NATIONAL BOARD OF REVIEW CERTIFICATION

September 16, 2011

Jill J. Chasson, NBR Chair
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Background

What is the National Board of Review?

- Under the Amateur Sports Act of 1978, NGBs were required to establish and maintain provisions for a prompt and equitable resolution of disputes involving any of its members.
- The National Board of Review (along with the LSC BORs and the BOD) is the ***independent and impartial*** "judiciary" for Swimming to hear and decide such disputes.

Hearing Requirement of the Ted Stevens Olympic and Amateur Sports Act (1998)

Section 220522(a)(8) requires that before declaring any athlete, coach, trainer, manager, administrator, or official ineligible to participate, NGBs must provide fair notice and an opportunity for a hearing.

What authority does the NBR have?

- Impose and enforce penalties for any violation of the rules and regulations (administrative or technical) of USA-S;
- Vacate, modify, sustain, reverse or stay any decision or order properly submitted on appeal, or remand the matter for further action;
- Determine the eligibility and right to compete of any athlete;
- Investigate any election impropriety or cause for removal of a national officer or national committee member and take corrective action;

NBR Authority (cont'd)

- Interpret any provision of the rules and regulations of USA-S except the technical rules (Part One);
- Review any revocation, suspension, reinstatement of membership or challenge the granting or denial of membership; and
- Issue such interim orders, prohibitory or mandatory in nature, as may be necessary pending a final decision of the NBR.

Who investigates complaints?

- For matters occurring during the course of an international meet – the OIOC Coordinator
- For matters occurring at a national or regional event – the VP Program Ops.
- For matters involving alleged violations of physical abuse of an athlete by a coach – a committee of 3 coaches appointed by President of USA-S
- In all other matters – the Exec. Director or designee

Disposition after investigation:

- After the initial investigation, the Executive Director may decide to:
  - Initiate a complaint in USA Swimming's name (filed with NBR Chair)
    - May also request emergency hearing before the NBR
  - Not send complaint to NBR (USA-S President must concur), in which case the Executive Director may:
    - Cause further investigation into alleged violations;
    - Seek to mediate the complaint; or
    - Advise complaining party that he/she may file complaint in own name with NBR Chair. (NBR Chair may then decide to assign the matter for hearing or dismiss the complaint.)

Code of Conduct matters adjudicated by the LSC Board of Review:

- Fraud: Any act of fraud, deception or dishonesty in connection with any USA-S activity. (304.3.13)
- Abuse of Official: Any non-consensual physical contact, obscene language or gesture, or other threatening language or conduct directed towards any **meet official** and which is related to any decision made by such official in connection with a USA-S competition. (304.3.14)

Code of Conduct matters adjudicated by the LSC Board of Review (contd.)

- Recruiting: Action, other than through general advertising, by a coach, etc., either through direct contact with an athlete or the encouragement of others, to **recruit** or otherwise encourage an athlete who is already a member of a USA-S member swim club to compete for or become a member of the swim club with which the acting party is affiliated, unless approved by the athlete's coach or parents. (304.3.15)

Code of Conduct matters adjudicated by the LSC Board of Review (contd.)

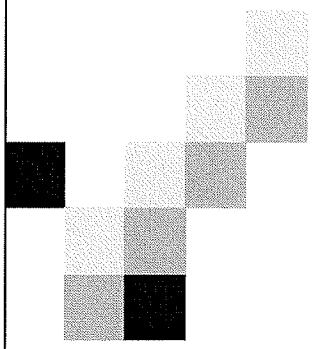
- Misconduct: Violation of any team misconduct rule as established by the USOC, USA-S, any Zone or LSC team authority. (304.3.16)
- Other: Any other act or omission not provided for in 304.3.1 through 304.3.10 above, **which is detrimental to the image or reputation of USA Swimming, a LSC or the sport of swimming**. (304.3.17)

What disputes go to the National Board of Review and not the LSC?

- The NBR has original jurisdiction over any complaint brought under **Code of Conduct Sections 304.3.1 through 304.3.12** against any member of USA-S.
- The NBR also has original jurisdiction over any conflict that involves athletes or other USA-S members or "Participating Non-members" from different LSCs, and over any conflict involving athletes or other USA-S members or "Participating Non-members" that occurs at a national or international event.

For example . . .

- Convictions or pending charges for
  - any felony;
  - any drug offense; or
  - any sexual misconduct.
- Any sexual contact or other inappropriate sexually oriented behavior directed towards an athlete by a coach or other person in authority over the athlete.
- Violations of Athlete Protection Policies.
- Alcohol-related violations of the Code.



Appeals to the NBR

Appeals from LSC Board of Review Decisions

- Any real party in interest may appeal any LSC Board of Review decision to the NBR.
- Appealing party must file a petition to appeal with the Executive Director of USA-S and pay a filing fee of $250, within **30 days** after the LSC decision is transmitted.
- All available documentation should accompany the appeal and filing fee.
- The USA-S President and the NBR Chair each have the authority to deny or reject an appeal that they deem to be without merit, or lacking the necessary specificity for proper review.

Appeals from LSC Board of Review Decisions (contd.)

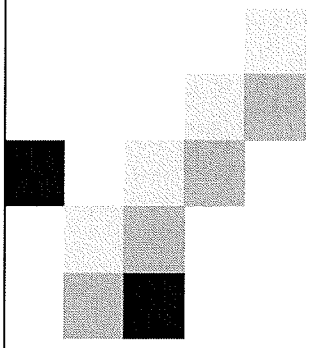
- Appeals to the National Board of Review shall be on the basis of the record (i.e., the Petition, Response, Reply, Notice of Hearing and other filings, as well as the hearing transcript) and any briefs filed with the NBR on appeal, unless the NBR orders a *de novo* hearing.

