



**USA SWIMMING
NATIONAL BOARD OF REVIEW**

USA SWIMMING, INC.,)
)
 Petitioner,)
)
vs.)
)
RANDALL K. SMITH,)
)
 Respondent.)
_____)

DECISION

This matter arises out of a complaint filed by USA Swimming, Inc. (“Petitioner”) against Randall K. Smith (“Smith”), member coach currently unaffiliated with any club, for alleged violations of Articles 304.3.5 and 304.3.15 of the 2008-2010 versions of the USA Swimming Code of Conduct by inappropriately kissing and sexually touching a minor female athlete member Anna Strzempko. Smith served as a coach with the Greater Holyoke YMCA Vikings (“HYV”) in Massachusetts from 1994 through 2012.

A Notice of Hearing was issued and properly served upon Smith scheduling a hearing for the purpose of determining whether Smith should be permanently banned from membership in USA Swimming and that his name be added to the published list of banned coaches. Smith was ordered to file a Response by October 23, 2014. A detailed Response was timely filed.

The scheduled telephone conference call commenced at **7:00 p.m. Eastern Daylight Time on Monday, November 17, 2014**. The National Board of Review panel for this hearing consisted of Bernard “Buddy” Pylitt, Chair; Ward Foley and Ceallach Gibbons (Athlete Representative). Petitioner was represented by its counsel, Lucinda McRoberts of Bryan Cave. Smith appeared with his counsel Michael Aleo.

The Chair began the hearing by apologizing to the other volunteer panel members for the last minute barrage of exhibits from the parties during the five days prior to the hearing. A Prehearing Order was issued on September 24, 2014 which clearly established deadlines for the production and exchange of exhibits to allow the panel sufficient amount of time to review them prior to the hearing. However, the last minute efforts of counsel to bolster their case and/or defense, included the untimely submission of an Affidavit from the victim on the Saturday before the hearing. The record is clear that her allegations have been tried publically in the media and through the victim’s own blog. The Amateur Sports Act and USA Swimming’s Rules and Regulations governing Board of Review hearings mandate the right for all parties to have a fair

and independent review of the evidence. Counsel's last minute submissions and counter-submissions tainted the process.

USA Swimming offered the following exhibits:

1. USA Swimming member record for Randall K. Smith.
2. USA Swimming member record for Anna Strzempko.
3. Correspondence from Monica Strzempko to Susan Woessner, dated October 8, 2012, with attached Commonwealth of Massachusetts Department of Children and Families Report.
4. Commonwealth of Massachusetts Department of Children and Families 19 page "Fair Hearing" Decision rendered November 15, 2012.
5. Investigation Report regarding Randall K. Smith prepared by USA Swimming outside investigator Nancy Fisher received by Bryan Cave on April 16, 2013, which did not include an interview of Anna Strzempko.
6. Emails between Susan Woessner, Elizabeth Hoendervoogt, Lucinda McRoberts, Cindy Hayes and Teri Goss regarding a transcribed voicemail from Anna Strzempko dated June 6, 2013 offering to be interviewed by USA Swimming's investigator.
7. Interview summary of Anna Strzempko prepared by USA Swimming's outside investigator Nancy Fisher prepared on June 7, 2013.
8. Drawing of Randall Smith's office layout prepared by Anna Strzempko.
9. 5 page Psychiatric Forensic report dated September 23, 2014 prepared by Dr. Barry Sarvet for attorney Robert Allard about Anna Strzempko apparently for litigation purposes which included estimated costs for future treatment.
10. Correspondence from Monica Strzempko to Elizabeth Hoendervoogt dated April 17, 2014 with attached excerpts from Anna's blog.
11. Blog entries by Anna Strzempko (<http://annastrz.tumblr.com>)
12. Affidavit of Anna Strzempko signed Friday, November 14, 2014, and submitted to counsel and the panel on Saturday, November 15, 2014-just 2 days before the hearing.
13.

14. “Does the US Olympic Committee fail sexual abuse victims?”, Joie Chen and Serene Feng, Al Jazeera, America Tonight, August 5, 2014.
15. 11page “memo to the NBR” prepared by Victor Vieth dated November 11, 2014, which was not requested by the NBR or the panel members.
16. CAS 99/A/246, W. v International Equestrian Federation (FEI), May 11, 2000. Opinion discussed the admissibility of polygraph examinations under Swiss law.

