

UNITED STATES OLYMPIC COMMITTEE

ESTHER FREEMAN and	)	
KENNETH RICHARDS	)	
	)	
Complainants,	)	
	)	DECISION
v.	)	ON
	)	MOTION TO DISMISS
USA DANCE, Inc.	)	
	)	
Respondent.	)	May 29, 2019

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I. THE PARTIES

1. Esther Freeman (“Freeman”) and Kenneth Richards (“Richards”) (collectively, “Complainants”) are members of USA Dance (“USAD” or “Respondent”).
2. USAD is a Recognized Sport Organization (“RSO”) member<sup>1</sup> 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. Complainants and USAD are collectively referred to as the “Parties.”

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<sup>1</sup> 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 sport 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 same 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.

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## II. COMMENCEMENT OF PROCEEDING

4. On October 29, 2018, Complainants 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 ("MSOC");  
Sarah Gascon, Team Handball athlete and athlete representative on the Athletes' Advisory Council ("AAC").

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.

9. Accordingly, the Hearing Panel was seated without objection.

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#### IV. LEGAL COUNSEL

10. Complainants are represented by Ellen M. Zavian, Esq.

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

#### V. COMPLAINT

12. The underlying controversy that gives rise to the Complaint stems from USAD's requirement that individuals running for an officer position within USAD must sign an unmodified confidentiality agreement provided by USAD. Failure to do so renders the individual ineligible to run for election.

13. In July of 2018, Freeman and Richards both submitted applications to be placed on the ballot for officer positions within USAD, but both refused to sign the confidentiality agreement.

14. In August of 2018, USAD's National Elections Director on behalf of the Nominating & Elections Committee emailed both Freeman and Richards declining their applications because they had not signed and submitted the required confidentiality agreements.

15. Subsequently, in August of 2018, Freeman and Richards each filed a complaint with USAD which alleged that USAD did not have the authority to require an individual running for an officer position to sign a confidentiality agreement.

16. On August 31, 2018, the Ethics Committee Chair dismissed Freeman's complaint reasoning that the "complaint lacked any abuses of ethical standards." The dismissal also stated that USAD had not violated any rules, regulation, program, service,

bylaw, policies or any provision of the Act relating to USAD's recognition as a governing body.

17. On September 6, 2018, the Ethics Committee Chair dismissed Richard's complaint for the same reasons that Freeman's complaint was dismissed, and also stated that Richard's complaint was without merit and was not within the purview of an administrative complaint.

18. After Freeman and Richards internal complaints were dismissed, they jointly filed this Section 10 Complaint with the USOC.

19. In their Section 10 Complaint, Complainants allege that USAD's Bylaws are out of compliance with the requirements of the Act and USOC Bylaws in the areas of: (i) financial and operational transparency, (ii) accountability to its members and (iii) providing procedures for the prompt and equitable resolution of grievances of its members.<sup>2</sup>

20. Further, Complainants challenge USAD's authority to require a confidentiality agreement, and argue that the scope of the confidentiality agreement extends too broadly. Additionally, the Complainants believe that the requirement to have a confidentiality agreement should be set out in USAD's bylaws, and not in an external policy<sup>3</sup>

21. Complainants request the following remedies:

- a. USOC to place USAD under probation;
- b. USOC to re-evaluate USAD's Bylaws for compliance;

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<sup>2</sup> Complainants did not cite a specific section of the Act or USOC Bylaws as a basis for USAD's non-compliance, nor did they list out and provide evidentiary support for each of these allegations in their Complaint in a clear manner.

<sup>3</sup> Complainants focus their argument on the confidentiality agreement requirement yet never point to a single provision of the USOC Bylaws or the Act as a basis for the violation.

- c. USOC to rule that the signing of a confidentiality agreement as a condition of running for office is non-compliant with requirements of a governing body; and,
- d. USAD place Freeman and Richards' names on the ballot, based on a finding by the USOC that USAD cannot require individuals running for office to sign a confidentiality agreement.<sup>4</sup>

VI. MOTION TO DISMISS & EXHAUSTION OF REMEDIES REQUIREMENT

22. On November 28, 2018, USAD filed a Motion to Dismiss for Complainants failure to comply with Section 10.1 of the USOC Bylaws, which requires Complainants to serve the complaint on USAD and file a proof of service with the USOC.

23. Although USAD's Motion to Dismiss was not based on the requirement that an individual can only file a Section 10 complaint after exhausting all available remedies with the governing body as required by Section 220527(b) of the Act and Section 10.11 of the USOC Bylaws, the Hearing Panel directed the Parties to submit briefs on whether this requirement was met.

24. The March 14, 2019, Order set forth a briefing schedule for Complainants to respond to the Motion and for USAD to reply. The Order also provided a hearing date for oral argument on the Motion to Dismiss, including whether Complainants had exhausted their available remedies with USAD.

25. On March 27, 2019, counsel for the Parties telephonically presented arguments and answered questions from the Hearing Panel on the Motion to Dismiss and the exhaustion of remedies requirement. Richards and Freeman, and Michael Murphy, a representative of USAD, also participated in the hearing. Additionally, Sara Pflipsen,

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<sup>4</sup> The Hearing Panel reminds Complainants that the scope of a Section 10 hearing is limited to determining whether an NGB is in compliance with its obligations as a National Governing Body.

