

AMERICAN ARBITRATION ASSOCIATION

In the matter of the Arbitration between:

Re: 77 190 E 00318 10 JENF

Michael Saltzstein
and
USA Swimming
and
Affected Individuals:
Jaquelyn Allender; Robert Broyles; and James Sheehan

I, JAMES R. HOLBROOK, THE UNDERSIGNED ARBITRATOR, having been appointed by the American Arbitration Association (“Association”) to serve as the Arbitrator in accordance with the United States Olympic Committee (“USOC”) Bylaws and the Association’s Commercial Arbitration Rules, and having been duly sworn and having heard the Parties’ allegations and proofs, do hereby AWARD as follows:

AWARD OF ARBITRATOR

Jurisdiction

1. The Arbitrator has jurisdiction to hear and decide this dispute pursuant to Section 9 of the USOC Bylaws and the Ted Stevens Olympic and Amateur Sports Act (“Sports Act”) which provides in pertinent part that: “An amateur sports organization is eligible to be recognized . . . as a national governing body only if it . . . agrees to submit to binding arbitration in any controversy involving . . . the opportunity of any . . . official to participate in amateur athletic competition . . . in accordance with the Commercial Rules of the American Arbitration Association . . .” 36 U.S.C. § 220521. Under USOC Bylaw 1.3(u) a “protected competition” includes international competitions in which U.S. athletes compete against foreign athletes.

The Parties and Affected Individuals

2. The Claimant Michael Saltzstein has been a member of Respondent USA Swimming for more than 30 years. He was elected to the San Diego Hall of Fame in 2009 in recognition of his accomplishments in the sport of swimming. He received the Pettigrew Award in 2006 for his service to the sport of swimming. He served as an official (a stroke and turn judge) at the 2008 Beijing Olympic Games. He has an N3 certification with USA Swimming, which is its highest certification for officials, which permits him to officiate at the Respondent’s national championships.

3. The Respondent USA Swimming is the National Governing Body (“NGB”) for the sport of swimming in the United States. The Respondent is a member of the USOC and a member of the Federation Internationale de Natation (“FINA”), the international federation for aquatic sports including pool swimming and open water swimming. In this arbitration, two USA Swimming volunteers are involved as decision makers. James Sheehan is Chair of the Respondent’s Officials Committee. Pat Lunsford is the Respondent’s Program Operations Vice President. These two officials are responsible for recommending USA Swimming officials as nominees as referees, starters, and judges for FINA lists to the Respondent’s Board of Directors for approval. Carol Zaleski is the FINA representative on USA Swimming’s Rules and Regulations Committee who provides perspective to the Respondent’s Officials Committee and Program Operations Vice President on whether potential nominees by the Respondent to be FINA international referees, starters, and judges are likely to be accepted by FINA.
4. The Respondent nominated Jaquelyn Allender and Robert Broyles, and re-nominated James Sheehan as FINA Swimming International Referees (“FINA Referee”) for FINA List No. 16 (“FINA List 16”).

Claims and Defenses

5. The Claimant submitted for decision a claim that he had been improperly denied re-nomination by the Respondent as a FINA Referee on FINA List 16 because of retaliation for submitting a document dated April 22, 2010 (“White Paper”) (Ex. USAS-16 at Ex. B) complaining of the Respondent’s female athlete protection and coach screening deficiencies (“the Retaliation Claim”) and a claim he had been denied due process in the Respondent’s decision not to re-nominate him as a Referee for FINA List 16 (“the Due Process Claim”).
6. In its Pre-Hearing Brief dated July 10, 2010, the Respondent submitted for decision the following defenses:
 - a. The evidence does not support the Claimant’s Retaliation Claim.
 - b. Concerning the Claimant’s Due Process Claim, the Respondent’s decision to nominate the Affected Individuals as FINA Referees instead of re-nominating the Claimant was based on rational reasons including:
 - 1) During the 2007-2010 quadrennial, the Claimant applied to officiate only one national meet—the 2009 Short Course Nationals in December 2009, whereas each of the Affected Individuals applied to officiate in at least four national meets.
 - 2) Based on the point system used by the Respondent for tracking officials’ national participation in USA Swimming, the Claimant earned only 5.5 points during the 2007-2010 quadrennial, whereas the Affected Individuals earned 15, 12, and 20 points, respectively.

