

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

NO: SDRCC 20-0455

BETWEEN:

LISA FERGUSON

(CLAIMANT)

AND

EQUESTRIAN CANADA

(RESPONDENT)

AND

COLLEEN LOACH

(AFFECTED PARTY)

DECISION

Appearances:

Carlos Sayao and Julia Miller

Counsel for the Claimant

Michelle Kropp

Counsel for the Respondent

No one appeared on behalf of the Affected Party

1. On June 11, 2020, I was selected by the parties as an Arbitrator and appointed under Article 6 of the *Canadian Sport Dispute Resolution Code* (the “Code”) to hear Lisa Fergusson’s appeal of Equestrian Canada’s (“EC’s”) decision not to nominate her for Senior Card funding under the Athlete Assistance Program (“AAP”) for the 2020 carding cycle.
2. On October 2, 2020, I issued my decision to allow Ms. Fergusson’s appeal, with reasons to follow. These are my reasons.

BACKGROUND

3. EC is a not-for-profit corporation and is recognized by Sport Canada and the Federation Equestre Internationale (“FEI”) as the national governing body for equestrian sport in Canada.
4. Ms. Fergusson is an Eventing equestrian athlete. She represented Canada at the FEI World Equestrian Games (“FEI WEG”) in 2018, and received a Senior Card for the 2019 carding cycle.
5. Colleen Loach, the Affected Athlete, is an Eventing athlete who has represented Canada at numerous international competitions, including the 2016 Olympics, the 2018 FEI WEG and the 2019 Pan American Games.
6. On December 17, 2019, EC notified Ms. Fergusson that she had been nominated to receive Development (“D”) Card funding for the 2020 carding cycle and that Sport Canada had approved her nomination.
7. Ms. Fergusson challenged EC’s decision, contending that she should have been nominated for a Senior Card.
8. Pursuant to Equestrian Canada Discipline, Complaints and Appeal Policy, EC’s Complaint Manager appointed a single member panel to hear the appeal (the “internal appeal panel”).
9. In its May 8, 2020 decision, the internal appeal panel concluded that the nomination criteria had been appropriately established, and that the High Performance Advisory Group (“HPAG”) had interpreted the nomination criteria correctly.
10. Ms. Fergusson filed an appeal of that decision on June 5, 2020.

Preliminary Issue

11. The parties disagreed about the scope of this Tribunal's review. On July 14, 2020, I issued a decision finding that the Tribunal owed no deference to the decision of the internal appeal panel. I concluded that a National Sport Organization ("NSO")

[...] cannot restrict or confine the power of SDRCC to subject an NSO's carding recommendation to a robust and probing examination, either by creating an internal appeal process or a review process, to which any degree of deference is owed.

The appeal will proceed as a review of the HPAG decision.

12. EC has the initial burden of establishing that the carding criteria were appropriately established and that the carding decision was made in accordance with the criteria. If that burden is satisfied, the onus then shifts to Ms. Fergusson to demonstrate, on a balance of probabilities, that she should have been nominated in accordance with the criteria. (*Code* Section 6.7)
13. Ms. Fergusson does not dispute that the carding criteria were appropriately established. She contends that EC's decision was unreasonable because it failed to follow, misinterpreted and misapplied the criteria. Specifically, she contended that EC could not have nominated Ms. Loach for a card because she did not meet the carding criteria.
14. Ms. Fergusson also argued that EC miscalculated one of the four prioritization factors set out in the carding criteria by including two competitions at which she had withdrawn. Ms. Fergusson argued that she had relied on a representation made to her by EC's Eventing Chair of the HPAG that withdrawing following the dressage portion of the competition would not negatively impact her (the "Estoppel argument").
15. Ms. Fergusson further asserted that the carding decision was biased in favour of Ms. Loach.
16. I conducted an oral hearing in this matter on August 18, 2020. Following the oral hearing, Ms. Fergusson withdrew her allegation that the decision was biased.