Smith objected to the admission of Exhibits 1 through 16 (other than 13) as hearsay. The Affidavit of Dr. Dana Blackburn previously identified as Exhibit 13 was not offered despite the fact that her statement to USA Swimming’s investigator was part of Exhibit 5. The Chair overruled Smith’s objections, and the Exhibits were admitted.

The following witness was the only witness who testified on behalf of USA Swimming:

1. Victor Vieth- Senior Director and Founder, Gunderson Health System, National Child Protection Training Center located at Winona State University, Minnesota. Vieth is an attorney. Vieth routinely provides consultation and advice exclusively to prosecutors and law enforcement officials.

Gunderson entered into a contract with USA Swimming in August 2013 to conduct a “comprehensive assessment” of USA Swimming’s Safe Sport program. In his report, Vieth recommended that “reliable hearsay” be considered by the NBR when a victim (such as Anna) is “noncompliant” and unwilling to testify before the NBR.

Vieth prepared a “memo to the NBR” (Exhibit 15) analyzing factors he felt supported the credibility of Anna’s allegations to others after reviewing both USA Swimming and Smith’s evidence. Among those factors were Anna’s motive to fabricate, her initial emotions in discussing her allegations with the police, the timing of her mental health issues, and corroboration. Given the fact that Anna’s Father, a physician was missing from her life, Vieth concluded that Smith filled that void and began “grooming” Anna. Vieth was critical of the initial police investigation, the DCS investigation (poor training), and Smith’s polygraph examination. Finally, Vieth stated that if Anna is lying, “she is a good liar”.

On cross examination, Vieth testified that studies indicate between 1 to 7% of victims reporting sexual abuse proved to be untruthful. Vieth was offered as an expert by USA Swimming during the NBR hearing. Smith had no objection to Vieth being offered as an expert.

No member of the NBR or this panel requested the memo from Vieth, or his testimony during the hearing.

Neither counsel thoroughly questioned Vieth about the factual basis for many of his conclusions. The Chair asked and learned that Vieth spoke with Anna's Mother one time for approximately one (1) hour, never spoke with the police investigators, DCS, Smith, or any of his witnesses. More importantly, Vieth never spoke with or met Anna.

Vieth believes that Gundersen Health System, his employer, will be compensated for his time in preparing his memo and testimony at a rate of approximately \$300 per hour. He testified that he had already spent approximately 5 hours in his review of this matter.

Smith offered the following exhibits:

- A. Curriculum Vitae of William Wesche, a former Detective with the Enfield Connecticut Police Department for 21 years.
- B. Polygraph report of William Wesche dated October 20, 2014 of a polygraph examination of Randall Smith conducted on October 17, 2014, concluding that Smith showed "no deception" when he denied touching and inserting his fingers in Anna Strzempko's vagina in Smith's YMCA office.
- C. Commonwealth of Massachusetts Department of Children and Family Services 9 page Intake 51A Report, with notation at the bottom right corner that it was printed April 4, 2012.
- D. 10 page Holyoke Police Department Incident report dated May 23, 2012 which initially indicated that the victim claimed the abuse took place in Rhode Island at a swim meet the year before.
- E. 19 page Hearing Decision from the Massachusetts Department of Children and Families dated November 15, 2012. (Same as USA Swimming Exhibit 4)
- F. Photograph of outside of the Holyoke YMCA recently taken by Smith.
- G. Email from [REDACTED] to Smith from April 23-24, 2009.
- H. Affidavit of [REDACTED] -mistakenly named [REDACTED] by Anna Strzempko in her statement to USA Swimming's investigator. Denies having any knowledge that Smith engaged in any kind of inappropriate relationship with any swimmer as alleged by Anna Strzempko in her statement to USA Swimming's investigator.
- I. Email exchange between [REDACTED] and Attorney Michael Aleo dated November 13-14, 2014. His Daughter swam for Smith at Holyoke YMCA. He never suspected that Smith had an inappropriate relationship with Anna Strzempko or [REDACTED]

Coppler contrary to the information Anna Strzempko described in her statement to USA Swimming's investigator.

