

**BEFORE THE  
CALIFORNIA STATE ATHLETIC COMMISSION  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

In the Matter of the Arbitration	)	
Of:	)	
	)	Case No. 082905-01
ISHE SMITH, Boxer	)	
	)	
TOURNAMENT OF CONTENDERS, INC.	)	
	)	
Promoter	)	
_____	)	

**DECISION**

This matter came on regularly for hearing before executive officer Armando Garcia at approximately 1:00 p.m. on August 29, 2005 pursuant to a Request for Arbitration filed by boxer, Ishe Smith. The parties were informed prior to the hearing that each side would be given one hour to present their evidence in the form of documents or testimony. This announcement was repeated at the outset of the proceedings.

Mr. Ishe Smith was present and represented by attorney M. Keith Jackson. Karen Chappelle, Lead Supervising Deputy Attorney General, was present and represented the California State Athletic Commission. Attorney John Gatti was present and represented the promoter, Tournament of Contenders, LLC . Documentary evidence and oral testimony were presented, including the testimony of Mr. Ishe Smith, Mr. Dean Lohuis, Mr. Brian Edwards, Mr. Henry Holmes, and Mr. Steve Rivera.

At the conclusion of the hearing, 6:00 p.m., the matter was left open for one month for the submission of a declaration by Mr. Jeff Wald, from the Tournament of Contenders. On September 22, 2005, said declaration was received. Additional material submitted by Tournament of Contenders was not considered since those materials were not served on Smith or his attorney and they exceeded the scope of materials the arbitrator had agreed, at the conclusion of the hearing, to accept.

**FINDINGS OF FACT**

1. On or about August 11, 2005, Boxer Ishe Smith (hereafter, "Smith") filed a Request for Arbitration with the California State Athletic Commission. (hereafter

"Commission"), pursuant to paragraph "C" and Rule 221. The basis for the request was that Smith alleged that the Tournament of Contenders, LLC, (hereafter, "Promoter") did not have his best interest in mind. The request further alleged that the promotional contract drawn up by Promoter violated the California Addendum to Promotional Contract and that it had been unlawfully extended by four years, in violation of the California provision that a promotional contract should not exceed three years, and is not valid and enforceable until submitted to, approved by, and filed with the Commission.

2. Smith first received a California boxer license on July 22, 2004. That license is currently expired and was not renewed in 2005. Smith testified that he read the Exclusive Promotional Agreement, which he signed July 21, 2004 in the presence of Dean Lohuis and Mark Burnett. He further stated that during the course of filming the television series, the boxers were housed in a location apart from their families, without access to telephones, cell phones, or their computers and e-mail. During the time he was housed in such facility, the "attorney's" for the show showed up on two occasions, and told the boxers to sign the contracts. The contracts referred to were the Amended and Supplement Exclusive Promotional Agreements dated September 7, 2004 and September 23, 2004. Smith testified he was not allowed to speak with anyone regarding the contents of these documents, which were not explained to him. He did not have the opportunity to talk with his attorney or his wife prior to signing the documents.

3. Promoter was first licensed by the Commission in July 2004, said license is current.

4. Dean Lohuis, Chief Inspector for the Commission testified that at the time of the signing of the Contender promotional contracts, he was Acting Executive Officer for the Commission. In that capacity, he was present when the California Addendum to Promotional Contract (hereafter "California Addendum") was signed by Smith. Lohuis testified that he reviewed the provisions of the agreement with Smith and that Smith understood the terms. The term of the promotional agreement contained in the California Addendum is July 19, 2004 to May 1, 2005. However, the California Addendum was signed July 19, 2004 but the Exclusive Agreement allegedly attached to it was not signed until July 21, 2004. There is not sufficient evidence to establish that Mr Lohuis complied with the regulation requirement (and the contract requirement) for signature in the presence of both the boxer and the promoter.

The written portion of the California Addendum is attached hereto as Exhibit A. It states in the second paragraph: " Any and all inconsistencies or ambiguities between the promotional agreement and this California Addendum which is attached to it and made a part of it shall be resolved in favor of this California Addendum, the Boxing Act, and the Commission's rules."

It further states at paragraph "A.:"

**"No promotional contract may exceed three years nor is it valid and enforceable until it is submitted to, approved by, and filed with the commission with this California Addendum attached."** (emphasis added) At paragraph C(6) the contract also states: **"No promotional contract is valid until and unless both parties appear at the same time before the commission or a representative and the contract has been approved by the Executive Officer. (emphasis in original)"**

Mr. Lohuis stated that he went over the provisions of the California Addendum with Smith thoroughly and that Smith understood the terms. The California Addendum, dated July 19<sup>th</sup>, 2004, was signed by Mark Burnett, promoter, Dean Lohuis as Executive Officer, and Smith.

