BEFORE THE AMERICAN ARBITRATION ASSOCIATION
Commercial Tribunal

Melissa Merson Claimant v. USA Triathlon Respondent	)	**AAA No. 01-14-0001-6464**

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On April 14, 2015, the Parties herein, Claimant Melissa Merson (sometimes "Claimant" or "Merson") and Respondent USA Triathlon (sometimes "Respondent" or "USAT") appeared and presented evidence in support of their respective positions with respect to the Charging Letter issued by USAT, asserting claims against Merson and requesting that the Arbitrator impose sanctions on Merson.

Background of the Dispute

1. Claimant was a member since 2008 of the Executive Board of the International Triathlon Union ("ITU") having been elected that year. As a direct result of holding that position, Claimant was also an *ex officio* member of the USA Triathlon Board of Directors, the Respondent in this matter.

2. During 2012, the Respondent's Board of Directors was called on to vote on an individual whom the USAT would nominate to stand for election to ITU Executive Board for the coming term of office, and Claimant sought nomination to be re-elected. The USAT Board voted to nominate a person other than Claimant, and Claimant brought an Article 9 Proceeding before the United States Olympic Committee ("USOC") seeking to overturn that vote and compel the USAT to nominate her to stand for election to the ITU Executive Board. (AAA Case No. 77 190 272 12 JENF) (the "First Arbitration") The hearing on that complaint was held on September 20 and 21, 2012, and a decision rendered by the Arbitrator on September 22, 2012, with a reasoned decision published on October 12, 2012. The First Arbitral Award ruled for USAT and held that:

> "[Ms. Merson]'s claims and requested relief are denied (in other words, the USA Triathlon Board's decision to nominate only [another individual] for a position on the ITU Executive Board remains in effect.)"

3. On or about October 11, 2012, a USAT form purporting to nominate Ms. Merson to stand for election on the ITU Executive Board was prepared by or on behalf of Ms. Merson and executed by the Secretary General of USAT. (the "SG").

4. The USAT form purporting to nominate Ms. Merson was forwarded to Ms. Merson by the SG and submitted by her to the ITU as a nomination by the USAT. However, given the lateness of the submission, questions were raised about the propriety of the submission. These questions were not triggered by the nature of the form or the signatures on it.

5. As a result of the questions raised by the form, the ITU contacted Ms. Merson, who argued on various grounds not particularly relevant to this decision that the form was proper and the ITU could choose to waive the time filing restriction and permit her to stand for election. However, during this period the ITU also communicated with the USAT to inquire as to why it was submitting a form out of time. This triggered consternation on the part of the USAT which promptly disavowed the form. The ITU then informed Ms. Merson that she could not stand for election. Following the elections in October of 2012, Ms. Merson lost her position on the ITU Executive Board and lost her *ex officio* position at the USAT. The record indicates that the

nomination was never submitted to the electing body and the knowledge of the submission of the form was confined to a very few ITU officials.

6. Not deterred in her zeal to participate in governance of her sport, Ms. Merson was elected as Secretary to the Mid-Atlantic Region Council of the USAT in the fall of 2013 and assumed office in January 2014. She had previously held this position for a number of years prior to her election to the USAT Board of Directors in 2008.

The Current Proceeding

7. Approximately one year and eight months after the actions of Ms. Merson and the SG in submitting the nomination form to the ITU, and over six months since her election as Secretary of the Mid-Atlantic Region Council, Respondent USAT notified Ms. Merson for the first time that she was under investigation for her actions with respect to the nomination in 2012.

8. It was not, however, the first point at which the USAT Board was queried about whether action should be taken. The evidence shows that a USAT official wrote to the Board members immediately after the 2012 ITU meeting, suggesting that consideration should be given to whether to take action about the false nomination form. In addition, it appears undisputed that Respondent commenced an internal complaint procedure sometime in 2013, but did not inform Claimant of that process until sending the June 6, 2014, Charging Letter.

9. That June 6, 2014, notification informed Ms. Merson that she was to be subject to a disciplinary proceeding before the Board of Hearings and Appeals of the USAT Board of Directors ("BHA") to determine whether she should be sanctioned and excluded from USAT activities for a period of time as a result. This is apparently the first point at which Claimant was notified that a formal disciplinary proceeding would be held.

10. It is noteworthy that The SG was never charged with a violation of his duties as a Board member *and officer* of USAT despite the fact that without his complicity, the scheme could not have been advanced at all. USAT did establish that the SG was requested to resign as the Secretary General of USAT as a result of his participation, but was not otherwise required to curtail his activities in the sport nor even to resign from the Board, where he served for another two years. He was never put through the embarrassing process of a formal complaint procedure. Similarly, though USAT proffers evidence of what it characterizes as improper and abusive actions of Mr. Sexton in support of Ms. Merson in support of its claims against her, it appears that Mr. Sexton has suffered no punitive reaction from the USAT Board of any kind, not even a hearing on his actions.

11. There was no suggestion, much less evidence, that Ms. Merson had done anything since the clearly improper submission of a nomination form to ITU, that would reflect badly on the USAT or which were disruptive of the USAT in any way. To the contrary, Ms. Merson testified without contradiction that she works on advancing the interests of her Regional Council, coaches, works with children, and has even been appointed by USAT representatives to work on

USAT projects. She is a certified USAT Coach and a certified USAT race official and an ITU Continental Official.

