

UNITED STATES OLYMPIC COMMITTEE

Matthew Fogarty	)	
	)	
Complainant,	)	
	)	
v.	)	ORDER
	)	
USA Badminton	)	
	)	
Respondent.	)	November 20, 2007

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I. BACKGROUND

On May 21, 2007, Matthew Fogarty (“Fogarty”) filed four Complaints against USA Badminton (“USAB”) 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”). On June 12, 2007 Fogarty filed a Motion to Withdraw three of the four Complaints. The Hearing Panel granted Fogarty’s Motion, leaving one Complaint, which is the subject of this proceeding.

In response to Fogarty’s filing, USA Badminton, on June 6, 2007, filed a Motion to Dismiss.<sup>1</sup> After hearing argument, the Hearing Panel granted USAB’s Motion to Dismiss on June 22, 2007. In its Decision the Hearing Panel concluded that it did not have the authority under

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<sup>1</sup> The Motion to Dismiss set forth three grounds for dismissal. First, USAB asserted that the Complaint was improperly filed pursuant to Article VIII, and should have instead been filed as an Article IX Complaint. Second, USAB claimed that Fogarty had failed to exhaust his administrative remedies as is required by Section 8.1 E of the USOC Bylaws and Section 220527(b) of the Act. Third, USAB asserted that the issue raised by Fogarty, “that the selection process must be based solely on the world ranking list of the Badminton World Federation,” has already been decided against Fogarty by an American Arbitration Association (“AAA”) arbitrator in January 2006 in an Article IX proceeding initiated by Fogarty (Fogarty v. USAB; AAA Case No. 30 190 01374 05, decided January 27, 2006).

Article VIII of the Bylaws and Section 220527 of the Act to provide Fogarty with the relief that he requested, which was to be named to the 2007 Pan American Games Team.

On June 22, 2007, in response to the Hearing Panel's Decision dismissing the May 21 Complaint, and in an attempt to cure the shortcomings of that Complaint, Fogarty re-filed his Complaint. The June 22 re-filed Complaint is essentially the same as Fogarty's May 21 filing, except that Fogarty amended that section of the Complaint entitled "the relief sought," setting forth two additional claims for relief, which purportedly conform with the requirements of Article VIII and Section 220527. Those two new requests for relief are: 1) that the Hearing Panel place USAB on probation or revoke USAB's membership in the USOC and 2) that the Hearing Panel "continue to evaluate and determine all USA Badminton Athletes whom may have been damaged by USAB & USOC actions which violated Applicable Statues, including, the Olympic Charter, the Act, USOC Bylaws, BWF Constitution, BWF Competition Regulations, and USAB Bylaws so that the Hearing Panel may determine the severity of harm to USA Badminton and its athletes in order for the USOC Hearing Panel to make recommendations to either place USAB on probation or revoke USOC Membership of USAB."<sup>2</sup>

In response to the June 22 re-filed Complaint, USAB on June 27, 2007 USAB filed a Motion to Dismiss asserting that Fogarty has failed to exhaust his administrative remedies as is required by Section 8.1 E of the USOC Bylaws and Section 220527(b) of the Act.

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<sup>2</sup> This second claim for relief was incomplete when originally filed, but was clarified by Fogarty in response to one of the questions posed by the Hearing Panel in its September 1, 2007 Order.

On September 11, 2007 the Hearing Panel issued an Order in which it requested that Fogarty and USAB respond to certain questions posed by the Panel. It was the Panel's hope that the responses would help clarify the issues in this proceeding. Both Fogarty and USAB responded. In USAB's response it again reiterated its position, which it first stated in its June 6, 2007 Motion to Dismiss, that the underlying issue in this proceeding has already been heard and decided against Fogarty by an AAA arbitrator, and therefore is barred by res judicata or issue preclusion.

By emails of October 23, 2007, October 25, 2007, and November 4, 2007 Fogarty filed 13 Motions for consideration by the Hearing Panel. As these Motions will be dealt with later in this Order, they will not be recited here.

## II. ISSUE AS PRESENTD BY FOGARTY

Fogarty in his June 22 re-filed Complaint challenges USAB's 2007 Pan American Games Selection Procedures. Fogarty further challenges USAB's actions stating 1) that "USA Badminton refuses to require the WBF<sup>3</sup> and WBF Continental Confederation to follow the WBF Competition Regulations which state that entry into the men's doubles draw is determined by WBF World Ranking," 2) that "USAB has refused to submit Dean Schoppe<sup>4</sup> and Matt Fogarty's entry in Men's Doubles to the Pan Am Games," and 3) that "USA Badminton refuses to require the WBF and WBF Continental Confederation to follow the WBF Competition Regulations which specifies no limit on the number entries per country in Men's Doubles for all BWF events including the 2007 Pan Am Games." Fogarty states that USAB's 2007 Pan American Selection Procedures, and USAB's

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<sup>3</sup> Fogarty at times refers to the Badminton World Federation "BWF" as the 'WBF.'

