

**IN THE MATTER OF AN ARBITRATION  
OF  
ADR-SPORT-RED**

**Ordinary Division**

**BETWEEN**

**URSULA BERO and KAMIL KARBONOWSKI**

**(the "Appellants")**

**AND**

**CANADIAN FENCING FEDERATION**

**(the "Respondent")**

**Before Tricia Smith, Sole Arbitrator  
by Telephone Conference**

Present:       Kamil Karbonowski (Claimant)  
                  Perry Stevens (Representative of both Claimants)  
                  Carol Malcolm O'Grady (Canadian Fencing Federation)  
                  David Lech (Counsel for the Canadian Fencing Federation)  
                  Danak Nowosielski (High Performance Director of the Respondent)  
                  Odette Lagace (Court Office)

**Summary**

This is an Appeal by Ursula Bero and Kamil Karbonowski from a Decision of the Canadian Fencing Federation ("CFF") Appeals Committee, which upheld the Decision of the National Team Selection Committee of the CFF, the Respondent.

In short, both appellants failed to attend the January 26th and 27th, 2004 Montreal training camp, which CFF says was a mandatory condition of selection to the 2004 World Junior/Cadet Championship Team. The Respondent's position is that they set appropriate selection criteria and the criteria were communicated to the athletes in the National Team Booklet ("NTB"). The athletes signed forms acknowledging they were required to read the NTB.

Both athletes contend that they were not fully aware that the camp would take place. For different reasons, they both missed the camp.

If they had attended the camp, both would have qualified to attend the 2004 World Junior/Cadet Championships in Plovdiv, Bulgaria. The National Team Selection Committee of the CFF declined to name them to the team because both had missed the mandatory camp.

An appeal was launched in both cases to the CFF Appeals Committee and both appeals were denied.

Both of the athletes and the CFF then agreed to have the matter referred to and finally resolved by arbitration under the ADRsportRED Program and pursuant to its Code of Procedure.

The arbitration was held on an expedited basis due to the fact that the selected team for the Junior/Cadet World Championships was scheduled to depart on March 26, 2004.

The Summary of the Arbitration Decision was produced on March 23, 2004 and forwarded by the ADR-sport-Red office to all parties.

Following is a more comprehensive discussion of the facts, issues and Decision.

## **PRELIMINARY MATTERS**

A conference call was held on March 19, 2004 to ensure that all parties had all documents and to arrange a time for the hearing suitable to all parties and witnesses.

Attending the pre-hearing conference call were David Lech, counsel representing the CFF, Carol Malcolm O'Grady of the CFF and Perry Stevens, representing the Appellants, along with Odette Lagace from the Court Office.

A letter stating that both Appellants had agreed for Perry Stevens to represent them was produced in the materials. Mr. Stevens agreed on behalf of the Appellants that their individual appeals be heard together but it was also agreed that there might be two different decisions based on the different fact scenarios involving the reasons each of the Appellants missed the mandatory camp.

It was agreed that the hearing would be held on Monday, March 22, 2004 and a decision rendered on or before March 23, 2004.

Mr. Stevens did not have access to a fax machine but admitted as evidence the two documents, which he had not received, which were the Appellants' application forms for the Canadian Fencing Federation 2003/2004 High Performance Program. The forms state, among other things, "I understand I am required to: **Read the National Team Booklet (NTB)**" It was accepted on behalf of the athletes that these were the documents which each of the two athletes had signed.

## **HEARING**

### **The Appellants' Case**

#### ***Submission of Kamil Karbonowski***

Kamil gave written and oral evidence that he became aware of the training camp on Thursday January 22, 2004, just before the weekend tournament in Laval, Quebec, when he and his father

saw it in the National Team Booklet. He admitted he believes he received the National Team Booklet at the beginning of the season, around October 2003.

He said, about the camp information provided, that he was “*not sure enough in order to make arrangements, because of minimal information.*” Kamil said in the oral hearing that he had, in fact, on Friday the 23<sup>rd</sup> tried to change a school exam scheduled for the Monday when the camp was to start but his instructor would not agree.