J. Affidavit of [REDACTED] for Smith at Holyoke YMCA. Her background matches the "Korean female swimmer" mentioned by Anna Strzempko in her statement to USA Swimming's investigator. She denies having the conversation with Anna Strzempko that she was sexually abused by Smith as Anna described to USA Swimming's investigator.

USA Swimming had no objection to the admission of Smith's exhibits and they were admitted into evidence.

The following witnesses testified on behalf of Smith:

1. [REDACTED] employed by the Holyoke YMCA since 1973. She has been an assistant coach at Holyoke YMCA for approximately 32 years and has known Smith since 1979. She has never seen nor is she aware of any allegations against Smith for inappropriate sexual behavior. She is familiar with Anna's allegations of abuse by Smith. [REDACTED] is familiar with the layout of Smith's prior office which has windows but no storage room inside. She described Smith's prior office on the second floor of the YMCA in relation to Exhibit 8, a diagram prepared by Anna. She confirmed that Smith would conduct one-on-one goals meetings with swimmers. [REDACTED] was interviewed during the original police investigation and testified at the Massachusetts Department of Children and Families Fair hearing.
2. [REDACTED] worked as a lifeguard at age 16 at the Holyoke YMCA. Became an assistant coach at Holyoke YMCA at age 18 working with the 10 and under swimmers. She has worked in that position since the fall 2010. She confirmed that coaches conducted one-on-one meetings with swimmers to set goals or discuss strategy during the time that Anna swam for the YMCA club. She believes the diagram of Smith's previous office prepared by Anna (Exhibit 8) looked familiar to Smith's office. Remodeling of that office occurred after she started working as an assistant coach in the fall of 2010. There was no storage room in Smith's office.
3. [REDACTED] an assistant coach at Holyoke YMCA for 11 years was available to testify but was not called by Smith to save time. The parties stipulated that her testimony would be consistent with her prior statement to law enforcement.
4. Randall K. Smith-Respondent. Coached at the Greater Holyoke YMCA from fall 1981 until 2012, when he was placed on administrative leave following allegations of sexual misconduct with an unknown swimmer. Subsequently his employment was terminated. He coached Anna Strzempko starting in the fall of 2007. She was a "good" swimmer. Anna stopped swimming in January 2011 after her Mother reported to Smith that she had an eating disorder. Smith had a brief meeting with Anna at her Mother's

request to let her know that once she became healthy she was welcome to return to the team. Anna returned for one week in April 2011 but her Mother withdrew Anna from the team since she lost five pounds. As a result, Anna missed the YMCA National Championship in Atlanta during the summer of 2011.

He denies ever engaging in any inappropriate sexual behavior with Anna Strzempko or any other swimmer. He specifically denies ever kissing her, digitally fingering her vagina, having intercourse with her, or having anal sex with her. Smith never had a storage room in his office at the YMCA.

Smith testified that he will never work again as a swim coach. However, despite being fired in 2011, Smith has maintained his membership in USA Swimming.

USA Swimming offered no rebuttal evidence.

After a proper hearing in accordance with USA Swimming Rules, and lengthy deliberations over the course of several weeks, the National Board of Review finds that (i) the Board has proper jurisdiction to hear this matter pursuant to the *Rules and Regulations* of USA Swimming, (ii) membership in USA Swimming is a privilege and not a right, (iii) Petitioner has the burden of proof in this matter, and (iv) the standard of proof for Boards of Review is by a preponderance of the evidence (i.e., more likely than not). In addition, the panel unanimously finds the following facts, unless otherwise noted:

1. The Board has proper jurisdiction to hear this matter pursuant to Article 405 of the *USA Swimming Rules and Regulations*.
2. Smith received a proper Notice of Hearing pursuant to Rule 407.9.
3. According to SWIMS, Smith was born on February 21, 1953, and is currently 61 years old.
4. According to SWIMS, Anna Strzempko began swimming for Smith and was approximately 14 years old during 2008.
5. During the majority of 2008, Smith was 55 years old.
6. The evidence is undisputed that Anna Strzempko has been and remains a troubled young lady suffering from an eating disorder, issues sleeping, and other psychiatric conditions as outlined by Dr. Barry Sarvet in his September 23, 2014 report and her Affidavit. The panel members express their sincere sympathy to Anna and her family.
7. The record is undisputed from the evidence offered by each side that Anna's allegations of abuse by Smith have been publically discussed in growing detail by her and her Mother Monica.