<sup>4</sup> Dean Schoppe is Fogarty's doubles partner.

actions, do not conform to Badminton World Federation (“BWF”) rules. Fogarty contends that BWF rules require that “entry into the men’s doubles draw [for the 2007 Pan American Games] is determined by WBF World Ranking.” Finally, Fogarty asserts that USAB’s 2007 Pan American Games Selection Procedures, and its actions, violate Section 220522(a)(14) of the Act, which limits an NGB from having eligibility criteria that are more restrictive than its international federation.<sup>5</sup>

### III. SCHEDULING OF HEARING

The Hearing Panel has determined to schedule a hearing on this matter for December 6, 2007 commencing at 8:30 AM Mountain Standard Time. The parties should be prepared to present their cases at that time. The following shall pertain to the hearing:

1. The Hearing Panel shall hear argument and receive evidence concerning Fogarty’s June 22 re-filed Complaint dealing with USAB’s 2007 Pan American Games Selection Procedures and their alleged violation of Section 220522(a)(14) of the Act. Since the issues raised in the June 22 re-filed Complaint are similar to or are the same as the issues raised by Fogarty in his

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<sup>5</sup> The Hearing Panel notes that one of Fogarty’s four complaints filed on May 21, 2007, although later withdrawn, raises essentially the same issue as is presented in this Complaint. In the withdrawn complaint, Fogarty contests USAB’s 2008 Olympic Selection Procedures. Fogarty further challenges USAB’s actions stating 1) that “USA Badminton refuses to require the BWF to fulfill its obligation to comply with the WBF Competition Regulations which state that entry into the men’s doubles draw is determined by WBF World Ranking,” and 2) that “USAB has refused to submit Dean Schoppe and Matt Fogarty’s entry in Men’s Doubles to the 2007 World Championships.” Fogarty also contends that “USA Badminton refuses to require the BWF to acknowledge [Fogarty and Shoppe’s] entry into the 2007 World Championships.” Fogarty asserts that USAB’s 2008 Olympic Selection Procedures, and its actions, violate Section 220522(a)(14) of the Act, which limits an NGB from having eligibility criteria that are more restrictive than its international federation.

withdrawn Complaint, filed on May 21, 2007 dealing with the 2008 Olympic Games, the Hearing Panel will hear argument and receive evidence relative to USAB's Selection Procedures for the 2008 Olympic Games and their alleged violation of Section 220522(a)(14) of the Act. Fogarty should be prepared to specifically explain how USAB's selection procedures are more restrictive than what BWA's rules and regulations allow in providing for the selection of athletes to the Pan American and Olympic Games.

2. The hearing shall occur by conference call. The Parties shall be notified prior to the hearing of the conference call number.
3. The Parties shall have until December 4, 2007 to submit any documentary evidence that they wish the Hearing Panel to consider. Any documentary evidence submitted shall also be served on the opposing Party on December 4.
4. The Parties shall have until December 4, 2007 to submit any testimony that they wish the Hearing Panel to consider in the form of a sworn affidavit. Any testimony by affidavit submitted shall also be served on the opposing Party on December 4.
5. Any person who submits testimony by affidavit shall be available on December 4, 2007 for cross-examination by the other Party.
6. If either Party desires that the hearing be stenographically recorded, the Party making such request shall notify the Hearing Panel by November 30, 2007. The Party requesting that the hearing be recorded shall arrange for a stenographer. The Party requesting that the hearing be recorded shall pay for the cost of the stenographer, unless both parties want the hearing recorded,

then the cost of the stenographer shall be equally divided. A Party requesting a transcript of the argument shall pay for the cost of the transcript.

