrestle-Off.

41. Paragraph 113 of the Award states:

[...] The fact that subsequent medical opinions confirmed that the Appellant was binocular did not necessitate a reconsideration of the WCL decision to disqualify the Wrestle-Off results.

42. WCL did not disqualify or invalidate the wrestle-off results. They remain valid results for that competition. However the results did not affect UWW competition rules which were a prerequisite of the Nomination Policy. At that time, Mr. Balfour did not satisfy the UWW rules and therefore was not eligible for nomination under the Nomination Policy. Arbitrator Fraser's references to "invalidating" or "to disqualify" the wrestle-off results do not affect the application of the UWW competition requirements.

43. Mr. Balfour suggests that WCL improperly refused to recognize valid competition results. The evidence does not support that assertion. Until July 21, 2020, when WCL was first advised that Mr. Balfour was in fact binocular, the evidence is uncontroverted that Mr. Balfour could not compete internationally in compliance with all UWW requirements and therefore could not comply with the Nomination Policy. WCL was prevented from considering Mr. Balfour's wrestle-off success in selecting the athlete in the 74 kg class to represent Canada at the remaining Olympic qualifying events.

44. Mr. Balfour contends that the Arbitrator was incorrect in finding that there was no evidence that WCL considered irrelevant information. Specifically, the UWW decision denying Mr. Balfour's use of protective eyewear was irrelevant information that WCL should not have considered.

45. The UWW decision was the basis of WCL's decision and correctly so. Ignoring the UWW decision would have violated Article 5 of the Nomination Policy which states:

In order to be considered by WCL for nomination to the COC for team selection, all athletes must meet the following requirements **at the time of nomination** and maintain these requirements through the completion of the 2020 Olympic Games:

[...] Be in compliance with all relevant United World Wrestling (UWW) and IOC requirements for eligibility; [...]

Had WCL nominated Mr. Balfour, WCL would have selected an athlete, as the facts were known and understood up to July, 2020, who **at the time of nomination** could not compete in compliance with UWW rules. (emphasis added)

46. The UWW decision was relevant to WCL's decision to nominate Mr. Phulka and not Mr. Balfour.

47. Mr. Balfour argues that WCL's appropriate course of action would have been to advise him that while he was required to wear protective goggles, he could not compete in UWW international events and allow Mr. Phulka to compete as the Canadian

representative. If cleared to return to competition without protective eyewear, Mr. Balfour could then do so, replacing Mr. Phulka.

48. On this point, the Nominating Policy was not referred to, but it is specific and does not allow for a nominated athlete's replacement as Mr. Balfour suggests. Once selected, an athlete's nomination can only be withdrawn in certain circumstances. Those are set out in Article 8 of the Nominating Policy as follows:

- a. If the athlete has not fulfilled his/her responsibilities with respect to mandatory training camps, testing, and competitions;
- b. If the athlete has not fulfilled his/her responsibilities as identified in the WCL Athlete Agreement;
- c. If the athlete is found to be in breach of the WCL Code of Conduct [...];
- d. If the athlete has be (sic) found to have committed an anti-doping rule violation [...];
- e. If the athlete is unable to perform due to injury, illness or other medical reasons as supported by the WCL Chief Medical Officer (CMO).

49. There is no suggestion that any of these circumstances have occurred in relation to Mr. Phulka since WCL's decision was communicated to Mr. Balfour on March 3, 2020. Accordingly, Mr. Phulka could not be removed from nomination and replaced by Mr. Balfour based on the latter's subsequent improved medical condition.

50. There is no evidence that there has been any revision to WCL's Nominating Policy arising from the postponement of the 2020 Olympic Games. As a result the Nominating Policy continues to govern the athlete selection process.

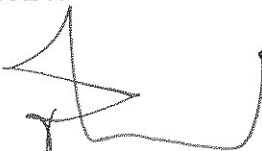
51. Mr. Balfour, as submitted by Mr. MacDonald, is the best athlete available and WCL's mandate is to put forward the best athlete to compete internationally for Canada. WCL did not disagree. Mr. Balfour is clearly a gifted wrestler. However, neither that fact nor the mandate are determining factors in this appeal.

52. The standard for review of Arbitrator Fraser's Award is whether his decision is reasonable based on his analysis and the result. There isn't any substantive error in his consideration of the facts or his analysis of those facts. The result of that analysis is that Mr. Phulka and not Mr. Balfour is the nominated athlete in accordance with the Nominating Policy. That result is reasonable based on the Arbitrator's consideration and analysis of the facts.

Decision:

53. The appeal is dismissed.

Dated at Calgary, Alberta, on May 10th, 2021.



John H. Welbourn, Arbitrator