

**AMERICAN ARBITRATION ASSOCIATION**

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In the Matter of the Arbitration between

Re: 77 190 00050 12 JENF

Olivia Morgan and Michelle Theriault

vs.

USA Synchronized Swimming

and

Affected Athletes: Mary Killman, Mariya Koroleva,  
Leah Pinette, Caitlyn Stewart, and Alison Williams

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**DECISION AND AWARD OF ARBITRATOR**

I, THE UNDERSIGNED ARBITRATOR, having been designated by the American Arbitration Association, having been duly sworn, and having duly heard the proofs and allegations of the Parties, and the Affected Athletes, do hereby issue the following DECISION AND AWARD:

INTRODUCTION

Claimants Olivia Morgan (“Morgan”) and Michele Theriault (“Theriault”) (sometimes hereafter referred to collectively as “claimants”) filed a complaint and demand for arbitration against respondent USA Synchronized Swimming (“USA Synchro” or “respondent”). Claimants, members of the USA Synchro Team, contend that USA Synchro failed to follow its published athlete selection procedures as regards duet participants in connection with the upcoming 2012 London Olympics. They request that the arbitrator strike the current selections and order the selection process be repeated. Respondents deny all allegations and request that the complaint be dismissed. This arbitration is governed by applicable provisions of the Bylaws of the United States Olympic Committee (“USOC”), effective as of September 24, 2011 (“Bylaws”).

Section 9.8 of the Bylaws requires that all athletes who might be adversely affected by arbitration must be identified and given notice of the proceedings (“Affected Athletes”). Besides claimants, the Affected Athletes are Mary Killman (“Killman”), Mariya Koroleva (“Koroleva”), Leah Pinette (“Pinette”), Alison Williams (“Williams”), and Caitlyn Stewart (“Stewart”). All Affected Athletes were given notice.

The arbitration took place on March 19, 2012, at 132 E. Washington Street, 8<sup>th</sup> Floor, Indianapolis, Indiana, commencing at 8:00 a.m. The following parties and counsel appeared: claimants and counsel Stephen A. Hess, Esq., of Sherman & Howard, L.L.C., as well as two law students, Mr. John Dwyer and Ms. Tia Lubber of the University of Colorado Law School<sup>1</sup>; respondent, through its Executive Director, Terry Harper (“Harper”), and counsel Steven B. Smith, Esq., and K. Lucinda McRoberts, Esq., of Bryan Cave HRO, LLP; Killman and Koroleva, and counsel Mark W. Sniderman, Esq. of Caplin Sniderman P.C.; Pinette and counsel David B. Schultz, Esq., and Daniel Sabol, Esq., of Luftman, Heck & Associates, LLP; Williams and

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<sup>1</sup> Under applicable rules, law students may participate in this type of proceeding, as long as a licensed attorney supervises them. Mr. Hess is a licensed attorney, and he supervised the students in this matter. Andrew Hartman, Esq., the students’ faculty advisor and Experiential Learning Program Director at the University of Colorado Law School, called in periodically during the day and listened to the proceedings.

counsel Matthew A. Foote, Esq. (the latter by telephone); and Steward, representing herself. John W. Ruger, USOC Athlete Ombudsman, appeared by telephone and listened to the proceedings as an observer.

Counsel made opening statements, various persons were called as witnesses, and the arbitrator received exhibits into evidence. Stewart, acting as her own attorney, fully participated in the proceedings. Williams also acted on her own behalf, in that her attorney, although making a telephonic appearance, did not otherwise participate. Counsel, Stewart, and Williams made closing arguments, and the arbitrator took the matter under submission. Proceedings were closed at approximately 8:30 p.m. that evening.

### CONTENTIONS OF THE PARTIES

As set forth in claimants' complaint and supplemented by their counsel's letter of March 7, 2012, and further articulated by counsel at the hearing, claimants allege that respondent failed to follow its own published procedures in the following respects:

(1) the evaluations sent to the final selection committee did not properly reflect fitness evaluations, and the fitness evaluations were not given the required 25% weight in the selection process:

(2) the athlete representative who sat on the final selection committee was not elected by athletes as required by statute and the Bylaws, but rather handpicked by respondent, and she was not adequately qualified or prepared to participate in the decision-making process;

(3) Sandra Mahoney ("Mahoney"), the National Team Director, had a direct conflict of interest and should have recused herself, in that, among other things, in response to a previous letter by Morgan to respondent that Mahoney should resign, the latter told others she would never select Morgan as a consequence of this perceived slight; and

(4) the selection procedures contemplated selection as a duet, not that the highest two in the rankings would automatically constitute the duet; although a strong majority of the final selection committee favored selecting claimants as the pair, Mahoney and Harper overrode the views of the majority and ordered that the individuals be selected based on individual rankings.<sup>2</sup>

Respondent denies each of claimants' contentions. Respondent also alleges that claimants lacked standing to file a complaint under Section 9, in that, not only were they given opportunities to participate in the trials, they were actually given invitations to be a 2012 Olympic Duet competitor and alternate, respectively, which they declined. Respondent filed a motion to dismiss Theriault's complaint on this basis, which was taken under submission.

Killman and Koroleva, USA Synchro's current duet selection, contend the selection process was fair and should not be disturbed. Pinette argues the fitness evaluations were not given the necessary 25% weight, and the current duet selection should be struck. Stewart and Wilson allege the selection process was flawed in various ways.