12. Following receipt of the June Charging Letter, Claimant quickly retained counsel and on June 27, 2014, before receiving any new communication from the BHA, her counsel had in turn filed a complaint against Respondent before the United States Olympic Committee ("USOC") under Article 9 of the USOC By-Laws seeking to prevent the announced disciplinary proceeding from taking place. That complaint asked that the dispute between Claimant and Respondent be resolved by the USOC, if possible.

13. During the course of the efforts by the USOC Ombudsman to negotiate a resolution, Respondent informed the Claimant by letter of September 2, 2014, that the BHA would proceed with the disciplinary proceeding and hold a hearing on the charges against her on October 15, 2014, despite the fact that the parties were actively participating in what was supposed to be a mediated resolution.

14. Having little choice at that point, on October 6, 2014, Claimant filed the arbitration demand which resulted in this proceeding.

15. While this proceeding commenced by reason of Merson's having filed the arbitration demand, there has not actually been a disciplinary proceeding conducted by USAT at all. Therefore the Parties agreed that the issue of Merson's conduct and whether a sanction would be appropriate, and the nature of any such sanction, would be decided in this arbitration proceeding. This effectively placed USAT in the position of a plaintiff and it carries the burden of proof herein.

16. Pursuant to agreement of the Parties and the Arbitrator, on January 16, 2015, USAT served on Merson a "Charging Letter" which serves as the complaint in this matter. The January 16 Charging Letter alleged that submission to the ITU of the October 11, 2012 nomination form signed by Merson and the SG constituted a fraudulent act, and a violation of Merson's obligations under the USAT Volunteer Code of Ethics and Conduct (the "Code"), and her obligation under state law as a Director of USAT.

Burden of Proof

17. An issue in this case is the applicable standard of proof that must be met by USAT in order to establish a doping violation in this case. The issue arises as a result of the ambiguous and loose language of the USAT Bylaws, Article XV, Section 4(f):

> The burden of proof shall be on the proponent of the charge, which burden shall be at least a "preponderance of the evidence."[1] (quotations in original)

[1] In its brief, USAT for some reason omits the important language "at least", suggesting that it is a single standard applicable in all instances. Whether or not that is what USAT meant when adopting this provision, it is clearly not what the Bylaw says.

18. Since the USAT appears to recognize the potential for differing burdens and has not been clear on what standard should be applied in different matters, it is left to the Arbitrator. As a consequence, the Arbitrator examined the bases for the development and adoption of different standards of proof and how those standards are applied. In reaching his decision the Arbitrator examined the application of well-known standards of proof, considered the factors which should apply when choosing among those standards for application in a particular case, and compared those factors to those used to set burden of proof standards in other, similar sorts of cases.

19. Modern standards of proof derive from the shift to scientific thought and probabilistic methods in the eighteenth century. This focus on probability led to the modern hierarchy in common law countries of "beyond a reasonable doubt" for criminal cases, "clear and convincing evidence" for quasi-criminal and some civil cases, and "a preponderance of the evidence" for most civil cases.

20. In determining the appropriate standard to apply in a case of first impression where there is no prior guidance, a judge or arbitrator must consider (1) the personal interest at stake, (2) the chance of an erroneous finding resulting from a lower standard of proof, and (3) the public interest in the standard of proof.

The Historical Development of Standards of Proof

21. Beginning in the eighteenth century, an increased interest in science resulted in a focus on probability in law. By the end of that century, juries were being instructed in "detailed Lockean terms of probability and degrees of certainty." It was around this time that the criminal and civil standards diverged in common-law systems, resulting in the highest standard of (probabilistic) proof for criminal charges, and lesser standards for various civil charges. [2]

Modern Usage

22. The modern method of determining which standard of proof should be applied to a particular case or type of case in the United States was described by Justice Harlan in his oft-cited concurrence in *In re Winship*.[3] The analysis is based on two propositions: that the factfinder can only acquire a belief of what probably happened, and that the factfinder will occasionally be wrong in this belief.[4] The choice of a standard of proof is, therefore, a

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[2] Kevin M. Clermont and Emily Sherwin, "A Comparative View of Standards of Proof", 50 AM. J. COMP. L. 243, 255, 256-257 (2002).
[3] 397 U.S. 358 (1970) (holding that proof beyond a reasonable doubt was a required due process safeguard in a juvenile delinquency hearing that could result in confinement of up to six years).
[4] *Id.* at 370 (Harlan, J. concurring).

measurement of the "comparative social disutility" of an incorrect finding in favor of either party.[5]

23. The Supreme Court considered the standard of proof required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution in *Matthews v. Eldridge*[6]. The Supreme Court described three factors that should be considered: (1) the private interest at stake; (2) the risk of loss due to an incorrect finding and probable value of a lower standard; and (3) the public interest.[7] This balancing test provides a means of weighing the "social disutility" described by Justice Harlan in *Winship*. Thus, if the private interest and risk of loss are overwhelmingly more significant than the probable value of a lower standard and the public interest in a quick and inexpensive resolution of disputes, a high standard of proof, as in a criminal case, should be applied.