- 3) The Claimant, who was a stroke and turn judge during the 2009 Short Course Nationals, exhibited rude and unprofessional behavior toward a female chief judge.
- 4) Because the Claimant has been on two prior FINA lists, served as a FINA referee at the Beijing Olympic Games, and is on a FINA Open Water list through 2012, it is reasonable for the Respondent to give other USA Swimming officials the opportunity to gain international experience and be eligible to be selected for future Olympic Games and World Championships as FINA Referees.
- 5) At least seven other persons had more national competition participation points than the Claimant and could have been nominated by the Respondent as FINA Referees ahead of the Claimant.

The Hearing

7. An evidentiary hearing was conducted by the Arbitrator by teleconferences all day on July 12 and for a half day on July 13, 2010. The Claimant was represented by his counsel Edward G. Williams of Stewart Occhipinti, LLP of New York City. The Respondent was represented by its counsel Brent E. Rychener and Jennifer Bielak of the Colorado Springs office of Holme Roberts & Owen (the Claimant and the Respondent collectively are “the Parties” herein). The Affected Individuals received notice of the hearing and are bound by this Award. Messrs. Broyles and Sheehan appeared personally in the hearing, and Mr. Sheehan testified as a witness.
8. The Parties submitted simultaneous pre-hearing briefs on July 10, 2010.
9. The Parties each submitted proposed exhibits, all of which were received into evidence.
10. The following witnesses were sworn and testified under oath on direct and cross-examination: Pat Lunsford, James Sheehan, Michael Saltzstein, Carol Zaleski, Clark Hammond, and Eric Peterson.
11. Because it is uncontroverted that the Respondent’s decision not to re-nominate the Claimant as a FINA Referee had been made in January 2010 (i.e., long before he submitted his White Paper to the Respondent on April 22, 2010), the Claimant at the conclusion of his case withdrew with prejudice his Retaliation Claim from this arbitration.
12. The Parties submitted post-hearing closing briefs on July 17 and post-hearing reply briefs on July 20, 2010.
13. The Arbitrator closed the hearing on July 21, 2010.

14. The Parties agreed that the Arbitrator could announce his decision by July 22, 2010, and thereafter issue this reasoned Award. On July 21, 2010, the Arbitrator announced his decision that:
- a. The Respondent's decision—to nominate Mr. Broyles as a FINA Referee rather than re-nominate the Claimant—was arbitrary, capricious, and in violation of the Claimant's legally protected opportunity to participate as an international referee under the Sports Act which affords him due process rights in being fairly considered as a nominee for FINA List 16.
 - b. The Arbitrator therefore ordered the Respondent to immediately replace Mr. Broyles with the Claimant as a Referee nominee for FINA List 16 and so inform FINA immediately.

The Standard of Review and Burden of Proof

15. FINA has two requirements for eligibility as an international referee in pool swimming: candidates cannot exceed FINA's age limitation (for FINA List 16, candidates had to be born after 1949), and they must have acted as a referee or judge in at least two national or international competitions in the previous three years. The Respondent can establish additional, consistent criteria for its FINA nominations.
16. On April 28, 2010, the Respondent posted its FINA nominee selection criteria online on its website. These objective and subjective criteria are rational on their face. Deference must be paid to the Respondent's special expertise and competence with respect to such policy making.
17. The Claimant has the burden of proving either there is no rational basis for the Respondent's criteria for selecting nominees for FINA List 16, or that these criteria, if rational, were not followed or were applied arbitrarily and capriciously in violation of the Claimant's legally protected opportunity to participate in international competitions under Section 9 of the Sports Act as a FINA Referee nominee for FINA List 16.
18. The Arbitrator has authority only to determine whether the Claimant had a fair opportunity to be nominated for FINA List 16 and whether the Respondent fairly established and rationally applied its FINA nominee selection criteria. The Arbitrator's role is not to determine whether the Respondent chose the best process for selecting FINA nominees, or to substitute the Arbitrator's lay judgment for the expert professional judgment of the Respondent in fairly establishing and rationally applying its FINA nominee selection criteria. The Arbitrator must determine whether the Respondent's conduct in this case is so willful and unreasoning, without consideration of the facts and circumstances, as to be arbitrary and capricious.