The Carding Criteria

17. EC nominates athletes for carding by way of a two-step process. Each December, athletes are selected to the National Team Program ("NTP") High Performance Squad ("HPS") ("NTP HPS"). For the 2020 HPS, eligible athletes were ranked

based on their 2019 CCI (Concours Complet International, a competition rating) results from January 1, 2019 to November 20, 2019.

18. Once selected to the HPS, athletes are then selected to either the National Squad or the Development Squad. The HPS Criteria provides that National Squad athletes are eligible to be nominated for AAP funding (carding) at the Senior level, while athletes selected to the Development Squad are eligible to be nominated for a Development Card.

Equestrian Canada National Team Program - 2020 Eventing High Performance Squad Criteria

19. The purpose of the NTP is set out in Paragraph 1.2:

The purpose of the National Team Program - is to increase the competitiveness of the athlete pool and the number of Canadian athletes achieving international podium performances.

There may be a maximum number of athletes selected to the Eventing High Performance Squad, with priority given to the National Squad – the National Squad will be selected first with any remaining positions to be allocated to the Development Squad.

If there are more qualifiers than positions available, selections to the National or Development Squad will be based on consideration of the Reliability Rating which is the percentage of eligible competitions with a clear cross country jumping performance (no jumping penalties).

20. Section 2 of the NTP HPS Criteria outlines the resources and benefits available to NTP athletes, including eligibility to be nominated for carding.

21. Section 3 of the HPS Criteria provides:

3. High Performance Squad Criteria

Selection of the NTP Eventing High Performance Squad will take place annually in December [...]. In making such selection, the Eventing HPAG will take account [sic] both the Performance Criteria and the Other Criteria as outlined in this document.

Athletes on the most recent World Equestrian Games Team and/or Olympic Games team and/or Pan American Games Team also become invitees to the High Performance Squad. [my emphasis]

3.1 National Squad

Performance Objective

The Eventing High Performance National Squad consists of combinations committed to and capable of producing individual performance results that contribute to a top 6 team result at the next Championships (ie World Equestrian Games and Olympic Games).

Performance Criteria

Athlete and horse combination (sic) with proven form at 4* and/or 5* long or short competitions in the previous 12 months that demonstrates that the combination is capable of being competitive at the 2020 Olympic Games by achieving the following result at any competition during the qualifying period:

- CCI 5* - L-33 dressage, zero jumping penalties and maximum 12 time penalties cross country, maximum one rail show jumping; or maximum combined final score 49
- * CCI 4* - L/CCI 4* - S-33 dressage, zero jumping penalties and maximum 7 time penalties cross country, maximum one rail show jumping; or maximum combined final score 44

OR

A ** SCORE INDEX at 2019 – 5* and 4* competitions of 44 or better

Carding Nomination Criteria

22. EC's 2020 carding cycle is from January 1, 2020 to December 31, 2020. The results under consideration for the nomination of athletes for the 2020 Carding cycle were from FEI Eventing Competitions which took place between January 1, 2019 and December 31, 2019.
23. The selection decisions are essentially a data analysis exercise, with the performance requirements for each of the two Squads (National Squad and Development Squad) prescribed by the Criteria.
24. The Carding Nomination Criteria for the Sport Canada Athlete Assistance Program, 2020 Carding Cycle, for the Eventing discipline provides for, among other things, the number and types of cards and the priority of Nominations. There are two Carding levels – Senior and Development, and there are three Criteria levels under which athletes may be nominated: Senior International,

Senior National, and Development. The Criteria used for prioritization of the Cards is as follows:

- a. Athletes who met the Senior International (SR1/SR2) card criteria
- b. If fewer than four (4) athletes meet the SR1/SR2 Criteria, the top ranked athletes who meet the Senior (SR/C1) card criteria until up to a maximum of four (4) athletes are nominated at SR1/SR2/SR/C1
- c. Up to a maximum of the top two (2) ranked athletes who meet the Development (D) card criteria
- d. The next ranked athlete who meets Senior (SR/C1) card criteria
- e. The next ranked athlete who meets Development card criteria.