5. Mr. Lohuis testified that attached to the California Addendum at the time he signed it was a 16-page document entitled "Exclusive Boxing Promotional and Rights Agreement." (hereafter "Exclusive Agreement") The document was dated July 21, 2004 and was not contained in the Commission file. Lohuis did not go over each paragraph of the document with the boxer. Lohuis testified that while he read the agreement and signed that he approved it, he did not recall noticing paragraph 30 entitled "**Dispute Resolution**" which reads in pertinent part:

" . . . Unless provided otherwise by the rules and regulations of the Athletic Commission having jurisdiction over any Bout hereunder, any claim or controversy arising out of or related to this Agreement, including the issue of arbitrability of any such claim or controversy, shall be resolved solely and completely by mandatory, final, binding, and non-appealable arbitration, conducted by the California Athletic Commission, pursuant to its then-effective rules ( as set forth in Exhibit A and the California Rules and Regulations). The arbitrator(s) shall not have any power to alter, amend, modify or change any of the terms of this Agreement nor to grant any remedy which is either prohibited by the terms of this Agreement, or not available in a court of law. Moreover, the arbitration proceedings, testimony, discovery and documents filed in the course of such proceedings, including the fact that the arbitration is being conducted, will be treated as confidential and will not be disclosed to any third party to such proceedings, except the arbitrator(s) and their staff, the parties' attorneys and their staffs, and any experts retained by the Parties. The cost of arbitration, including the adverse party's attorney fees and costs, shall be borne by the losing Party in such proportions as the arbitrator(s) decides. A judgment on the ward rendered by the arbitrator may be entered in any court having jurisdiction thereover. The parties hereto agree that, notwithstanding the provisions of this paragraph, Promoter shall have the right to injunctive or other equitable relief. The parties further agree that venue and jurisdiction over any litigation, motion to compel arbitration or to confirm an arbitration award shall lie exclusively with the courts (state or federal) located in and having jurisdiction over Los Angeles County, California, and hereby submit to the jurisdiction thereof. . . . "

When questioned as to whether he received a copy of the Exclusive Agreement, he replied that he had, and had forwarded such copy to "Sacramento." Lohuis had no

explanation as to why the Commission files did not contain any copy of the Exclusive Agreement.

Mr. Lohuis was questioned regarding the subsequent Supplemental and Amended Exclusive Agreements dated September 7, 2004, and September 23, 2004, both of which also bore his signature. Mr. Lohuis could not explain the purpose of such amendments, only that they were "for the good of the boxer." Lohuis was unable to state when the contract term ended, and did not know why these documents were not in the Commission files. Lohuis testified that he had been given adequate time to review these documents prior to signing and approving them, but did not recall what they contained. Lohuis, who is not an attorney, did not consult with any of the attorneys associated with the Commission or on the Commission or any Commissioner prior to giving his approval to these documents.

The September 7, 2004 and September 23, 2004 amendments to the promotional agreement were submitted by the Promoter to the Commission in connection with the arbitration proceedings. They do not appear in the Commission files either in Sacramento or Los Angeles.

Mr. Brian Edwards Esq., a licensed California Promoter testified that he had participated in procuring the fighters for the Contender series. With regard to Smith, Edwards was told by Lohuis that the Exclusive Agreement was approved by the Commission. According to Edwards, the Amendments to the Exclusive agreement were discussed and worked out with Lohuis in order to give clarity to paragraph 1 of the original Exclusive Agreement, which dealt with the length of the term of the contract. Edwards maintained that the original Exclusive Agreement was discussed with Mark Risman, who at that time was attorney for Smith. Risman's signature does not appear on the agreement. Edwards, whose signature appears on both the September 7, and September 23, 2004 Amended and Supplemental Agreements, believes that Lohuis as well as Smith were all present when the documents were signed.

Mr. Henry Holmes, Esq., counsel for Promoter, also testified that the provisions of the Exclusive Agreement were discussed with Attorney Mark Risman, who represented Smith. Mr. Holmes testified that 3 years and 11 months remain in the Exclusive Agreement.

Steve Rivera, on behalf of Promoter, testified that he had been in contact and communication with Smith in efforts to set up bouts.

Mr. Jeff Wald, co-executive producer on the Contender series submitted a declaration to the arbitrator subsequent to the hearing. In the declaration, Mr. Wald states the promotional agreements entered into with Smith were reviewed and approved by the Commission. Specifically, drafts were sent to Sanford Michelman ( then a Commission member) and Dean Lohuis. He additionally declares that the terms were discussed with Karen Chappelle and Earl Plowman in the Attorney General's office, as well as with Mark Risman, attorney for Smith. Wald states that the Tournament of

Contenders has throughout the contract period worked in the best interest of Smith, and continues to do so, by offering bouts.

### **LEGAL CONCLUSIONS**

1. Exclusive authority of the Commission to arbitrate promotional contracts exists in the express language of the contract itself, which provides in paragraph C(2) for arbitration, and in Rule 221. See also Business and Professions Code Section 18640.
2. Dean Lohuis as Acting Executive Officer of the Commission possessed the authority to approve contracts that are consistent with the Commission rules and laws. However, he lacked authority to bind the Commission to contracts that violate the Commissions rules and express terms of its own California Addendum to Promotional Contract or otherwise violate public policy.