Statement of Facts

The 2009 Short Course Nationals

19. At the 2009 Short Course Nationals, the Claimant was a stroke and turn official. According to a memorandum drafted by Clark Hammond (“the Hammond Memo”) (Ex. USAS-19) , who was the Meet Referee, the Claimant had an issue with a female chief judge over how to position himself as the stroke judge at the start. The female chief judge was a less experienced official who did not think carefully through how she wanted the Claimant to officiate the position. The Claimant was confident he knew what to do and he was most likely right, according to the Hammond Memo. The female chief judge later said that, if she had messed up, she was prepared to apologize. The Claimant admittedly called her and another female chief judge a “bitch.”
20. Neither Mr. Hammond, Mr. Lunsford, nor Mr. Sheehan personally observed the Claimant’s conduct at the 2009 Short Course Nationals. Ex. USAS-19.
21. Mr. Hammond spoke to Messrs. Lunsford and Sheehan in their official capacities at the 2009 Short Course Nationals about the Claimant’s conduct at that competition.
22. Mr. Hammond testified that he regarded the Claimant’s conduct as inappropriate, out of line, very important, and more than a minor matter. He testified that he regarded the conduct as significant enough to be the subject of a Board of Review process. Similarly, Mr. Sheehan testified that he regarded the Claimant’s conduct as serious and something that could have been submitted as a complaint to a Board of Review.
23. Eric Peterson testified that Mr. Hammond talked to him on the telephone for 30 minutes in December 2009 and told him he was conducting an investigation of the Claimant’s conduct at the 2009 Short Course Nationals to put together paperwork to submit to the Respondent. Following Mr. Hammond’s investigation, no complaint was ever filed against the Claimant.
24. Mr. Hammond drafted a four-page, single-spaced memorandum dated December 19, 2009, addressed to Messrs. Lunsford and Sheehan in their respective capacities as officials of the Respondent describing the Claimant’s conduct at the 2009 Short Course Nationals. Ex. USAS-19. The Hammond Memo was not shown to be copied to the Claimant.
25. The Hammond Memo reflects a personal bias by Mr. Hammond against the Claimant that goes beyond what happened at the 2009 Short Course Nationals: “As I have mentioned on more than one occasion, I am sorry for [the Claimant] as well because although he has some great traits, he just does not seem to be able to get over himself and, in my opinion, has a huge insecurity/superiority problem which he masks by putting others down or acting as if he is more important, more knowledgeable or more [fill in the blank] than

anyone else in the entire swimming world. When you talk to him, he uses the 'I' word a lot. 'I did this' or 'I've done that.'" Ex. USAS-19 at page 4.

26. Messrs. Lunsford and Sheehan never talked to the Claimant about his conduct at the 2009 Short Course Nationals, nor did either of them file a complaint against him with the Respondent.
27. Mr. Lunsford testified that he considered the Claimant's conduct at the 2009 Short Course Nationals to be an issue he would consider in future assignments. Mr. Lunsford did not assign the Claimant to serve as an official at any national championship after the 2009 Short Course Nationals. As described below, this adversely affected the number of the Claimant's national participation points which were assigned to the Claimant by Mr. Sheehan, which in turn was used by Messrs. Lunsford and Sheehan in determining not to re-nominate the Claimant for FINA List 16.
28. Mr. Hammond testified that he did not send his Memo to the Respondent until early in July 2010 just before the arbitration hearing, when he sent it to the Respondent's counsel, who provided it to the Claimant's counsel in pre-hearing discovery.
29. The only official public comment about the Claimant's conduct at the 2009 Short Course Nationals (which is posted on the Respondent's Official Tracking System) is a positive evaluation of the Claimant made by Richard Allen Biggs who stated, "Mike is a great person to have on your deck. He was on time for all meetings and in position. Mike brings a lot of knowledge and experience to the deck." Ex. MS-4.

The Respondent's FINA Nominee Selection Process for FINA List 16

30. Mr. Lunsford testified that before April 28, 2010, there were no written criteria to be used in determining who would be nominated for FINA List 16. He said selection information was sometimes discussed at clinics. He said he told the Claimant in 2008 that age and activity level would be the criteria used for determining FINA nominees. The Claimant's age satisfies the age criterion. The Parties sharply differ about the meaning of the activity criterion. There is no written record of what this criterion was in September 2008.
31. Messrs. Lunsford and Sheehan admitted they agreed before January 19, 2010, that they would not recommend the Claimant for re-nomination as a Referee for FINA List 16. They testified that their decision was based in part on the Claimant's alleged relatively inactive national competition participation during the 2007-2010 quadrennial ("Alleged National Inactivity") and in part on their third-hand knowledge received from Mr. Hammond of the Claimant's conduct at the 2009 Short Course Nationals which they did not discuss with the Claimant.
32. The Claimant did not know that Messrs. Lunsford and Sheehan decided in January 2010 not to re-nominate him. He did not know what criteria they used in making their decision. They did not communicate their decision to him when their decision was made.