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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.

26. The Hearing Panel reviewed the Complaint and all the papers filed in support of and in opposition to the Motion to Dismiss and all submissions regarding the exhaustion of remedies requirement. The Hearing Panel also considered the oral argument presented by the Parties.

## VII. ANALYSIS

### A. Service Requirement

27. As previously stated, USAD's Motion to Dismiss is based on Section 10.1 of the USOC Bylaws that requires individuals to serve a copy of the complaint on the applicable governing body and provide the USOC with proof of service.

28. Section 10.4 of the USOC Bylaws provides that if the procedural requirements outlined in Section 10.1 of the USOC Bylaws are not followed, the filing will be rendered ineffective and not properly filed.

29. The following facts are undisputed. Complainants filed this Complaint with the USOC on October 29, 2018. On October 30, 2019, the USOC sent a letter via email to Complainants acknowledging the Complaint. Also, on October 30, 2019, the USOC provided USAD with a letter via email notifying USAD of the Complaint. The email also attached the Complaint and supporting exhibits. Further, Complainants mailed USAD the Complaint and supporting exhibits on November 9, 2018. The Complaint and supporting exhibits were received by USAD on November 13, 2018. Thereafter, the Complainants notified the USOC that the Complaint and exhibits had been served on USAD.

30. USAD first contends that service cannot be made by sending the Complaint via regular mail. USAD states that Complainants provided a “proof of delivery” to the USOC, but “delivery” is not the same as “service.” Second, USAD asserts that Complainants’ efforts to serve the Complaint was invalid as it was not accomplished until two weeks after it was filed with the USOC. For those reasons, USAD contends that the Complaint does not satisfy the service requirements under Section 10.1 of the USOC Bylaws and should be dismissed.

31. Complainants respond that Section 10.1 only requires that a complainant be notified of the proceeding, not that a formal process be utilized in serving the complaint. Further, since Section 10.1 does not specify a time period as to when an individual filing a complaint must complete service, service is only required to be made within a reasonable amount of time after the complaint is filed with the USOC. Complainants assert that serving the Complaint on USAD two weeks after its filing is within a reasonable amount of time.<sup>5</sup>

32. The first issue presented by the Parties is whether a complainant can meet the service requirement by mailing the complaint to a respondent governing body. The Hearing Panel decided that such a method of service is proper. In reaching this decision, the Hearing Panel followed the same reasoning as set out in *Richards v. USA Dance*, Decision on Motion to Dismiss, page 8 (April 23, 2019) (Kikkan Randall, Christopher Parker, Sarah Gascon, Pnl. Mbrs.). That decision established that for purposes of a

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<sup>5</sup> Complainants apologized for any delay in service and requested that the USOC start the computation for USAD to respond commence from the date of actual notice, on November 13, 2018.

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Section 10 proceeding, service does not require the same formalities as in civil litigation. For Section 10 proceedings, service can be completed by mail.

33. The Hearing Panel next turned to the issue of when Complainants had to complete service on USAD. Although serving the Complaint on USAD two weeks after filing with the USOC is not ideal, the Hearing Panel found that it is not fatal. However, the Hearing Panel also finds that in such circumstances a respondent governing body's time to file an answer or motion to dismiss should not commence until the complaint is actually received. Thus, USAD's time to respond to the Complaint did not commence until November 13, 2019.

34. Accordingly, Complainants met the service requirement when they mailed the Complaint on November 9, 2019, and it was received by USAD on November 13, 2018.

35. Therefore, the Hearing Panel denies USAD's Motion to Dismiss for failing to satisfy the service requirements under Section 10.1 of the USOC Bylaws.

**B. Failure to Exhaust Administrative Remedies**

36. Although USAD did not raise the exhaustion requirement in its Motion to Dismiss, Section 220527(b)(2) of the Act and Section 10.11 of the USOC Bylaws charges the Hearing Panel with deciding if a complainant has exhausted all available remedies. Hence, the Hearing Panel asked the Parties to submit supplementary briefs addressing this issue.

37. Section 220527(b) of the Act provides that an individual may file a complaint alleging non-compliance "only after exhausting available remedies within the national governing body...unless it can be shown by clear and convincing evidence that



those remedies would have resulted in unnecessary delay.” Similarly, Section 10.11 of the USOC Bylaws states that an individual may file a Section 10 complaint “only after exhausting all available remedies with the NGB...for correcting deficiencies, unless it can be show by clear and convincing evidence that those remedies would have resulted in unnecessary delay.”

38. The Hearing Panel examined whether this requirement was met in two parts (i) did the Complainants exhaust internal remedies for correcting deficiencies and (ii) if not, were Complainants otherwise excused from exhausting their internal remedies.

(a) Exhaustion of Internal Remedies

39. According to Section 220527(b)(1) of the Act and Section 10.11 of the USOC Bylaws, in order to satisfy the exhaustion requirement, an individual must first pursue a complaint within the governing body specifically addressing *allegations of non-compliance* with the Act or USOC Bylaws prior to filing a Section 10 complaint.

