

UNITED STATES OLYMPIC COMMITTEE

Matthew Fogarty)	
)	
Complainant,)	
)	
v.)	DECISION
)	
USA Badminton)	
)	
Respondent.)	October 1, 2004

I. BACKGROUND

The National Governing Body ("NGB") for the Sport of Badminton in the United States is USA Badminton ("USAB"). USAB is recognized by the United States Olympic Committee ("USOC") as the NGB for the Sport of Badminton pursuant to the Ted Stevens Olympic and Amateur Sports Act (36 USC § 220501 *et seq.*), (the "Act").

On March 10, 2004, Matthew Fogarty ("Fogarty") filed a Complaint against USAB pursuant to Article VIII, Section 1, of the USOC Constitution, Chapter VIII of the USOC Bylaws,¹ and Section 220527 of the Act. In accordance with Chapter VIII, Section 3 of the Bylaws, Acting USOC President, William Martin, appointed, and the USOC

¹ On October 18, 2003, the USOC adopted new Bylaws that succeeded and combined the USOC's Constitution and Bylaws. The new Bylaws did not go into effect until June 14, 2004, at which time a new Board of Directors was seated. Since the Complaint was filed previous to the effective date of the new Bylaws, this matter was heard and the Hearing Panel was appointed pursuant to the USOC's Constitution and Bylaws effective at the time of filing of the Complaint. All references in this Decision are to those Constitution and Bylaws. Further, all references to USOC Board of Director positions and Executive Committee positions also pertain to the time of the filing of the Complaint.

Executive Committee approved, a Hearing Panel of five voting members of the USOC

Board of Directors for the purpose of hearing this matter. The Panel members are:

James McCarthy, Chair

USOC Executive Committee, USOC Board of Directors, U.S. Ski and Snowboard Association

Bret Bernard

USOC Board of Directors, U.S. Water Polo

Tom Osborne

USOC Board of Directors, National Congress of State Games

Reyne Quackenbush

USOC Board of Directors, USOC Athletes' Advisory Committee, Diving Representative

Lisa Voight

USOC Executive Committee, USOC Board of Directors, USA Cycling

Pursuant to Chapter VIII, Section 2 of the Bylaws, in a letter dated March 30, 2004, USAB filed a Motion to Dismiss. Fogarty filed a Response to the Motion to Dismiss dated June 2, 2004. After reviewing the submissions of the USAB and Fogarty, the Hearing Panel issued an Order dated June 17, 2004 in which it raised, on its own prerogative, the jurisdictional question as to whether or not Fogarty had exhausted his administrative remedies with USAB prior to filing his Complaint, as required by Article VIII, Section 1 of the USOC Constitution and Section 220527(b) of the Act.² The Hearing Panel also set forth a briefing schedule in its Order in which it asked the parties to present their positions on this question. Both the USAB and Fogarty submitted briefs on June 30, 2004.

On July 13, 2004 the Hearing Panel issued a second Order in which it indicated that it would hear oral argument on the Motion to Dismiss filed by USAB. The Panel further requested in its Order that the parties provide responses to a series of questions

² A copy of the June 17 Order is attached.

posed by the Panel concerning the exhaustion of remedies issue.³ The USAB and Fogarty provided responses on July 28, 2004.

The Hearing Panel held oral argument on the Motion to Dismiss by telephone conference call on July 29, 2004. Fogarty was on the call representing himself. G. Dudley Welch was on the call representing the USAB as its attorney. James D. Cloppas, Executive Director of USAB, appeared on the call as a representative of the USAB. Also on the call were Gary L. Johansen, USOC Deputy General Counsel and Cheryl Wah, USOC Summer Legal Intern.

Both Fogarty and USAB agreed to waive the requirement of Article VIII, Section 1(B) of the Constitution, Chapter VIII, Section 3(B) of the Bylaws and Section 220527(b) of the Act, which require that a motion to dismiss be heard and decided within thirty days of the filing of a complaint.

In its consideration of this matter, the Hearing Panel reviewed the Complaint and all of the papers filed in support of and in opposition to the Motion to Dismiss. The Hearing Panel also considered the oral arguments presented by the parties.

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

II. DECISION

A. Ruling

For the reasons as set forth below, it is the determination of the Hearing Panel that the Motion to Dismiss is granted.

³ A copy of the July 12, 2004 Order is attached.

B. The Complaint

The Complaint is far reaching containing many conclusory statements with little factual substantiation and so is difficult to summarize with any precision. However, it appears that at the heart of the Complaint is the change made by USAB to its Bylaws that dislodged Fogarty from his position on USAB's Board of Directors. Further, it appears that there has been a long standing dispute between Fogarty and individuals with leadership positions in USAB regarding the operation of USAB in fulfilling its responsibilities as an NGB.