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<sup>2</sup> Claimants set forth a fifth contention in their attorney's letter dated March 12, 2012, that the elected athlete alternate representative, Kendra Zanotto ("Zanotto"), was improperly removed for alleged conflict of interest or bias. Claimants elected not to pursue this contention at the hearing.

## FINDINGS OF FACT

Claimants are members of USA Synchro. They participated, along with other team members, in the 2012 Olympic Team trials held November 11-14, 2011, in Greensboro, North Carolina, for the right to represent the United States at the 2012 London Olympics. After a three-phase process, nine athletes were selected for the Olympic Team, which included claimants and the other five Affected Athletes in this proceeding. The seven Affected Athletes went on to compete in Phase 4 of the trials to determine the Duet Team. At the conclusion of the process, Killman and Theriault, ranked 1 and 2, were chosen as the Duet Team, and Koroleva, ranked number 3, was chosen as the alternate. Morgan was ranked 4<sup>th</sup>. When Theriault declined an invitation to compete, Koroleva moved to the second spot, accepted, and became Killman's duet partner. Morgan moved from the fourth to third spot and became the alternate. Morgan, however, declined the opportunity to participate as an alternate. (Although the successful athletes may be qualified by USA Synchro to participate in the London Olympics, such participation is not guaranteed. They must further qualify at trials to be held by Federation Internationale de Natation ("FINA")<sup>3</sup> in London on April 18-22, 2012.

Respondent is a nonprofit organization recognized by the USOC as the national governing body ("NGB") for the sport of synchronized swimming in the United States under the Ted Stevens Olympic and Amateur Sport Act (the "Act"). Its headquarters are located in Indianapolis, Indiana.

1. The history behind the selection procedures.

Harper testified that the USOC divides the various sports into three categories: foundation sports, medal potential sports, and development sports. Foundation sports, such as track and field, receive more funding than medal potential sports, and medal potential sports receive more funding than development sports. From 2004 through 2008, synchronized swimming was classified as a medal potential sport. Since 2010, it has been classified as a development sport. USA Synchro has been on a downward slide in worldwide competitions since 2004. Harper further testified that a substantial amount of funding for USA Synchro comes from the USOC. Such funding is based, in large part, on the success of the team, particularly in medal count. Thus, results in the pool can significantly impact funding.

In 2009, Harper searched for a new National Team Director to make changes and return the team to international prominence. Mahoney was hired to make such changes.

In about December 2010, Mahoney, along with Betty Hazle ("Hazle"), International Relations Committee Chair, formed a committee to begin drafting athlete selection procedures for the 2012 Olympics. Mahoney believed that the past duet selection procedures were flawed. First, duet teams tried out as pairs, not individually. The selection committees sometimes felt compelled to select a pair consisting of a less-talented performer with a much stronger one. The new selection procedures would incorporate a different concept, that the duet team would be selected from the best athletes. This would not necessarily mean that the two best athletes would automatically be selected, since there are many discretionary and other criteria that go into choosing the duet most likely to win a medal, but pairing the better athletes together would increase prospects for success. Also, the new approach would be fairer to swimmers who came to the trials without partners.

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<sup>3</sup> FINA is the international governing body for synchronized swimming.

Furthermore, the duet teams in the past were selected first, and the team was selected thereafter. It was thought that if the rules were changed to have the team selected first and then the duet team, it would eliminate past duet pairs' perceived inclinations not to give their best efforts during the team selection process, since they were guaranteed positions on the team as a result of being chosen the duet pair.

Mahoney and Hazle were not the only persons working on new selection procedures. Other members of the committee included Sarah Lowe ("Lowe"), the USOC Athlete Advisory Council ("AAC") representative, Mayuko Fujiki ("Fujiki"), then Head Coach, Pan American Games, and later Head Coach of the 2012 Olympic Team, and Duke Eielinski, President and USOC NGB Council Representative. The new selection procedures were required to be approved by the USOC, and the committee worked with the USOC Team Selection Working Group ("TSWG"), primarily Stephanie Isley ("Isley").

Drafting new selection procedures took almost nine months. Finally, in September 2011, after numerous revisions, the committee approved a final version of the new selection rules. Committee members, including Lowe, the AAC Athlete Representative, signed off on the new rules. The document containing Lowe's signature, dated September 7, 2011, provides that if the AAC Representative did not agree with the new procedures, he/she could submit reasons for such disagreement to his/her Sports Performance representative. There is no evidence in the record that Lowe ever expressed any disagreement or brought any disagreements to her Sports Performance representative.

By letter dated September 8, 2011, from Chris Vadala ("Vadala"), Chair, USOC TSWG, to Harper, Vadala stated that: "I am pleased to inform you that the USOC Team Selection Working Group (TSWG) has approved US Synchronized Swimming's Athlete Selection Procedures for the 2012 Summer Olympic Games as Amended August 31, 2011." It is these procedures, U.S. Synchronized Swimming Athlete Selection Procedures, 2012 Olympic Games, Team and Duet Selection, dated March 2, 2011, as amended August 31, 2011 ("Selection Procedures"), that are challenged in this arbitration. (The Selection Procedures were admitted into evidence as Exhibit 103.)

