

UNITED STATES OLYMPIC COMMITTEE

KENNETH RICHARDS)	
)	
Complainant,)	
)	DECISION
v.)	ON
)	MOTION TO DISMISS
USA DANCE, Inc.)	
)	
Respondent.)	April 23, 2019

I. THE PARTIES

1. Kenneth Richards (“Richards” or “Complainant”) is a member of USA Dance (“USAD” or “Respondent”).

2. USAD is a Recognized Sport Organization (“RSO”) member¹ of the United States Olympic Committee (“USOC”) and is recognized pursuant to the Ted Stevens Olympic and Amateur Sports Act (36 USC §§ 220501-220529) (the “Act”) and Section 8 of the USOC Bylaws. USAD oversees and conducts programs for the sport of DanceSport in the United States.

3. Complainant and USAD are collectively referred to as the “Parties.”

¹ For any sport included on the program of the Olympic, Paralympic or Pan American Games, Section 220521 of Act grants the USOC with the authority to recognize a sports organization as the National Governing Body (NGB) for that sport. DanceSport is not included on the program of the Olympic, Paralympic or Pan American Games. However, Section 220504 of the Act allows the USOC to establish membership categories and eligibility requirements for other sport organizations, which the USOC provides for under Section 8 of the USOC Bylaws. Pursuant to Section 8, the USOC allows sports that are not on the program of the Olympic, Paralympic or Pan American Games, but are widely practiced and are recognized by the IOC to be eligible for membership in the USOC as an RSO. RSOs are required to comply substantially with the provisions of the Act as required of NGBs. Therefore, the Section 10 Complaint process has been available for all RSOs. Any reference to NGB applies consistently with RSOs.

II. COMMENCEMENT OF PROCEEDING

4. On November 5, 2018, Complainant filed a Complaint with the USOC against USAD pursuant to Section 220527 of the Act and Section 10 of the USOC Bylaws.

5. Section 220527 of the Act and Section 10 of the USOC Bylaws collectively provide that a person who belongs to a governing body may seek to compel the governing body to comply with the requirements of Sections 220522 - 220525 of the Act and Section 8 of the USOC Bylaws. Those provisions set forth the obligations and requirements of a governing body.

III. HEARING PANEL COMPOSITION

6. In accordance with Section 220527(a)(2) of the Act and Section 10.6 of the USOC Bylaws, USOC Chief Executive Officer, Sarah Hirshland, appointed a Hearing Panel of three members for the purpose of hearing this matter. The Panel members are:

Kikkan Randall, Hearing Panel Chair and USOC Board Member;
Christopher Parker, President and CEO of the National Junior College Athletic Association and Member of the Multisport Organization Council;
Sarah Gascon, Team Handball athlete and athlete representative on the Athletes' Advisory Council.

7. The Parties were provided with a list of Hearing Panel members by letter from Ms. Hirshland on December 7, 2018.

8. No Party objected to the appointment of the Hearing Panel members. Accordingly, the Hearing Panel was seated without objection.

IV. LEGAL COUNSEL

9. Complainant is represented by Ellen M. Zavian, Esq.

10. USAD is represented by Jesse A. Salen of the firm Sheppard, Mullin, Richter & Hampton LLP.

V. COMPLAINT

11. The underlying controversy that gives rise to the Complaint stems from an action occurring on August 28, 2018, when the Governing Council (“GC”) of USAD reprimanded Richards for allegations of misconduct in violation of USAD’s Code of Ethics Policy and USAD’s Abuse and Harassment Policy Guidelines and warned him to prohibit from engaging in such conduct in the future.

12. USAD’s states that its basis for reprimanding Richards involved actions taken by Richards in relation to posting “false or misleading” information about USAD’s Pittsburgh’s Chapter and its President, in particular information concerning misappropriation of funds.

13. USAD did not provide Richards with a hearing on the matter prior to issuance of the reprimand and warning letter.

14. Richards argues that USAD should have followed its grievance process prior to reprimanding him.

15. USAD contends that it does not have to provide a member, like Richards, with a hearing prior to reprimanding him because (i) it was a private matter and not communicated to any third-party and (ii) did not take away any membership rights. If Richards wanted to dispute the reprimand, USAD states that Richards could have

requested a hearing subsequent to the issuance of the reprimand pursuant to USAD's grievance process.²

16. Consequently, Richards makes the following allegations:
 - a. USAD violated USAD's Bylaws when Richards was denied access to any and all complaint procedures;
 - b. USAD violated USAD's Ethics Policy because Richards was denied due process and the opportunity for a hearing;
 - c. USAD violated USAD's Conflict of Interest Policy;
 - d. USAD violated USAD's Abuse and Harassment Policy because the reprimand letter lacked specificity and details for what Richards allegedly violated and did not provide due process;
 - e. USAD violated the USOC Bylaws because it failed to maintain a culture of ethical behavior and failed to fulfill its USOC membership obligations of transparency when it unilaterally reprimanded a member without due process;
 - f. USAD violated the USOC Code of Conduct by (i) treating Richards unfairly by unilaterally reprimanding him, (ii) failing to provide due process and (iii) tainting Richards' name as a self-serving attempt to eliminate him as a potential competitor in future elections.

