

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

NO: SDRCC 24-0706

Jessica Dowling

(“Claimant”)

And

Gymnastics Canada

(“Respondent”)

And

**Jessica De Sousa
Maddison Hajjar
Azaraya Ra-Akbar
Reese Wilson
Frédérique Sgarbossa
Shallon Olsen**

(“Affected Parties”)

Before: Matthew R. Wilson, Arbitrator

Attendees at the hearing:

For the Claimant: Michael Robson
Jessica Dowling
Jim Dowling
Ellen Dowling

For the Respondent: Christian Gallardo
Jenny Trew

For the Affected Parties: Katerine Dussault (Frédérique Sgarbossa)
Jared Goad (Shallon Olsen)
Marcia Ra-Akbar (Azaraya Ra-Akbar)
Richard Hajjar (Maddison Hajjar)
Johanne Soucy (Maddison Hajjar)

Philippe Germain – Interpreter
Alexandra Lojen - SDRCC

DECISION

OVERVIEW

1. This appeal, filed by Jessica Dowling, challenges the decision of the Women's Artistic Gymnastics ("WAG") of Gymnastics Canada (GymCan) to deny her funding pursuant to the 2024 Athlete Assistance Program ("AAP") Carding nominations.
2. Ms. Dowling filed an appeal with the Sport Dispute Resolution Centre of Canada ("SDRCC") on February 28, 2024. There was no objection to my jurisdiction.
3. I held a preliminary call with the parties on March 19, 2024 to review the arbitration process. The parties agreed to proceed by way of written submissions and rely on the documents filed with the SDRCC. It was also agreed that a short hearing would be held so that I could ask any clarification questions. This hearing was held by videoconference on April 5, 2024. The Affected Parties were identified, given appropriate notice and participated in the proceeding.
4. On April 12, 2024 I issued a short decision dismissing the appeal with reasons to follow pursuant to Article 6.12 of the Canadian Sport Dispute Resolution Code (the "Code").
5. These are the reasons for my decision.

Background on the Carding Process

6. The WAG program of GymCan had the equivalent of 15 SR cards or \$317,700 to be allocated in accordance with the AAP. The process for allocating cards is set out in the Women's Artistic Gymnastics AAP Carding Process for 2024 ("the AAP Carding Process"). This is a 22-page document setting out the criteria and the process for allocating the cards.
7. In a memo to the community dated December 13, 2023, Jenny Trew, Program Manager, announced the allocation of the first 12 cards. She also identified that

the Carding Working Group (“CWG”) could not reach a consensus on the other cards and there were also questions about the validity of two of the group members.

8. An update was announced on January 30, 2024 whereby a more detailed explanation of each nomination was provided. It was also announced that the CWG nominated another athlete for a Health Related Reasons Card (“HRR Card”). Two other athletes were denied HRR Cards. The analysis then focused on the nomination of the remaining cards, which are referred to as Discretionary Cards.
9. The memo explained that since GymCan had not circulated the application in a timely manner, it considered all athletes on the High Performance list. This decision has been raised by the Claimant as a problem with the decision-making process. While I accept that it is a procedural flaw in the process, there is nothing inherently unfair by considering all athletes since GymCan had not circulated the applications on time. In my view, it was a fair response to address an error.
10. It was further explained that since it was an Olympic year, the CWG felt that the remaining 4.7 SR cards should be allocated to Senior athletes with the potential to contribute to Olympic success¹. But since there was also concern for the Los Angeles 2028 quadrennial, and only one junior aged athlete in 2024, the CWG considered both Senior and Junior athletes. Therefore, the CWG used the Schedule E – Combined Discretionary Card Assessment Criteria. It was affirmed in the memo that the CWG considered the “...potential to bring a significant contribution towards the achievement of the performance objectives of the WAG Program, in particular at the 2024 Olympic Games.” This was a factor in Schedule E.
11. The CWG determined that the Claimant was ineligible for a card under Section 10 of the AAP Carding Process and thus was not evaluated under Schedule E.

¹ This later became 3.7 cards after GymCan accepted a late filed application. It explained that it had done so because it was late in sending out the applications.

The Claimant challenges this assessment and that is the crux of the appeal before me.

ANALYSIS

12. There is no dispute that GymCan had the onus of demonstrating the carding decision was made in accordance with the criteria stipulated by the AAP Carding Process. Section 6.10 of the Code states as follows:

6.10 Onus of Proof in Team Selection and Carding Disputes

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.

13. In *Christ v. SSC – SDRCC 16-0298*, Arbitrator Palamar summarized the relevant considerations as identified by Arbitrator Pound in *Larue v. Bowls Canada Boulingrin, SDRCC 15-0255* (Pound, QC):

40. In *Larue v. Bowls Canada Boulingrin, SDRCC 15-0255* (Pound, QC), an accomplished athlete who in the past had been selected to the national team many times, challenged a decision not to select him again. Arbitrator Pound noted that the decision made by the team selection committee involved a great deal of discretion and so the applicable standard of review was that of reasonableness and not correctness. He referred to *Dunsmuir v. New Brunswick, [2008] 1 SCR 190*, in which the Supreme Court of Canada determined the difference between the terms "correct" and "reasonable", and explained what level of deference should be applied by a reviewing body respecting a decision made by an administrative tribunal.