Kamil also stated he spoke to the CFF High Performance Director, Danek Nowosielski at the Laval tournament about the camp. He said Danek told him, not attending the camp “could” affect his selection to the World Championship team. He told Danek about the exam. He claims Danek told him he could come to the camp the second day to meet the attendance criteria. He also claims Danek told him, if he could not attend the camp he should make arrangements to attend a camp in Giengen, Germany as a make up event. Kamil said he would not have gone to Giengen because of financial issues.

Kamil stated he finished his exam about 12:00 pm on Monday. He said he had talked it over with his parents and it was decided his mother would take the day off work and drive him back to Laval from Toronto on Tuesday morning so that he could attend the second day of the camp. Unfortunately, there was a snowstorm in Toronto on Tuesday morning and the conditions were not drivable. Kamil says that he fully intended to attend the camp but was prevented by circumstances beyond his control. He asks, therefore, that he be selected to the Cadet National Team on the merit of the other selection criteria.

### ***Submission of Ursula Bero***

According to Ms. Bero she did not understand the Montreal training camp was going ahead because she heard nothing further about it after first being notified of it in the National Team Booklet. She said it was common for such camps to be cancelled and also common to receive additional information confirming if such a camp would be proceeding.

In addition, her mother had contacted Janek in the months prior to the mandatory camp asking which competitions were mandatory. She did not ask what camps were mandatory. Janek responded regarding the competitions only and did not mention the camp. Consequently, Ursula said she did not understand the camp was still scheduled. She did attend the World Cup in Laval but did not perform as she had expected and disappointed, returned home early. It was not until after she returned home, when she emailed Janek about something different that she heard about the camp from him. He asked her why she was not there.

Ursula also asks, therefore, that she be selected to the Cadet National Team on the merit of the other selection criteria.

### ***Evidence of Marian Zakrzewski***

A letter was submitted as evidence from Marian Zakrzewski the personal coach of both athletes. He said he was shocked to hear about the athletes being excluded from the World Championship

Team due to missing the camp. He said he also had forgotten about the camp and points out that many others had also forgotten the camp. One reason he suggested was because the fencers and the coaches were absorbed with selection and other matters and the camp “was not important to us at the moment when selection was still going.” He suggested CFF should have had the camp on the web page setting out the purpose of the camp, the schedule and the names of the fencers invited. He suggested that the communication from the CFF should be clearer and more helpful to the athletes.

### ***Appellant’s Argument***

The appellants argue that communication of the selection criteria was not sufficient. They say that the criteria is not clear and it is not sufficiently obvious. No confirmation of the camp was communicated as they say has been done in the past. They also argue that the penalty for missing the camp, especially unintentionally, or because of reasons outside the control of the athlete, is overly harsh. They have asked that they be named to the team based on the other selection criteria, exclusive of the requirement to attend the camp because they argue they missed the camp because of a mistake or for reasons outside their control. The camp was not missed intentionally.

### **The Respondents Case**

#### ***Evidence of Danek Nowoseilski***

Danek gave oral evidence that in December 2003, he had received five enquiries from parents, coaches and athletes from different provinces about the mandatory camp and whether it was still on. He received the last enquiry in early January. Forty-four athletes attended the camp including some who were ultimately not selected for the National Team. He said he never reminded any particular athlete about the camp because information about the camp was published in the National Team Booklet (NTB) “from day one” and all athletes who were required to attend signed off that they were required to read the NTB.

He stated a hand-out sheet, which was given out after each of the competitions at the Laval tournament, was not a confirmation of the camp. It was just a detailed schedule so the athletes knew where to be and when, as they had some space problems. The schedule was prepared on the previous Thursday with the National Team coaches. Approximately 30-35 were printed and not all were given out.

He said he met with Kamil on the day of Kamil’s competition. He said he discussed with Kamil a potential development opportunity at the German tournament, for potential World Championship team candidates. It was not an official CFF trip. He said he just wanted to make Kamil aware of it. He said he never presented it as an alternative to attending the mandatory training camp.

He said they then had a separate conversation about the Montreal training camp. He admitted he told Kamil that not attending the camp “might” affect his selection. He said he used the word,

“might” because he was only one member of the selection committee and the decision as to who was selected was not solely his. He said he asked Kamil if he had tried to reschedule the exam and Kamil said he had tried Friday but without success.