33. Mr. Lunsford testified that the Claimant had applied to be a referee in only one national competition during the 2007-2010 quadrennial. Mr. Lunsford appointed the referees who served at national competitions. He did not ask the Claimant to serve as a referee at any national competition during the 2007-2010 quadrennial.
34. In determining the Claimant's Alleged National Inactivity, Messrs. Lunsford and Sheehan relied on a document entitled "USA Swimming Officials Trip Points List" ("Trip Points List") (Ex. USAS-4) which is maintained by Mr. Sheehan as Chair of the Officials Committee. The Trip Points List is supposed to represent an objective quantification of an official's national participation with USA Swimming. Mr. Sheehan determines which competitions to include in the Trip Points List. The number of participation points awarded is determined by Mr. Sheehan based on the position held by an official at a competition. The number of participation points in the Trip Points List supposedly was used by Messrs. Lunsford and Sheehan as one of the criteria they considered for their FINA nominee recommendations for FINA List 16.
35. The Claimant testified that Mr. Lunsford told him in 2008 that the Trip Points List has no bearing on being nominated as a FINA official and does not represent national participation in USA Swimming.
36. Mr. Lunsford testified that participation points were only assigned in the Trip Points List for national championship meets. "National Qualifying" meets shown in the Respondent's Official Tracking System, which is available online to officials, were not assigned points in the Trip Points List unless they were national championship meets.
37. Unlike the Official Tracking System (which is available online), the Trip Points List is not available online. Therefore, the Claimant and other officials cannot track what competitions and points are assigned to them by Mr. Sheehan in the Trip Points List. Consequently, they cannot monitor which of their meet participations is regarded by the Respondent as relevant for FINA nominations. Similarly, they cannot know and therefore point out errors, omissions, or inconsistencies in Mr. Sheehan's maintenance of the Trip Points List. For example, Mr. Sheehan included in his list his and Mr. Broyles' service as officials at the 2009 Short Course Nationals (for which he awarded points to himself and Mr. Broyles), but he did not include the Claimant's service as an official at this same meet (and therefore he awarded no points to the Claimant for the 2009 Short Course Nationals). Ex. USAS-4. There was no explanation given by the Respondent for this inconsistency.
38. The Claimant, who previously had served as the Respondent's Program Operations Vice President for four years, testified that the Trip Points List had not been used previously by USA Swimming in nominating persons to be FINA Referees.
39. The Claimant also testified that (except for unavailability and exceeding FINA's age limit) the Respondent previously re-nominated officials who were on a FINA list who wanted to be on the next FINA list. Mr. Lunsford testified that in the past ten years four people on a FINA list have not been re-nominated by the Respondent to be FINA