24. In cases of a non-criminal nature, but where the private interest still substantially outweighs the public interest, a lower, but still substantial burden of proof is appropriate. Finally, in situations where private interests are relatively balanced, or the private interest is balanced by the public interest, a relatively lower standard of probability may be imposed as the burden of proof to be carried.

25. Thus in criminal cases, the highest standard of "beyond a reasonable doubt" is applied, since the disutility of an incorrect finding in favor of the prosecution far outweighs the disutility of an incorrect finding in favor of the defense.[8] In this country, as in most, it is considered far better that a guilty-in-fact defendant escape punishment than an innocent-in-fact defendant be punished unjustly.

26. In civil cases, where the disutility of an incorrect finding in favor of either party is roughly equal, the lowest "preponderance of the evidence" standard is appropriate.

27. In civil and quasi-criminal cases where one party has much more at stake than the other,[9] it is appropriate to impose a higher level burden of proof on the complaining or accusing party. This is generally known as the "clear and convincing evidence" standard. Such cases include

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[5] *Id.* at 370-71; *see also* Richard S. Bell, "Criminal Law: Decision Theory and Due Process: A Critique of the Supreme Court's Lawmaking for Burdens of Proof", 78 CRIM. L. & CRIMINOLOGY 557 (1987) (suggesting that the Supreme Court utilizes Kaplan's method of decision theory).

[6] 424 U.S. 319 (1976) (holding that evidentiary hearing prior to termination of Social Security benefits not required by Due Process Clause); *see also* Santosky v. Kramer, 455 U.S. 745 (1982) (applying Matthews factors to determine appropriate standard of review in parental rights termination proceeding).

[7] Matthews, 424 U.S. 319.

[8] Winship, 397 U.S. at 370-71.

[9] *See, e.g.,* Addington v. Texas, 441 U.S. 418, 424 (1979) (clear and convincing standard appropriate when "[t]he interests at stake...are more substantial than mere loss of money"; the standard is necessary to protect "particularly important individual interests in various civil cases.").

civil fraud, deportation, naturalization, civil commitment, and termination of parental rights, among others.[10]

28. For example, in *Santosky v. Kramer*[11] the Supreme Court applied the *Matthews* analysis to determine the proper standard of proof required in a parental rights termination hearing. The Court emphasized that the correct interest to examine was that of the parents, since "the fact finding hearing pits the State directly against the parents."[12] For this portion of the analysis, the interests of other parties such as foster parents were not considered. The Court found that the private interest at stake – the right of parents to raise their children – was "commanding."[13] The Court next determined that a "preponderance of the evidence" standard would result in a substantial likelihood of an erroneous deprivation of the private interest at stake, since in most parental rights proceedings "[t]he State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense."[14]

29. Finally, the Court concluded that an elevated standard of proof would not impose a substantial increase in the financial costs imposed on the State.[15] The final conclusion of the Court was that a standard of proof higher than "a preponderance of the evidence" was necessary. The Court further stated that the "clear and convincing" standard was well-suited to the proceedings, but that individual states were free to adjust the "precise burden" required.[16] By analogy, there does not seem to be any impediment to the USAT adopting a set standard, or a set of standards for disciplinary hearings rather than leaving the issue open ended.[17] However, the USAT has done so.

30. Thus, to determine the appropriate standard of proof to apply in a case of first impression as is presented in this matter, the Arbitrator must first examine the private interest at stake – that of the responding athlete or official – which the Arbitrator finds to be high, given the potential for an interruption in or cessation of the career of the athlete, coach or sports official, depending on the nature of the claim and the penalty being sought. For example, loss of a profession, employment and livelihood, or obstruction of a non-monetary but important opportunity (such as

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[10] *See* California ex rel. Cooper v. Mitchell Bros. Santa Ana Theater, 454 U.S. 90, 92-93 (1981) (listing cases requiring clear and convincing standard); Santosky, 455 U.S. at 769-70 (1982) (something greater than preponderance of the evidence required in parental termination hearing); Grogan v. Garner, 498 U.S. 279 (1991) (majority of states require proof of fraud to be clear and convincing); Addington v. Texas, 441 U.S. 418, 431-33 (1979) (majority of states require clear and convincing evidence for civil commitment, and due process requires something higher than preponderance of the evidence).

[11] Santosky, 455 U.S. 745.

[12] *Id.* at 759.

[13] *Id.* at 758.

[14] *Id.* at 763.

[15] *Id.* at 767.

[16] *Id.* at 769-70.

[17] The language of the section itself is puzzling since it would seem to be unnecessary to set a floor for the burden of proof as a preponderance of the evidence. A lower standard would mean that it is more probable than not that the person being charged has not committed an offense. This might be the equivalent to a "suggestion" of guilt, or a "hint" of guilt or a "suspicion" of guilt. The Arbitrator need not address whether this would comport with due process requirements as it is clear that at least a preponderance is required.

competing in an Olympic competition, which is a fleeting opportunity) ought to be held to a higher standard of proof. A denial of the perquisites of office or prestige of position does not carry such a high level of impact on the individual and may be more closely analogized to a civil proceeding. For this reason, the Arbitrator will consider the nature of the relief sought in making his findings.

31. We next turn to the question of whether there is a substantial chance of an erroneous finding which would result in a loss of that private interest. This is a complex question, in so far as the basic elements of proof are not of a scientific nature (as is the case in a doping charge), but ephemera such as the veracity of the witnesses, or the potential for a miscommunication between parties which may be critical to the claim.

