

ACC 2016/A/014

OFFICE OF THE ATHLETICS CANADA COMMISSIONER
IN THE MATTER OF AN APPEAL

between

NESS MURBY

as Appellant

and

ATHLETICS CANADA

as Respondent

CARDING APPEAL DECISION

APPEARING FOR THE APPELLANT:

Ness Murby (Athlete)
James Sifakis (Legal Representative)
Mike Grant (Legal Representative)

APPEARING FOR THE RESPONDENT:

Jared Macleod (Operations Manager, Athletics Canada)

I. PARTIES

1. The Appellant, Ness Murby is a Paralympic athlete who has represented Canada internationally at the 2016 Paralympic Games in Rio De Janeiro, Brazil, at the 2015 ParaPanAm games in Toronto, Canada, and at the 2015 IPC World Championships in Doha, Qatar. She competes in the discus and javelin events and was a carded athlete for the 2015-2016 cycle.

2. The Respondent, Athletics Canada is the sport governing body for track and field in Canada.

II. JURISDICTION

3. This Appeal has been brought to the Athletics Canada Commissioner's Office pursuant to regulations found in the Athletics Canada Commissioner's Office Terms of Reference. Those terms of reference state that the Commissioner's Office is empowered to resolve appeals of carding decisions in any manner. The time required for the submission of appeals is 14 days following the announcement of the carding decision.

4. Section 7 of the Athletics Canada 2016-2017 Athlete Assistance Program (AAP) Policy Paralympic Stream states that:

Athletes who are not nominated for carding may appeal, which will be heard in accordance with AC's Procedures for Carding outlined in Rule 140 - Commissioner's Office - Terms of Reference of AC's Rules and Bylaws. Appeals are restricted to those athletes who were eligible to be considered for carding by virtue of meeting the requirements set out in Section 2, who met the requirements to be admitted to the General Carding Pool as described in Section 5 and who fulfilled any additional requirements for the different categories of cards as specified in Appendix 1.

5. The carding decisions were announced on November 17, 2016. The Appellant filed her appeal on November 30, 2016. The Commissioner's Office has determined that the Appellant was eligible to be considered for carding and to be admitted to the General Carding Pool as set out in Sections 2 and 5 of the AAP Policy. Section 6.2 of Sport Canada's Athlete Assistance Program Policies and Procedures for 2016 also grants a previously carded athlete a right of appeal. Ms. Murby is therefore eligible to submit an appeal as her appeal was filed in compliance with the rules.

III. FACTUAL BACKGROUND

6. A teleconference hearing took place on December 23, 2016. The Appellant, Ness Murby, was present and was assisted by James Sifakis and Mike Grant. Jared Macleod, the Operations Manager for Athletics Canada, represented the Respondent. Below is a summary of the relevant facts and allegations based on the parties' written submissions and oral representations made at the hearing.

7. Ms. Murby is a blind Para-athlete who competes in the Javelin and Discus throw with the aide of her guide Eva Fejes. She was a Para-athletics senior carded athlete in 2015-2016 for the F-11 Javelin throw. She learned that she was not included in the 2016-2017 carded athlete list via a teammate's Twitter post which listed the 2016-2017 AAP Sport Canada approved nomination list and the selection reasoning. Ms. Murby was not given any reasons as to why she was not re-nominated for carding in the current cycle.

8. There is no affected athlete in this case.

9. Nominations for carding were made by Athletics Canada using a two phase approach as follows:¹

Phase 1 – General Carding Pool

An athlete must first be in the General Carding Pool to be considered for carding, but this does not guarantee nomination. Phase 1 is simply a list of the athletes who will be considered in the process outlined in Phase 2.

The following athletes will be admitted to the General Carding Pool provided they submit a completed and signed Application Form (Appendix 2) and training and competition plan by the deadline date (November 10, 2016):

- Current SR1 or SR2 carded athletes
- Athletes who are ranked in the top 25% of their event on the IPC Annual Recorded Best Performances lists
- Athletes eligible for Development cards who achieved a performance* in 2016 with a minimum score of 750 points on the Athletics Canada point score table – using the version available at the time this criteria was published - Click here for the score table*in an individual event/class according to the 2016 Paralympic program
- Athletes who competed in a relay event at the Rio 2016 Paralympic Games
- Athletes introduced by the CTO/Head Coach under special circumstances

¹ Athletics Canada 2016-2017 Athlete Assistant Program Policy, Section 5, The Carding Process

- Athletes who are currently carded and who have submitted a “Notification of Injury, Illness or Pregnancy” form to maintain their carding status during the carding cycle, and who have otherwise fulfilled all requirements to be considered for a Medical Card

Phase 2 – Nomination to Sport Canada

In November, 2016, the NTC will review the athletes in the General Carding Pool, and select athletes to be nominated for carding. The NTC will consider athletes by proceeding through the following five steps in sequential order:

Step 1 Athletes who won a Gold medal at the Rio 2016 Paralympic Games, AND who the NTC believe demonstrate a realistic potential to win an individual Gold medal at the 2017 IPC World Championships.