## 2. The Selection Procedures.

The Selection Procedures governed the four phases of the trials in November 2011. The first three phases, namely Phase 1, Phase 2, and Phase 3, set out procedures to be followed to select the team. After the team members were selected, an additional process, Phase 4, would take place to determine the duet team and alternate. Athletes would be evaluated on routine evaluations and fitness evaluations. 75% of the final score would be allocated to routine evaluations, while 25% would be allocated to fitness evaluations. A representative from St. Vincent Sport Performance would conduct the fitness evaluations in Phase 3.

The Selection Procedures specified the overseers ("Overseers") of the entire process, as well as the evaluators ("Evaluators") for the technical duet. The overseers would be Harper, Mahoney, and Nathalie Bartleson ("Bartleson"), Vice President Olympic International. The Evaluators would be the National Team Director (Mahoney), the Olympic Team Head Coach (Fujiki), the Olympic Team Assistant Coach (Lori Eaton) ("Eaton"), and the Skills and Training Consultant (Karen Josephson) ("Josephson"), and several FINA judges.

In the first swim, each athlete would swim individually, with each swimmer judged on separate elements, namely, “Albatross Twirl, Continuous Spin 1440°,” “Rocket Split,” “Fishtail, Full Twists (3),” and “Thrust, 360° Spin,” with assigned degrees of difficulty. Relevant overall factors would include execution, extension, flexibility, height, propulsion/power, as well as manner of presentation and accuracy of count. In the second swim, athletes would be selected to swim in groups of no more than three. They would be judged on most of the factors used in first swim, with the additional factor of matchability of style and technique. Mahoney and the Olympic Team Coaching Staff had the discretion to choose athletes for additional swims, but the average of group swims would constitute the second swim score. The scores from the first and second swims would be averaged to result in a final routine score. Thereafter, the final score of each athlete would be calculated by combining the routine evaluation score with the fitness evaluation score on the 75%/25% ratio noted above.

The Evaluators would then provide the results, scores, and recommendations to the Final Selection Committee (“FSC”). The FSC would use the results, scores, and their recommendations, as well as discretionary non-water and other criteria, to select and rank the two athletes to be nominated to the 2012 Olympic duet, as well as identify a third athlete as an alternate. FSC members would already be very familiar with the athletes and the results; Mahoney and Fujiki, for example, would participate in the duet trials as judges. Discretionary non-water criteria included mental factors such as drive, enthusiasm, teamwork, maturity, the ability to take constructive criticism, and intangible considerations that would affect the dynamics and performance of a team.

The Selection Procedures also outlined procedures to be followed if a member of the FSC had a conflict of interest. They provide that: “In the event that any member of the Final Selection Committee has a conflict of interest (to include, but not be limited to, an athlete or a coach or a family member of an athlete being considered for a nomination to the Team), the National Team Director will select another individual who does not have a conflict of interest to serve on the Final Selection Committee. If the AAC Representative has a conflict of interest, the USOC AAC alternate will be used. If the alternate also has a conflict of interest, the National Team Director will select an athlete who meets the standards set forth in the USSS Code, Section 7.06A.” (Underlining original.)

3. Removal of the AAC Representatives due to conflicts of interest and appointment of a successor by Mahoney.

USA Synchro has a written “Conflicts of Interest Policy.” The policy provides, among other things, that conflict of interest forms must be submitted by specified individuals when required, and the relevant USA Synchro committee would make a determination whether the individual in question “need[s] to refrain from participation or decision-making, or what action is necessary to respond to the conflict of interest.” If the committee were unable to come to a decision, the issue would then be referred to USA Synchro’s Ethics Committee.

On October 3, 2011, Mahoney spoke with Isley of the USOC, who suggested that the Ethics Committee determine if there was a conflict of interest for Josephson, Lowe, and Zanotto. Mahoney communicated this information to an Ethics Committee representative, Laurette Longmire (“Longmire”), and said that if the answer were yes for both athlete representatives, she would recommend that Becky Kim (“Kim”) serve in that position. On October 13, 2011, the Ethics Committee met regarding Josephson, Lowe, and Zanotto. The minutes of the meeting stated that “[i]t was mentioned that a sister involved in the 2010 process might be identified with

a strong conflict and would probably not be recommended.”<sup>4</sup> The Ethics Committee requested additional information, namely, “[l]ist of athletes, including affiliation, and ask all being considered to include connections (family, teammate, coach etc.)” and “[c]ompleted COI forms for the people being considered.”

On October 28, 2011, the Ethics Committee had another meeting. As noted, Mahoney had identified Kim as a possible replacement on the FSC, should Lowe and Zanotto both be removed, so Kim was under consideration, as well as Mahoney, Fujiki, Josephson, Lowe, and Zanotto. As reflected in the email from Longmire to Harper and Mahoney of the same date, she reported that the Ethics Committee had determined that Lowe and Zanotto had “conflicts of interest as current coaches from clubs with athletes participating in Trials,” but there were no conflicts of interest as to the other submitted names, namely, Mahoney, Fujiki, Josephson, and Kim. By email dated October 31, 2011, from Harper to Zanotto, the latter was informed of the decision of the Ethics Committee and her right to appeal. Zanotto did not appeal the decision. Pursuant to the selection procedure rule that applied if the AAC representative and alternate were both removed, Mahoney selected Kim to replace Zanotto on the FSC.

