

UNITED STATES OLYMPIC COMMITTEE

Michael Farry	)	
	)	
Complainant,	)	
	)	
v.	)	DECISION
	)	
USRowing	)	
	)	
Respondent.	)	September 8, 2006

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I. INTRODUCTION

On July 24, 2006, Michael Farry filed a Complaint against USRowing pursuant to Article VIII, Section 8.1, of the USOC Bylaws and Section 220527 of the Ted Stevens Olympic and Amateur Sports Act (36 USC § 220501-220529), (the “Act”). USRowing is the National Governing Body for rowing in the United States, as recognized by the United States Olympic Committee (“USOC”) pursuant to the Act.

In accordance with Article VIII, Section 8.1 B. of the USOC Bylaws, USOC Chair, Peter Ueberroth, appointed a Hearing Panel of five members for the purpose of hearing this matter. The Panel members are:

- James McCarthy, Chair  
USOC Board of Directors
- Ron Radigonda  
USOC National Governing Body Council, USA Softball
- Virginia Jasontek  
USOC National Governing Body Council, USA Synchronized Swimming
- Robert Latham  
USOC Multisport Organizations Council, USA Rugby
- Courtney Johnson  
USOC Athletes’ Advisory Council, US Water Polo

On August 3, 2006, USRowing filed a Motion to Dismiss the Complaint. For the reasons set forth below, it is the determination of the Hearing Panel, by unanimous decision, that the Motion to Dismiss is granted. In its consideration of this matter, the Hearing Panel reviewed the Complaint, the Motion to Dismiss, the Opposition to the Motion to Dismiss, the additional materials submitted by the parties, and the July 14, 2006 Order issued by the American Arbitration Association (“AAA”) hearing panel. The Panel also considered the oral arguments presented by the parties. All members of the Hearing Panel reviewed and approved this written Decision.

## II. BACKGROUND

To briefly summarize the procedural history of this matter, Farry first filed an Article VIII Complaint with the USOC on January 16, 2006. That Complaint was rejected by the USOC General Counsel as being deficient, without a USOC hearing panel having been convened. Farry then proceeded to file a claim with the AAA on February 2, 2006 asserting the same grounds as he asserted in his January 16 Article VIII Complaint. USRowing moved to dismiss Farry’s AAA claim on jurisdictional grounds. On July 14, the AAA hearing panel issued an Order granting USRowing’s Motion to Dismiss<sup>1</sup>. The

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<sup>1</sup> The AAA hearing panel in its July 14 Order explained the basis for dismissal as follows: “The statutory basis for this motion is 36 USC 220527(b)(1) and the USOC Bylaws that reflect its requirement that a claimant either exhaust administrative remedies available through the National Governing Body (“NGB”) or show, by clear and convincing evidence, that doing so would have resulted in unnecessary delay. There is no dispute that Claimant here did not exhaust any NGB remedies. Because we have granted Respondent’s motion to dismiss, the issues of whether any such avenues, if they exist at all, would have afforded Claimant a meaningful hearing and whether Claimant has met his burden of establishing unnecessary delay is not squarely before us.”

AAA Hearing Panel also granted Farry leave until July 24, 2006 to file a new complaint with the USOC.<sup>2</sup>

In compliance with the AAA hearing panel's order, Farry refiled his Article VIII Complaint on July 24, 2006.<sup>3</sup> On August 1 the Hearing Panel issued a Scheduling and Procedural Order. On August 3 USRowing filed a Motion to Dismiss Farry's Article VIII Complaint and on August 7 Farry filed an Opposition to the Motion. Pursuant to the Scheduling and Procedural Order, argument on the Motion to Dismiss was scheduled for August 9 by telephone conference call. However, Farry notified the Panel on August 8 by email that he could not be present for argument, and stated that his prior submissions would sufficiently convey his arguments. The Panel convened on August 9 to consider Farry's inability to be present for argument. The Panel concluded that Farry's participation would be necessary in making a ruling on the Motion. The Panel also did not want to proceed unless Farry had been provided with every opportunity to have his arguments heard. Accordingly, the Panel issued a Scheduling Order on August 9, rescheduling argument on the Motion to Dismiss for August 16, provided that the parties would be available on that date.

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<sup>2</sup> The AAA hearing panel stated in its July 14 Order: "Claimant is granted leave to file a new complaint with the USOC within 10 days of the date of this Order containing the prerequisites for a complaint set forth in Article VIII of the USOC Bylaws, including but not limited to describing in detail how he has exhausted all remedies available to him under the organic documents of Respondent or why doing so would have resulted in unnecessary delay. Alternatively, if Claimant remains convinced that the complaint he has already filed meets all prerequisites contained in Article VIII [of] the USOC Bylaws, then Claimant may renew his pending complaint by written notice to the USOC within 10 days of the date of this Order. If Claimant fails or refuses to either file a new complaint or renew his pending complaint within such 10 day period, then our grant of Respondent's motion to dismiss shall become final and unconditional."