32. As to whether there is a large disparity between the litigating powers of the parties, that is not always the case, as the parties who may come within the purview of the sports codes in general may be individually wealthy or supported by benefactors or sponsors, and are often well-funded and well represented by competent, experienced counsel. In this matter, for example, Ms. Merson was represented by competent, experienced counsel from the very start. Indeed, the fact that she was not subject to the announced USAT disciplinary hearing is attributable to the actions of her initial counsel, Chris Campbell, who removed the dispute to the USOC, and her subsequent counsel who removed the dispute from the USOC to the American Arbitration Association. Thereafter, Ms. Merson added the Valparaiso University Law Clinic to her team, which was highly aggressive in seeking favorable procedural rulings, and at trial appeared with a team of five advocates. The representation of Ms. Merson in this matter was of a very high quality. The Arbitrator finds that this factor is evenly balanced despite the cumulative experience of the USAT and its witnesses as well as of its very experienced counsel, and the generally greater power of organizations.

33. Finally, there does appear to be strong public interest in assuring that sports organizations and their officials "play by the rules"[18]. This interest encompasses not only the oft-stated concern that sports competitions be conducted in accordance with the rules, but also general societal interests in the effect on impressionable youth, and general adherence to laws and codes of ethics. The issue before this Arbitrator is the extent to which those interests balance against the interests of the individuals and the injury from an erroneous decision. As is discussed elsewhere in this decision, the Arbitrator has examined this factor in light of the evidence submitted and the relief sought.

34. While society in general and the sporting organizations in particular have the interests described above, those interests are not of a sufficiently immediate nature, nor has it been established to the satisfaction of the Arbitrator that they are sufficiently grounded in the interests of protecting the public safety and wellbeing of persons other than the individual at the bar (or in this case before the arbitration panel). To put it in terms used by Justice Harlan, the "disutility" of a failure to find against any one particular individual who might have "cheated," and also

[18] This obligation should and will be applied to both parties.

perhaps thereby to deter others – as strong as that is, does not outweigh the potentially devastating effect that an incorrect finding would have on the individual.

35. In this case, there has been no evidence presented that impressionable youth, or in fact any third party, was affected by the impropriety of Ms. Merson's actions. Indeed the record shows that only a very small group of individuals has any knowledge of the events, and USAT admitted at the hearing that quite possibly the bulk of any embarrassment in 2012 may well have arisen from other disputes directly between USAT and officials of the ITU – not Ms. Merson's actions. Indeed, the majority of positions up for election at the ITU meeting in 2012 were filled by candidates nominated by USAT.

36. Ms. Merson, relying on decisions in doping charge cases, urges that the arbitration be decided under the intermediate standard of "comfortable satisfaction[19]."

> "[A]ccording to the Code of Ethics, that burden of proof "shall be at least a preponderance of the evidence." Considering that the nature of an ethics charge is essentially an allegation of intentional moral transgression, the burden of proof should be commensurate with the gravity of the charges. In this case, the seriousness of the claim and possible penalty dictates that the burden should be higher than a preponderance of the evidence. It should be similar to other burdens for ethical breaches in the sports world, namely a comfortable satisfaction.

37. By whatever name called, this intermediate standard of proof is higher than the "balance of probability" (i.e., preponderance of the evidence), but lower than the criminal standard of proof beyond a reasonable doubt. Other panels have also described it as "high".[20] The intermediate level of proof is sometimes referred to in sports matters as a level of proof to the "comfortable satisfaction" of the trier of act. The Arbitrator finds this to be the equivalent of a "clear and convincing standard."

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[19] World Anti-Doping Code Art. 3, § 3.1 (2003). It appears that the standard originated in cases decided by the Court of Arbitration for Sport (CAS). *See, e.g.,* World Anti-Doping Code, Art. 3, § 3.1 comment; Frank Oschutz, "Harmonization of Anti-Doping Code Through Arbitration: The Case Law of the Court of Arbitration for Sport", 12 MARQ. SPORTS L. REV. 675 (2002) (quoting a CAS panel that stated the proper standard of proof is "less than criminal standard, but more than the ordinary civil standard. The panel are content to adopt the test that ... ingredients must be established to the comfortable satisfaction of the Court having in mind the seriousness of the allegation which is made.").

[20] N., J., Y., W. v. Federation Internationale de Natation (FINA), No. 98/208, Digest of CAS Awards II 1998-2000 at 247 (Matthieu Reeb ed., 2002) (hereinafter CAS II); B. v. FINA, No. 98/211, CAS II at 255, 266; S. v. FINA, No. 2000/A/274, CAS II at 396 (quoting M. & M. v. FINA, CAS 99/A/234 and CAS/99/A/235, at paras. 4.2, 4.3); H. v. FINA, No. 2000/A/281, CAS II at 416 (quoting M. & M. v. FINA, CAS 99/A/234-35).

38. This standard is consistent with the analysis of the U.S. Supreme Court in *Santosky*, as the private interest at stake is large. An individual can be stripped of his profession and reputation, depending on the penalty being sought. The risk of an erroneous finding is substantial, due to an imbalance in available resources, and the public interest in quick resolutions is not substantially jeopardized by requiring an elevated standard.