8. Smith offered statements from three (3) witnesses identified by Anna who contradicted the information Anna Strzempko provided to USA Swimming's investigator on June 7, 2013 that they were aware of or suspected misconduct by Smith:

- a. Affidavit of [REDACTED]-Exhibit H-mistakenly identified as [REDACTED] by Anna Strzempko in her statement to USA Swimming's investigator. He denies having any knowledge that Smith engaged in any kind of abuse as alleged by Anna Strzempko in her statement to USA Swimming's investigator.
- b. Email between [REDACTED] and Attorney Michael Aleo dated November 13-14, 2014-Exhibit I. His Daughter swam for Smith at Holyoke YMCA. He never suspected that Smith had an inappropriate relationship with Anna Strzempko or [REDACTED] contrary to the information provided by Anna Strzempko in her statement to USA Swimming's investigator.
- c. Affidavit of [REDACTED]-she swam for Smith at Holyoke YMCA. She matches the description of the "Korean female swimmer" mentioned by Anna Strzempko in her statement to USA Swimming's investigator. She denies having the conversation with Anna Strzempko indicating that she was sexually abused by Smith as Anna described to USA Swimming's investigator.

9. Smith testified on his own behalf during the hearing. The panel considered the following conflicting evidence which was weighed against the other evidence offered to determine the credibility of Smith:

- a. Despite not coaching since 2011, and testifying that he will never coach again, Smith maintained his membership in USA Swimming.
- b. Smith testified before the Massachusetts Department of Children and Family at a Fair Hearing on May 23, 2012 that he was never alone with swimmers in the locker room or in the pool. Further he testified that he did have meetings in his office with swimmers.
- c. Smith was interviewed by USA Swimming's investigator on December 6, 2012 (Exhibit 5). Nowhere in USA Swimming's 1 ½ page summary of his interview did the investigator specifically ask Smith whether he ever kissed or otherwise sexually abused Anna. He was simply asked whether "Anna had a conversation with him which implied or stated that she and he were involved in a sexual relationship".

- d. Although he became very emotional during his polygraph examination on October 17, 2014 requiring a short break, Smith showed little or no emotion during his testimony before the NBR, even when the Chair questioned him about specific allegations which he simply denied.

10. All of Smith's witnesses confirmed that he had the opportunity to be alone with and/or abuse Anna in his office despite lengthy testimony about the configuration of his office and any potential discrepancies in Anna's hand-written diagram (Exhibit 8).

11. In September 2014, and simultaneously with the filing of USA Swimming's complaint to the NBR, Smith received a settlement demand from lawyers representing Anna Strzempko.

RATIONALE FOR THE MAJORITY DECISION

The evidence remains in dispute whether Smith abused Anna Strzempko, by kissing her and digitally penetrating her vagina from 2008 through 2010, as alleged in the Complaint and originally reported to the police six to ten times a year in the storage room of Smith's office at the YMCA, in violation of Code of Conduct Article 304.3.5 and Article 304.3.15 of the 2008-2010 versions of USA Swimming's Code of Conduct. Among the conflicting evidence that the panel considered was the following:

- a. Anna's Mother reported to the Massachusetts Department of Children and Family Services in December 2011 that one act of abuse by Smith occurred at a swim meet in Rhode Island years before.
- b. The Holyoke Police were advised by Anna on January 15, 2012 that Smith abused her five times over two years.
- c. Anna told USA Swimming's investigator on June 7, 2013 that Smith fingered her vagina 6-10 times a year for over 3 years.
- d. Anna's Affidavit dated November 14, 2014 states that she was raped at least 6 times over 3 years.