<sup>3</sup> In filing his July 24 Complaint, Farry merely attached a copy of his January 16 Complaint to a cover letter which he submitted to the USOC CEO. Thus, the January 16 and the July 24 Complaints are identical in every aspect.

On August 16 the Hearing Panel held oral argument on the Motion to Dismiss by telephone conference call. All Panel members were on the call. Farry was on the call representing himself. USRowing was present, represented by Steven Smith and Matthew Barnett of the law firm Holme Roberts & Owen. The call lasted approximately one hour. Both parties were heard and responded to questions asked by the Panel. At the end of the call, the Panel informed both parties that they would have the opportunity to submit further written materials on the Motion to Dismiss. Both parties submitted additional materials for the Panel's consideration on August 17.

### III. THE COMPLAINT

In order to understand the arguments submitted by the parties on the Motion to Dismiss, it is helpful to summarize the basis of Farry's Complaint. Farry alleges in his Complaint that USRowing is not in compliance with Section 220524(3) of the Act, which states that an NGB shall "keep amateur athletes informed of policy matters and reasonably reflect the views of the athletes in its policy decisions." Specifically, Farry alleges that "a majority of the 'athletes' eligible to compete in the lightweight men's four event at the 2006 World Championship are of the view that the U.S. entry in that event should be selected through open trials."<sup>4</sup> Farry contends that this could be confirmed through an independent confidential poll of the lightweight men athletes.

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<sup>4</sup> Although not ruling on the underlying issue raised in Farry's Complaint, the Hearing Panel makes the following comment. Section 220523(7) of the Act states that each NGB has the authority to "designate individuals and teams to represent the United States in international amateur athletic competition (other than the Olympic Games, the Paralympic Games and the Pan-American Games)...." Regarding the Olympic, Paralympic and Pan American Games, pursuant to Section 220523(6) of the Act, an NGB has the authority to recommend to the USOC individuals and teams to represent the United States. In fulfilling this obligation, numerous NGBs use selection camps, and subjective criteria, to choose athletes for international competitions.

The Hearing Panel understands that the real issue underlying Farry's Complaint is how to best select athletes to represent the US in the lightweight men's four boat that will participate at the 2006 World Rowing Championships (and presumably how to best select US athletes to compete at other international rowing competitions). USRowing promulgated selection procedures for the lightweight men's four boat that provided for the selection of athletes through a selection camp. Farry believes that athletes should be chosen through a trials event.

#### IV. MOTION TO DISMISS

In its Motion to Dismiss, USRowing states two grounds for dismissal. First, it asserts that Farry did not file a proper complaint because the Complaint did not meet the requirements as set forth in Article VIII, Section 8.1 of the USOC Bylaws. Second, USRowing asserts that Farry failed to comply with Section 220527(b)(1) of the Act and Article VIII, Section 8.1 E of the USOC Bylaws, which requires that in order to file a complaint Farry must a) exhaust his administrative remedies by filing a grievance or b) show by clear and convincing evidence that filing a grievance would have resulted in unnecessary delay.

Farry, in his Opposition to the Motion, does not dispute that he did not exhaust his administrative remedies with USRowing by filing a grievance. However, he claims that since USRowing failed to maintain a standing grievance panel as required by USRowing's Bylaws, it was impossible for him to proceed with the grievance process. Farry further claims that because the comment period on the selection procedures for the lightweight men's four event was to end on January 27, there was no time for him to exhaust his internal remedies with USRowing prior to the close of the comment period.

A. Section 220527(b)(1) and Section 8.1 E Requirements.

The Hearing Panel will first consider USRowing's contention that Farry failed to comply with Section 220527(b)(1) of the Act and Article VIII, Section 8.1 E. of the USOC Bylaws. Those Sections provide that a complainant may file a complaint with the USOC only a) after having exhausted all remedies available under the organic documents of the NGB, or b) by showing through clear and convincing evidence that those remedies would have resulted in unnecessary delay.

1. Failure to Exhaust Administrative Remedies

There is no dispute that Farry did not exhaust his administrative remedies. Farry never filed a grievance with USRowing. Farry does not dispute this or contend that he exhausted his administrative remedies. Accordingly, the Hearing Panel finds that Farry did not exhaust his administrative remedies.<sup>5</sup>

2. Unnecessary Delay

Since Farry did not exhaust his administrative remedies, the issue before the Hearing Panel is, if he had filed a grievance, would it have caused unreasonable delay.<sup>6</sup>

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<sup>5</sup> This was also the finding of the AAA hearing panel. In its July 14 Order the AAA hearing panel stated, "There is no dispute that Claimant here did not exhaust any NGB remedies."

