

NEW ERA ADR

Case No. 24061101

In the Matter of the Arbitration between

SANTO CONDORELLI, Claimant

and

USA SWIMMING, INC., Respondent

and

JOSEPH HUNTER ARMSTRONG, BRENT PINFOLD, and Others, Affected Athletes.

OPERATIVE AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated by New Era ADR and in accordance with the Ted Stevens Olympic and Amateur Sports Act ("ASA"), 36 U.S.C. §220505 et seq., Section 9 of the United States Olympic and Paralympic Committee ("USOPC") Bylaws (effective April 1, 2024) and the United States Olympic & Paralympic Movement Arbitration Rules ("Arbitration Rules"), and having been duly sworn, and having fully considered the Claimant's June 11, 2024 Section 9 Complaint and Demand for Expedited Arbitration pursuant to Section 9.8 of the USOPC Bylaws; Respondent's June 13, 2024 Answer and Pre-Hearing Statement; and the parties' respective exhibits and witness as well as Affected Athlete Brent Pinfold's written statement during an approximately two-hour video hearing on June 14, 2024, does hereby AWARD, as follows:

Claimant Santo Condorelli is a 28-year-old elite swimmer who is a U.S. citizen and passport holder. Because he competed in a 2020 Tokyo Olympic Games swimming event for Italy on July 29 or 30, 2021 and his request to change his sport nationality to the U.S. was submitted to World Aquatics on June 12, 2023, he currently has an "Italian Sport Nationality." Pursuant to CAS 2023/A/9806, *Cordorelli v. World Aquatics* (June 10, 2024), his sport nationality will change to the United States of America "with effect from 30 July 2024

(inclusive).” He seeks an opportunity to qualify for his first U.S. Olympic Team by competing in the men’s 50 and 100 meter freestyle and 100 meter fly events during the 2024 U.S. Olympic Team Trials – Swimming (“Trials”) on June 15- June 23, 2024 in Indianapolis, Indiana. Based on his Trials competition results, he could earn the opportunity to participate for Team USA in these individual events and/or various relays held on July 30, 2024 or thereafter during the Paris Olympic Games.

Respondent USA Swimming, Inc. is the National Governing Body (“NGB”) recognized by the USOPC for the sport of swimming in the United States. On June 10, 2024, after being notified by Claimant of Sole Arbitrator’s ruling in CAS 2023/A/9806, Respondent informed Claimant as follows: “USA Swimming’s position is that per our Selection Procedures, athletes must be eligible to represent the U.S. as of the date of the Qualifying Competition, which begins June 15. Since Santo is not eligible until July 30, he is not eligible for entry into the Qualifying Competition.” More specifically, Respondent has refused to permit Claimant to participate in its Trials because he currently does not satisfy the nationality requirement of Section 1.1.1 (a) of its ATHLETE SELECTION PROCEDURES 2024 Olympic Games (May 2023; updated November 2023), which stipulates that an “Athlete . . . be able to represent the U.S. in an international competition at the time of the Qualifying Competition” [i.e., Trials]. See also Section 1.2 (b) (“To qualify for the Qualifying Competition, an athlete must, at the beginning of the Qualifying Competition, satisfy the minimum eligibility requirements for an athlete to be considered for Nomination to the Team, which are set forth in Section 1.1”); Section 1.1.4 (f) (“In order to be considered for Nomination to the Team, an athlete must, at the time of Nomination to the Team, be an Available Swimmer”); **DEFINITIONS (“Available Swimmer”)** (““Available Swimmer” means a swimmer who (i) qualifies to be Nominated to the Team in an Event according to these Selection Procedures and has complied with all eligibility requirements set forth in Sections 1.1-1.2 of these Selection Procedures . . . If a swimmer does not satisfy these requirements, then he/she is not considered an Available Swimmer. . .”).

Acknowledging he has the burden of proving at least one of his claims by a preponderance of evidence to prevail in this Section 9 arbitration proceeding, Claimant asserts 1) there is no rational basis for Respondent to preclude his participation in the Trials because he will be eligible to represent the U.S. in swimming events for which he qualifies in the Paris Olympic Games

beginning on July 30, 2024; and 2) by precluding his participation in the Trials, Respondent is impermissibly applying an athlete nationality eligibility requirement more restrictive than World Aquatics' requirement in violation of the Ted Stevens Olympic and Amateur Sports Act ("ASA"), 36 U.S.C. §220522(a)(14) [sic].