17. Richards requests the following remedies:
 - a. That the reprimand letter be destroyed immediately and that the minutes of the August 27, 2018, GC meeting be revised to strike the vote to reprimand Richards.
 - b. That USAD be placed on probation until a complete and further investigation is completed by the USOC to ensure compliance.

VI. MOTION TO DISMISS

18. On December 5, 2018, USAD filed a Motion to Dismiss. The Motion is based on two grounds. Briefly stated, they are (i) Richards failed to properly serve the Complaint as required by USOC Bylaw Section 10.2 and (ii) that Richards failed to exhaust his administrative remedies as required by USOC Bylaw Section 10.11.

² This raises the question of whether USAD in not providing Richards with a hearing prior to reprimanding him violated Section 220522(a)(8) of the Act.

19. In its January 24, 2019, Scheduling Order, the Hearing Panel set a briefing schedule and hearing date for oral argument on the Motion to Dismiss.

20. Prior to the scheduled oral argument, the Parties requested a stay of the proceeding until March 1, 2019, in order for the Parties to engage in settlement negotiations. The Hearing Panel granted this stay.

21. On February 28, 2019, Richards informed the Hearing Panel that settlement efforts were not successful and that the matter should proceed pursuant to the Section 10 process and on March 1, 2019, USAD confirmed this information.

22. The Hearing Panel rescheduled and held oral argument telephonically on the Motion to Dismiss on March 18, 2019.

23. Counsel for the Parties presented arguments and answered questions from the Hearing Panel on the Motion to Dismiss. Richards and Michael Murphy, as a representative of USAD, also participated in the hearing. Additionally, Sara Pflipsen, USOC Senior Counsel and legal counsel to the Hearing Panel, and Lucy Denley, USOC Senior Paralegal and liaison to the Hearing Panel participated in the hearing.

24. In its consideration of the Motion to Dismiss, the Hearing Panel reviewed the Complaint and all the papers filed in support of and in opposition to the Motion to Dismiss. The Hearing Panel also considered oral argument presented by the Parties.

VII. ANALYSIS

A. Basis for Motion

25. As previously stated, the Motion to Dismiss is based on two grounds.

26. First, USAD contends that the Complaint should be dismissed because Richards failed to properly serve his Complaint, as required by Section 10.1 of the USOC Bylaws.

27. Second, USAD asserts that Complainant failed to exhaust his administrative remedies with USAD, as required by Section 220527(b) of the Act and Section 10.11 of the USOC Bylaws.

B. Service Requirement

28. As a procedural matter for filing a Section 10 complaint, Section 10.1 of the USOC Bylaws requires a complainant to serve a copy of the complaint on the respondent and file a proof of service on the NGB with the USOC.

29. Section 10.4 of the USOC Bylaws provides that if a complaint is not filed in accordance with Section 10.1, it will “render the filing ineffective and shall not be considered to have been properly filed.”

30. The following facts are undisputed. Richards filed this Complaint with the USOC on November 5, 2018. On November 6, 2018, the USOC provided Richards with an acknowledgment of the Complaint, along with confirmation that USAD was notified about the Complaint. Also, on November 6, 2018, the USOC provided USAD with a letter via email notifying USAD of the Complaint, along with the Complaint itself. Further, Richards mailed the Complaint to USAD on November 9, 2018, and USAD confirmed receipt of the hard copy on November 13, 2018.

31. USAD contends that sending the Complaint in the mail does not meet formal service requirements.

32. USAD states that since it was never properly served with the Complaint, Richards could not have provided proof of service to the USOC.

33. Accordingly, USAD asks the Hearing Panel to dismiss the Complaint because Richards did not comply with Section 10.1 of the USOC Bylaws.

34. USAD argues that the USOC Bylaws are unambiguous in the service requirements and that “service” should follow the accepted term as is contemplated with civil procedures.

35. Richards responds arguing that USAD was served when Richards mailed the Complaint to USAD on November 13, 2018. Further USAD was put on notice of the filing of the Complaint when the USOC emailed its notification letter along with the Complaint on November 6, 2018.

36. As a basis for this, Richards argues that Section 10 proceedings do not need to conform to the strict interpretation of service of process under civil procedures, and rather, the USOC provides for flexibility and guidance in the procedural filing requirements in order to help assist NGB members, including athletes, who are not versed in formal legal procedures.