<sup>6</sup> Farry filed two Complaints with the USOC. The first was filed on January 16, which was rejected, and the second was filed on July 24 pursuant to the AAA hearing panel's July 14 Order. The Complaints were identical. The question raised is whether there would have been an unreasonable delay when Farry first filed his Article VIII Complaint on January 16, or whether the Hearing Panel should make this determination in light of the July 24 filing. These are two different time frames, with two different factual circumstances to be considered. On January 16, the comment period for the selection procedures had not yet closed and the procedures had not yet been finalized. By July 24, all of those events were in the past. Thus, USRowing makes the argument that when the July 24 Complaint was filed, since the procedures for the men's lightweight four boat had been approved and the team chosen, there was no impending time limitation. Accordingly, USRowing asserts that, based on the July 14 filing, requiring Farry to exhaust his administrative remedies would not cause unreasonable delay. However, in order to give every benefit to Farry regarding which filing date should be considered, the Hearing Panel will use the January 16 filing date.

USRowing's grievance procedures are set out in Article IX, Sections 56 through 73 of its Bylaws. Section 56 states that the grievance procedures:

“shall be used for the swift and equitable resolution of grievances brought by those who believe themselves aggrieved by (1) an action of USRowing....where such action is alleged to violate the aggrieved's rights under the USRowing Constitution, these Bylaws, or applicable law governing amateur sport, or is otherwise inconsistent with the best interests of the sport of rowing.”

The following sections of Article IX of USRowing's Bylaws detail the procedures to be followed in filing and processing a grievance. Thus, there is no question that Farry had available to him procedures pursuant to which he could have filed and had his grievance heard. Further, Article IX sets forth certain time parameters for the processing and hearing of a grievance.

Farry contends, however, that because USRowing failed to maintain a standing grievance panel as required by USRowing's Bylaws, pursuing a grievance with USRowing would have caused unreasonable delay. The Hearing Panel rejects this argument as it is either factually false, or is based on Farry's misunderstanding of USRowing's grievance process. Article IX, Section 62 of USRowing's Bylaws states that a grievance panel of ten individuals shall be appointed by the President of USRowing in March of each even numbered year for a term of two years until their successors are appointed and qualify. From these ten individuals a hearing panel of three, one of whom shall be an athlete, shall be appointed to hear the grievance. Contrary to Farry's assertion, a standing grievance panel of ten individuals was in place when he filed his January 16 Complaint.<sup>7</sup> Pursuant to Section 63 of USRowing's Bylaws, three individuals

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<sup>7</sup> Donovan Langford, President of USRowing states in his affidavit dated August 17, 2006 that at the time of filing of Farry's Article VIII Complaint, USRowing had a standing ten person grievance panel as required by USRowing's Bylaws.

from the grievance panel would then have been appointed by the chair of the grievance panel to hear Farry's grievance. Since a grievance panel was in place, and since three individuals were available to hear Farry's grievance, no unnecessary delay would have resulted from empanelling a hearing panel to hear Farry's grievance.

Farry further contends that because the comment period was to end on January 27, his grievance could not have been heard prior to the close of the comment period.<sup>8</sup> The Hearing Panel rejects this argument for two reasons. First, the January 27 date was just the cutoff date for comment. The procedures were not approved until sometime in February by USRowing's Board<sup>9</sup> and the trial camp did not commence until the end of May, which would have given Farry an opportunity to have his grievance heard. Further, Article IX, Section 70 of USRowing's Bylaws provides that if the grievant challenges a rule or decision affecting the eligibility of an individual member of USRowing, then his or her grievance may be expedited.<sup>10</sup>

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<sup>8</sup> The Hearing Panel finds this argument somewhat disingenuous since USRowing states, and Farry does not deny, that Farry never commented on the procedures during the comment period, which ran from January 14 to 27. It appears that for whatever reason Farry declined the opportunity to provide direct input to USRowing regarding his opinion as how athletes to the men's lightweight men's four boat should be selected.

<sup>9</sup> The Hearing Panel notes that the procedures were drafted by USRowing's High Performance Committee. That Committee has twenty per cent athlete representation as is required by Article XVII, Section 17.7 of the USOC Bylaws. All of the athlete members of the High Performance Committee approved the procedures. Additionally, although not officially on the Committee, the USOC AAC Athlete Representative and the USOC Alternate AAC Representative also approved the procedures. February 14, 2006 letter from Jay Feenan to Board Members. USRowing's Board also has twenty per cent athlete representation as is required by Section 220522(a)(10) of the Act and Article XVII, Section 17.7 of the USOC Bylaws.

<sup>10</sup> The Hearing Panel recognizes that Section 70 normally applies to situations where an athlete alleges that he or she has been denied an opportunity to compete. However, since Farry's ultimate goal was to have the selection procedures for the men's lightweight four changed, providing him an opportunity to be selected pursuant to a trials event, Section 70 may have been available in this instance to address Farry's concerns.