In what Vieth labels a "non-compliant" victim, Anna refused to testify before the NBR, which left the panel with little or no opportunity to consider her testimony or determine her credibility. Instead, the panel was simply provided with her extensive public blog entries (Exhibit 11) along with her Affidavit which was submitted two days before the hearing (Exhibit 12). Paragraph 14 of that Affidavit states that she is "only able to discuss it when she is in complete control of the situation" apparently when she is blogging or providing interviews to Al Jazeera.

The panel was asked by USA Swimming to reach its decision based upon second and third hand interpretations by others of Anna's previous conflicting allegations balanced against the remainder of the "evidence" actually presented at the hearing and subject to questioning by the panel members and counsel for USA Swimming. In reaching its decision, the panel considered the following:

- a. During December 2011, Anna's Mother initially reported to the Massachusetts Department of Children and Family Services that Anna stated that the alleged misconduct occurred in Rhode Island at a swim meet years earlier while Anna was in 6th grade. (Exhibit 4, pg. 3). Everyone agrees that the initial information proved was completely inaccurate.
- b. On October 8, 2012, the Commonwealth of Massachusetts Department of Children and Families reported the alleged sexual abuse of Anna Strzempko by Smith pursuant to statute.
- c. That same day, Monica Strzempko wrote Susan Woessner at USA Swimming complaining about Smith (Exhibit 3).
- d. Following an appeal by Smith of the Department of Children and Family's decision to support a report of sexual abuse by Smith pursuant to statute, the Commonwealth of Massachusetts Department of Children and Families conducted a Fair Hearing on May 23, 2012, chaired by a female attorney, resulted in that panel rendering a 19 page "Fair Hearing" Decision on November 15, 2012. At page 12 of its Decision, the panel concluded that "in light of the totality of evidence in this matter, the child's credibility is questionable". The panel further found Smith to be a "credible individual".
- e. From a review of the Fair Hearing Decision, Anna Strzempko was not represented by legal counsel, did not testify, and was not present to offer evidence at the "Fair Hearing".
- f. On the other hand, Smith was represented by legal counsel, testified, and presented witnesses at said hearing.
- g. From January 15, 2012 through May 2012, the Holyoke Police Department investigated Anna Strzempko's allegations against Smith resulting in no criminal charges filed.
- h. Smith recently submitted to a polygraph interview and examination for four (4) hours by William Wesche, President of the Connecticut Polygraph Association on October 17, 2014, showed "no deception" when he denied touching and inserting his fingers in Anna Strzempko's vagina in Smith's YMCA office.

- i. Smith testified that Wesche was compensated \$1,000 to conduct the polygraph exam and prepare his report.
- j. Counsel for Smith confirmed that the results of polygraph examinations are generally inadmissible in court in Massachusetts.
- k. The 11page “memo to the NBR” prepared by Victor Vieth and dated Tuesday, November 11, 2014, less than one week before the NBR hearing, and after Smith had responded to the complaint, was not requested by the NBR.
- l. Previously Vieth was retained to conduct a “comprehensive assessment of USA Swimming’s Safe Sport program” in August 2013, and subsequently published his findings and recommendations during 2014. In that report, Vieth discussed “non-compliant” victims of abuse, such as Anna Strzempko, who are unwilling to cooperate and participate in USA Swimming’s NBR process, often upon the advice of legal counsel. Vieth recommended that the NBR consider “reliable hearsay” when that occurs.
- m. Vieth’s “memo” offered his personal conclusions after reviewing all of the evidence including that recently offered by counsel for Smith. However, Vieth never met or spoke with the alleged victim; only her Mother on one occasion when she called him during his assessment of USA Swimming’s Safe Sport program. Additionally, Vieth never met with or spoke to Smith, any of his witnesses, any representative of DCS, or the police investigators.
- n. Nothing contained in Vieth’s review of Smith’s exhibits to the NBR caused him to alter his opinion.
- o. As a lawyer, Vieth continually volunteered during the hearing that in his opinion things were “more likely than not” which invaded the province and responsibility of the NBR panel.
- p. Vieth testified that he provides consulting services and advice primarily to law enforcement officers and prosecutors in sexual abuse cases; not individuals accused of crimes.

The panel is responsible to independently and carefully analyze the totality of evidence presented during the hearing, as required by USA Swimming’s Rules and Regulations, and fairly determine whether USA Swimming met its burden of proof of the allegations by a preponderance of the evidence. Further, the Amateur Sports Act requires that Smith be entitled to procedural due process before he can be declared ineligible to participate in the sport of swimming.