- officials. Because the Claimant is on FINA List 14, he expected to be re-nominated as a Referee for FINA List 16 pursuant to this past practice. Mr. Sheehan was on FINA List 14 and was re-nominated by the Respondent to be a Referee for FINA List 16. Paul Memont was a starter on FINA List 14 and was re-nominated by the Respondent for FINA List 16. Neither Ms. Allender nor Mr. Broyles was on FINA List 14.
40. Messrs. Lunsford and Sheehan agreed by January 19, 2010 that they would recommend the nomination as Referees for FINA List 16 the names of Mr. Sheehan and two others from a list of 10 names created by Mr. Sheehan (“the Sheehan Memo”) (Ex. USAS-3). Mr. Sheehan’s list includes Ms. Allender and Mr. Broyles among others, but not the Claimant.
 41. The Sheehan Memo states that “certifications, national participation and age” were the criteria used in selecting the candidates named in Mr. Sheehan’s list. The Claimant’s age and certifications satisfy those two criteria. The Sheehan Memo does not mention that “national participation” is determined by use of the Trip Points List. Rather, it says, “I’ve run a list of officials from OTS [the Respondent’s online Official Tracking System which shows “National Qualifying” meets] . . .” *Compare* Ex. USAS-3 *with* Ex. MS-4.
 42. The Respondent’s Official Tracking System shows that in the 2007-2010 quadrennial, the Claimant participated as an official in 10 pool competitions designated by the System as “National Qualifying” meets. Ex. MS-4.
 43. Messrs. Lunsford and Sheehan testified that the “national participation” criterion used by them in their decision making about FINA Referee recommendations was objectively determined by their use of the number of points a person had had been assigned in the Trip Points List.
 44. There is no written record that the Respondent’s FINA candidates were ever told that FINA nominations would be determined in part by use of a person’s participation point totals assigned in the Trip Points List. There is no written record that the Claimant knew that Messrs. Lunsford and Sheehan were going to use the points assigned to him by Mr. Sheehan in the Trip Points List to evaluate his Alleged National Inactivity.
 45. Three people listed in the Sheehan Memo (Cecil Gordon, Steve Lottes, and Mark McCaw) each had more points in the Trip Points List than those shown for Mr. Broyles, but they were not recommended as nominees for FINA List 16. One person listed in the Sheehan Memo (Don Hougardy) had fewer points in the Trip Points List than those assigned to the Claimant. *Compare* Ex. USAS-3 *with* Ex. USAS-4.
 46. The Sheehan Memo selection criteria are inconsistent with the FINA nominee selection criteria posted on the Respondent’s website on April 28, 2010. The Sheehan Memo does not mention: gender; geography; individual evaluations; ability to work well with others and professionally represent USA Swimming on the international deck; or the comparison of the opportunity for additional international work for those already on a list versus new nominations. Similarly, the Sheehan Memo does not mention that

“Appointed meets” (such as Trials) would not be considered for FINA nominations. Compare Ex. USAS-3 with Ex. USAS-6.

47. There is no document in evidence that shows the FINA nominee selection criteria posted on the Respondent’s website on April 28, 2010 (Ex. USAS-6) were in fact used by Messrs. Lunsford and Sheehan in January 2010 when they determined not to re-nominate the Claimant.
48. Messrs. Lunsford and Sheehan talked with Ms. Zaleski in February 2010 at the Respondent’s Officials Meeting in New Orleans about their decision not to re-nominate the Claimant for FINA List 16. After this meeting, Mr. Sheehan contacted Ms. Allender and Mr. Broyles to inform them that he expected to submit their names as nominees to be FINA Referees, but he did not talk to the Claimant about the decision not to re-nominate him. After the meeting, Mr. Lunsford talked to two other judges who were not re-nominated for FINA List 16. Although he testified that it was his responsibility to do so, Mr. Lunsford never talked to the Claimant about the decision not to re-nominate him for FINA List 16.
49. On April 22, 2010—four and a half months after the 2009 Short Course Nationals and more than three months after the decision by Messrs. Lunsford and Sheehan not to recommend the Claimant as a Referee for FINA List 16—Mr. Lunsford sent the Claimant an email (“the first Lunsford email”) that says in part, “We have decided to go in a different direction and submit names that met the criteria used.” Ex. USAS-7.
50. The first Lunsford email does not identify what FINA nominee selection criteria were used. The email does not mention that Messrs. Lunsford and Sheehan decided sometime before January 19, 2010, not to recommend the Claimant as a Referee for FINA List 16. The email does not mention that Messrs. Lunsford and Sheehan relied in part, in making their decision not to recommend the Claimant as a Referee for FINA List 16, on what Mr. Hammond had told them in December 2009 about the Claimant’s conduct at the 2009 Short Course Nationals. Ex. USAS-7.
51. The second Lunsford email sent to the Claimant on April 22, 2010, states that the consideration given by Messrs. Lunsford and Sheehan was based on “some of the criteria mentioned to you in September, 2008.” Ex. USAS-7.
52. The second Lunsford email does not identify which criteria were mentioned in September 2008 nor which were used in deciding not to recommend the Claimant as a Referee for FINA List 16. Ex. USAS-7.
53. The third Lunsford email sent to the Claimant on April 22, 2010, incorrectly states, “Regarding the timing of the decision, it was just made recently . . .” Ex. USAS-7. It is uncontroverted that sometime before January 19, 2010 (i.e., at least three months earlier, not “recently”), Messrs. Lunsford and Sheehan made their decision not to re-nominate the Claimant. In fact, the Claimant learned for the first time on July 10, 2010, during pre-hearing discovery in this arbitration, that Messrs. Lunsford and Sheehan in January 2010

had made their decision not to recommend him for re-nomination as a Referee for FINA List 16.