Mahoney’s decision to select Kim was not a hasty one. Pursuant to the Selection Procedures, Zanotto’s replacement had to meet the qualifications set forth in the Code of Regulations, USA Synchro’s Swimming Rules, Section 7.06(A).<sup>5</sup> In consultation with Hazle, Mahoney had looked to athletes on the Board of Directors that met the qualifications, as well as members of the 2008 Olympic Team. Mahoney felt that it was important the person be actively involved in synchronized swimming in some way. She and Hazle went through the entire 2008 Olympic Team and had come up with several candidates, including Kim. Mahoney felt that Kim was levelheaded and would not be easily influenced.

4. The November 2011 trials and the selection process.

a. Determination of final scores based on fitness evaluations and routine evaluations.

The fitness evaluations conducted in Phase 3 were designed to determine each athlete’s strength and conditioning level, as well as gymnastic skills. The former included the following exercises: bodyweight hand walks, depth drops, single leg box squats, single arm squat presses, and “dive bomber progressions.” Gymnastic exercises included: single arm circles forward, left and right, while walking – 4 count; knee walk – 4 count; pike walk with hands on floor – 2 x 4 count; and step kicks forward – 2 x 4 count alternating leg kicks. At the conclusion of the exercises, each athlete received a fitness evaluation. The rankings from the fitness evaluations

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<sup>4</sup> In her disclosure form dated October 7, 2011, Zanotto stated the following regarding possible conflicts of interest: “Older sister to Khadija Zanotto, 2010 National Team Member and current member of the Ohio State Synchro Team. Lead Coach of Santa Clara Aquamid 13-15 Program, USOC Athlete Advisory Council Alternate Representative.”

<sup>5</sup> For example, one qualification set forth at Section 7.06(A)(3)(a) is that the athlete candidate must “[w]ithin the ten (10) years preceding election, represented the United States in the Olympic or Pan American Games, or an Operation Gold event or a World Championship recognized by the NGB’s International Federation for which a competitive selection process was administered by the NGB, or, in a team sport, an international championship recognized by the International Federation of the NGB[.]”

were in relevant part as follows: Pinette no. 1, Williams no. 2, Theriault no. 5, Morgan no. 6, Killman no. 9, Stewart no. 10, and Koroleva no. 12.

The technical duet evaluations were either scored by a panel of five judges (consisting of Hazle, Linda Loehndorf, Sherri Darst, Kris Olson, and Ginney Jasontek) or a panel of three judges (Fujiki, Mahoney, and Eaton). The athletes performed individual swims, followed by group swims. Several athletes were then chosen for additional group swims. The final rankings for the routine evaluations were as follows: Killman no. 1, Theriault no. 2, Koroleva no. 3, Morgan no. 4, Stewart no. 5, Pinette no. 6, and Williams no. 7.

The final scores, incorporating the fitness evaluations and routine evaluations, calculated on the 75%/25% ratio, were ranked as follows: Theriault no. 1, Pinette no. 2, Killman no. 3, Morgan no. 4, Williams no. 5, Koroleva no. 6, and Stewart no. 7.

The results of the Phase 4 trials were provided to the FSC. Among other information, the FSC was provided with rankings not only based on the final scores, but also with rankings based on routine evaluations only. The first page of the materials provided to the FSC, entitled "TOTAL SUMMARY," reflected the following rankings:

<u>Results of final score (75%/25%) ranking</u>	<u>Rankings based on routine evaluations only</u>
No. 1 Theriault	No. 1. Killman
No. 2 Pinette	No. 2 Theriault
No. 3 Killman	No. 3 Koroleva
No. 4 Morgan	No. 4 Morgan
No. 5 Williams	No. 5 Stewart
No. 6 Koroleva	No. 6 Pinette
No. 7 Stewart	No. 7 Williams

Sue Johnson, the scorer, testified that providing a column ranking results by routine evaluations only, in addition to one ranking the final scores calculated on the 75%/25% ratio, simply presented two views of the data. The Evaluators also made recommendations for selection, with a majority preferring Theriault/Morgan, and a minority preferring Killman/Koroleva.

b. Deliberations of the Final Selection Committee.

The FSC, consisting of Mahoney, Josephson, Fujiki, Eaton, and Kim, began its deliberations immediately upon receipt of information from the Evaluators. It met for several hours during the afternoon of November 14, 2011, had a dinner break, and then met until about 1:00 a.m.

All the evaluations and results were discussed in great deal, as well as the various discretionary factors. Although Pinette had scored very high in fitness and second in the final scores, Mahoney and others felt that she would not be a good candidate for the duet team, since there was such a discrepancy between her fitness evaluation score and routine evaluation score.<sup>6</sup>

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<sup>6</sup> Hearing exhibit no. 130 reflected how many times each athlete was ranked first or second by a judge. Pinette received this status two times. On the other hand, Killman placed first or second 24 times, Theriault 18 times, and Koroleva 16 times. Morgan received this status four times.

The discussions finally came down to four athletes: Killman, Theriault, Koroleva, and Morgan. Mahoney and Josephson felt that Killman and Koroleva should be selected first and second, and constitute the duet team, while Fujiki and Eaton felt the better pairing would be Theriault and Morgan. Kim did not strongly favor either pairing.