7. If either Party desires that the hearing be open to the public, the Party making such request shall notify the Hearing Panel by November 30, 2007 so that the Hearing Panel can make adequate arrangements. Further, the Party requesting that the hearing be open to the public shall provide the Hearing Panel with an estimate of the individuals who will be on the conference call as observers.
8. The Parties shall submit a pre-hearing brief to the Hearing Panel by December 4, 2007 setting forth their position regarding USAB's selection procedures and whether or not they are more restrictive than what is allowed under BWA's rules and regulations for the selection of athletes to the Pan American and Olympic Games. The pre-hearing brief should set forth the Parties respective reasoning with regard to this issue. The pre-hearing brief should not exceed five (5) pages in length. A copy of the pre-hearing brief shall be served on the opposing Party.
9. The Parties shall each have forty-five (45) minutes to present their case. The Parties may reserve whatever time they feel is necessary to provide concluding remarks to the Hearing Panel at the end of the hearing. Fogarty shall present his case first. USAB shall present its case after conclusion of Fogarty's case.
10. All communications to the Hearing Panel, all documentary evidence and all affidavit testimony shall be sent to the UOSC Office of General Counsel, addressed to Ruby Haddock ([ruby.haddock@usoc.org](mailto:ruby.haddock@usoc.org)), with a copy to

([gary.johansen@usoc.org](mailto:gary.johansen@usoc.org)). All communications should be sent electronically, unless not possible. The Office of General Counsel shall distribute all such communications, documentary evidence and affidavit testimony to the Hearing Panel.

#### IV. STATUS OF MOTIONS

Both Fogarty and USAB have pending motions before the Hearing Panel. The Hearing Panel renders rulings on the motions as follows.

##### A. Motions Filed by Fogarty

1. Motion to preclude USAB's response to Hearing Panel's September 11 Order, which contained questions to be answered by USAB.

This Motion is denied, as USAB submitted its response timely.

2. Motion that the USOC Hearing Panel order USAB to provide the entire 2006 Bylaws, the USAB Published Board Minutes from 2004, 2005, 2006 and 2007 to determine if USAB has actually provided the correct documents.

USAB has submitted its 2006 grievance procedures, which were part of its Bylaws in effect in 2006. As to the other documents referenced by Fogarty, the Motion is denied, as Fogarty has not shown what relevance the above named documents have to this proceeding.

3. Motion that the Hearing Panel conduct an evidentiary hearing regarding the documents submitted by USAB.

This Motion is denied, as the Hearing Panel is not clear as to what documents Fogarty is referring. Further, the Motion is denied as Fogarty has not shown what relevance any of the documents to which Fogarty may be referring have to this proceeding. Finally, Fogarty may question USAB at the time of the hearing about any documents that USAB submits into evidence in this matter.

4. Motion that USAB/USOC produce the Final [Pan Am] Trial Procedures, the date they were approved by USAB, the USOC, and the final date of publishing those procedures.

The Motion is denied as it pertains to the USOC, as the USOC is not a party to this proceeding. The Motion is granted as it pertains to USAB and its 2007 Pan American Games Badminton Selection Procedures.

5. Motion that USAB/USOC produce the original Trial Procedures rejected by the USOC, the date they were submitted, the date they were reviewed and the date they were rejected.

The Motion is denied as it pertains to the USOC, as the USOC is not a party to this proceeding. The Motion is denied as it pertains to USAB, as Fogarty has not shown what relevance the “original Trial Procedures” are to this proceeding.

6. Motion that Skinner, Ruger, Johansen and Scherr give testimony as to why the USOC rejected the USAB’s Trial Procedures, why USOC approved Trial Procedures 7 months after retroactive to the beginning of the Trial Period, why the USOC approved procedures which violated USOC Bylaws, why the USOC required USA Athletes to have World Rankings, and other matters relating to the USOC’s reasoning as to requiring World Rankings in opposition to the AAA’s Ruling.

The Motion is denied as the USOC is not a party to this proceeding. Further, the Motion is denied as Fogarty has not shown what relevance the sought after testimony is to this proceeding.



7. Motion that USOC employee's and USOC Board Members Ueberroth, Dershowitz, Scherr, Johansen, Ruger, and Skinner give testimony as to their actions regarding the Selection Procedures for the 2007 Pan Am Games, and all Article IX complaints, Article VIII complaints, and Ethics complaints from 2003 to present by USAB Athletes in the hearing on the motion to dismiss.

The Motion is denied as the USOC is not a party to this proceeding. Further, the Motion is denied as Fogarty has not shown what relevance the sought after testimony is to this proceeding.

8. Motion that USOC Employee Johansen provide testimony regarding his stated position to determine if it is based on his personal beliefs or his position is based on all applicable Olympic Statutes.

The Motion is denied as the USOC is not a party to this proceeding. Further, the Motion is denied as Fogarty has not shown what relevance the sought after testimony is to this proceeding.

9. Motion that USOC employees produce all Article IX complaints against USAB and each of the USOC's investigative reports regarding those article IX complaints since 2003.

The Motion is denied as the USOC is not a party to this proceeding. The Motion is further denied as Fogarty has not shown what relevance unspecified Article IX complaints filed against USAB are to this proceeding.