Step 2 Athletes who won a medal in an individual event and/or Relay events at the Rio 2016 Paralympic Games AND who the NTC believe demonstrate a realistic potential to win an individual and/or Relay medal at the 2017 IPC World Championships.

Step 3 Athletes ranked in the IPC Top 8 (minimum 16 athletes ranked in the event) in an individual event in 2016, who are not eligible under Steps 1 or 2 AND who the NTC believe demonstrate a realistic potential to win a medal at the 2017 IPC World Championships. For events with fewer than 16 athletes on the IPC ranking – Athletes ranked in the top 1/2 of the field will be considered

Step 4 Athletes eligible for Development Cards ranked in the IPC Top 16 (and top 1/2 of the field) in an individual event in 2016 AND/OR who the NTC believe demonstrates realistic potential to win a medal in an individual event at the 2017/19 IPC World Championships and/or the 2020 Paralympic Games. For events with fewer than 32 athletes on the IPC ranking – Athletes ranked in the top 1/2 of the field will be considered

Step 5 If there are any nominations remaining, all athletes in the Carding Pool who have not been nominated through any of the above 4 steps will be considered based on the factors (outlined below) which identify an athlete’s realistic potential to win a medal at 2020 Paralympic Games and/or 2017 or 2019 IPC World Championships

In determining an athlete's "realistic potential to win a medal", as set out in the above steps, the NTC will consider the following factors:

- Athlete’s performance profile/”Bridging the Gap analysis”

- Athlete performance trend over the past 3 years compared with event progression (using Paralympic Games/World Championship medalist and top 3 World Rankings in years without a major championship) over the past 3 years

- The Athletics Canada point score table and IPC ranking (Annual Recorded Best Performances)
- The athlete's ability to consistently repeat performances, particularly at peak times in the season (major championships and championship trials)
- International and major event performances (Paralympic Games and or World Championships)
- The athlete's medical history, in the case of Medical Cards
- The fulfillment of any previous conditions and/or targets set for the athlete, where applicable
- Any other information introduced by the CTO/Head Coach and deemed relevant by the NTC

All NTC members will participate in this process unless a NTC member has a conflict of interest in relation to any athlete being considered, in which case he or she must declare the conflict. The Chair of the NTC will decide if that NTC member can participate in the deliberations of the NTC in relation to that particular athlete.

The Chair of the NTC will determine the order in which athletes will be considered for carding within each of the 5 steps described above. All members of the NTC will vote on carding nominations decisions. A member will abstain from voting if the member has declared a conflict of interest. The CTO/Head Coach will have a tie-breaking vote in the event there is a tie.

In determining carding nominations, the NTC will also have the discretion to determine the relative allocation of cards among the different categories of cards (Senior, Medical and Development).

10. The Chief Technical Officer/Head Coach has full discretion on which athletes he introduces to the General Carding Pool for consideration by the National Team Committee (NTC). The CTO/Head Coach did not introduce Ms. Murby under the special circumstances provision during the carding selection meeting of the NTC, held via teleconference on November 15, 2016. As a result since Ms. Murby was deemed not to have met any of the criteria listed in Phase 1, she was not included in the General Carding Pool and was not considered or evaluated for nomination by the NTC.

IV. ISSUES

11. Was the discretion of the CTO/Head Coach exercised properly?
Should the Appellant have been considered eligible for the 2016/2017 AAP general carding pool?

Should the Appellant have been nominated to receive support for the 2016-2017 cycle?

V. SUBMISSIONS

12. The Appellant submits that Athletics Canada has not adhered to Section 6.2 of Sport Canada's Athlete Assistance Program Policies and Procedures (2016) which outline the guidelines surrounding an NSO's decision against an athlete's carding re-nomination. She further submits that she has performed in a manner which meets Athletics Canada's own carding criteria, and that had Athletics Canada properly assessed her eligibility for re-nomination, she would have been re-nominated.

13. Ms. Murby notes that she fits the caliber of athlete for which funding is designed to support in that she has finished in the Top 3 at an IPC World Championships (2015) and is progressing towards a finish in the Top 3 at future IPC World Championships in Athletics or Paralympic Games.