He said he asked Kamil to be back at the camp for the Monday 7:00 pm evening session. Danek said he subsequently told the national coach Kamil would be back on Monday evening.

With regard to Ursula’s appeal, Danek had nothing to add which was of relevance to the appeal. It was clear he did not understand Mrs. Bero’s intent when she asked the question about mandatory tournaments.

### ***The Respondent’s Argument***

The CFF's position is that the National Federation established appropriate selection criteria, it was properly communicated to the athletes as a mandatory camp and that because the athletes did not attend, they have no choice but to leave the athletes off the team. They point out that this was consistently applied across the team selection and pointed to a number of other athletes who met performance criteria but did not meet some technical requirements and were left off the team. The CFF also points out that on page 4 of the NTB it sets out clearly that it is the athlete’s responsibility to contact the CFF if they have any questions regarding the material in the NTB. It also states in the NTB at page 2 that if changes occur they will be posted on the CFF website.

The CFF counsel cited the decision in *Dominic Gagnon et al and Cross Country Canada* dated December 13, 2001 which he submits stands for a number of principles of relevance to this case, including, that it is appropriately within the authority of a National Sport Federation to set criteria for selection as long as the criteria are not entirely unreasonable or unachievable and as long as the criteria adopted are not applied in a manner that is arbitrary and inequitable.

Counsel also suggests the case stands for the proposition that the “Panel” may not substitute its view of what constitutes appropriate selection criteria even if it strongly disagrees with the criteria adopted by the sport organization.

### **DECISION**

With respect, the Panel in the *Dominic Gagnon et al and Cross Country Canada* case was operating under a much more limited mandate which was set out in the Arbitration Agreement for that case, than under the current ADR-sport-RED Code, which provides a very broad scope of authority.

Having said that, I agree that in principle, that the Sport Federation is the most suitable body to define and designate the selection criteria for athletes to qualify for various teams and events and that the criteria should be fair and attainable and applied in a manner which is neither arbitrary nor inequitable. In this case, there appear to be good reasons why the camp in Montreal was deemed a mandatory condition of selection. In fact, the rationale for the camp is explained in the National Team handbook as follows:

*The CFF HP program is continuing with the initiatives that were introduced over the past two years in the Junior/Cadet National Programs. Certain concepts that are already part of the Senior program are also being introduced in the Junior program to facilitate the transition of the Junior athletes to the Senior ranks.*

*Key changes include:*

- 1) the reduction in the number of designated international selection competitions. Only three competitions will be identified in each age category. This change will reduce the financial burden on the Junior/Cadet athletes (and their parents) and allow for more training between events.*
- 2) introduction of designated developmental Junior World Cups: up to three Junior World Cups are identified in each weapon to provide additional developmental opportunities for our fencers. Selection points will not be awarded at these competitions but an athlete will be able to earn an athlete I.D. criteria.*
- 3) pre-world's preparations: a greater emphasis will be placed on the preparation of those fencers that are selected to the Junior/Cadet Worlds. There will be a training camp with the Junior National coaches immediately after the Junior World Cup in Montreal that will be mandatory for all fencers that wish to be considered for selection for the Junior/Cadet World Championships. This camp will allow the National coaches to work with the selected athletes (and their personal coaches) to establish a training plan that will help them prepare for the Worlds.*

In addition, at page 7 of the National Team Booklet:

#### ***D. Team Preparation Prior to the World Championships***

##### ***I. Post - Montreal Junior World Cup Training Camp.***

***A two-day training camp will be held on January 26 and 27 at the Montreal NTC located at Centre Claude Robillard. This camp is mandatory for all fencers in order to be considered for selection to the 2004 Cadet/Junior World Championships.***

*Any fencer that may be in a position to be selected for 2004 Cadet/Junior World Championship should make plans to attend this camp. The camp is scheduled to take place from 9:00 a.m. to 5:00 p.m. on Monday and Tuesday. Therefore, all athletes should make prior arrangements to miss school or work on these days.*

*Athletes are responsible for their own lodging for this camp and their personal coaches are invited to attend.*

Finally, on page 10 of the National Team Booklet:

#### **4. SELECTION POLICIES**

##### **A. Eligibility for Selections**

*To be eligible for a selection, an athlete must:*

- 1. Be registered in the CFF HP Program (see application procedure on page 30.).*
- 2. meet the minimum criteria for that particular selection.*
- 3. Athletes who are receiving AAP support from Sport Canada must also sign the carded athlete agreement.*

***The HP Selection Committee will confirm all team selections, however, it reserves the right to withdraw an athlete from any selection:***

- 1. if the athlete has not taken part in the mandatory training camp organized by the CFF prior to the event.***
- 2. if the athlete has not fulfilled his/her responsibilities as identified in the "Carded Athletes Agreement".***
- 3. if the athlete has not fulfilled his/her responsibilities as identified in the "CFF Code of Conduct".***

It is clear from the information contained in the NTB that the CFF considered attendance at the Montreal training camp a very important part of the preparation of their Junior Team for the World Championships as well as for the preparation of their Junior athletes in general.

Once CFF, the National Federation, set the selection criteria, it had the duty to properly communicate the criteria to the relevant athletes.

It was acknowledged by all parties that athletes were notified of the mandatory training camp through the NTB only. Athletes acknowledged, in their application forms to become part of the

high performance program, that they were required to read the booklet. Those documents signed by both Kamil and Ursula have been produced.

Strictly speaking, the CFF would appear to have provided clear notification to the athletes of the mandatory camp. The camp and the reason for it is well described in the NTB. There is also sufficient information upon which to make travel and accommodation plans.

It is important that athletes, even young athletes, take responsibility for informing themselves about the requirements for selection, just as they learn the rules of their sport. Having said that, the question has to be asked why at least four athletes who should have been at the camp, missed this mandatory camp. On this point, I was not comforted by the data provided by CFF, in support of their position that the selection criteria had been applied consistently across the board. The data showed the number of other athletes who did not make the team due to what the CFF called, "technicalities". Surely this is an indication of some problems within the organization and communication of the High Performance team.

Especially when dealing with Junior athletes, it seems both the CFF and the athletes' personal coach could have been more helpful in assisting them in understanding the requirements for eligibility for the World Championship team. I note in the NTB that the coach of the athlete is also required to sign the athlete's training booklet, which is submitted to the National Team High Performance director. I would expect the coach who is working out the program for these athletes to attend the World Championship should be familiar with the requirements that are set out in the NTB.

Danek, the High Performance Coordinator advised that they do not have the resources to review all of the 114 high performance athletes' training and competition plans to ensure they include all the mandatory components.

Mr. Karbonowski was most unfortunate in the timing of his realization that the camp was mandatory. He stated in his oral testimony that he had even tried to change his exam on the Friday prior to the World Cup but was unable to do so. It is apparent, therefore, that he was aware of the camp at least the week before. He did not return to the camp on the Monday afternoon as Janek had understood he would. I find that the snowstorm was not an issue. The agreement was that he would be at the camp by Monday evening, which was before the snowstorm occurred. Kamil's evidence was that he did not even intend to arrive until Tuesday morning.

Ms. Bero's experience was also extremely unfortunate in that she did not pay sufficient attention to the NTB and her mother reasonably believed she had done her due diligence in attempting to find out what the steps were for Ursula to make the World Championship Team. Mrs. Bero did not ask the right question and the CFF High Performance Director did not understand the full significance of the question.

This was an extremely difficult decision to make. Two obviously dedicated and talented young athletes will miss this opportunity to attend the 2004 World Junior/Cadet Championships. I hope

they can overcome this disappointment and continue with their careers. I also hope that steps are taken by them and all the parties to minimize the chances that such circumstances occur again.

However, the CFF set selection criteria which were appropriate and clearly set out in the NTB. At least 44 athletes did attend the mandatory camp. It is important that in selection, CFF apply the standards consistently and fairly. It would not be fair to the other athletes who fulfilled all the criteria to make exceptions for a few athletes who did not, through some fault of their own, however unintentional. To do so would introduce a degree of arbitrariness in selection, which should be avoided.

For all of these reasons, I deny the appeals of Kamil Karbonowski and Ursula Bero and confirm the decision of the CFF.

Dated at Vancouver, British Columbia on March 30, 2004

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Tricia C. M. Smith, Arbitrator