39. It is therefore instructive to examine briefly the standards used in various professional misconduct proceedings in an effort to understand the standard that we are asked to apply. In the various individual states in this country there is some variation, with disciplinary proceedings in the legal and medical fields generally requiring a standard of *either* "clear and convincing" *or* "a preponderance of the evidence." With respect to attorney misconduct hearings, most states require "clear and convincing" evidence.[21] The largest, nation-wide legal association in the United States, the American Bar Association, has adopted a "clear and convincing evidence" standard for proof for misconduct and incapacity proceedings in its Model Rules for Judicial Disciplinary Enforcement.[22] This may have been more an administrative election rather than one driven by due process requirements, but that does not factor heavily into this analysis.

40. Standards for medical professionals, however, vary greatly depending upon the specific state in which a complaint is made and the nature of the specific allegations made. For example, actions involving allegations of substandard care in Virginia use the clear and convincing test,[23] while a disciplinary proceeding to revoke a physician's license in New York applies the preponderance of evidence standard[24] and an administrative hearing to revoke an EMS license in California requires "clear and convincing proof to a reasonable certainty"[25] However, it does

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[21] "Attorney Disbarment Proceedings and the Standard of Proof", 24 HOFSTRA L. REV. 275, 284-85 (1995) (stating that New Jersey, Illinois, Florida, Connecticut, and the Fifth Circuit all require clear and convincing evidence in disbarment or disciplinary proceedings). Two notable exceptions are California, which requires proof "to a reasonable certainty" and New York, which requires only "a preponderance of the evidence." *Id.* Other states requiring clear and convincing evidence for various disciplinary hearings include Oklahoma, Utah, Louisiana, West Virginia, and the District of Columbia. O.S. § 6.12(c), *available at* http://www.oscn.net/applications/oscn/DeliverDocument.asp?citeid=100622 (last visited June 29, 2004); Utah State Court Rules, Rule 17, *available at* http://www.utcourts.gov/resources/rules (last visited June 29, 2004); Rules of Supreme Court of Louisiana, Part B, Section 18(C), *available at* http://www.lasc.org/rules/html/ptBr19_2.htm (last visited June 20, 2004); Nebraska Supreme Court Disciplinary Rules, §§ 11, 12, *available at* http://court.nol.org/rules/Discipli_03.htm (last visited June 29, 2004); West Virginia State Bar Rules of Lawyer Disciplinary Procedure, § 3.7, *available at* http://www.wvbar.org/BARINFO/rulesldp/rules3.htm (last visited June 29, 2004).

[22] American Bar Association, Model Rules fir Judicial Disciplinary Enforcement, § II, Rule 7 (2004), *available at* http://www.abanet.cpr/juddis/rule7.html (last visited June 29, 2004).

[23] *See, e.g.,* Damon Adams, "Medical Boards Feel Pressure", Amednews, *at* http://www.ama-assn.org/amednews/2003/04/21/prl20421 (April 21, 2003).

[24] *See, e.g.,* Association of American Physicians and Surgeons, "New York State Assembly, Committees on Health, Higher Education, and Codes", at http://www.aapsonline.org/testimony/schlaflytestimony (January 31, 2002) (address by Andy Schlafly, AAPS General Counsel).

[25] This is probably equivalent to a "clear and convincing" standard. *See* Ettinger v. Board of Medical Quality Assurance, 135 Cal. App. 3d 853, 185 Cal. Rptr. 601 (1982) (stating that disbarment proceedings and similar actions are "of a nature all their own, neither civil nor criminal", and that the appropriate standard is something more than "a preponderance of the evidence").

appear that all medical disciplinary proceedings use one of the common standards of proof generally applied in legal proceedings in the United States. It may be that some jurisdictions find that the public interest in protecting the health of individuals and the public in general is paramount and justifies a lower standard of proof to support revocation of licenses.

41. Standards of evidence, or burdens of proof, are not mathematical and are, necessarily, of the very wide, general nature by which they have been defined. Commentators have suggested that factfinders can only determine whether something probably happened, highly probably happened, or almost definitely happened.[26]

42. By way of example to the issues in this case, in light of the potential need for "intent" to be found on the part of Ms. Merson, consider an employee who can be fired in 2003 if his blood alcohol content (BAC) on testing meets or exceeds .08%, and the standard of proof imposed on the employer to show that fact is "beyond a reasonable doubt." If the employee's blood is taken in 2003, but charges are brought in 2004, it is clear that the employer could not lower the standard to .06% for liability. However, if the level for discipline remains at .08%, but the burden of proof standard has been lowered to require "clear and convincing" evidence, applying the new standard does not impose a new liability for the employee's actions. That change merely changes the "believability" required of the evidence presented and, therefore, the new standard may be applied. This result is partly dependent on the nature of the charge. If the blood alcohol level is a strict liability charge, it requires no intent on the employee's part and no interpretation of his or her actions by the factfinder. If, on the other hand, the employment regulation in question permits only an employee who *willfully* becomes intoxicated to be fired, then intent must be established.

Discussion

43. Following the April 14 hearing, USAT narrowed its claims against Ms. Merson to:

a. Section IV.G.1 of the Volunteer Code of Ethics & Conduct[27] (the "Code")

> "it is a violation of the Code to alter or falsify information on any record or document, to intentionally make a false or exaggerated claim to anyone, or to mislead anyone about what we do."