25. Appendix 1 outlines the eventing specific carding criteria:

12 SENIOR CARD

12.1 Senior National criteria as set by Equestrian Canada. Senior (SR/C1) Cards are awarded for one carding cycle (one year)

12.2 Senior National cards are awarded to NTP -Eventing High Performance Squad athletes on the basis of international results

12.3 Senior Card support Athletes with the potential to reach International Senior Card status

12.4 In order to be eligible for nomination at the SR/C1 level, an athlete must:

- Achieved (sic) the performance results to be named to the NTP-2020 Eventing High Performance National Squad

And

- In combination with an international horse must have completed a CCI 5*-L/CCIO5*-L or CCI 4*-L/CCIO4* - L eventing competition and have achieved a FEI Minimum Eligibility Requirement as defined by current FEI regulations.

12.5 Prioritization

Eligible athletes will be ranked for AAP nomination based on their performance in FEI CCIO/CCI5*-L star and CCIO/CCI4*-L/CCI 4*-S competitions during the qualifying period. In determining the ranking of athletes Equestrian Canada will consider the following factors:

Level of Competition	CCI5*-L	CCI4*-L/	CCI4-S/
Level of the competition result obtained		CCIO4*-	CCIO4*S
<p>Consistent Ability to Achieve Target Results</p> <p>Performance consistency in each of the three individual phases of competition relative to HP Squad targeted result expectations (often in comparison to the winning score at an event or compared to scores expected for podium potential at World Equestrian Games or Olympic Games)</p>			
<p>The Score Index</p> <p>The Score Index is a tool developed by the Eventing data analytics company, EquiRatings, as a means by which to consider an athlete/horse combination's competitiveness in a given time period. This performance value is the average Dressage score, average Show Jumping penalties and its best cross country time (penalties) of the applicable FEI competitions which are added together for the qualifying time period.</p>			
<p>Reliability Rating</p> <p>The Reliability Rating is the percentage of competitions completed within in (sic) the Score Index with a clear cross country jumping performance (no jumping penalties).</p>			

The factors, as presented in the matrix above, are considered on their individual merit, as well as through their combined merit.

EC's Decision

26. I heard evidence from James Hood, EC's Executive Director as well as four members of the HPAG: Fleur Tipton, the Manager, Eventing, an *ex officio* member of HPAG since its formation in 2017 and a member of EC for 32 years; Robert Stevenson, a former Olympic Eventing team member (1992), coach and FEI event organizer who has been the Chair of the HPAG since 2017; James Atkinson, a former member of the Canadian Equestrian Team at the 2002 World Equestrian Games and the 2011 Pan American Games; and Shandiss McDonald, the athlete representative on the HPAG.
27. For the reasons that follow, I do not find it necessary to recount the evidence of the parties in any detail. The evidence relating to the issue of bias is not relevant

given that the allegations were withdrawn following the evidentiary portion of the hearing. I have also found it unnecessary to set out any of the evidence related to Ms. Fergusson's estoppel argument in light of my reasons on the first ground of appeal. My decision is based solely only on the application and interpretation of the criteria and the undisputed evidence.