The deliberations were contentious. Mahoney testified at the hearing that she believed Fujiki came into the deliberations with her mind already made up and “really had it out” for Killman. Mahoney further testified Fujiki stated in the meeting that she simply did not want to coach a Killman/Koroleva team. Mahoney also stated that Eaton, the team assistant coach, stated her role as a member of the FSC was to support the team coach, Fujiki. Josephson testified that Fujiki stated in deliberations that Killman/Koroleva were the best duet, but she did not want to coach them. Fujiki questioned Killman’s work ethic and Koroleva’s health. Josephson also testified that she felt Fujiki was trying to intimidate the FSC into selecting Theriault/Morgan.

As regards consideration of fitness results in the deliberations, both Mahoney and Josephson testified they were not dropped, they were in fact considered, but they believed more emphasis should be given to routine factors, since this is what the judges saw in the water. Fujiki and Bartleson, an Overseer who sat in on deliberations but did not participate, both testified that fitness results were omitted from consideration on Mahoney’s recommendation. Fujiki testified she was “tricked” and “talked into this.” (The remaining two members of the FSC, Eaton and Kim, were not called as witnesses at the hearing.)

The meeting adjourned at 1:00 a.m. without reaching a result. Mahoney put over deliberations for several weeks, in part to collect additional information about some of the athletes.

The FSC further met on December 15, 2011, in a telephone conference. Mahoney testified extensively about this call, and Exhibit 124, her typed notes regarding the conference, was received into evidence. The strengths, weakness, and other characteristics of individual athletes were discussed in great detail. For example, as regards Killman, the notes reflected, among other things, that she was the “[t]op swimmer through the trials, had “[g]ood execution,” and because of her outstanding ability, “sometimes it is a challenge to match certain moves.” As for Morgan, the notes provided, among other things, that she had “[w]eak Knees and fatigue extension issues,” was “[i]nconsistent throughout figures,” and “[c]ounts were inconsistent,” but “[w]as very good under pressure at World Trophy, learned well and performed under pressure.”

The participants discussed the pros and cons of possible pairs. Regarding a Killman/Koroleva pairing, the pros included “[t]echnical ability [¶] Big presence [¶] More powerful [¶] Mary can make the duet higher”; the cons included “[l]ess consistent in warm up” and “Maria injury-training time an issue.” As for a Theriault/Morgan pairing, the pros were “[s]pins were more consistent [¶] presentation strongest category”; the cons were “[c]onsistency of elements [¶] Olivia height not matched (double leg vertical), makes Michelle look weaker [¶] [s]tamina [¶] Olivia makes the duet lower [¶] [m]ore consistent in warm up than competition.”

The possible pairing of Killman and Theriault was also carefully considered. They were considered the two “strongest technicians” and, since technically equal, might “have more possibilities for choreography.” Since they had not swum together in the past, however, it was uncertain if they would have good chemistry or jell as a pair.

Exhibit 124 states that “[i]t was agreed at the beginning of the call that the routine evaluation from the trials would carry the most weight in the discussion to determine the best pairing.” Also, the members of the FSC “feel confident that by going with the overall routine results based on the judges scores as well as the athlete performances is the fairest selection for all of the athletes involved.”

Fujiki and Eaton refused to budge from their position that the duet team had to be Theriault/Morgan. Mahoney and Josephson still favored Killman/Koroleva. Kim, who had fully participated in all proceedings, recommended that they select athletes as they were ranked in the routine scores, which meant that Killman and Theriault would be the duet team. A Killman/Theriault pairing had great potential, since there was general agreement they were the two best technicians and had greater possibilities for choreography. Mahoney and Josephson agreed to this approach, and a vote was taken. Mahoney, Josephson, and Kim voted to select Killman no. 1, Theriault no. 2, Koroleva no. 3, and Morgan no. 4. The final vote was 3-2, with Fujiki and Eaton in the minority.

As noted previously, pursuant to selection procedures Killman and Theriault were offered the duet positions, and Koroleva was offered the position of alternate. Killman accepted, while Theriault declined the invitation on January 8, 2012. Once Theriault declined the invitation, it was extended to Koroleva, who accepted. Morgan was offered the alternate position, which she accepted on January 28, 2012, but later declined on February 17, 2012.

By an email on December 20, 2011, addressed to Harper, Fujiki asked Harper and Mahoney to give her something in writing regarding the selection process. Harper responded to this request in a memorandum to Fujiki dated January 5, 2012. Harper stated in relevant part as follows: “For the 2012 Olympics, we made a conscious decision to do two things: (1) select the team first, and select the duet from within the team; and (2) select what we considered to be the two best athletes for the duet, rather than selecting the best ‘pair’ who tried out. This means that the trials were an individual try-outs. We have, in the past, used both trials judging results and ‘discretionary’ criteria as part of the decision-making process. We wanted the head coach of the team to have input into, and a vote upon, who was selected, but we also wanted other persons to have input, and a vote, as well. Any process like this may result in differing opinions among those who have to make the ultimate decision. The Final Selection Committee made its decision based upon what I understand to be a number of factors, including your opinion, but ultimately came to the conclusion that the best possible combination for the duet was Mary and Michelle, with Maria as the alternate (replacement athlete). [¶] It is sometimes a very difficult decision, it’s their job to make the decision, no matter how hard. It is now our responsibility to support that decision.”

#### CONCLUSIONS OF LAW

1. Respondent’s motion to dismiss Theriault’s complaint.

Respondent made a prehearing motion to dismiss Theriault’s complaint for lack of standing. Under Sections 9.1 and 9.2 of the Bylaws, a claim may only be brought where a national governing body has denied, or threatened to deny, an athlete “the opportunity to

participate in the Olympic Games [or protected competitions].”<sup>7</sup> Since she was given the opportunity to compete, argues respondent, she lacks standing to bring her complaint.