44. This provision has multiple components. The first and third prohibit altering or falsifying information on any document or in statements to others. The second specifically includes a

[26] C.M.A. McCauliff, "Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?", 35 VAND. L. REV. 1293 (1982) (quoting McBaine, "Burdens of Proof: Degrees of Belief", 32 CALIF. L. REV. 242 (1944)).

[27] Effective as of August 2012

provision that requires that scienter, or intent, is a necessary component of the offense. The USAT urges that the intent requirement should only apply to the second prong and that it should not be required to show intent for either the first or third possible forms of offense. However, the analysis is not so simplistic. False information is often innocently included on documents. For example, a document on which an employee or official of USAT enters the wrong date, but actually thought it was the correct date, is not a violation of an Ethics Code even though the word "intentionally" is not specifically spelled out. Similarly, it is easy to "mislead" people in the most innocent fashion. Who has not been involved in situations where two parties simply do not understand each other? Moreover, it makes little sense to require intent only when making "a false ... claim," but not require intent when misleading anyone about what the USAT has done (such as whether it nominated Ms. Merson). Either may cover the matter before the Arbitrator and the outcome should not depend on which sentence is read.

45. Having made the foregoing observation, however, the Arbitrator finds that there was nothing innocent or unintentional on the part of Ms. Merson in this matter. Regardless of the level of proof required, the Arbitrator finds that the creation, submission and her communications about the nomination form were calculated, intentional and unethical. Furthermore, it is unnecessary to determine whether the clear and convincing or a preponderance of the evidence standard applies given the decision set out below on the sanction imposed, and since under either standard of proof, the Arbitrator finds that Ms. Merson committed the acts of which she is accused and has, therefore, violated this provision of Code.

b. Section I of the Code

> [A]ny one or more of the following shall constitute violations of the [Code]": (1) "any act of fraud, deception, improper use of assets (including intellectual property, trade secrets and equipment), or dishonesty in connection with any USA Triathlon-related activity;" or (2) "any other material and intentional wrongful act, conduct or failure to act not provided for above, which is detrimental to the image or reputation of USA Triathlon or its Objects and Purposes.

46. USAT urges again that an element of intent applies only to item number (2) and not item number (1). However, item (1) includes a claim of fraud, which necessarily includes an element of intent to defraud. USAT also fails to address the second clause in the second item that the act must be "detrimental to the image or reputation of USA Triathlon or its Objects and Purposes."

47. Ms. Merson argues in response that she did not actually deceive the ITU. Rather, she argues, she was "forthright" in her communications with the ITU. The record does not support this position, but to the contrary establishes the fact of actual deception.

48. The Arbitrator finds that USAT has not established, under either level of burden, that the image or reputation of USAT has been damaged. There was no testimony from any third person

on the subject, nor any documents submitted which credibly may indicate an injury to a pre-existing level of reputation, either with the ITU or otherwise[28]. As Ms. Merson points out in her brief, a USAT witness testified that the ITU did not specifically express "disappointment or embarrassment" in USAT because of Ms. Merson's actions. As set out above, the incident was confined to a small group of individuals and, in fact, at the election after the controversy, the majority of USAT nominees for ITU positions were successful.

49. The Arbitrator has no doubt that *USAT officials* found it annoying and embarrassing that Ms. Merson subverted the process and caused some confusion and consternation with a few individuals at the ITU, but it appears from the record that it is only Ms. Merson's reputation that is likely to have taken the "hit" for her own actions.

50. It is unnecessary to determine whether the clear and convincing or a preponderance of the evidence standard applies given the decision set out below on the sanction imposed, and since under either the Arbitrator finds that Ms. Merson committed the acts of which she is accused which actions did constitute deception of the ITU and, therefore, were in violation of the first section of this Code Provision, though not the second section.

c. Section 5231(a) of the California Nonprofit Public Benefit Corporations Law

51. USAT argues that under California law (which applied at the time of the events in question) a director has certain duties to the corporation and is subject to standards of conduct, including the obligation to

> "perform the duties of a director . . . in good faith, in a manner that director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances."

52. Ms. Merson presented her position at the hearing and in post-trial briefs that she thought she was acting in the best interests of the corporation and, therefore, cannot have violated this provision of the law. A board member does have an obligation to depart from the decisions of the board on which he or she may serve if that member believes that the actions may be in violation of the law, or constitute a threat to the health or safety of others. However, the argument presented by Ms. Merson here is unpersuasive.

53. The proposition as it may be applied here is dubious at best, given that the intended beneficiary of her actions was Ms. Merson *herself.* The exceptions for directors generally is thought to be an affirmative obligation to speak even though the action may be contrary to the

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[28] Indeed, there was evidence of record, unchallenged, that some, if not most, of any embarrassment suffered by the USAT may have arisen from other disputes directly between the USAT and ITU officials, and not Ms. Merson's actions.

interests of the individual board member. Here, Ms. Merson's actions were most directly for her own personal interest.

54. The Arbitrator makes no conclusions on this point, however much a stretch the position represents because, given the findings as to other two provisions cited by USAT, the Arbitrator finds it unnecessary to address this point and holds it to be moot. It does illustrate, however, the divide between the parties and the internecine battles within the USAT Board.