10. Motion that USOC Employee Johansen produce the letter he wrote in June 2003 to CAS [Court of Arbitration for Sport] in opposition to my position as a USA Athlete whom qualified for the 2003 Pan Am Games in both Men's Doubles and Mixed Doubles according to the BWF Statutes.

The Motion is denied as the USOC is not a party to this proceeding. Further, the Motion is denied as Fogarty does not assert that he does not have a copy of the letter. If Fogarty has a copy of the letter, then he can produce it himself. If Fogarty does not have a copy of the letter, then the Hearing Panel will consider asking the USOC if it is willing to voluntarily produce it. Further,

Fogarty is ordered to produce all filings by the parties, and all Orders and Decisions rendered by the CAS Hearing Panel relating to his 2003 CAS proceeding (CAS 2003/A/489 - Fogarty v the International Badminton Federation, the Pan American Badminton Confederation and USA Badminton and the Pan American Sports Organization), as such matter appears to possibly also deal with the issue that Fogarty has raised in this proceeding.

11. Motion that the Hearing Panel Order USOC Employee Johansen to produce all letters written to the IOC and the BWF explaining how the USOC would like to develop their own procedures which in effect would be more restrictive than the BWF's Eligibility Criteria.

The Motion is denied as the USOC is not a party to this proceeding. Further, the Motion is denied as Fogarty has not shown what relevance the sought after information is to this proceeding.

12. Motion that the USOC Hearing Panel remove USOC Employee Johansen from any involvement in the current Article VIII Complaint.

The Motion is denied. The Hearing Panel makes its own decisions regarding the issues in this proceeding. The USOC General Counsel's Office serves an administrative function and provides legal counsel to the Hearing Panel at the Panel's pleasure.

13. Motion that the USOC Hearing Panel review and determine if they have been prejudiced by USOC Employees and if any member of the hearing panel has been prejudiced by USOC Employees to declare a mistrial.

The Motion is denied. The Hearing Panel makes its own decisions regarding the issues presented in this proceeding. The USOC General Counsel's Office serves an administrative function and provides legal counsel to the Hearing Panel at the Panel's pleasure.

B. Motion Filed by USAB

1. Motion to Dismiss the Complaint

The Hearing Panel reserves its ruling on USAB's Motion to Dismiss. USAB's Motion is considered to encompass all of the grounds set forth in the Motion filed on June 27, 2007 as well as its Motion filed on June 6, 2007. USAB may make any argument it wishes with regard to its Motion to Dismiss at the hearing on this matter.

V. FURTHER MOTIONS

Neither Party shall file a further motion with the Hearing Panel, unless first making a request to the Hearing Panel and second being granted permission to file such motion by the Hearing Panel.

VI. DOCUMENTS TO BE PRODUCED TO THE HEARING PANEL

A. Documents to be Produced by Fogarty

1. Fogarty shall produce to the Hearing Panel and to USAB on November 30, 2007 those specific BWA rules and regulations upon which he relies in asserting that USAB has promulgated selection procedures that are more restrictive than those allowed by BWA.
2. Since it appears that Fogarty has filed claims with CAS concerning issues similar to or the same as those that he has raised in this proceeding, Fogarty shall produce to the Hearing Panel and to USAB on November 30, 2007: a) all filings by the parties, and all Orders and Decisions rendered by the CAS Hearing Panel relating to Fogarty's 2003 CAS proceeding (CAS 2003/A/489 - Fogarty v the International Badminton Federation, the Pan American Badminton

Confederation and USA Badminton and the Pan American Sports Organization) (referenced in the Hearing Panel's ruling on Fogarty's Motion relating to a June 2003 letter to CAS from the USOC General Counsel's Office), and b) all filings by the parties, and all Orders and Decisions rendered by the CAS Hearing Panel relating to Fogarty's 2007 CAS proceeding (Re: CAS 2007/A/1317 - Fogarty and Schoppe v the Badminton World Federation).

**B. Documents to be Produced by USAB**

1. USAB shall produce to the Hearing Panel and to Fogarty on November 30, 2007 its Selection Procedures for the 2007 Pan American Games (referenced in the Hearing Panel's ruling on Fogarty's Motion relating to production of USAB's 2007 Pan American Selection Procedures).
2. USAB shall produce to the Hearing Panel and to Fogarty on November 30, 2007 its Selection Procedures for the 200 Olympic Games.

\_\_\_\_\_/s/  
Mary McCagg, Chair

Robert P. Latham, Panel Member  
Max Cobb, Panel Member  
Debbie Hesse, Panel Member  
Courtney Johnson, Panel Member

Dated this 20<sup>th</sup> day of November, 2007