As to this submitted motion the arbitrator now rules as follows: the motion is granted. Not only was she given the opportunity to compete, she competed and was selected as a member of the duet team for the 2012 Olympic Games. Although not completely clear, Theriault may also be arguing that her duet partner, Killman, was wrongly selected, when the proper selection should have been Morgan, and this in some way denied her “the opportunity to participate” at the Olympics with the greatest possibility of success. This argument is rejected. Section 9.1 is very specific in its language that the athlete must be denied, or threatened with the denial of, “the opportunity to participate in the Olympic Games.” Theriault was manifestly given such an opportunity.<sup>8</sup>

As acknowledged by respondent at the hearing, however, the dismissal of Theriault’s complaint is in some respects a technicality, in that her claims are the same as Morgan’s, and Theriault has the right to participate as an Affected Athlete.

## 2. Applicable law.

Where an athlete makes a facial challenge to selection procedures, the standard is whether there is a rational basis for the challenged rules. *Booth, et al. v. United States Rowing Association and the United States Olympic Committee* (2008) AAA Case No. 30 190 259 07, at p. 25. To prevail on such a claim, the claimant must show, by a preponderance of the evidence, that there is no rational basis for the procedure. (*Ibid.*) As for athlete selections by a national governing body, “an arbitrator should not disturb the selections made by [the governing body] unless the arbitrator finds that the body abused its discretion in the selection process, failed to follow appropriate and approved procedures thereto or violated other requirements or prohibitions (such as gender or racial discrimination) of the governing documents.” *Wright v. Amateur Softball Association of America, Inc.* (2003) AAA Case No. 301900046602, at p. 4.

A claimant’s burden of proof is not an easy one, as reflected by the following language from another case cited with approval in *Booth*:

“In the final analysis, the court must determine if the board’s action is so willful and unreasoning, without consideration of the facts and circumstances, and in such

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<sup>7</sup> Section 9.1 of the Bylaws provides in relevant part as follows: “Section 9.1 Opportunity to Participate. No member of the corporation may deny or threaten to deny any amateur athlete the opportunity to participate in the Olympic Games . . . .” Section 9.2 of the Bylaws provides in relevant part as follows: “Section 9.2 Manner of Filing the Complaint. Any athlete who alleges that he or she has been denied by a corporation member an opportunity to participate as established by Section 9.1 of these Bylaws, may seek to protect his or her opportunity to participate by filing a complaint with the CEO, with a copy to the corporation’s legal division. . . .” (Underlining original.)

<sup>8</sup> Although respondent did not make a formal motion to dismiss Morgan’s complaint on the basis of lack of standing, it did assert this position as an affirmative defense. The issue would be whether an athlete chosen as an alternate could be considered to have been denied the opportunity to participate in an Olympic Games, and thus have a basis to file a Section 9.2 complaint. Because the arbitrator has ruled as otherwise set forth in this decision, this particular issue need not be addressed.

disregard of them as to be arbitrary and capricious. Where there is room for two opinions on the matter, such action is not ‘arbitrary and capricious,’ even though it may be believed that an erroneous conclusion has been reached. *Art Gaines Baseball Camp, Inc. v. Houston*, 500 S.W. 2d 735, 740-41 (Mo.App. 1973),” cited at *Booth, supra*, at pp. 27-28.

Arbitrators or courts “must avoid interfering with an organization’s autonomy by substituting ‘judicial judgment’ for that of an association’s in an area where the association is more competent.” *California Trial Lawyers Association v. Superior Court* (1986) 187 Cal. App. 3<sup>rd</sup> 575, 579-80. The specifics in the *Booth* case are instructive here. Claimant therein challenged the rowing association’s selection procedures, which provided that athletes would participate in a selection camp and be trained with, and evaluated by, national team coaches on six objective factors and one subjective one, team chemistry. Any team recommended for the Olympics would have to be approved by a nominating committee. Claimant contended the selection process should allow athletes to assemble teams and have a “Row Off” to determine the Olympic team, and that the selection camp approach denied him his opportunity to compete.

Rejecting claimant’s position, the panel stated that the use of a selection camp, instead of a “Row Off,” did “not demonstrate a denial of an opportunity; it demonstrates a difference of opinion as to the best means of selection.” *Booth, supra*, at p. 29 “There has been no showing of a lack of rational basis for their decision, and this Panel declines to alter, in any way, this policy decision of USRowing and the USOC.” (*Id.* at p. 56.)

3. Arbitrator’s rulings on issues presented in this case.

a. Use of fitness evaluations in FSC deliberations.

Claimant’s first contention is that the evaluations sent to the FSC did not properly reflect fitness evaluations, and such evaluations were not given the required 25% weight. Credible evidence at the hearing, however, established Evaluators provided the FSC with data that reflected fitness evaluations, as well as final scores weighted 75% routine evaluations and 25% fitness evaluations. The document did contain another category, rankings based solely on routine evaluations, but as the scorer, Sue Johnson, testified, this was simply another view of the data.