28. In her capacity as Manager, Eventing, Ms. Tipton compiles and maintains data, including scores and classifications, for the Canadian athletes from the Eventing competitions at which they competed, in order to assist the HPAG team selection and carding decisions. She compiled the results for each horse and athlete combination and presented the data to HPAG at its December 2, 2019 meeting.
29. The HPAG considered the athletes and horse combination metrics to determine which athletes were eligible for the HPS and to be nominated for carding. Because the HPS does not have a maximum number of athletes that can be placed on it, all eligible athletes, including Ms. Fergusson and Ms. Loach, were named to the 2020 HPS.
30. The HPAG next identified five athletes, including Ms. Fergusson but not Ms. Loach, who had met the target scores for the National Squad.
31. The HPAG members agreed that Ms. Loach's performance score index was 44.1, .1 above the qualifying standard prescribed in the High Performance Squad Criteria and that it could not "round down" that score in order for Ms. Loach to meet the qualifying standard. Ms. Tipton, Mr. Hood and Dr. Stevenson all agreed that Ms. Loach did not achieve the performance results to be named to the National Squad based on her 2019 competitions. Indeed, at its meeting on December 2, 2019, the HPAG were of the view that Ms. Loach and another athlete had not achieved the necessary target scores to be placed on the National Squad and thus be recommended for a Senior Card.
32. The HPAG also agreed that if an athlete did not meet the prerequisites set out in Section 12.4 of the Senior Card criteria (the performance results), they could not be prioritized, or ranked according to the Section 12.5 factors.
33. At its December 3, 2019 meeting, HPAG decided that although Ms. Loach had not met the Section 12.4 criteria, she and one other athlete could nevertheless be named to the National Squad based on Section 3 of the High Performance Squad Criteria; that is, their participation in past competitions. With respect to Ms. Loach, HPAG considered her participation at the 2018 WEG and 2019 Pan American Games.
34. The HPAG reconsidered its decision of December 2, 2019, and decided to select Ms. Loach and the other athlete for the National Squad.

35. The HPAG then ranked athletes in order for the carding nominations. HPAG determined that one of the five athletes originally selected for the National Squad could not be nominated for carding due to a conflict of interest.
36. The HPAG determined that because Ms. Loach had previously been carded at the Senior Level for more than two years, she was therefore ineligible for nomination for a Development Card under Section 5.2.2 (which provides for maximum number of years of support). The HPAG decided that Ms. Loach should be nominated for a Senior Card. HPAG decided to nominate Ms. Fergusson for a Development Card in order to maximize the available funding for eligible athletes.

The Code

37. The Tribunal has held that carding nomination appeals are akin to judicial review, as opposed to appeal or *de novo* hearings, and that deference is owed to the expertise and experience of sporting authorities. (*Mehmedovic et al v. Judo Canada* SDRCC 12-0191) The applicable standard of review is that of reasonableness, not correctness.
38. The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov* (2019 SCC 65) does not change this standard of review.
39. In *Vavilov*, the Court held that a reasonableness review is a "robust form of review" in which the reasons of the decision maker must demonstrate that he or she has considered the facts and governing scheme relevant to the decision as well as any past practices.
40. While deference is owed to the experience and expertise of sporting authorities, a National Sport Organization must nevertheless follow its own rules making carding or team selection decisions. Where a sport organization has made a decision that is not in accordance with its own rules, that decision cannot be found to be reasonable or to "fall within a range of possible outcomes," and the Tribunal has the power to correct such errors. (see *Kraayeveld v. Taekwondo Canada*, SDRCC 15-0253, *Larue v. Bowls Canada Boulingrin*, SDRCC 15-0255 and *Carruthers v. Speed Skating Canada*, SDRCC 16-0309)

ISSUES ON APPEAL

41. The issues on review are:

- a. whether EC failed to follow its carding criteria in nominating Ms. Loach for a Senior Card when she was ineligible for such a card; or, in the alternative,
- b. whether EC reasonably applied the carding criteria; specifically, by misapplying the prioritization factors set out in Section 12.5 of the Carding Criteria.

ANALYSIS

Did EC fail to follow its carding criteria?