14. The Appellant maintains that she qualifies for Phase 1 of selections, the general carding pool, under eligibility points two and five since she is in the top 25% in the F11 Javelin. Alternatively she argues that she was eligible to be introduced to the general carding pool by the CTO/Head Coach under special circumstances for her F11 Discus event. The special circumstances that she points to are her athletic progression, past performance, and future potential.

15. Ms. Murby further submits that she qualifies for nomination under steps 3 and/or 5 of Phase 2 of the eligibility criteria because she is ranked in the top half of her field in both Javelin and Discus and has demonstrated a realistic potential to medal in London at the 2017 IPC World Championships as well as the 2019 IPC World Championships and 2020 Paralympics. She notes that she was a medalist in F11 Javelin at the 2015 IPC Athletics World Championship in Doha, Qatar.

16. As a further submission Ms. Murby maintains that she has demonstrated "realistic potential" under six of the seven factors that the NTC are required to consider in assessing an athlete's "realistic potential to win a medal". She could not comment on the seventh factor because it pertains to any information introduced by the CTO/Head Coach that the NTC deems relevant. With regard to the "Bridging the Gap" analysis, she observes that from 2014 to 2016 she has shown consistent "bridging" in F11 discus. In 2015 the gap between podium 3rd and her rank of 5th was 30.87m to her **27.02m**, while 6th place was 26.66m. In 2016, the gap between podium 3rd to her rank of 6th is 32.6m to her **30.79m**.

17. In continuing the "bridging the gap" analysis for the F11 Javelin event, Ms. Murby notes that in the F11 Javelin event, she broke the Canadian record in 2015 and won a silver medal at the Doha 2015 IPC World Championships. Since the Javelin was not a

Rio 2016 Paralympic event she was encouraged to focus her training and competitive efforts on the discus. She recalls that in June, 2016 the CTO/Head Coach, Peter Erikson informed her personal coach that she would be exempted from competing further in the Javelin. She was nevertheless able to retain her 2nd position in the world ranking in the F11 Javelin event.

18. Ms. Murby argues that she is a relatively new athlete in the sport and demonstrated growth with each first time competition experience even though she did not achieve a personal best at the Rio games. She also states that her performances improved each time that she appeared at a repeat event.

19. With regard to the other factors to be considered by the NTC, Ms. Murby stated that she met and surpassed her 2016 competitive readiness targets as set out in February and May. A target of 28m was set for her in the discus. Her personal best in the discus in 2015 was 27.02 m. On April 10th, 2016 she threw the discus 28.3 meters. In May a new target of 29 meters was set for her and on June 25th Ms. Murby recorded discus throws of 29.08 meters and 30.51 meters. Then on July 16th she threw the discus 30.79 meters. Thus, the Appellant submits that she met and surpassed all of her 2016 targets.

20. The Appellant submits that Athletics Canada is a body subject to administrative law and has a duty to proceed fairly in all of the decisions that it makes. Part of this duty of fairness says the appellant, involves providing reasons as to why she was not nominated to the general carding pool for 2016-17. She maintains that as a fully-blind elite athlete, she relies on AAP funding as a vital component of her livelihood and expenses involved with her athletic career. She also submits that since she has a right of appeal to a higher administrative body, it was vital for the CTO/Head Coach to provide reasons for his decision not to nominate her under Step 5, Phase 1 of the 2016-17 AAP Policy.

21. The Appellant submits that the decision not to nominate her was a discretionary one which according *Dunsmuir v. New Brunswick* 2008 SCC 9, [2008] 1 SCR 90 must be reasonably exercised. She adds that the lack of reasons in support of the decision demonstrates a lack of the required transparency.

22. Another submission made by Ms. Murby is that in choosing not to nominate her, the head coach failed to take into account relevant results such as her continued improvement in the discus event from 2014 when her personal best was 24.73 meters to 2016 when her personal best improved to 30.79 meters. Her improvement from 2015 to 2016 was 3.77 meters or 13.9%. She notes that an athlete that was nominated as an SR2 for F53 shot put improved by 3.2% over that same period. Ms. Murby underlines the fact that two of the athletes who were admitted to the general carding pool by virtue of CTO/Head Coach Introduction showed less athletic progression in their respective events than she did. Furthermore adds Ms. Murby both of the athletes in question achieved Athletics Canada point scores that were lower than hers. In an Appendix to her submissions, Ms. Murby provided a chart which indicated that of the athletes who

were carded under steps 3 and 5, only three athletes achieved Athletics Canada point scores that were higher than hers.

23. The Appellant further submits that of the seventeen athletes carded under steps 3 and 5, only six are internationally ranked higher than her while three are ranked the same and eight are ranked lower. Amongst those ranked lower than Ms. Murby are the two athletes who were entered into the General Carding Pool by virtue of the CTO/Head Coach's introduction.

