

II. COMMENCEMENT OF PROCEEDING

3. On March 5, 2013, Complainants filed a Complaint against USS pursuant to Section 220527 of the Act and Section 10 of the USOC Bylaws. The Complaint alleges that USS is not meeting its requirements as an NGB, as set forth in the Act and USOC Bylaws. Specifically, Complainants allege that USS lacks the financial and managerial capabilities required of an NGB, that USS has a failed and ineffective grievance process, that USS is not responsible or accountable to its members and that USS lacks operational transparency.

III. PANEL COMPOSITION

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

Mary McCagg, Chair
USOC Board of Directors
Steve Johnson, Panel Member
USOC National Governing Bodies Council, USA Cycling
Andrew Johnson, Panel Member
USOC Athletes' Advisory Council, Nordic Skiing Athlete

5. On March 29, 2013, the Panel members made disclosures. Neither Complainants nor USS voiced an objection to the composition of the Hearing Panel. Accordingly, the Hearing Panel is seated and confirmed to hear this matter.

IV. MOTION TO DISMISS

6. On April 4, 2013, USS filed a Motion to Dismiss. The Motion is based on the ground that Complainants failed to exhaust their administrative remedies with USS as is required by Section 220527 of the Act and Section 10.11 of the USOC Bylaws.

7. The Hearing Panel allowed Complainants until April 23, 2013, to respond to the Motion to Dismiss. Complainants filed an Opposition to the Motion on April 23, 2013. A Supplemental Opposition was filed on April 24, 2013.

8. The Hearing Panel allowed USS until April 30, 2013, to file a Reply to Complainants' Opposition. USS did not file a Reply.

9. The Hearing Panel held oral argument on the Motion to Dismiss by telephone conference call on May 9, 2013. Steven B. Smith of Bryan Cave represented USS. Complainants were represented by Edward G. Williams of Stewart Occhipinti. Also, on the call were the following Complainants: Nate Di Palma, Jack Jayner, Levi Kirkpatrick, Eva Rodansky and Patricia Rodowsky. Additionally, Gary L. Johansen, USOC Associate General Counsel and legal counsel to the Hearing Panel, Lucy Denley, USOC Senior Legal Assistant and Hearing Panel liaison and Ryan Lake, USOC Legal Extern were on the call.

10. In its consideration of the Motion to Dismiss, 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.

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

V. RULING

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

VI. ANALYSIS

A. Background

13. Section 220527(b)(1) of the Act provides that:

An organization or person may file a complaint under subsection (a) of this section only after exhausting all 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.

14. Section 10.11 of the USOC Bylaws states:

The complainant may file a complaint under this Section 10 only after exhausting all available remedies with the NGB or PSO for correcting deficiencies, unless it can be shown by clear and convincing evidence that those remedies would have resulted in unnecessary delay.

15. Complainants filed an internal grievance with USS on August 30, 2012. Although styled differently than the Section 10 Complaint, the internal grievance basically raises the same issues as are set forth in the Section 10 Complaint.

16. USS's grievance procedure is set forth in Article XVIII, Sections 18.1 through 18.9, of its Bylaws. That procedure as it relates to the issue in this matter can briefly be summarized as follows. First, the grievance is to be filed with the Executive Director of USS and has to meet certain procedural requirements, including the submission of a \$250.00 filing fee. Second, upon receipt of the grievance the Executive Director is required to "immediately refer the matter to the Grievance Committee."

Third, the President of USS may attempt to resolve the grievance through informal means, including mediation. Fourth, the Chair of the Grievance Committee is required to appoint a three person hearing panel. One member of the panel has to be an athlete. Fifth, the hearing panel is required to hold a hearing on the grievance within ninety (90) days of the panel's appointment. Sixth, the hearing panel is required to render a written decision within thirty (30) days of completion of the hearing. Additionally, in disciplinary matters the President of USS may conduct a preliminary investigation of the allegation and if he or she finds the allegation to be true, provide notice to the accused of a proposed penalty.²

17. USS has not conducted a hearing on Complainants' internal grievance.

B. Position of the Parties

18. USS takes the position that Complainants have failed to exhaust the internal remedies available to them through the USS grievance procedures. USS also asserts that Complainants have not shown, and cannot show, by clear and convincing evidence that exhausting their remedies would result in unnecessary delay.