There was conflicting testimony on whether the members of the FSC considered the fitness evaluations, or whether the fitness evaluations ultimately were totally omitted from their consideration. Mahoney and Josephson testified that the fitness evaluations were always considered, but the routine evaluations given greater consideration, while Fujiki and Bartleson testified fitness evaluations were omitted. The arbitrator concludes the more credible evidence supports the testimony of Mahoney and Josephson on this question, that the fitness evaluations were not completely omitted, and that the fitness evaluations informed the FSC’s selections.<sup>9</sup>

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<sup>9</sup> It is noted that Mahoney’s notes regarding the December 15, 2011 telephone conference stated the group “feel[s] confident that by going forward with the overall routine results based on the judges scores as well as the athletes performances is the fairest selection for all of the athletes involved.” Although this is open to an interpretation that the fitness evaluations were omitted, the totality of the evidence, in the view of the arbitrator, is that the FSC did not completely omit fitness evaluations, they were in fact considered, separately and as a component of the final scores, and they did inform the ultimate decisions of the FSC.

There is no question that the members of the FSC were aware of the fitness evaluations, and also aware of the final scores weighted 75%/25%. Under the selection procedures, however, they were then required to go beyond the scores and apply a host of discretionary water and non-water criteria. In making their final determinations on rankings and selecting the duet pair, there was no requirement in the rules, or in logic, that the determinations had to include an identifiable percentage attributed to fitness evaluations. The relevant Selection Procedures had a rational basis, and the FSC did not abuse its discretion in following its procedures.

b. Kim's participation on the FSC.

The Act requires that the USOC "establish and maintain an Athletes' Advisory Council composed of, and elected by, such amateur athletes to ensure communication between the corporation and such amateur athletes." 36 U.S.C. § 220504(b)(2)(A). Section 8.8.5 of the Bylaws provides that: "Athlete representatives to an NGB's board of directors, executive committee, and other such governing boards as defined in Section 8.8.1 shall be directly elected by athletes who meet the standards set forth in Section 8.8.2. Athlete Representatives to all other NGB committees and task forces shall be selected by the NGB with the approval of the athletes, or a representative group of athletes, who meet the standards set forth in Section 8.8.3" Since other athletes had not duly elected Kim, claimants argue that the selections must be struck, a new athlete representative elected, placed on the FSC, and selections held anew.

There are a number of problems with this analysis. First, the duly elected AAC representative, Lowe, specifically signed off on the procedures that would result in Mahoney selecting an athlete representative for the FSC, should both she and Zanotto be removed for conflicts of interest. When Lowe, the duly elected ACC Representative, agreed to such a procedure, she spoke on behalf of the athletes that elected her. It would be hard to see how Lowe, for example, could complain about a process she specifically approved. Also, when Zanotto was informed she was being removed for conflicts of interest but had the right to appeal the decision of the Ethics Committee, she elected not to do so.

There was testimony at the hearing that if an athlete representative were unable to attend an NGB Board or committee meeting for some reason, or had been disqualified from attendance due to a conflict of interest, the meeting would proceed without the athlete representative. This was consistent with USOC policy and practice. It may well be that Lowe, in signing off on the Selection Procedures, wanted to ensure that the FSC at least had some athlete representation if both she and Zanotto were disqualified.

Furthermore, there is no existing authorization for holding an athlete representative special election for a single committee where the AAC representative is disqualified for conflicts of interest. It is not hard to see the havoc that might result if such a special election were compelled. According to testimony at the hearing, athlete representatives are elected every four years at Senior Nationals. If claimants were correct, once the Ethics Committee on October 28, 2011, ruled that Lowe and Zanotto were disqualified for conflicts of interest, a special election, for which there are no established procedures, would have to be held. Qualified candidates would have to be identified, as well as qualified voters. There would have to be a notice for nominations, which would have to be received, and any nominees would have to be cleared by the Ethics Committee. Then there would have to be some type of vote, perhaps by email.

All this would have to be done between October 28, 2011, and November 11, 2011, the start of the trials. Further complicating the scenario was the fact that the Pan American Games were held in this interim period. Importantly, the vote would be for a single selection committee, in reality just for a few votes. This might present the unseemly spectacle of candidates running on platforms to select particular athletes over others for participation in the Olympic Games.

Under the unique facts of this case, Kim's participation on the FSC was not inconsistent with relevant statutory authority and the Bylaws. As regard the allegation that Kim was hand-picked by Mahoney to go along with anything Mahoney proposed, the evidence is sharply to the contrary. Kim was manifestly not Mahoney's puppet. She refused to follow Mahoney's recommendation of Killman/Koroleva, and in fact persuaded Mahoney to her position, that the best choice would be Killman/Therault. All the evidence at the hearing indicated that Kim was an independent and valuable member of the FSC, and that she performed her duties with diligence and distinction.

The Selection Procedures, including those particularly relevant to this issue, had a rational basis, and the FSC did not abuse its discretion in following its procedures.

c. Alleged bias of Mahoney.

Claimants next allege that Mahoney had a direct conflict of interest and should have recused herself, in that, among other things, in response to a previous letter by Morgan to respondent that Mahoney should resign, Mahoney told others she would never select Morgan as a consequence of this perceived slight.

Based on the evidence, the arbitrator concludes that Mahoney did not show bias against Morgan, or any other athlete, at any point during the selection process. In fact, there is statistical evidence in the record to show a lack of bias. Exhibit 130 sets forth the evaluations by Fujiki, Mahoney, and Eaton on each element in the technical duet trials. As to six elements in Swim 1, Mahoney ranked Morgan third, tied for fourth, fifth, tied for fourth, tied for fourth, and fifth. On the same categories, Fujiki ranked Morgan fourth, tied for fourth, tied for fourth, tied for fourth, tied for third, and sixth. These results are roughly similar; in fact, Fujiki sometimes ranked Morgan lower than Mahoney. If Mahoney had any bias against Morgan, these scores certainly do not display it.