The Standard of Review on Appeal

- For any appeal decided solely on the record, the findings of fact (as contrasted with conclusions of law) of the LSC Board of Review must be accepted on review, **unless they are so clearly erroneous as not to have support in the record on Appeal**.
- The LSC Board of Review's presence during the presentation of testimonial evidence provides an unparalleled opportunity to determine the credibility of the witnesses and the weight to be afforded the evidence. Therefore, if the LSC Board of Review's factual findings are supported by competent evidence in the record, they should be affirmed.

The Standard of Review on Appeal (contd.)

- The NBR has complete discretion to overturn, modify or affirm conclusions of law of the LSC Board of Review, (e.g., whether a set of facts constitutes a Code of Conduct violation or how to interpret the language of the Code of Conduct).
- In a *de novo* hearing, or any hearing where additional testimony or evidence is accepted, the NBR has complete discretion to overturn, modify or affirm both the findings of fact and the conclusions of law of the LSC Board of Review.



Conducting the Hearing

Prepare and Distribute a Hearing Agenda

1. Call Hearing to Order (announce the name of case, the place, time and date of the hearing, the fact that the hearing is being recorded, and read the Charge against Respondent as set forth in the Notice of Hearing or Complaint).
2. Record Appearances
   - Board of Review panel members (athlete required)
   - Petitioner and counsel, if any
   - Respondent and counsel, if any
   - Witnesses and others present, if any

Hearing Agenda (contd.)

3. Brief Opening Statements - setting forth generally each party's view of the issues in dispute, the relief sought and what they hope to prove by their presentation of the evidence:
   - Petitioner
   - Respondent

Hearing Agenda (contd.)

4. Presentation of Evidence and Witnesses (swear each witness in)
   - As to each of Petitioner's witnesses, the following will occur:
     - Petitioner's direct examination
     - Respondent's cross examination
     - Redirect examination by Petitioner

Hearing Agenda (contd.)

5. After all of Petitioner's witnesses have testified, the following will occur with respect to each of Respondent's witnesses:
   - ❑ Respondent's direct examination
   - ❑ Petitioner's cross examination
   - ❑ Redirect examination by Respondent
6. Rebuttal evidence by Petitioner

Hearing Agenda (contd.)

7. Questions from NBR Panel Members (appropriate at any time during the hearing)
8. Closing Statements (ask if there are any objections to the fairness of the hearing)
   - ❑ Petitioner
   - ❑ Respondent
9. Adjournment of Hearing
10. Closed Deliberations of Panel

Rules of Evidence

Rule 406.2.6 provides as follows for LSC BOR hearings; presumably also applies to NBR hearings:

- Hearsay, letters, affidavits, news media articles and reports, etc., as well as direct testimony taken from witnesses present at a hearing, are all admissible to the extent the Presiding Officer is satisfied as to the relevance and non-repetitive nature of the evidence.
- Similarly, claims of privilege (other than attorney-client and privileges that, under applicable Federal and state laws, the Board of Review is required to recognize) shall not be entertained by the Board of Review, except in extraordinary circumstances.

Rules of Evidence (contd.)

- Proper weight shall be given to each type of evidence considering the source [e.g., credibility] and other common sense factors.
- Does the testimony of a particular witness hold water and make sense?
- Do any of the witnesses have ulterior motives?

The Burden of Proof

The **Petitioner** has the burden of proving that Respondent committed the acts charged in the Complaint. The Respondent does not have to prove that he/she did not commit the alleged acts.

The Standard of Proof

The standard of proof means the degree to which the trier of fact must be convinced that the charges have been proven. There are 3 possible standards :

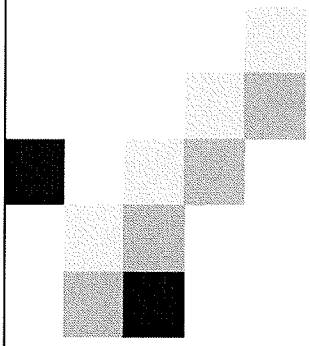
- Beyond a reasonable doubt (used in criminal cases);
- Clear and convincing evidence (used in special civil cases, such as fraud or termination of parental rights); and
- Preponderance of the evidence (used in NBR cases and most civil cases).

A Preponderance of the Evidence

Under this standard of proof, Petitioner will win if he/she can show that it is **more likely than not** that his/her contention is true. In other words, there may be significant doubt about the truth of the allegations, there may not be clear and convincing evidence to support the Complaint, but the credible evidence says Petitioner's claims are more likely true than not.

Hearing Agenda for Appeals

1. Call to Order
2. Record Appearances
3. Oral Argument – typically15 minutes per party
   a. Appellant (may reserve time for rebuttal)
   b. Appellee
4. Questions from NBR panel members (anytime)
5. Adjournment
6. Closed deliberations of panel



The Board of Review Written Decision

Requirements for the Decision

- The decision of the NBR may be rendered at the time of the hearing, and thereafter reduced to writing and delivered within 7 days.
- Otherwise, panel must reach a decision as soon as possible and in no event more than 21 days after the conclusion of the hearing.
- The decision shall include findings of facts and a statement of remedies ordered or penalties imposed, if any, and a statement setting forth the rights of the parties to appeal the decision.

Requirements for the Decision (contd.)

- Remember: Your role is to impartially decide if the Petitioner, by a preponderance of the evidence, proved that the complaint against Respondent is true (not whether the Respondent is a saint or a bad apple).
- Make the punishment fit the crime.
- Be reasonable and fair!
- Assess costs rarely, and never attorneys' fees.

Stay Orders

The National Board of Review has the power and discretion, but not the duty, to stay a Decision of the LSC Board of Review or the NBR during the period within which an appeal may be filed to it or the Board of Directors, respectively.

Questions?

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