55. Finally, Ms. Merson attempts to side step the consequences of her actions by suggesting it was not her fault. It was others, she testified, that convinced her to find some way around the decision of the Board. It was only to go along with what she saw as the encouragement of others – including other Board members - that she engaged in the dubious exercise of having the Secretary General of USAT sign a nomination form and submit it to the ITU with the appearance as though it were an official act of the USAT. This deflection is clear in her post hearing brief in which it is argued:

> "...if anyone made a false representation, it was [the SG]."

This willingness to accuse her close supporter, rather than accept responsibility for her actions demonstrates her unwillingness to accept any responsibility on her own and factors into the sanctions, as discussed below.

56. The Arbitrator finds that Ms. Merson was in point of fact the central actor in this drama, and without her pushing for the scheme to proceed, it would never have taken place. Indeed, it is perhaps more accurate to state that she dragged others in the scheme and injured their reputations and positions as a result. To be sure, the SG and Mr. Sexton engaged willingly and affirmatively in fighting the decision of the Board on its refusal to nominate Ms. Merson, but Ms. Merson was not a passenger but the driver. The outcome was, for example, that the SG was forced to resign as Secretary General of the USAT, and as of December 2014 is no longer on the USAT Board. The circumstances do illustrate that the USAT Board, at least in 2012, was very dysfunctional and that without the connivance of other Board members and Officers, she could not have implemented the scheme. None of that excuses her actions.

57. Moreover, such an argument is at best cynical. The sports movement and its constituent members such as the USAT, hold athletes to a measure of strict accountability for their actions. For example, if an athlete were to ingest a dietary supplement which contained a prohibited substance, then it generally is not a defense that the athlete was unaware of that fact. An athlete is expected to be responsible for anything she puts into her body, whether or not she did so knowingly. This is a logical necessity in the field of doping as the proof of knowledge or intent is difficult to prove. While the present dispute does not involve doping, the Arbitrator finds, at least in this instance, that an official ought not be held to a looser standard than an athlete. While an intent may be required for certain offenses, such as filling out a form incorrectly, it would be unconscionable to permit an official to dodge responsibility by claiming that someone else did it for her. If an athlete may be held responsible for what his trainers, coaches or helpers do, then

this Board member must take responsibility for what her helpers do on her behalf. In this case specifically, Ms. Merson was the person actually submitting the form – not the SG.

58. Ms. Merson testified that she fully understood that the results of the Board's actions were that she was not the nominee and that Elizabeth Farnan was the nominee to the ITU Executive Board. As Ms. Merson put it, once the First Arbitral decision came down, she "was done."

59. It is basically undisputed by Ms. Merson that she did precisely that which she is accused of doing – falsifying a nomination form of the USAT and submitting it to the ITU. Her primary response to the charges is that she did not fully understand or know the USAT rules and thought if she could persuade the SG to sign the form, that would be sufficient. On this point, she is plainly not credible. The evidence indicates that Ms. Merson was directly informed by the ITU itself that the nomination must come from the USAT. Moreover, she not only was a Board member with actual knowledge and imputed knowledge of the Rules[29], but had gone through an arbitration during which it was explained in the controlling decision. She just chose to ignore that decision. It is also undisputed that she meant to submit that form. Indeed, when questioned by the ITU about the filing she cast about for some argument to convince the ITU to accept it. In her post trial brief, Ms. Merson argues that she is not a lawyer and cannot be expected to interpret the First Arbitral Decision. However, the rules are clear and uncomplicated, and she was informed of the provision by others, including Arbitrator Benz in his decision. Her further argument that the only import of the decision was that she had not *yet* been nominated by the USAT Board is clearly incorrect and insupportable, and that argument is being made by her attorneys.

Imposition of Sanction

60. Respondent USAT has presented evidence of what it characterizes as harassing actions, including allegedly frivolous actual or threatened administrative complaints or lawsuits by another Board Member, Mr. Sexton, and threatening behavior by an attorney allegedly associated with Claimant and Mr. Steven Sexton, Mr. John Lines, all in support of Ms. Merson.

61. However disruptive and annoying those events may have been to Respondent, and whether or not the Claimant was a participant in those events, and whether or not they occurred after October 12, 2012, it remains that none of these were addressed in either the June 6, 2014 or the January 16, 2015 Charging Letters. Consequently, they are irrelevant to the issue of whether Ms. Merson failed in or violated some duty to the organization and cannot be the basis of a charge. However, they may bear on findings with respect to various elements of the imposition of sanctions.

62. Despite prior rulings by this Arbitrator, the parties continued to devote time, space and energy to revisiting the original dispute long since resolved by the First Arbitration Decision.

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[29] ITU Constitution, at Section 27.2(a), provides that "all candidates for election must be nominated by their NF of citizenship or residence." *USAT Exhibit C.*

USAT argues that Ms. Merson acted in bad faith in acting as she did. The Arbitrator must agree. However, before relying on generalized claims of bad faith – rather than specific charges or allegations of injury – USAT should look to its own house. USAT is correct that, mathematically, Ms. Merson's inventive scheme to add individuals to the USAT Board and force another vote likely would have made no difference, but the actions of some Board members to deliberately and repeatedly undermine the USAT official call for a Board meeting is hardly evidence of fair play either. The issue of the Board vote has been decided and will not be revisited. However, that is not to say that the refusal of Board members to follow the USAT's own rules and practices on attendance at meetings will not factor into the general principles of equity to be applied here with respect to any relief sought.