37. Further, Richards argues that absent any clear timeframe in the USOC Bylaws as to when service must be completed by, service simply needs to be accomplished within a reasonable time. Richards acknowledges that the Complaint was not served on USAD immediately upon filing with the USOC, but that it was served within a reasonable time thereafter.

38. In making its determination, the Hearing Panel focused its analysis on the question as to whether a complainant in a Section 10 proceeding can meet the service requirement by mailing the complaint to the respondent.

39. Service of process associated with the filing a complaint is generally known to mean the delivery of a legal document that notifies the respondent of a pending action against him/her, so that he/she can properly defend himself/herself.

40. USAD's position is that proper service can only be met upon an individual hiring a process server to serve the complaint, with the process server then attesting to service by attaching a proof of service.

41. Although civil litigation requirements may impose the strict process server requirement, Section 10 is not a civil litigation matter. Section 10 matters are administrative proceedings that do not adhere to the strict conformity of legal rules.

42. The Hearing Panel agrees with Richards that Section 10 matters are much less formal than court proceedings and that latitude, informality and flexibility should be provided to parties with the service requirement in a Section 10 matter.

43. In order to provide for the fair, efficient and effective resolution of complaints, the most important aspect is that a Section 10 complaint reach the NGB so that the NGB has notice of the complaint and the proceeding against it. This can be accomplished by a process server (if a party is so inclined), mail, email, or any other reasonable means.

44. The Hearing Panel determines that service is complete when a respondent is provided with the complaint and the USOC has some proof that the respondent has the complaint.

45. Further, and most importantly, there is no dispute that USAD received and had notice of the Complaint. USAD never contends that it did not know of the Section 10 Complaint filed against it. Richards mailed the Complaint to USAD on November 9, 2018. Further, the USOC provided the Complaint to USAD via email on November 6, 2018.

46. The Hearing Panel finds that USAD was notified of the Section 10 action against it allowing it to respond to the Complaint. Richards, by mailing the Complaint to USAD, met the service requirements of Section 10.1.

47. Accordingly, USAD's Motion to Dismiss relating to the service requirement of Section 10 is denied.

C. Failure to Exhaust Administrative Remedies

48. Section 220527(b) of the Act states that a complainant may file a complaint with the USOC regarding allegations of NGB noncompliance "only after exhausting available remedies within the national governing body for correcting deficiencies, unless it can be shown by clear and convincing evidence that those remedies would have resulted in unnecessary delay." Likewise, Section 10.11 of the USOC Bylaws states that a complainant may file a Section 10 complaint "only after exhausting all available remedies with the NGB...for correcting deficiencies."

49. In its Motion to Dismiss, USAD argues that it has a robust grievance process which Richards is very familiar with,³ including a process to file complaints alleging NGB non-compliance, and that such process must be pursued before Richards can file a Section 10 complaint.

50. USAD states that if Richards wanted to challenge the underlying merits of the reprimand, or the authority of USAD to impose a reprimand, he could have filed a grievance with the USAD Ethics Committee and a hearing would be held on the matter.

51. Lastly, USAD notes that Richards cannot show that filing his complaint with USAD's Ethics Committee would result in unnecessary delay⁴ and thus, the Motion to Dismiss should be granted.

52. Richards asserts that because USAD never filed a formal complaint against him prior to issuing a reprimand, USAD violated its own grievance process and "made up a new hearing process" with no due process and no appeal option.

53. Richards contends that without any internal process afforded to him on the reprimand, he has satisfied the exhaustion requirement and the USOC is the right venue to hear his complaint.

54. The Hearing Panel believes that Richards is misguided as to what is required to satisfy the exhaustion requirement and misinterprets the purview and scope of Section 10 proceedings.

55. The Section 10 complaint process provides an avenue for individuals to seek to compel NGBs to comply with the requirements of Section 8 of the USOC Bylaws and Sections 220522-220525 of the Act. A Section 10 proceeding allows a member to file a complaint of non-compliance against an NGB *for* correcting deficiencies. The "deficiency" must be related to NGB compliance under Section 8 of the USOC Bylaws or

³ USAD notes that Richards filed seven complaints with USAD in 2018 alone, showing that Richards is well aware of the internal processes.

⁴ Richards offers no evidence to show that proceeding through USAD's complaint process would result in unnecessary delay, and thus the Hearing Panel did not consider that in making its determination.

under Section 220522-220525 of the Act. Accordingly, in order to exhaust his/her internal remedies, a member must file a complaint with the NGB specifically relating to allegations of non-compliance. It is not enough for the individual to assert that he/she raised issues of unfair treatment in an underlying controversy, and then claim that action satisfies the exhaustion requirement.