54. When asked why he had waited three months from January 19, 2010 to April 22, 2010, to email the Claimant that he was not going to be re-nominated, Mr. Lunsford testified that he was “too busy.”
55. On April 22, 2010, Mr. Lunsford sent to the Respondent, to be approved on at the May 1, 2010 Board meeting, the names of Messrs. Sheehan and Broyles and Ms. Allender to be nominated as Referees for FINA List 16. Ex. USAS-24.
56. The criteria used and the decision by Messrs. Lunsford and Sheehan in not recommending the Claimant for re-nomination as a Referee for FINA List 16 were not discussed at the Respondent’s Board meeting on May 1, 2010.

Analysis and Conclusions

57. The Respondent contends that FINA referees nominated by USA Swimming are not afforded due process rights under the Sports Act and USOC Bylaws because they are not “team officials” or “other officials” and they, as international referees, do not represent USA Swimming or the United States in amateur athletic competition. The Sports Act, however, covers the opportunity of any official to participate in amateur athletic competition and under USOC Bylaw 1.3(u) a “protected competition” includes international competitions in which U.S. athletes compete against foreign athletes. The Arbitrator, therefore, has concluded that the Claimant has a legally protected opportunity to participate as a referee in international competition under the Sports Act, which in turn affords him due process rights in being fairly considered as a nominee for FINA List 16.
58. The Respondent contends that it is not required to publish selection criteria for a FINA list. The Respondent admittedly did not publish any selection criteria until April 28, 2010. However, without having published selection criteria, it is difficult to show—as in this case—that the Respondent in fact used and rationally applied specific selection criteria.
59. The Claimant did not know before July 2010 which criteria supposedly were used in determining not to re-nominate him for FINA List 16.
60. The Claimant did not know before July 2010 that the third-hand knowledge of Messrs. Lunsford and Sheehan about the Claimant’s conduct at the 2009 Short Course Nationals was used by them in making their decision not to re-nominate him. Because Mr. Sheehan regarded the Claimant’s conduct as serious and used it as a factor in deciding not to recommend the Claimant for re-nomination, he should have discussed this with the Claimant in January 2010.
61. On April 28, 2010, the Respondent posted for the first time its FINA nominee selection criteria on its website. Although these criteria are rational on their face, and deference

must be given to the Respondent's policy making, there is no evidence that these criteria were made known to FINA nominee candidates prior to April 28, 2010. They certainly are not the two criteria (age and national activity) discussed with the Claimant in September 2008. There is no written record that the April 2010 FINA Selection Criteria were actually used in January 2010 in deciding not to re-nominate the Claimant. Because they are substantially more expansive than the three criteria listed in the Sheehan Memo of January 19, 2010 (age, certifications, and national participation), and because they were not posted online until April 28, 2010, it is not credible that they were the criteria actually used in January 2010 in deciding not to re-nominate the Claimant.

62. The criteria posted online on April 28, 2010 do not mention that the Trip Points List will be used as an objective criterion to measure national activity in USA Swimming for FINA nomination decision making. The Claimant did not know that the Trip Points List was going to be used to objectively quantify his national activity in USA Swimming. Even if he had known this, the Trips Points List was not accessible to him because it is not available online. The Trip Points List as maintained by Mr. Sheehan has errors, omissions, and inconsistencies. The inconsistencies in the Trip Points List between the Claimant's points and those of Mr. Broyles seem willful rather than merely negligent.
63. The Respondent contends that Mr. Sheehan did not decide which events to include in the Trip Points List or how many points to give events. This contention is not credible. The Trip Points List is not a self-implementing system. As discussed below, the Trip Points List is so fraught with error, omission, and inconsistency concerning the national participation points assigned to the Claimant (especially in comparison to the points assigned to Mr. Broyles) as to be arbitrary and capricious. Given such error, omission, and inconsistency, use of the Trip Points List in deciding not to re-nominate the Claimant was willfully unfair and without consideration of all the facts and circumstances of the Claimant's actual national participation.
64. Mr. Sheehan did not include in the Trip Points List the Claimant's service as a referee at the 2009 Short Course Nationals or award him any points for that meet, but Mr. Sheehan did award points to Mr. Broyles and himself for that meet. Ex. USAS-4. This omission appears to be willful rather than merely negligent, because the Respondent otherwise regarded the Claimant's service as a judge at the 2009 Short Course Nationals as a qualifying national competition in the pro forma FINA application ("Pro Forma FINA Application") which the Respondent prepared as a demonstrative exhibit used at the hearing that shows the Claimant's FINA qualifying experience. Ex. USAS-15. The relevance of Mr. Sheehan's omission in the Trip Points List of the Claimant's service at the 2009 Short Course Nationals is material, because Mr. Sheehan awarded Mr. Broyles 4.0 points for his service as a referee at this meet, but awarded no points to the Claimant for being a judge at the same meet. Therefore, 4.0 points must be added to the Claimant's point total in the Trip Points List for the 2009 Short Course Nationals.
65. Carol Zaleski testified that that the Claimant's service as an official at the 2008 Beijing Olympic Games would be regarded by FINA as a qualifying international competition in applying for nomination as a FINA Referee. She testified that to be an Olympic Games