In response, Respondent asserts that it is applying its ATHLETE SELECTION PROCEDURES, which were approved by the USOPC and consistent with its Athlete Selection Procedures Template as well as approved by the Chair of USA Swimming's Athletes' Advisory Council, as written in determining that Claimant is ineligible to participate in the Trials. Respondent contends that its legitimate interest in permitting only those athletes who currently have U.S. Sport Nationality and the approvals of its ATHLETE SELECTION PROCEDURES by the USOPC and AAC Chair (who understood "in order for an athlete to compete at the [Trials], they must be eligible to represent the United States in an international competition, as of the beginning of the Trials") provide a rational basis for its application of Section 1.1.1 (a) to deny Claimant's participation in the Trials because he currently has an Italian Sport Nationality. In addition, Respondent contends that permitting only athletes with current U.S Sport Nationality to participate in the Trials is a rational application of Section 1.1.1 (a) that provides an orderly selection process benefiting athletes that eliminates uncertainty and avoids potential chaos. In particular, Respondent notes that "allowing [Claimant] to compete in the Trials presents significant challenges due to his ineligibility for the 4x100 Freestyle Relay" to be held on July 27, 2024 at the Paris Olympic Games with "consequences negatively impact[ing] other athletes and risks denying them the opportunity to compete in the Games." Answer and Pre-Hearing Statement at 12-13.

In reply and to prevent any potential adverse effects on other athletes, Claimant stated during the hearing that he would agree not to compete in the 100 meter freestyle, thereby precluding his ability to qualify to be a member of the U.S. 4x100 Freestyle Relay team during the Paris Olympic Games. His counsel suggested that the Arbitrator could effectively eliminate Respondent's concern about any potential chaos by permitting Claimant to compete in only the 50 meter freestyle and 100 fly events during the Trials and prohibiting his participation in the 100 meter freestyle event.

Pursuant to Section 9.2 of the USOPC Bylaws, the Arbitrator has undisputed jurisdiction to resolve the parties' dispute, specifically, whether Respondent has denied Claimant the

opportunity to participate in the Trials, whose competition results will determine the Team USA swimming team members who will be nominated by Respondent to compete in the 2024 Paris Olympic Games, a “protected competition” pursuant to Section 1.3(x)(ii) of the USOPC Bylaws.

Both parties cite and rely on the same general legal principles in their respective written submissions:

“Section 9 jurisprudence requires [Claimant] to prove [the NGB] breached its approved and published Athlete Selection Procedures for the [2024 Paris Olympic Games], applied them inconsistently to athletes similarly situated, acted in bad faith towards or with bias against [Claimant], and/or violated applicable federal or state laws (e.g., Ted Stevens Olympic and Amateur Sports Act).”

Section 9 Complaint and Demand for Expedited Arbitration at 13 (citing *Hyatt v. USA Judo*, AAA Case No. 01 14 000 7635); Answer and Pre-Hearing Statement at 9 (*Lui v. USA Table Tennis*, AAA Case No. 01-19-0001-4377). They also cite *Beckom et al. v. United States Bobsled and Skeleton Federation, Inc.*, AAA No. 7 190 E 00105 10 JENF (“Claimants must either prove there is no rational basis for the [NGB’s] USOPC-approved twelve objective and subjective criteria for selecting push cart athletes for the 2010 Olympics (which is not their contention), or that these criteria, if rational, were not followed or were applied arbitrarily in violation of their legally protected opportunity to participate . . .”).

After *de novo* consideration of the record evidence (no witnesses testified during the hearing) and the parties’ respective arguments, the Arbitrator concludes that Respondent did not violate any of the legal principles established by the foregoing Section 9 jurisprudence.

The Arbitrator finds that Respondent complied with and applied its published and approved ATHLETE SELECTION PROCEDURES as written, specifically Section 1.1.1 (a), which expressly requires that an “Athlete . . . be able to represent the U.S. in an international competition at the time of the Qualifying Competition” [i.e., Trials]. The Claimant clearly does not currently meet this requirement.

Claimant does not contend that Respondent inconsistently applied Section 1.1.1 (a) to him vis-à-vis other similarly situated member athletes of U.S. Swimming or “acted in bad faith towards or with bias against him.”

It is undisputed that Claimant satisfies all other applicable requirements to participate in the Trials. Claimant's willingness to forego participating in the 100 meter freestyle event at the Trials would effectively remedy Respondent's legitimate and reasonable concern that his participation and performance in this event could create uncertainty and potential chaos, which makes this a close case regarding whether Respondent applied Section 1.1.1 (a) "arbitrarily in violation of [his] legally protected opportunity to participate" in the Trials by not permitting him to compete in any of its other events (i.e., 50 meter freestyle and 100 meter fly).

Even when exercising *de novo* review (which does not simply provide broad arbitral deference to an NGB's team selection decisions without careful factual and legal scrutiny on a case-by-case basis), the Arbitrator is mindful of *Lui*'s guidance that my authority and appropriate role is limited to determining whether Respondent "rationally applied [its] published [Athlete Selection Procedures], "not . . . to substitute [their] judgment for the expert professional judgment of [an NGB] . . . in applying the criteria to individual [athletes]." "Arbitrators are not ombudsmen; they are authorized to resolve disputes under contracts and rules, not to declare how the world should work in the large." *Lindland v U.S. Wrestling Ass'n, Inc.*, 227 F.3d 1000, 1004 (7th Cir. 2000).