### **DISCUSSION**

1. Boxer Ishe Smith argues that he should be relieved of the contract terms because the promoter has failed to offer him any fights that would advance his career as a boxer or further his career goals to become a champion. In addition, he argues that the terms of the Exclusive Agreement violate the terms of the California contract in that the terms exceed the three year limit set forth in paragraph "A" as well as the handwritten provision on the same document which sets forth the period of the agreement as July 19, 2004 through May 2005.
2. Promoter argues that it has acted in good faith toward Smith, by offering him several bouts that would advance his career, and that Smith accepted money for one such bout and refused the bout. Promoter further argues that the Exclusive Agreement is valid, does not violate California law or the Commissions rules, and that such agreement was approved by the Commission itself.
3. At the outset, it is noted that wherever possible, the Commission strives to uphold agreements between boxers and promoters. In some rare instances, however, circumstances warrant the Commission's action to dissolve such contractual relationship. These circumstances include, but are not limited to, breach of the contract by the boxer, breach by the promoter and other circumstances where the Commission feels it is "in the best interest of boxing" to dissolve the relationship.
4. Testimony given at the arbitration hearing centered around the Commission's requirements to have all parties to the contract present at the signing. There was conflicting testimony given on this issue and there was insufficient evidence to establish that this requirement had been met. In this instance, however, the mere presence of all parties at the instance of signing is not the determining factor.

5. The Exclusive Agreement attached to the California Addendum was not read and approved by the Commission. Although Lohuis, as Acting Executive Officer for the Commission at the time, and Sanford Michelman, former Commission member, may have read the contract, the provisions contained therein do not withstand the applicability of the Commission's own rules, for several reasons. The Commission acknowledges the allegations that former Commissioner Michelman gave advice relative to drafting the initial promotional contract. Such input however, in no way overcomes the legal defects in the Exclusive Agreement.

6. Vagueness and Uncertainty of Terms The contract provision governing the length of the contract initially provides for a term that runs from the effective date of the contract through the conclusion of the Championship Round of the Contender bouts occurring during the first season of the program, and may be extended according to three other scenarios that are set forth in subparagraphs (a), (b), and (c). From reading this provision, it is impossible to ascertain the length of the contract. Brian Edwards himself testified that the reason for the Supplemental and Amended Exclusive Agreement was to clarify the terms.

The California Addendum indicates on its face that no promotional contract can exceed three years. The exclusive agreement at paragraph 1(c) allows for an "automatic" contract extension of five (5) additional one year terms, provided certain other contingencies exist or come to pass.

The existence of such contingencies, and the extension beyond the three year period set forth in the California Addendum are inconsistent with the California Addendum.

Parole Evidence Rule One of the principals governing contract validity is the parole evidence rule, which applies where, as here, there is a written contract. This rule bars oral or written evidence which contradicts the express and material terms of the contract. Here, the material provision at issue is the length of the contract term. Several people who testified on behalf of the promoter were unable to state when the contract would end. Lohuis, on behalf of the Commission did not know when the contract ended. Finally, Smith clearly had no idea when his contract with the Promoter ended.

The parole evidence rule operates here to preclude Promoter by way of amendment or California Addendum from orally clarifying or explaining the length of the original contract term.

Adhesion Contract The terms and provisions contained in the 16 page Exclusive Agreement were not sufficiently explained to Smith. Smith is not an attorney. Lohuis, who reads and approves promotional contracts with great frequency, was unaware of the terms and effects of the terms contained in the Exclusive Agreement, most notably the provision contradicting the ability of his own Commission to conduct arbitrations. Under the circumstances, the contract was not understood by two of the three

signatories. Again, the conflicting terms create an inconsistency with the California Addendum.

7. On a separate and collateral matter, Promoter alleged during the hearing that Smith granted an interview to Boxingtalk.com, an Internet magazine. In the article, Smith characterizes the Promoter in an unflattering light. The arbitrator agrees, and finds that this conduct by Smith is not in the best interest of boxing, and admonishes Smith for such conduct. The arbitrator also notes that the motivation that led to Smith giving such interview and statements is consistent with the view that the present contract relationship between Smith and Promoter is not in the best interest of boxing, and is itself a ground for dissolving the contractual relationship.

8. Finally, regarding allegations that the Office of the Attorney General reviewed (and, impliedly, approved) the contracts, testimony of Brian Edwards indicates that such review was limited to the review of the confidentiality agreement relative to California reporting requirements to the Association of Boxing Commissions. Therefore, to the extent that Promoter is asserting a defense of detrimental reliance, it is rejected.

8. Accordingly, the arbitrator hereby finds that the Exclusive Boxing Promotional and Rights Agreement as well as the Supplements and Amendments thereto dated September 7, 2004 and September 23, 2004 are inconsistent with the terms of the California Addendum to Promotional Contract dated July 19, 2004. In such instance, the terms of the California Addendum control. The terms of the California contract indicate a term through May 1, 2005. Accordingly, there is no current contract that exists as between boxer Ishe Smith and Promoter Tournament of Contenders, LLC.

### ORDER

WHEREFORE, THE FOLLOWING ORDER is made:

The arbitration is resolved in favor of boxer, Ishe Smith.

IT IS SO ORDERED this \_\_\_\_\_ day of October, 2005.

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ARMANDO GARCIA, Arbitrator  
Executive Officer  
California State Athletic Commission