63. I find this does not impact the right of USAT to bring charges and does not factor into the findings of violations by Ms. Merson. However, the level of tension involved in this matter and the disruption by Ms. Merson may have been avoided had the organization simply met. By the same token, Ms. Merson and her supporters had, prior to the First Arbitral Decision, knowledge of the issues raised now and knew their options to proceed against the USAT, including an administrative action against the Board in the form of a Section 10 complaint and did not pursue them at the time. She cannot now be heard to use them as justification for her actions.

64. USAT originally requested the suspension of Ms. Merson's membership in the USAT for three years or denial of her the ability to be on the Board for five years. However, in its post-trial brief, it now requests imposition of a penalty without being specific about the length or breadth of that penalty.

> "She should either be suspended from membership in USAT, or she should be declared ineligible to hold a governance position in USAT for an extended period of time."

65. USAT then goes on to reference as support for the requested relief the penalties or voluntary abandonment of positions by others as result of settlements. The transgressions of those others, USAT argues, "...pale in comparison to those committed by Ms. Merson," and lists a number of bases for a suspension or lengthy prohibition on holding office in the USAT, and argues that lesser penalties on others should not mitigate the decision in this matter:

> (i) The SG (who resigned his office position) settled his case. The Arbitrator finds this unpersuasive. The scheme could not have been carried out without the SG and the record shows that USAT imposed a "gag" provision on the SG with respect to the events in question preventing him from speaking with Ms. Merson. Moreover, Ms. Merson was not offered a settlement until after she was publicly charged and potentially humiliated by USAT – something it did not do to its own officer, the SG. USAT alternately makes much of Ms. Merson's duty to the USAT, and her remote connection to the Board as only *ex officio*, but ignores the transgressions of its own officer.

(ii) The SG was nearing the end of his term limits on the Board so resignation was not necessary. The Arbitrator also finds this unpersuasive since the SG appears to have served an additional two years as a member of the Board and that hardly qualifies as "nearing the end."

(iii) It is much more difficult and arguably a more severe penalty to take an existing member, like the SG, off the Board, than it is to make a non-Board member ineligible to run for a period of time. The Arbitrator finds this particularly inapt. The ease of punishment is not a factor in deciding the validity of the sanction. It also is, as a legal matter, incorrect – however uncomfortable it might be as a practical matter.

(iv) The SG apologized for his actions and took responsibility, whereas Ms. Merson still, to this day, has not. The Arbitrator does credit this ground for consideration in imposing a sanction. Ms. Merson clearly knew what she was doing was wrong and that it not only violated the USAT rules, it was in direct contravention of a decision of Arbitrator Benz in the First Arbitration Decision. Rather than accept this, she blames, of all people, the SG who lost his own position at the USAT as a result of doing what was asked of him (see *supra*). Rather than exculpating her behavior, it merely demonstrates that she is unrepentant and unapologetic.

66. While USAT may stretch the implications of this disruptive behavior, it is an important issue. It must be kept in view that Ms. Merson had already put the USAT to a great deal of expense and effort and distraction in bringing her first Section 9 action on the very same issue – the nomination for a seat on the ITU Executive Board. While Ms. Merson had every right to do so, ignoring that decision has caused an unnecessary expense and disruption of the USAT, and a burden on the USOC without just cause. Tempering this finding, however, is that there is no evidence of record that Ms. Merson has been in any way disruptive since the end of October 2012, until the USAT surprised her with a disciplinary proceeding in 2014.

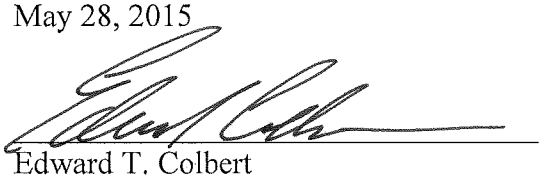
67. Ms. Merson claims that a suspension from her membership in the USAT will harm her ability to earn a living from her coaching, officiating and race organizing if she could no longer coach or officiate, which she testified would be the case if suspended from membership. USAT responds that she is incorrect, and could still officiate and coach, "just not when USAT membership is required." This is unpersuasive. First, USAT did not adequately rebut her testimony at the hearing, and exclusion from the ability to practice her craft among members of the largest triathlon body would, without question, harm her ability to pursue her livelihood even if it does not utterly destroy it. As discussed in detail regarding the burden of proof, imposition of the suspension requested by the USAT likely would require use of the "clear and convincing" standard of proof, but since the decision herein will be confined to participation in the governance of the USAT that will not be essential. In any event, the proofs herein are sufficient under either standard.

68. Therefore, Ms. Merson shall be and hereby is prohibited for a period up through and including June 30, 2019, from serving in any position within the national governance structure or

committees of the USAT National organization, elective or appointed: Provided, however, that she will not be required to resign her current position as Secretary to the Mid-Atlantic Regional Council. USAT had every opportunity to take action against her and the Arbitrator will not inconvenience her regional organization or subject her to an obligation to resign from a position which, had USAT acted expeditiously, she would not have been able to seek.

SO ORDERED

May 28, 2015



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