



# THE BOARD OF REVIEW PROCESS

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# *Background*

## *What is a LSC 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 Board of Review is the *independent and impartial* “judiciary” for the LSC 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 administrative and rule making powers does a LSC Board of Review have?*

## Administrative Powers –

- administer and conduct the affairs and achieve the purposes of the Board of Review,
- establish policies, procedures and guidelines,
- elect the Board of Review Chair,
- subject to any LSC budgetary constraints, retain attorneys, agents and independent contractors and employ those persons which the Board of Review may determine are appropriate

## *Administrative and rule making powers (cont'd)*

### Rule Making Powers -

The Board of Review shall have the power and the duty to promulgate rules and procedures with respect to any matter within its jurisdiction or appropriate, necessary or helpful in the administration and conduct of its affairs. The rules and procedures adopted by the Board of Review shall have the same force and effect as if they had been adopted as part of the LSC Bylaws.



## *What investigative and judicial powers does the LSC Board of Review have?*

The LSC Board of Review may investigate and conduct hearings, make and publish decisions and orders with regard to any matter affecting the LSC, its status or conduct as a Local Swimming Committee or the administration of the sport of swimming within the LSC boundaries which involves:

## *Investigative and judicial powers (contd.)*

- the LSC *and* a member(s) of the LSC, between only members of the LSC; or with respect to conduct or events occurring outside the LSC, between (i) the LSC and a member(s) of the LSC, or (ii) only members of the LSC.



## *Discretionary Statute of Limitations:*

The Board of Review need not [but may, if it chooses] exercise its jurisdiction with respect to a Petition the subject matter of which occurred, or concerns or is founded on events which occurred, **more than ninety (90) days** prior to the date the Petition is received.



## *How must the Board of Review exercise its authority and make decisions?*

- Except for authority and power granted to the Board of Review Chair, the exercise of the authority and powers of the Board of Review and the decision of matters which are the subject of a hearing shall be decided by a majority vote of the panel, the rehearing panel or the full membership of the Board of Review.
- The views of any dissenters shall be included in the record of the proceeding if requested by the dissenters.

## *Exercise of authority (contd.)*

- The exercise of the Board of Review's authority and power shall lie solely in its discretion and the interests of justice and the sport of swimming. However, the Board of Review shall exercise its power in response to a timely filed Petition, subject, in appropriate circumstances, to the power and discretion of the Board of Review Chair to dismiss a Petition with permission to refile for a stated period.
- In connection with any preliminary investigation, the Chair may offer the services of a Board of Review member to act as a mediator or similar position under other alternative dispute resolution mechanisms.

# *What types of penalties can the Board of Review impose?*

The Board of Review, after conducting such hearings as it may determine to be necessary or helpful, may, among other remedies:

- dismiss the Petition, with or without permission to refile;
- censure or fine the Respondent;
- establish a period of probation regarding Respondent;

## *Types of penalties (contd.)*

- prohibit or mandate future actions, inaction or conduct of Respondent;
- determine the results of, or require a rerun of, any election held by the LSC or any constituent element thereof;
- vacate, modify, sustain, reverse, remand or stay any decision or order of a smaller panel of the Board of Review, the House of Delegates, the Board of Directors, any officer, or committee, or official of the LSC;

## *Types of penalties (contd.)*

- interpret any provision of the FINA rules and regulations to the extent not pre-empted by: FINA, the USA-S Rules (except for Part One), the USA-S Code of Conduct, the Required LSC Bylaws, etc.
- deny, grant, suspend or restore the eligibility or right to compete of an Athlete Member of the LSC;

## *Types of penalties (contd.)*

- deny, grant, suspend or restore membership in the LSC and USA-S for a definite or indefinite period of time, with or without terms of probation, or expel (i) any Group Member, or (ii) Individual Member of the LSC, including any administrator, athlete, coach, trainer, manager, meet director, official, officer, Board Member, House of Delegates representative of a Group Member, or chair or member of any committee;

## *Types of penalties (contd.)*

- prohibit for a definite or indefinite period of time the participation by a non-member volunteer or other person in any capacity whatsoever in the affairs of USA-S, the LSC, its Group Members or other LSCs and their Group Members;
- assess costs, including any filing fee and attorneys fees and expenses, against the non-prevailing party or refund any filing fee paid by the prevailing party;
- or any other remedies deemed appropriate under the circumstances.