official is so significant and so well known by FINA that most applicants do not even include it on their FINA applications when they apply to be re-nominated by the Respondent.

66. The Respondent included the Claimant's service as an official at the 2008 Beijing Olympic Games as a qualifying international competition in the Pro Forma FINA Application which the Respondent prepared as a demonstrative exhibit to show the Claimant's FINA qualifying experience. Ex. USAS-15.
67. The Claimant testified that, during his tenure as the Respondent's Program Operations Vice President, a judge's service at the Olympic Games received 8 points.
68. The Arbitrator concludes that 8 more points should be added to the Claimant's national participation point total in evaluating his qualifications to be re-nominated as a FINA Referee.
69. If 12 additional points were added to the 5.5 points which Mr. Sheehan assigned to the Claimant in the Trip Points List, the Claimant would have more points (17.5 total points) than Mr. Broyles (12.0 total points). Ex. USAS-4.
70. It is inexplicable that Messrs. Lunsford and Sheehan contacted in person or by telephone each of the other FINA candidates who were positively and negatively affected by their decision making, but neither spoke to the Claimant. It is inexplicable that Mr. Lunsford waited at least three months to communicate to the Claimant by email (on the day the FINA recommendations were submitted to the Board of USA Swimming) that the Respondent had gone in "a different direction" and was not going to re-nominate him. It is inexplicable that this three-month-long failure-to-communicate occurred because Mr. Lunsford was "too busy." It is inexplicable that Mr. Lunsford's third email to the Claimant on April 22, 2010, incorrectly states that the decision not to re-nominate the Claimant had been "just made recently."

Decision

71. For all of the reasons set forth above, the Arbitrator concludes that the Respondent's decision—to nominate Mr. Broyles as a FINA Referee rather than re-nominate the Claimant—was arbitrary, capricious, and in violation of the Claimant's legally protected opportunity to participate as an international referee under the Sports Act, which affords him due process rights in being fairly considered as a nominee for FINA List 16.
72. The Arbitrator therefore orders the Respondent to immediately replace Mr. Broyles with the Claimant as a Referee nominee for FINA List 16 and so inform FINA immediately.
73. The Arbitrator orders the Respondent to provide a copy of this Award to Ms. Zaleski. The Arbitrator believes Ms. Zaleski will, in light of the totality of the facts and circumstances discussed herein, fairly re-evaluate the Claimant's re-nomination by the Respondent.

74. The Arbitrator did not decide the Claimant's Retaliation Claim because the Claimant at the conclusion of his case withdrew that claim from this arbitration with prejudice.
75. The Claimant's claim—that the Respondent should have included athlete members of USA Swimming in the Respondent's decision making whether or not to re-nominate him for FINA List 16—is denied without prejudice as moot.
76. If the Respondent chooses to use the Trip Points List as an objective measure of national participation for FINA nominations, the Respondent must make this clear in its online criteria, and the Trip Points List must be made available online together with a mechanism for correcting mistakes.
77. The administrative fees and expenses of the Association totaling \$750.00 shall be borne equally.
78. The fees and expenses of the Arbitrator totaling \$5,000.00 shall be borne equally.
79. Therefore, the Respondent shall reimburse the Claimant the sum of \$375.00, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by the Claimant.
80. This Final Award is in full satisfaction of all claims submitted to arbitration by the Claimant against the Respondent and in full satisfaction of all defenses submitted by the Respondent against the Claimant. All other claims and defenses not expressly granted herein are hereby denied.

Dated:

July 23, 2010

James R. Hollbrook
ARBITRATOR