19. Complainants state that eight (8) months have passed since their internal grievance was filed and that USS has taken no action during that time to have their grievance heard. Complainants contend that because of this passage of time, the Hearing Panel should find that they have exhausted their internal remedies, or that to require them to do so at this juncture would cause unnecessary delay in having their grievance heard.

² Whether Complainants' internal grievance was subject to this investigation process is discussed later in this Decision.

C. Discussion

20. USS's position that this matter should be dismissed rests on four (4) grounds. First, USS states that pursuant to Section 18.2 of its Bylaws the President of USS was obligated to initiate an investigation of the allegations set forth in the grievance. USS asserts that this investigation was carried out by the law firm of White & Case and that it was not completed until December 31, 2012. USS faults Complainants for not readily providing information to White & Case. USS claims that this was one of the reasons the investigation took longer than necessary. USS asserts that because of Complainant's own actions in not readily cooperating with White & Case, the hearing on Complainant's internal grievance was delayed.

21. Complainant's counter that the White & Case investigation had nothing to do with their internal grievance. They point out that the White & Case investigation was initiated prior to August 30, 2012; the date when they filed their internal grievance, so to connect the White & Case investigation with their internal grievance makes no logical sense from a timing standpoint. They also point out that White & Case was investigating disciplinary matters and their internal grievance had to do with USS's failure to meet its obligations as an NGB. Additionally, Complainants point out that USS's grievance procedure only contemplates investigations by USS when an individual has allegedly committed disciplinary violations, and so Section 18.2 does not apply.

22. It is difficult for the Hearing Panel to accept USS's contention that the White & Case investigation was instituted to investigate the issues raised by Complainants when the White & Case investigation was initiated prior to when Complainants filed their grievance. Also, the White & Case report states that its

investigation pertained to three specific issues: 1) an allegation of skate tampering, 2) physical abuse by coaches and 3) emotional abuse by coaches. Further, the report states what White & Case was not investigating:

White & Case has not been asked to investigate complaints about USS's funding, structure, administration, leadership, Board of Directors or other issues, and only examines them in this Report to the extent that they are relevant to the mentioned issues.

White & Case Report dated December 31, 2012, at 1.

23. Additionally, although Complainants' internal grievance mentions the failure of USS to provide a safe training environment for its athletes, a review of the internal grievance by the Hearing Panel makes it clear that the crux of the grievance was about USS's inability to fulfill its obligations as an NGB.

24. Finally a fair reading of Section 18.2 of USS's Bylaws, which sets forth the investigatory process to be conducted by the President of USS, leads the Hearing Panel to conclude that these investigations are only contemplated when the grievance concerns a disciplinary matter. Section 18.2, is titled "Disciplinary Process - Violations; Notice and Penalty." Also, Section 18.2 states that the President shall conduct an investigation when individuals have been negligent in their duties or conduct, have acted in a manner detrimental to the objectives of USS, have contravened the rules of USS or have violated USS's code of conduct. Further, Section 18.2 states that:

In the event of a violation, US Speedskating shall have the right to sanction, suspend for a definite or indefinite period of time, or declare ineligible to participate in one or more athletic competitions, the violating member or a member who aids, abets or encourages another member in committing a violation....

There is no indication that Section 18.2 applies to a grievance for non-disciplinary matters, such as Complainants' grievance alleging that USS has failed to fulfill its obligations as an NGB. Nor would such an interpretation make any sense.

25. Second, USS asserts that the parties suspended action on Complainants' grievance during an attempt to mediate the dispute in accordance with Section 18.4. USS goes on to state "attempting to resolve a dispute in a cooperative fashion" is not an "unnecessary delay," and therefore, Complainants should be required to exhaust their administrative remedies with USS prior to filing a Section 10 Complaint.

26. Complainants answer that although there was talk of mediating the internal grievance, a mediation session was never scheduled.

27. While the Hearing Panel endorses the efforts of parties to mediate their disputes, and can understand that a matter may be suspended during such discussions, mediation never took place in this case. Further, there certainly was no agreement, written or otherwise, that would have halted the grievance process from proceeding. Additionally, talks of trying to schedule the mediation were in January 2013. Complainants' internal grievance was filed in August of 2012. USS's attempt to excuse not proceeding with Complainants' grievance because of efforts to mediate is not credible.

28. Third, USS claims that the grievance process did not proceed because of USS's anticipation that Complainants would object to the composition of the hearing panel by alleging that the panel members had conflicts of interest. USS states that

ensuring a fair and objective adjudication process cannot be considered an “unnecessary delay.”