41. Applying *Dunsmuir* in *Larue*, Arbitrator Pound concluded that there were three considerations that should guide an arbitrator when applying the "reasonableness" test. I paraphrase him as follows:

1. absent cogent evidence of error, he/she should be deferential, because a team selection committee composed of experienced experts "knows its business";
2. the arbitrator cannot rewrite the high performance policy or team selection criteria with a view to "improving" things or substituting a personal view of what they should be, because the organization knows the sport better than any arbitrator could;
3. the arbitrator's role simply is to determine if the team selection process was decided in accordance with the selection criteria and whether that outcome fell within a range of possible and reasonable outcomes, defensible in light of the facts and the team selection criteria.

14. As will be reviewed further below, GymCan provided a complete explanation for the process utilized to make its carding decisions. While it candidly acknowledged that there were procedural errors, it presented a convincing argument that such errors were relatively minor and not prejudicial to the Claimant.

15. The Claimant's appeal is focused on the issuance of the Discretionary Cards that were available as she accepts that she was not eligible for one of the 8 Senior Cards.

16. There is a dispute about whether Section 10 ought to be applied and, if it is applied, the extent to which it should be given weight.

17. The CWG considered Section 10 in their evaluation process. Section 10 reads as follows:

10.0 Number of Years at the Senior Card Level

An athlete is normally expected to improve each year to maintain a Senior card based on Sport Canada's AAP Policies. In principle, athletes who have been on the High Performance Senior list for five years or more must rank among the top 12 athletes on the carding Objective Point Ranking list to be considered for nomination for the AAP.

An athlete who has been carded for five or more years at the SR or C1 level, who has not achieved the SR1/SR2 level within the past two years or who is not ranked in the Top 12, will be reviewed by the Carding Working Group to determine if continued progress or contribution to the team is demonstrated.

This is further defined as meaning that the athlete's D scores and final scores are at a level such that her scores could contribute to the team total at the Olympic Games/World Championships. There must also be national or international competition results that clearly show an increase in both D scores and final scores over previous D scores and results on most of the apparatus. An exception would apply if the athlete is already performing at a level that is consistent with the expected standards to reach a World Championship final or support the team in reaching a Team final.

18. The Respondent explains that Athletes who have been on the High Performance Senior list for five years or more must rank in the top 12 athletes on the carding Objective Points Ranking list to be considered for nomination. A second criterion is that the CWG will review the athlete's performance to determine if continued progress or contribution to the team is demonstrated. The Respondent further explains that the athlete's D scores and final scores are reviewed and there must be national or international results that clearly show an increase in both D scores and final scores from previous events on most of the apparatus.
19. When applying the criteria to the Claimant, the CWG concluded that in 2023 the Claimant was not in the top 12 Objective Ranking. The CWG further determined that the Claimant did not meet the expectation to improve based on her 2022 and 2023 results. This is described in considerable detail in the 2024 AAP Carding Nominations document (January 30, 2024). It referenced the Claimant's scores in the 2023 Carding Cycle, the 2022 World Championships, and the 2022 Mersin Challenge Cup. The CWG also referenced her placing at the 2023 Canadian Championships and her score at the Cairo World Cup in April 2023.
20. Based on this analysis, the CWG concluded the following with respect to the progression of scores:

Her scores from the Mersin Challenge Cup in October 2022 compared to her scores in 2023 do not show a forward progression, but rather a decline.

21. The CWG decided that despite being ranked 5th on the Discretionary Points Ranking, the Claimant would not be nominated because she had not shown sufficient improvement.
22. The Claimant argues that Section 10 is not a “bright line” eligibility criterion. Rather, the Claimant characterizes it as expressing a “principle”. She argues that the CWG erred in using Section 10 to exclude the Claimant from eligibility.
23. I can find no reason why Section 10 would not apply. On its face, it is clearly intended for the allocation of all Senior Cards. It is consistent with the discretion identified in Section 9, which reads, in part:

Discretionary card allocation is based on additional criteria beyond ranking on the Objective Point Ranking list. An athlete may receive a Discretionary card even if she is ranked lower than another athlete not yet nominated on the Objective Point Ranking List of her category.

24. A second reference to the discretion of the CWG found in Section 9 reads as follows:

In the case of a combined assessment, nominations will be based on the expert assessment of the Carding Working Group that the athlete has the potential to bring a significant contribution towards the achievement of the performance objectives of the WAG Program.