The Arbitrator concludes that Respondent did not arbitrarily apply Section 1.1.1 (a) to Claimant by determining that only athletes currently with U.S. Sport Nationality are eligible to participate in the Trials and to compete to earn spots on Team USA's swimming team that will compete in the Paris Olympic Games on behalf of the United States. Respondent has a reasonable and legitimate interest in permitting only those athletes presently "able to represent the U.S. in an international competition at the time of the [Trials]" (i.e., only those with current U.S. Sport Nationality), which is consistent with World Aquatics Rule 3.3.1 requiring an athlete intending to change one's Sports Nationality from one member to another to "observe a waiting period of three years between the last representation for the Member and the first representation for the New World Aquatics Member." Because Claimant currently has an Italian Sport Nationality, Respondent's refusal to grant Claimant's *de facto* request for an individualized waiver from the clearly expressed nationality requirement of Section 1.1.1 (a) is not arbitrary, capricious, or irrational. Doing so would arguably effectively convert the Trials into an

“international competition” between athletes with a U.S. Sport Nationality and an athlete with Italian Sport Nationality in the swimming events in which Claimant would participate.

Because its facts and holding are inapposite, *Lea v. USA Cycling & Duehring*, AAA Case No. 01-16-0000-8307 does not support Claimant’s position that Respondent arbitrarily applied Section 1.1.1 (a) to him. In *Lea*, the Arbitrator determined that “the ambiguity in the meaning of the term ‘nomination’ [in its team selection criteria] must be read against USA Cycling” and that the athlete “meets all of the minimum eligibility criteria prior to the date on which USA Cycling nominates athletes to the Olympic team and should have been nominated by USA Cycling to the Long Team.” By contrast, because Claimant has Italian Sport Nationality, he does not currently meet Section 1.1.1 (a)’s clear requirement that he have US Sport Nationality at the time of the Trials. Moreover, *Lea* is distinguishable because Claimant will not satisfy Section 1.1.4 (f) of Respondent’s ATHLETE SELECTION PROCEDURES 2024 Olympic Games, which requires “[i]n order to be considered for Nomination to the Team, an athlete must, at the time of Nomination to the Team, be an Available Swimmer [defined as having ‘complied with all eligibility requirements set forth in Sections 1.1-1.2 of these Selection Procedures’].”

Contrary to Claimant’s contention, the Arbitrator concludes that Respondent’s application and enforcement of Section 1.1.1 (a) as written by not permitting Claimant to participate in the Trials does not violate federal law, specifically 36 U.S.C. §220522 (15). This ASA provision prohibits an NGB from having “eligibility criteria related to . . . participation in the Olympic Games . . . that are more restrictive than those of the appropriate international sports federation.” On June 12, 2024, World Aquatics Legal Counsel Caroline Cusinato informed Respondent as follows: “World Aquatics is **not** taking the position that eligibility at the time of the trials is more restrictive than World Aquatics’ own three-year rule. . . . During the June 2024 U.S. Olympic Trials, the Appellant is still recognized as having **Italian Sport Nationality**. Given that the Appellant is considered Italian for competition purposes until 30 July 2024, he ‘may only represent that World Aquatics Member in International Competitions,’ pursuant to Rule 3.2.1 [“Election of a Sports Nationality”] of the World Aquatics Competition Regulations.” (emphasis original). Therefore, the Arbitrator finds that Respondent’s interpretation of Section 1.1.1 (a) to require that an athlete currently have U.S. Sports Nationality to be eligible to participate in the Trials and its application determining that Claimant is ineligible for the Trials

because he currently has Italian Sports Nationality is consistent with World Aquatics' explicit view that Respondent's interpretation and application of this nationality requirement is not impermissibly more restrictive than World Aquatics' own three-year rule. See *DeFrantz v. U.S. Olympic Committee*, 492 F. Supp. 1181 (D.D.C. 1980) (court relies on statement by IOC president that a National Olympic Committee's participation in the Olympic Games is entirely voluntary in support of its ruling that USOC did not violate the ASA by choosing not to enter a team of U.S. athletes to participate in the 1980 Moscow Olympic Games solely for political reasons); *Nieto v. USA Track and Field*, AAA Case No. 77 190 00275 08, (“[a]n aberration in the time deadline for achieving” the qualifying standard “must be very material in order to” violate the ASA).

The Arbitrator confirms Respondent's determination that Claimant is ineligible to compete in the Trials because he currently has an Italian Sport Nationality rather than Section 1.1.1 (a)'s required U.S. Sport Nationality and rejects his Section 9 Complaint and claims.

This Award fully resolves all claims and defenses submitted by the parties in connection with this arbitration proceeding. All claims and defenses not expressly granted herein are denied.

The Arbitrator will issue a written reasoned award by July 15, 2024 in accordance with Rule 49 of the UNITED STATES OLYMPIC & PARALYMPIC MOVEMENT ARBITRATION RULES.



June 15, 2024

Matthew J. Mitten, Arbitrator