42. Section 12.4 of the Carding Criteria requires that all athletes nominated for a Senior Card must have obtained performance results to be named to the 2020 Eventing High Performance National Squad. Those performance results are set out in Section 3.1 of the Squad Criteria.
43. There is no dispute that Ms. Loach did not meet the performance results to be named to the National Squad. Section 3.1 provides that the athlete and horse combination must achieve a score of 44 at any competition during the qualifying period. The evidence is that Ms. Loach's best result at 2019 competitions was 44.1, .1 over the National Squad Performance Score index of 44.0.
44. Section 3 provides only that Athletes on the most recent WEG Team and/or Olympic and or Pan American Games Team may become **invitees to the High Performance Squad**. As Ms. Loach was a member of the 2018 WEG Team, she was eligible to be invited to the HPS. However, there is nothing in Section 3 that permits EC to automatically select Ms. Loach for the National Squad and thus make her eligible for nomination for a Senior Card. Having been found eligible to be invited to the HPS, HPAG then had to make a second assessment – that is, to determine which Squad she was eligible for based on performance criteria.
45. Ms. Loach did not meet the Performance Criteria outlined for the National Squad as she did not achieve a score of 44 or better at 4* or 5* competitions in the previous 12 months. She also did not meet the performance results to be eligible for nomination at the Senior Card level under Section 12.4. In order to be eligible for nomination for a senior card, an athlete must achieve performance results (which Ms. Loach did not do) and achieve FEI Minimum Eligibility requirements. I find that Ms. Loach did not meet a condition precedent to receiving a Senior Card as prescribed in the criteria, namely, meeting the performance results for the High Performance National Squad.
46. Furthermore, Section 12.4 of the Carding Criteria requires that, to be eligible for nomination for a Senior Card, athletes must have achieved the performance results to be named to the NTP 2020 Eventing HP National Squad. Performance

results relevant to the 2020 Carding Criteria are restricted to the 2019 competitive season.

47. Ms. Loach did not achieve the specified performance results during the 2019 competitive season. The results that earned Ms. Loach a spot on the 2018 WEG team, which entitled her to be invited to the HPS, were achieved in competitions held in 2017 and 2018. It is not reasonable to conclude that an athlete can rely on performance results from up to three years prior to qualify for 2020 carding.
48. Ms. Loach's participation at the 2018 WEG did not take place within the 12 months preceding the nomination.
49. I also conclude that she did not obtain the required results during the "qualifying period." Even though "qualifying period" is not defined in the Criteria, given that carding is an annual process, it is not logical to infer that the qualifying period is anything other than the 2019 competition year. Furthermore, Dr. Stevenson's evidence was that "each athlete's competitive results from the previous year are considered on merit, with no roll-overs from years past. In this way favoritism is avoided and each athlete starts each season with a clean competitive slate such that any athlete will have an equal opportunity to be awarded funding through the process."
50. EC nominated Ms. Loach for a Senior Card through the application of Section 3 of the HPS Criteria. I find that EC erred in making this decision, as Ms. Loach did not meet the criteria. I find, therefore, that EC's decision to award Ms. Loach the fourth and final Senior Card to constitute a misapplication or misinterpretation of the Carding and Squad criteria.
51. In light of my conclusion on this point, I find it unnecessary to address Ms. Fergusson's second and alternative argument, that HPAG incorrectly/wrongly weighted the reliability factor.
52. I therefore set aside EC's decision to nominate Ms. Loach for a Senior Card.
53. While I would normally be inclined to refer the matter back to the HPAG to make a new decision, given that I conducted a lengthy oral hearing, I conclude that I need not do so in this case. I heard sufficient evidence to permit me to make an Order that EC nominate Ms. Fergusson for a Senior Card. The Carding Criteria permits EC to award up to four Senior Cards. The evidence was that Ms. Loach was initially found to have met the criteria for the National Squad and thus for a Senior Card. Given that I have concluded that Ms. Loach could not have been nominated, Ms. Fergusson is the only other athlete who met the criteria.

CONCLUSION

54. The appeal is allowed. I Order that Ms. Fergusson be nominated for a Senior Card for the 2020 carding cycle, with retroactive effect to January 1, 2020.

COSTS

55. Under Section 6.22 of the *Code*, an Arbitrator has the power to make an award of costs.

56. I am not inclined to make an award of costs. However, if either party wishes to make such application, they should do so no later than 4:00 p.m. (EDT) October 20, 2020. The submission should address, among other things, the outcome of the proceedings, the respective financial resources and conduct of the parties and any settlement offers.

57. If costs are applied for, and the party against whom costs are sought opposes the request, the responding party shall have until 4:00 p.m. (EDT) on October 27, 2020 to file a written response.

DATED: October 13, 2020, Vancouver, British Columbia

A handwritten signature in black ink, appearing to read 'Carol Roberts', written in a cursive style.

Carol Roberts, Arbitrator