25. It would be an error, in my view, to ignore the application of Section 10.
26. There is nothing inherently unfair with the CWG applying its discretion. As arbitrators have recognized, there is a level of expertise to be exercised by the National Sporting Organization in pursuing the objectives of Sport Canada in its funding allocation and those assessments may require an element of discretion. The AAP Carding Process contemplates that discretion being exercised through the expertise of the CWG. As articulated by the Respondent, its application of

Section 10 is consistent with Sport Canada's statement that an athlete is expected to improve each year to maintain a Senior Card. As demonstrated in its analysis, briefly described above, it considered relevant scores and results in an appropriate time period.

27. I am unable to accept the Claimant's argument that Section 10 somehow expresses a "principle" but cannot be applied to exclude the Claimant. It either applies or it does not. It would be problematic to recognize Section 10 as a "principle" but not apply it where an athlete is not shown continued improvement or progress. Moreover, there is nothing in Section 9 that precludes the application of Section 10.

28. While the Claimant disputes that Section 10 has any application, she argues that her individual circumstances ought to have been considered. Specifically, she did not compete in the Elite Canada competition in 2023 for health reasons. Her request for consideration of her scores from the Mersin Challenge Cup for the Objective Points Rankings was denied because it occurred outside of the applicable competitive window. The Claimant overcame losing two coaches during the competitive year while recovering from an injury and thus shows a strong prospect for improvement.

29. While I am sympathetic to the Claimant's position, her arguments all favour a more discretionary approach and consideration of factors outside of the AAP Carding Process. It would be inherently unfair to other athletes, and speculative, to consider factors that are not outlined in the AAP Carding Process or in Section 10. The Claimant made the following submission:

...Jessica's context shows that, but for events beyond her control, she would have earned the four additional points needed to be in the top 12 ...

30. In essence, the Claimant is stating that she was close to being in the top 12 of the Objective Points Rankings and that this should have been factored into the application of Section 10. While I appreciate the Claimant's perspective, it ignores the WAG's broader objective of identifying and providing funding to

athletes who “...demonstrate the potential to meet the Senior National and International criteria” (see 1.1 Goals, Objectives and Benefits of the Program in the AAP Carding Process). The CWG is entitled to some discretion, as explained above, in the pursuit of that objective.

31. With respect to the Claimant’s assertion that other athletes were not considered under Section 10, I accept the Respondent’s assertion, as demonstrated in its material, that another athlete was considered under Section 10. The other athlete ranked in the top 12 and was thus not excluded.

32. In conclusion, I find the Respondent’s application of Section 10 to be reasonable.

Schedule E

33. As this case was primarily focused on the application of Section 10, it is not necessary to address all of the points raised about the application of Section E. Briefly, the Respondent explains that it applied Schedule E on the basis that the CWG has the discretion to allocate cards to Senior athletes only or allocate cards to a “combined assessment of Junior and Senior athletes” (Section 6.4 of the 2024 Carding Process). The Respondent points to Section 9 of the 2024 Carding Process which stipulates that Schedule E shall be used “...for a combined assessment of Juniors and Seniors”.

34. It is under Schedule E that the Respondent argues for deference to be given to its expert panel. In particular, Schedule E states as follows:

The Carding Working Group will use the discretionary points for Senior and Junior to compare the athletes and discretionary assessment will be based on the committee’s ability to assess an athlete’s overall contribution to the NT and potential to achieve the objectives as stated in section 1.0.

35. The Respondent explains that the CWG worked through each of the athletes and removed athletes who were not eligible. The Claimant was not eligible because of Section 10.

36. I accept the Respondent's submission that it was not inappropriate to apply Schedule E as an evaluative tool. Moreover, since the Claimant was ineligible under Section 10, there is no merit to the claim that Schedule E was applied unfairly.

Other Issues

37. The Claimant has raised other concerns about the decision-making process. These can be dealt with summarily.

38. The Claimant asserts that the Respondent sent out the application forms late and then allowed late applications. The Respondent acknowledges that it sent out the forms late and that it sought to be fair in allowing the late applications. I find no issue with the Respondent's explanation even if it meant an imperfect process. It certainly does not mean that the Claimant was dealt with unfairly.

39. The Claimant noted procedural issues with the meeting held by the CWG. However, she does not assert (and it is not apparent) that the Claimant was prejudiced because of those issues. In bringing forward these procedural issues, the Respondent would be wise to address them in the future. But again, these issues did not impact the outcome.

40. Finally, the Claimant asserts that one of the Affected Parties who received a card – Azaraya Ra-Akbar – was not eligible because of her citizenship status. The Affected Party filed submissions, supported by the Respondent, that they were a Canadian citizen at the relevant time. The Claimant provided no evidence to support its assertion and it is dismissed as having no merit.

SUMMARY

41. For the foregoing reasons, the Appeal is denied.

42. The matter of costs was not discussed during the hearing. My inclination would be to not award costs. However, I retain jurisdiction to address any submissions

on costs, provided such submissions are filed no later than seven days from issuance of these reasons.

Signed this 22nd day of April, 2024.

Matthew R. Wilson

Arbitrator