56. This issue has been considered by previous Section 10 hearing panels. They have held that an individual must file a complaint with his/her NGB specifically alleging a violation of the Act or USOC Bylaws related to NGB obligations and responsibilities, which then allows the NGB the opportunity to correct the deficiency of non-compliance. *Gelfke v. U.S. Equestrian Federation*, Decision on Motion to Dismiss, page 9 (April 1, 2017) (Jim Benson, Rich Bender and Emily Azevado, Pnl. Mbrs.) (“If a complainant has not filed a separate complaint with an NGB alleging noncompliance with the Act or USOC Bylaws, then the complainant has not exhausted his or her administrative remedies”).

57. Here, the answer is simple. Richards never filed a complaint with USAD regarding any allegation of USAD non-compliance under the Act or the USOC Bylaws. Thus, he did not exhaust his administrative remedies.

58. Nor does Richards otherwise argue that USAD lacks a complaint process available to hear issues of non-compliance. To the contrary, Richards focused his argument on how USAD circumvented its complaint process for the underlying issue of the reprimand, and not about a lack of a complaint process for non-compliance complaints.

59. Further, Richards states that the USOC is the proper forum to hear his “appeal” on “this” matter (namely, the reprimand). The Section 10 process is not an appeal avenue of underlying controversies and individual member disputes. As stated in *Lee v. U.S. Speedskating*, Decision on Motion to Dismiss, page 12 (Sept. 1, 2016) (Anita DeFrantz, Jim Leahy and Brian Olsen, Pnl. Mbrs.), “a Section 10 Complaint... is not designed to provide a duplicable venue of appeal on an individual disciplinary action, and [it] does not provide a Hearing Panel with the authority to determine eligibility of individual members.”

60. Richards can use the underlying issue as evidence of non-compliance, but not the basis for the Section 10 complaint. Again, the precedent on that is clear. *Leach v. USA Track & Field, Inc.*, Decision on Motion to Dismiss, page 8 (Sept. 20, 2016) (Bob Wood, Darrin Steel and Kerry McCoy, Pnl. Mbrs.) (“[t]he conduct of an NGB... may be used as evidence” of non-compliance, but “a complainant cannot use the disciplinary proceeding itself to satisfy the administrative remedy requirement for a Section 10 complaint”).

61. Since Richards never filed a complaint with USAD on the non-compliance issue, USAD never had the opportunity to hear the matter or correct possible deficiencies.

62. The Hearing Panel cannot let individuals circumvent the exhaustion requirement within the Section 10 process without valid justification.

63. Simply because there is a disagreement between a member and an NGB regarding the authority of an NGB to issue a reprimand prior to a hearing does not trigger the Section 10 process. Internal processes must be followed first. The USOC cannot be flooded with member grievances as a first instance hearing body.

64. The Hearing Panel does not support Richards argument that he has no recourse available. The Hearing Panel believes that USAD has sufficiently shown that it has a process for Richards to utilize to submit complaints of non-compliance allegations.

65. If Richards desires to pursue a complaint of non-compliance against USAD, Richards must first file a complaint with USAD specifically alleging that USAD violated certain provisions of the Act and USOC Bylaws.⁵ The Hearing Panel trusts that USAD will provide Richards with a hearing on that type of matter if it is properly filed.

66. Accordingly, this Hearing Panel finds that Richards has failed to exhaust the administrative remedies available to him through USAD's grievance procedures, nor has any other justification for bypassing this requirement.

67. USAD's Motion to Dismiss relating to the exhaustion requirement of Section 220527(b) of the Act and Section 10.11 of the USOC Bylaws is granted.

VIII. RULING

68. The Hearing Panel denies USAD's Motion to Dismiss on the ground that Richards failed to properly serve the Complaint. The service requirement for a Section 10 proceeding is met upon the respondent having receipt of the complaint and notice of the proceeding.

69. The Hearing Panel grants USAD's Motion to Dismiss for the reason that Richards failed to exhaust his administrative remedies with USAD and that was he was not otherwise excused from fulfilling this requirement.

⁵ Even in the Section 10 complaint, Richards has yet to identify a specific provision of the Act or USOC Bylaws that it believes USAD is noncompliant with.

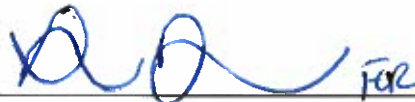
70. All members of the Hearing Panel reviewed and approved this written Decision.

IX. ORDER

71. USAD's Motion to Dismiss is granted.

72. The Section 10 Complaint is hereby dismissed.

Dated this 23 day of April, 2019.



Kikkan Randall, Chair

Christopher Parker, Panel Member
Sarah Gascon, Panel Member