The NBR's function is not to simply be a "rubber stamp" of complaints filed by USA Swimming against coaches.

The NBR's decision must be based upon reliable evidence in the record, without the benefit of Vieth's personal conclusions, or the results of Smith's polygraph examination. To do otherwise, would result in the panel members allowing USA Swimming or Smith to "outsource" its responsibility.

This panel was asked to determine if there was sufficient evidence, as USA Swimming alleged in its complaint, that Smith improperly kissed and digitally penetrated Anna Strzempko's vagina 6 to 10 times a year from July 2008 through January 2010. The complaint was never amended. Therefore, the panel focused its attention on evidence presented to determine if USA Swimming proved the allegations in its complaint by a preponderance of the evidence.

Nowhere in the record are there any specific details directly from Anna Strzempko that Smith ever engaged in inappropriate touch, kissing, or sexual intercourse, let alone anal intercourse. The only evidence to the contrary is found in Dr. Sarvet's report that Anna disclosed these new allegations during 2013. Dr. Sarvet did not testify at the hearing.

The initial investigative report prepared by USA Swimming's outside investigator was unhelpful as it failed to include any information directly from the victim. When Anna Strzempko was finally interviewed on June 7, 2013, the summary was lacking. However, Anna did provide information about 3 potential witnesses who were either abused by Smith or had knowledge of his abuse of other swimmers. USA Swimming apparently chose not to have those witnesses interviewed. It was Smith who did and offered evidence which contradicted the information provided by Anna.

Two of the three panel members concluded that USA Swimming failed to meet its burden of proof by a preponderance of the evidence that any violation occurred as alleged in its complaint. The evidence in the record fails to show that USA Swimming met its burden of proof, by a preponderance of the evidence, that Smith violated Articles 304.3.5 and 304.3.15 of the 2008-2010 versions of the USA Swimming Code of Conduct, by inappropriately kissing and sexually touching a minor female athlete member Anna Strzempko as alleged.

Based upon the foregoing findings of fact, the National Board of Review by a vote of 2 to 1 concluded that Randall K. Smith did not violate Articles 304.3.5 and 304.3.15 of the 2008-2010 versions of the USA Swimming Code of Conduct, as alleged in the complaint filed by USA Swimming.

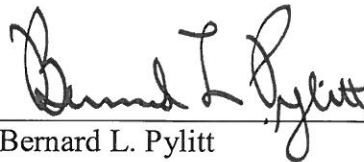
The dissenting panel member felt that Smith did violate the Code of Conduct as alleged, should be permanently banned from membership in any capacity with USA Swimming, and have his name added to the published list of individuals permanently banned from membership.

The majority of the panel wants to make it clear that they did not determine that misconduct alleged in the complaint did not occur. Rather, they found that USA Swimming failed to prove by a preponderance of the evidence that it did occur.

CONFIDENTIALITY- Article 410 of the USA Swimming Rules and Regulations mandates that all proceedings before the NATIONAL Board of Review regarding alleged Code of Conduct violations shall be and remain confidential until the National Board of Directors has rendered its final decision. Upon completion of all appellate rights, USA Swimming shall serve a summary of this Decision upon the Registrar of New England Swimming.

Pursuant to Article 409.1 of the *USA Swimming Rules and Regulations*, any person, including Petitioner and Respondent, having an actual, direct interest in this matter may appeal this Decision of the National Board of Review to the Board of Directors (or a panel thereof) of USA Swimming for review (based upon the record and any written briefs submitted, unless otherwise determined by the Board of Directors). The petition shall set forth the grounds for appeal, citing factual and legal issues in as much detail as possible, be served upon the Executive Director of USA Swimming, 1 Olympic Plaza, Colorado Springs, Colorado 80909-5770, within thirty (30) days of the date of this Decision and be accompanied by a \$250 filing fee payable to USA Swimming.

IT IS SO ORDERED this 8th day of December, 2014.



Bernard L. Pylitt
Chair of the National Board of Review

Decision
December 8, 2014
Page 13

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