C. Motion to Dismiss

In its Motion to Dismiss, USAB states that Fogarty has failed to exhaust his internal remedies as required under Article VIII, Section 1(A) of the USOC Constitution and Section 220527(b) of the Act. USAB sets forth two grounds in support of its Motion to Dismiss. First, USAB states that although Fogarty filed a grievance with USAB, he never pursued that grievance after it was filed. Second, USAB contends that the subject of Fogarty's Article VIII Complaint, which is before this Hearing Panel, goes far beyond the original grievance filed by Fogarty with USAB, and thus many of the issues raised by Fogarty have never been before USAB. Thus, USAB asserts that those issues have not been resolved through USAB's internal grievance procedures.

As a factual underpinning for its Motion to Dismiss, USAB states that in December 2003 Fogarty filed a grievance with USAB pursuant to its grievance procedures. In accordance with those procedures, the grievance was referred to USAB's Legal/Grievance Committee, which investigated the matter and in January 2003 filed a written report with USAB's Executive Committee. A copy of the report was also sent to

Fogarty by certified mail for his review and response, however the report was never delivered to Fogarty as it was returned by the U.S. Postal Service. USAB further states that Fogarty never responded to the written report, nor did he request that the matter be taken up by USAB's Executive Committee, as was required by USAB's grievance procedures. USAB contends that before Fogarty can pursue an Article VIII Complaint, he must first exhaust his remedies by proceeding before USAB's Executive Committee and Board of Directors.

Further, USAB asserts that Fogarty, in his Article VIII Complaint, alleges wrongdoings by USAB that go far beyond the original grievance filed with USAB, and thus he has not exhausted his administrative remedies as to these wrongdoings.

Fogarty responds that he never received a copy of the report and recommendations issued by the USAB's Legal/Grievance Committee. As such, he asserts that USAB failed to properly administer his grievance, thereby entitling him to pursue his complaint pursuant to Article VIII, Section 1 of the USOC Constitution and Section 220527(b) of the Act.

Fogarty admits that his Article VIII Complaint goes beyond the parameters of the grievance he filed with USAB, but contends that this is not cause for dismissal as the crux of the grievance and Article VIII Complaint are the same.

1. Failure to Exhaust Administrative Remedy

Article VIII, Section 1 of the USOC Constitution and Section 220527 of the Act provide that a complainant may file an Article VIII complaint with the USOC only after having exhausted all remedies available under the organic documents of the NGB, unless it can be shown by clear and convincing evidence that those remedies would result in

unnecessary delay. Further, Article IV, Section 4(C)(11) of the USOC Constitution and Section 220522(13) of the Act require that an NGB provide procedures for the prompt and equitable resolution of its members. Part of the reasoning for this requirement is to allow an NGB to review and possibly act on issues that involve the NGB.

The first question before the Hearing Panel is whether Fogarty exhausted his administrative remedies. USAB's internal grievance procedures, as set forth in Article 12 of its Bylaws, can be summarized as follows. When a grievance is filed, it is referred to USAB's Legal/Grievance Committee. That Committee investigates the matter and issues a written report with recommendations. The report and recommendations are forwarded to USAB's Executive Committee, with a copy served on the grievant. If the grievant is dissatisfied with the Legal/Grievance Committee's report and recommendations, the grievant can make a written request and have the matter heard by USAB's Executive Committee. The Executive Committee then determines whether or not to adopt the report and recommendations. If the grievant is dissatisfied with the Executive Committee's determination, the Grievant can then appeal the matter to USAB's Board of Directors.

It is uncontested that Fogarty's grievance never made its way through USAB's grievance procedure as Fogarty never made a written request to have the grievance heard by USAB's Executive Committee. However, Fogarty asserts that as he was never provided with a copy of the report and recommendations issued by USAB's Legal/Grievance Committee his grievance was in effect denied. Thus, Fogarty asserts that as he was denied proper administrative review, he is entitled to commence his Article VIII Complaint. USAB contends, however, that it did attempt to serve Fogarty with the Legal/Grievance Committee's report and recommendations, but that it was unable to do

so. USAB further argues that since Fogarty now has a copy of the report and recommendation issued by USAB's Legal/Grievance Committee (Fogarty was provided a copy during the pendency of this Article VIII proceeding), Fogarty is required to exhaust his administrative remedies with USAB before proceeding with his Article VIII Complaint.