29. Complainants point out that no panel was ever appointed, so how could USS know that Complainants would object. Further, Complainants state that if there was a valid objection, the process would be for USS to appoint another panel member, not to just halt the proceeding.

30. The Hearing Panel agrees with Complainants. USS cannot be excused from proceeding with the grievance process merely because it anticipated that Complainants would object to the composition of the hearing panel. The proper course of action would have been to appoint the panel, and if there was an objection, then to rule on the objection, and if the objection was upheld then replace the panel member.

31. Fourth, USS asserts that the chair of the grievance committee, who was tasked with appointing the hearing panel, had been dealing with a serious illness in his family.

32. Complainants respond that if a family illness prevented the chair from fulfilling his responsibility of appointing the hearing panel, then USS should have taken other measures to have the panel appointed.

33. While the Hearing Panel is sympathetic to someone who has an illness in his family and understands that such illness may cause certain delays, USS was obligated to have the panel appointed. USS should have been proactive in working with the chair to have the hearing panel appointed, or it should have delegated another person to make the appointment.

34. Additionally, the Hearing Panel considered the following. Since USS takes no issue with the manner in which Complainants filed their grievance, and since the \$250.00 fee was paid; it is taken that Complainants met these requirements. Although USS acknowledged the grievance in an email to Complainants, it appears that USS did little else. It is unclear if the Executive Director even referred Complainants' internal grievance to the Grievance Committee. Certainly, a hearing panel was never appointed. Since no hearing panel was appointed, USS did not, and could not, meet its obligation under its own Bylaws to conduct a hearing within the ninety (90) day time period or to render a decision within thirty (30) days of the hearing. Also, there is no evidence that Complainants requested or consented to a delay in having their grievance heard.

35. For whatever reason, USS either refused to go forward with the grievance process or was negligent in its actions relating to the administration of Complainants' internal grievance.

36. As stated in *Robinson v USA Taekwondo, Inc.*, Decision and Order (Sep. 16, 2011) (Susanne Lyons, Sarah Konrad & Glenn Merry, Pnl. Mbrs.)

A national governing body should not be allowed to defeat a Section 10 Complaint by not taking action on an administrative grievance and then advancing the argument that the complainant has not exhausted his or her administrative remedies.

Robinson v. USA Taekwondo, Inc. at 8.

37. Further, Section 220522(a)(13) of the Act states that an NGB must provide for the prompt resolution of grievances. That was not accomplished here.

38. The Hearing Panel can come to no other conclusion than USS failed to properly administer, or to hold a timely hearing, on Complainants' grievance as was required by its Bylaws.

39. However, there is one aspect relating to the Complainants, which the Hearing Panel finds troubling. During oral argument, the Hearing Panel inquired as to whether or not Complainants made an inquiry to USS as to the status of the grievance or made a request to USS that their grievance be heard. Complainants responded that they sent a September 11, 2012, email in which they requested certain documents from USS and set forth Complainants' witness list. However, in the eight (8) months since filing the grievance the Complainants did not make an inquiry as to whether a hearing panel had been appointed or whether the hearing had been scheduled, and if so, when the hearing would be held. If the matters complained about in the grievance were of such importance to complainants, one would assume that they would be persistent in their efforts to have USS hear the matter. Instead, they stood by and waited.

40. A complainant has some obligation to ensure that his or her grievance moves forward and is heard. Doing nothing and then blaming the NGB for the delay is cause for skepticism as to complainant's true motivation. See *Fogarty v. USA Badminton, Inc.*, Order (Oct. 1, 2004) (Marty Mankamy, Brian Derwin, James R. Joy, Herb Perez, & Nancy Wightman, Pnl. Mbrs.).


41. Nonetheless, Complainants' failure to inquire as to the status of their grievance does not, in this case, excuse USS's inaction.

VII. ORDER

42. USS's Motion to Dismiss on the grounds that Complainants have failed to exhaust their administrative remedies is denied.

43. Pursuant to Section 10.13 of the USOC Bylaws, USS has thirty (30) days from the date of this Decision to file an answer to the Complaint. If no answer is filed, the Complaint shall be deemed to have been denied.

Dated this 20th day of May, 2013.



Mary McCagg, Chair

Steve Johnson, Panel Member
Andrew Johnson, Panel Member