Second, the urgency of Farry's grievance depends on how his claim is characterized. Farry alleges that USRowing is not fulfilling its obligation as an NGB because it is in violation of Section 220524(3) of the Act, which states that an NGB shall "keep amateur athletes informed of policy matters and reasonably reflect the views of the athletes in its policy decisions." Taken on its face, this claim has no time limitation that, as long as the grievance was heard timely, would have caused unreasonable delay.

Finally, the Hearing Panel wishes to comment on the importance of the exhaustion requirement. First, it is a requirement of the Act. Not only does Section 220527(b)(1) of the Act require exhaustion, but Section 220522(a)(13) of the Act provides that an NGB shall maintain procedures for the prompt and equitable resolution of grievances of its members. Accordingly, Congress has deemed it important that complainants exhaust their administrative remedies.

Second, there are valid policy reasons for requiring members of NGBs to first pursue their complaints through an administrative proceeding. The exhaustion requirement enables an NGB to make an initial determination on matters within its control and expertise. It also affords an NGB the opportunity to review its actions, and thereby, if the complaint is valid, to either resolve or correct its mistakes. Further, it minimizes the necessity for intervention by a subsequent hearing body, in this case the USOC, or the AAA. Finally, it preserves the administrative process and discourages disregard of the NGB's grievance procedures. Thus, as a matter of sound policy, the administrative process would have been better served had Farry filed a grievance pursuant to USRowing's grievance procedures, rather than his bypassing this process and proceeding directly to the USOC by filing a complaint pursuant to Article VIII.

## B. Proper Complaint

In light of the Hearing Panel's determination to grant USRowing's Motion to Dismiss on the grounds that Farry did not comply with Section 220527(b)(1) of the Act and Article VIII, Section 8.1 E. of the USOC Bylaws, requiring that he first exhaust his administrative remedies, or show that to do so would have resulted in unnecessary delay, a ruling on USRowing's other claim that Farry's Complaint should be rejected because it did not meet the minimum filing requirements for complaints as set forth in Article VIII, Section 8.1 of the USOC Bylaws is not necessary. The Hearing Panel therefore makes no ruling on that argument for dismissal.

## V. OTHER MATTERS

Two other issues are before the Hearing Panel on which the Panel wishes to comment. First, Farry alleges in his January 23 cover letter to his Article VIII Complaint that athletes do not participate in the selection procedure process for "fear of retribution." This is a serious charge. However, other than his own assertion, Farry offers no evidence that USRowing has ever taken retaliatory action against athletes who have voiced their opinions regarding selection procedures. In fact, the contrary seems to be true as USRowing provides for comments for athletes on selection procedures and includes athletes on its High Performance Committee, which is tasked with drafting those procedures. Farry should take care in making statements that impugn the character of USRowing and those individuals who are involved in the selection procedure process. Also, USRowing needs to be cognizant, as do all NGBs, that any action of retribution is unacceptable.

Second, USRowing contends that Farry's intentions in filing this Article VIII Complaint, and the manner in which he has proceeded, are not above reproach. USRowing cites a number of reasons for making this claim, which the Hearing Panel will not delve into, but which the Hearing Panel takes seriously. Filing a complaint with the USOC pursuant to Article VIII of the USOC Bylaws is a serious matter. That process should not be abused. It puts into motion an administrative process that consumes time and resources, not the least of which is the time and energy expended by the five-person hearing panel, all of whom are volunteers, in fulfilling their duties as panel members. Also, it diverts an NGB's attention from its obligations as an NGB, which include governing its sport, implementing programs to advance athlete performance, providing athlete support, and increasing participation opportunities for athletes. Further, defending complaints requires the expenditure of limited NGB resources that could better be used for the benefit of athletes. Complaints that are well founded, and which raise serious issues relating to an NGB's governance are one thing. USRowing should handle such complaints in a professional and efficient manner, and in accordance with the written procedures contained in its Bylaws. However, complaints that are filed for the purpose of harassment are frowned upon and will not be tolerated.

#### VI. COSTS

Each party will bear its own costs and attorney fees in this matter.

#### VII. CONCLUSION

In conclusion, the Hearing Panel grants USRowing's Motion to Dismiss for the reason that Farry did not comply with Section 220527(b)(1) of the Act and Article VIII, Section 8.1 E. of the USOC Bylaws, requiring that he first exhaust his administrative

remedies, or show that to do so would have resulted in unnecessary delay. Accordingly, the Complaint filed by Farry is hereby dismissed.

Dated this 8th day of September, 2006.

  
James McCarthy, Chair

Ron Radigonda, Panel Member  
Virginia Jasontek, Panel Member  
Robert Latham, Panel Member  
Courtney Johnson, Panel Member