Here the Hearing Panel questions the motives and conduct of both Fogarty and the USAB. First, Fogarty knew the procedures for pursuing internal grievances with USAB. However, upon his own admission during the argument on the Motion to Dismiss, he never once inquired of USAB as to the Legal/Grievance Committee's report and recommendations. Further, there is some evidence that Fogarty may have himself contributed to USAB's failure to serve him with the Legal/Grievance Committee's report and recommendations by his refusal to sign for certified mail addressed to him. Second, USAB knew of Fogarty as he has had a longstanding relationship with USAB. Until recently he had been a member of its Board of Directors. He currently is an active athlete competing in many badminton competitions and is serving as USAB's athlete representative to the USOC Athletes' Advisory Committee. For USAB to say that it could not locate Fogarty so as to serve him with the Legal/Grievance Committee's report and recommendations is beyond credibility. With a little effort, the Legal/Grievance Committee's report and recommendations should have been in Fogarty's hands, whether he wanted them or not. Likewise, with a little effort Fogarty could have followed up with USAB and obtained a copy of the report and recommendations.

That being said, the bottom line, however, is that Fogarty has not exhausted his administrative remedies with USAB. Fogarty commenced an internal grievance with

USAB, but that grievance was never carried to completion. Fogarty's argument, considering all of the facts as presented, that the grievance was administratively denied by USAB is unpersuasive. Based on the above ruling, the Hearing Panel need not consider whether or not Fogarty's Article VIII Complaint is broader and presents issues that go beyond his grievance filed with USAB.

The second question before the Hearing Panel is whether Fogarty is required to proceed with his grievance, because doing so would cause unreasonable delay. Upon direct questioning by the Hearing Panel, USAB has confirmed that, assuming no delay on Fogarty's part, Fogarty's grievance can be concluded within 30 to 45 days. This certainly is not unreasonable. The Hearing Panel holds USAB to this commitment.

Finally, Fogarty suggests that proceeding with his grievance would be futile, as he asserts that USAB's Executive Committee and Board are biased against him. Although Article VIII, Section 1 of the USOC Constitution and Section 220527(b) of the Act only allow that a complainant is excused from exhausting administrative remedies if it can be shown that by doing so would result in unnecessary delay, the Hearing Panel does not dismiss the futility argument outright. It would be unreasonable to require a complainant to proceed with an administrative remedy if the complainant could not get a fair and impartial hearing.

In this regard, the Hearing Panel is sympathetic to Fogarty's argument. USAB's grievance procedure does not allow for a hearing of a grievance by an independent hearing panel. Under USAB's procedures, all grievances are eventually referred to USAB's Executive Committee and then to its Board of Directors. Fogarty's grievance is

directly aimed at USAB and at those who are in leadership positions with USAB. The question then is can USAB's Executive Committee and Board of Directors be impartial.

USAB assures the Hearing Panel that its Executive Committee and Board of Directors have diverse membership, that those members have diverse viewpoints, and so they can provide for an impartial hearing. Also, in response to a direct question from the Hearing Panel, USAB states that although no formal procedure is contained in its bylaws, members who are conflicted in any way are obligated to recuse themselves and that if conflicted they would do so with regard to Fogarty's grievance. USAB finally states that although Fogarty makes the general allegation that members of USAB's Executive Committee and Board of Directors are biased against him, he does not provide specific information as to such bias on the part of those members.

After much consideration of this issue, the Hearing Panel is not able to relieve Fogarty of his obligation to exhaust his administrative remedies with USAB. There is no clear showing that proceeding with the grievance would be futile or that USAB's Executive Committee or Board of Directors have predetermined the issues raised by Fogarty. In fact, the opposite may happen.

2. Failure to Set Forth Factual Basis

Although not at issue here, since the Hearing Panel has determined to grant the Motion to Dismiss, The Hearing Panel did consider whether or not the Complaint was insufficient for failure to set forth a factual basis for the relief sought. Such a failure would also subject the Complaint to dismissal. Chapter VIII, Section 1 of the USOC Bylaws provides that a complaint must set forth factual allegations supporting the alleged grounds of an NGB's noncompliance. Many of the allegations contained in Fogarty's

Article VIII Complaint, as has previously been expressed, are of a conclusory nature, often times setting forth general statements of noncompliance with no factual basis to support those grounds of noncompliance. An Article VIII Complaint needs to be more than that. It should be focused, to the point, clear in its direction, and grounded on specific facts.

III. CONCLUSION

In conclusion, the Hearing Panel grants USAB's Motion to Dismiss for the reason that Fogarty has not exhausted his administrative remedies. Accordingly, the Article VIII Complaint filed by Fogarty is hereby dismissed.


James McCarthy, Chair

Bret Bernard, Panel Member
Tom Osborne, Panel Member
Reyne Quackenbush, Panel Member
Lisa Voight, Panel Member

Dated this 1st day of October, 2004