24. Ms. Murby states that at the 2016 Canadian National Track and Field Championships, and Paralympic Selection Trials she finished first in the para-ambulatory discus event defeating two athletes who are carded for the 2016-17 cycle.

25. To counter the Respondent's submission that to be eligible for AAP, the athlete must be in an event that was contested at the 2016 Paralympic Games which in the case of Ms. Murby could only have been the F11 Discus, the Appellant submits that this criteria as stated does not stipulate that the (discus) event would be the only event eligible for inclusion in a carding application.

26. Ms. Murby notes that Athletics Canada themselves, used similar eligibility criteria for the 2015-2016 carding cycle and yet the Respondent nominated both herself and another athlete for AAP support in events not scheduled for the 2016 Paralympic Games. In Ms. Murby's case it was for the Javelin. In the case of Jason Roberts, the other athlete so nominated, it was for the F34 Discus which was not a 2016 Paralympic Games event.

27. Athletics Canada in their brief submissions state that Ms. Murby's only eligible event for carding consideration is the F-11 Discus and she was not ranked in the top 25% on the IPC Annual Recorded Best Performance list in that event.

28. The Respondent also maintains that Ms. Murby did not meet any of the criteria in Phase 1, was not included in the General Carding Pool, and was therefore not considered or evaluated for nomination by the NTC.

29. Finally, the Respondent submits that they followed the published carding criteria and that Ms. Murby was treated fairly.

VI. ANALYSIS

30. The first issue that I will deal with is whether the Appellant should have been considered eligible for the 2016/2017 AAP General Carding Pool. If an athlete is not placed in the General Carding Pool, they are not eligible to be considered for carding under Athletics Canada's eligibility rules and that would essentially end the matter.

31. To be eligible for carding nomination an athlete was required to meet eleven different criteria. On the evidence before me it appears that Ms. Murby has met all eleven.

The most noteworthy criteria for this discussion is the one stating “must be in an event that was contested at the 2016 Paralympic Games”.

32. There are six methods by which an athlete can be admitted to the General Carding Pool. Two of those methods would apply to Ms. Murby. If she was deemed to be an athlete ranked in the top 25% of her event on the IPC Annual Recorded Best Performance list; or if she was introduced by the CTO/Head Coach under special circumstances, she would have been admitted to the General Carding Pool.

33. Athletics Canada takes the view that Ms. Murby could not qualify for entry to the General Carding Pool under Phase 1 of the criteria because she was ranked in the top 25% on the IPC list in the Javelin, but not in the Discus and the Discus was the only one of her two events that was on the program of the 2016 Paralympic Games in Rio de Janeiro. With due respect I must disagree with the Respondent’s argument. The reference to top 25% of their event does not state that such event must have been contested at the Paralympic Games. The Appellant was only required to have competed in an event that was contested at the Paralympic Games. Her top 25% performance can come from any event that is listed on the IPC Performance List. I note that such interpretation is also consistent with the carding status that Ms. Murby had achieved for the previous cycle in which the F11 Javelin would have been the motivating event, rather than the discus.

34. Ms. Murby submits that even if she had not achieved automatic admittance to the General Carding Pool based on achieving the 25% mark in the F11 Javelin, her athletic progression, performance and potential in the discus should have enabled her to be introduced by the CTO/Head Coach under the special circumstances category. Given the fact that the term “special circumstances” is not defined and no examples are provided it is difficult to assess whether Ms. Murby should have qualified under this category. What is apparent in the evidence is that other athletes who were introduced by the Head Coach in this category had statistically less improvement between 2015 and 2016 than Ms. Murby. The absence of reasons from the NTC, which I will comment on later, makes it impossible to ascertain the rationale for not including the Appellant in the General Carding Pool.

35. I find therefore that Ms. Murby should have been admitted to the General Carding Pool by the CTO/Head Coach. His failure to do so meant that she could not even be considered or evaluated for nomination by the NTC.

36. If Ms. Murby had been admitted to the General Carding Pool, The NTC would have been in a position to assess the following information:

- She is ranked in the top half of her field in both the Javelin and Discus events.
- She was a medalist in F11 Javelin at the 2015 IPC Athletics World Championships in Doha, Qatar.
- She has demonstrated a realistic potential to medal in London at the 2017 IPC World Championships as well as the 2019 IPC World Championships and 2020 Paralympics.