As regards FSC deliberations, there is no evidence that Mahoney told anyone she would never select Morgan because of the alleged letter. The letter, never introduced into evidence by any of the parties, purportedly was written by Morgan and others to contest Mahoney's termination of the prior Head Coach, Jenny Ekhilevsky ("Ekhilevsky"). The letter was allegedly addressed to Harper and Mahoney. Mahoney testified that this letter did not cause her to be biased against Morgan. In fact, Mahoney stated that there were many emails requesting that she be fired because of Ekhilevsky's termination. Josephson testified that she never saw any bias displayed by Mahoney against Morgan. Although there was some evidence that the letter may have been mentioned briefly and tangentially in the deliberations, the arbitrator found the testimony of Mahoney and Josephson regarding a lack of bias to be credible and controlling.

d. Claimant's allegation that The FSC improperly chose two individuals, instead of a duet, as required by the Selection Procedures.

Claimants' final contention is that the selection procedures contemplated selection as a duet, not that the highest two in the rankings would automatically constitute the duet. Thus, the FSC's pairing of the top two athletes in the routine evaluations was improper. Claimants also alleged that, although a strong majority of the FSC favored selecting claimants as the pair, Mahoney and Harper overrode the views of the majority and ordered that the individuals be selected based on individual rankings.

The obvious purpose of the Selection Procedures was to select a pair with the greatest likelihood of winning a medal at the Olympic Games. In the past, teams had tried out for the duet in pairs, not individually. Unfortunately, stronger athletes would frequently come into the trials paired with weaker ones, and the selection committee was forced to pick among existing pairs. The new procedures were designed to address this problem by allowing the strongest athletes to be paired together, and to allow athletes not previously paired to try out.

At the final FSC meeting on December 15, 2011, Fujiki and Eaton adamantly refused to consider or vote for any duet other than Theriault/Morgan; Mahoney and Josephson favored Killman/Koroleva; and Kim would not vote for either pair. If everyone refused to budge, there would be no duet selection. The situation was difficult, but the FSC had to make a decision. The final vote, which represented a compromise, reflected a reasoned decision that Killman and Theriault, under the circumstances, were the best athletes to make the best pair. This determination was not illogical, since both had the best technique and, as a pair, the greatest potential. Mahoney and Josephson should not be faulted for having the flexibility to change their votes to reach a decision. The FSC made the best decision it could under very trying conditions. The FSC properly followed the Selection Procedures in making its selections.

Finally, there was no strong majority on the FSC favoring Theriault/Morgan. Rather, a minority, Fujiki and Eaton, favored them.<sup>10</sup> There is also no evidence that Mahoney or Harper overrode the views of a majority and ordered that individuals be selected on individual rankings. Harper did not participate in the deliberations of the FSC. There was never a majority favoring Theriault/Morgan, and there is no evidence that Harper or Mahoney ever "ordered" anything.

As previously noted, the Selection Procedures had a rational basis, and the FSC did not abuse its discretion in following its procedures.

e. Pinette's claim that she was treated unfairly by the FSC.

The arbitrator concludes that Pinette was not treated unfairly by the FSC, and that her rights were not violated. Although she performed very well on the fitness evaluations, she did not do nearly as well on the routine evaluations, as reflected by the relatively few times she was ranked first or second by the judges. The FSC was aware of the fitness evaluation results and the final score with the 75%/25% weighting, but they were entitled to consider all other discretionary and nondiscretionary factors to determine the pair most likely to win an Olympic medal. The arbitrator has already addressed Pinette's second contention, the same as claimants, that the failure to have an elected athlete representative on the FSC invalidated its selections.

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<sup>10</sup> There is also evidence in the record that Eaton was not exercising independent judgment, but rather automatically agreed with whatever position was taken by Fujiki. (Mahoney testified that Eaton stated during FSC deliberations that her role in the FSC was to support the Head Coach, Fujiki.)

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been duly designated to preside over this matter, having been duly sworn, having duly heard the proofs and allegations of the parties, and giving full consideration to the evidence and arguments of counsel, do hereby AWARD as follows:

THE ARBITRATOR FINDS IN FAVOR OF RESPONDENT AND AGAINST CLAIMANTS, AFFECTED ATHLETE PINETTE, AND AFFECTED ATHLETES STEWART AND WILLAMS, TO THE EXTENT THE LATTER TWO ADVANCED POSITIONS THE SAME AS CLAIMANTS AND PINETTE. THE COMPLAINT IS ORDERED DISMISSED. EXCEPT AS NOTED BELOW, EACH SIDE TO BEAR THEIR OWN ATTORNEY FEES AND COSTS.

The administrative filing fee of the AAA, totaling \$850.00, shall be borne entirely by claimants. The fees and expenses of the arbitrator, totaling \$2,799.81, shall be born entirely by respondent. Therefore, respondent shall reimburse claimants the sum of \$1,399.91, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by claimants, upon demonstration by claimants that these incurred costs have been paid.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

Dated: March 26, 2012



Judge Charles C. Lee, Ret.  
Arbitrator