40. It is well established that pursuing a complaint within a governing body based upon *other allegations* is not sufficient to satisfy the exhaustion requirement under Section 10. *Leach v. USA Track & Field, Inc.*, Decision on Motion to Dismiss, pages 8-9 (Sept. 20, 2016) (Bob Wood, Darrin Steel and Kerry McCoy, Pnl. Mbrs.) (determining that exhausting remedies for the matter in the underlying dispute, and not exhausting remedies related to compliance, is not sufficient to meet the exhaustion requirement).

41. Here, Complainants filed a complaint with USAD challenging the requirement of signing a confidentiality agreement to run for an officer position within

USAD. USAD dismissed the complaint as being outside of the scope of review for a hearing.<sup>6</sup>

42. However, Complainants never filed a complaint with USAD alleging that USAD was not in compliance with the Act and USOC Bylaws. Instead, Complainants went straight to the Section 10 process.

43. If Complainants believe that USAD is not fulfilling its responsibilities in providing due process, Complainants must first provide USAD with the opportunity to correct the alleged deficiency. The way to accomplish this is by filing a complaint with USAD alleging with specificity the provisions from the Act and USOC Bylaws that they believe USAD is non-compliant with, along with supporting evidence.<sup>7</sup>

44. Individuals cannot simply jump straight to the Section 10 process every time they are disgruntled with an action taken by a governing body.

45. During oral argument, Complainants were asked directly whether they ever filed a complaint with USAD alleging that USAD was not in compliance with fulfilling their responsibilities as a governing body under the Act or USOC Bylaws. In response, Complainants plainly admitted that they had not.

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<sup>6</sup> Although the Hearing Panel makes no determination on the merits of the case, the Hearing Panel strongly suggests that USAD examine its process and standards for dismissing complaints prior to providing a hearing on the merits. Except in rare circumstances that are clearly outlined as outside the scope of review of a hearing panel, the Hearing Panel believes that all governing bodies must provide the opportunity for a hearing on underlying disputes.

<sup>7</sup> To date, Complainants have failed to point to a single provision from the Act or USOC Bylaws that they contend USAD violates.

46. Further, USAD states that its Bylaws have a process for addressing alleged deficiencies.<sup>8</sup> As stated above, Complainants clearly communicated that they did not pursue that process prior to filing the Section 10 Complaint.

47. Thus, Complainants did not satisfy the exhaustion of remedies requirement under Section 220527(b)(1) and Section 10.11 because they did not file a complaint for non-compliance pursuant to USAD's complaint procedures prior to filing this Section 10 matter.

(b) Justification for Not Exhausting Administrative Remedies

48. Having determined that Complainants did not exhaust their remedies, the Hearing Panel now examines whether Complainants should otherwise be excused from this requirement.

49. Section 220527(b) of the Act and Section 10.11 provide that individuals can be excused from exhausting administrative remedies if they can show by clear and convincing evidence that exhausting those administrative remedies would result in unnecessary delay.

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<sup>8</sup> Pursuant to Article XIV, Section C of USAD's Bylaws, an individual may file a complaint pertaining to "any provision of the Ted Stevens Olympic and Amateur Sports Act relating to USAD Dance's recognition as a National Governing Body." This establishes that at a minimum, USAD has a complaint process available for individuals to pursue complaints of non-compliance. However, the Hearing Panel is still somewhat concerned about comments made from Complainants about the multitude of times that USAD has amended its complaint procedures in recent years. The Hearing Panel understands that procedures need to be updated from time to time, but also notes that USAD should maintain a clear and consistent process for members to follow.

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50. Complainants contend that they should be excused from fulfilling the exhaustion requirement because there will not be sufficient time to exhaust remedies before other potential candidates run for an upcoming election and are subject to the same requirement to sign a confidentiality agreement.

51. However, that is not the issue before this Hearing Panel. This argument goes to the merits of the underlying dispute which is centered around the confidentiality agreement and not about non-compliance issues.

52. Further, Complainants have failed to identify what harm would be done specifically to them to excuse them from the exhaustion requirement. Other candidates running for office are not part of this dispute.

53. Complainants did not make any additional argument as to why it would be justified to excuse them from fulfilling this requirement.

54. Accordingly, the Hearing Panel finds that Complainants have not shown, by clear and convincing evidence, that exhausting their administrative remedies would result in unnecessary delay, or otherwise excused.

#### VIII. RULING

55. The Hearing Panel denies USAD's Motion to Dismiss on the ground that Complainants 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.

56. The Hearing Panel grants USAD's Motion to Dismiss for the reason that Complainants failed to exhaust their administrative remedies with USAD and that they were not otherwise excused from fulfilling this requirement.

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

IX. ORDER

58. USAD's Motion to Dismiss is granted.

59. The Section 10 Complaint is hereby dismissed.

Dated this 29th day of May, 2019.



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Kikkan Randall, Chair

Christopher Parker, Panel Member  
Sarah Gascon, Panel Member