- She is a relatively new athlete in Track and Field and is continuing to improve.
- She met and surpassed all of her 2016 competitive readiness targets.
- She improved her discus performance by 13.9% from 2015 to 2016.
- She was a carded athlete in 2015/2016
- Statistically she has outperformed athletes who will be receiving AAP support for the 2016/2017 cycle.

37. It appears that the CTO/Head Coach has full discretion on which athletes to introduce to the General Carding Pool for consideration by the National Team Committee. Ms. Murby was entitled at the very least to be provided with reasons as to why she was not included in the General Carding Pool for 2016/2017. This is a matter of procedural fairness. As the Supreme Court of Canada stated in *Dunsmuir v. New Brunswick*², procedural fairness has grown to become a central principle of Canadian administrative law. There is a requirement for administrative decision makers to act fairly in coming to decisions that affect the interests of individuals. In my opinion, part of that duty of fairness would require the CTO/Head Coach to provide reasons for his decision not to include the Appellant in the General Carding Pool and to therefore make her ineligible for nomination for AAP support. This is all the more fundamental when the Appellant has a right to two levels of appeal. It is that much more challenging to appeal a decision when one has no knowledge of the basis on which the decision being appealed was made.

38. There is another important reason why the CTO/Head Coach and the NTC were required to provide reasons to the Appellant as to why she was not re-nominated for AAP support. Sport Canada requires it. Section 6.2 of Sport Canada's Athlete Assistance Program Policies and Procedures (2016) reads as follows:

Procedures for Athletes Not Being Re-nominated for Carding

Maintaining carded status depends on:

- The NSO re-nominating a carded athlete based on the athlete meeting the published NSO approved AAP compliant carding criteria;
- Sport Canada approving the re-nomination during the NSO's annual AAP Review Meeting.

If the NSO does not re-nominate a carded athlete for carding support for the new carding cycle, the NSO must:

- Advise the athlete in writing that he or she has not been re-nominated. The reason(s) for the decision must be included in the notice.

² 2008 1 SCR 190

- Advise the athlete who is not being re-nominated about the opportunities that are available, such as National Team program activities (camps, competitions, etc.) or AAP retirement support;
- Ensure that all athletes who are not nominated or re-nominated have access to an appeal process culminating with the right for the athlete to refer the issue to the Sport Dispute Resolution Centre of Canada (SDRCC);
- Notify Sport Canada, following the completion of the NSO appeal procedure, of the outcome of any appeal and make its recommendation to Sport Canada.

Following the annual AAP Review Meeting, Sport Canada will inform, in writing, those athletes who have not been re-carded.

39. On the evidence before me in this proceeding I am satisfied that Ms. Murby was never advised in writing by Athletics Canada that she has not been re-nominated for carding neither was she provided with any reasons for this decision. Furthermore, she has not been advised of opportunities that are available to her.

40. During the hearing the Respondent questioned whether the Appellant even had a right of appeal since it was their view that Section 7 of their 2016-2017 AAP Policy would have made her ineligible to appeal because only those athletes eligible to be admitted to the General Carding Pool would have a right of appeal.

41. The difficulty with this argument of course is that it is somewhat circular and is contrary to the provisions of the Sport Canada AAP Policies. Section 6.2 of Sport Canada's AAP Policies and Procedures clearly indicates that all athletes who are not being re-nominated for carding have access to an appeal process culminating with an appeal to the SDRCC. Ms. Murby falls into that category. As an athlete who was carded in the previous cycle she has an automatic right to access the available appeal processes.

VII DECISION

42. I find therefore that the CTO/Head Coach did not exercise his discretion in a reasonable manner when he excluded the Appellant from the General Carding Pool. As an existing carded athlete she was owed an explanation as to why she was deemed ineligible or unsuitable for admittance to the Carding Pool.

43. I also find that Ms. Murby should have been included in the General Carding Pool based on her ranking in the F11 Javelin event and should therefore have been one of the athletes placed before the NTC for consideration for nomination to Sport Canada.

44. I also find that had Ms. Murby's application been before the NTC as part of the General Carding Pool, she had a very realistic chance of being nominated to Sport Canada for carding based on my conclusion that she met the requirements of Step 3 and Step 5 of Athletics Canada's Phase 2, nomination criteria.

45. In conclusion I find that the Appellant, Ness Murby, has met the Athletics Canada approved AAP compliant carding criteria and I hereby direct the Respondent, Athletics Canada, to re-nominate Ms. Murby for AAP support for the 2016-2017 funding cycle.

46. The Appellant has succeeded in her appeal and I therefore direct the Respondent to return the \$250.00 filing fee to Ms. Murby at the earliest opportunity.

Dated at Ottawa, Ontario, this 6th day of January, 2017.

Hugh Fraser

Athletics Canada Commissioner