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

The LSC Board of Review has original jurisdiction over any non-Code of Conduct matter involving only members of its LSC, including any incident occurring in regional or zone competitions, or any complaint that alleges violations of Code of Conduct **Sections 304.3.11 through 304.3.15** (if the parties are members of that LSC and USA-S did not bring the complaint).



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

- Any act of fraud, deception or dishonesty in connection with any USA-S activity.
- 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;

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

- 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;

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

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

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

- The NBR has original jurisdiction over any conflict that involves athletes or other USA-S members from different LSCs , and over any conflict involving athletes or other USA-S members that occurs at a national or international event.
- The NBR also has original and exclusive jurisdiction over any complaint brought under **Code of Conduct Sections 304.3.1 through 304.3.10** against any member of USA-S.

## *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.
- Alcohol related violations of the Code.



## *Appeals from LSC BOR Decisions*

Any real party in interest may appeal any LSC Board of Review decision to the National Board of Review. The 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 Decision is entered. 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 which they deem to be without merit.

## Appeals from LSC BOR Decisions (contd.)

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

The LSC BOR Chair will be required to compile the Record on Appeal and send it to the NBR Chair.



## *What Happens After the NBR Decides the Appeal from the LSC BOR?*

Depending upon the case, the NBR may send the case back to the LSC for further hearings or enforcement of the NBR Decision. Any violation of the NBR Decision mandates are usually taken up by the NBR by way of an Order To Show Cause (contempt order).



# *Pre-Hearing Matters*

# *The Petition*

406.1.1 of the Rulebook requires that the Petitioner submit to the Board of Review Chair (or the LSC General Chair) a written statement setting forth:

- A description of the action, inaction or conduct that is believed to have been improper or incorrect; and
- The name of the person or group believed to have acted improperly or the circumstances believed to require answers, explanations or clarifications.



## *The Notice of Hearing*

Written notice of the hearing must be given by the LSC BOR Chair to each Respondent at his/her last known address (by certified mail, Federal Express or personal delivery), as soon as practical but no later than **twenty (20) days** after receipt of the Petition by the Board of Review Chair.

## *The Notice (contd.)*

- Appendix B to the Required LSC Bylaws provides a sample form of a Notice of Hearing.
- The Notice of Hearing must be prepared with care and meet all of the technical requirements set forth in 406.4.1A of the Rulebook.

## *The Notice (contd.)*

The Notice must include:

- a statement in reasonable detail of the charges against Respondent;
- a statement that the Respondent has the right to have counsel to represent him/her at the hearing;
- a description of the type of hearing to be held (in-person, conference call, etc.);

## *The Notice (contd.)*

- the date, time and location at which the hearing will be held (the hearing must be not less than 30 and no more than 60 days after the Notice is sent);
- a request that Respondent answer all of the charges, with instructions as to whom and where the answer should be sent; and
- a statement of the right to appeal.



## *Respondent's Answer*

Respondent shall answer the charges in a writing to be delivered to the Board of Review Chair at least fourteen (14) days prior to the hearing, with a copy to the Petitioner (or counsel) and anyone else specified in the Notice.



## *Rebuttal by Petitioner*

The Petitioner may, but is not required to, offer a rebuttal to Respondent's Answer (due seven (7) days before the hearing).

# *Alternative dispute resolution*

- Mediation by the Board of Review Chair or designee (who will not be part of the BOR panel hearing the case);
- Arbitration;
- Appointment of a special master for specific factual or legal issues;
- Informal conference with the parties, depending upon how emotional the issues are; or
- Whatever else works and is fair to everyone involved.

# *Appendix A to LSC Bylaws*

Appendix A to the Required LSC Bylaws, entitled “Questions and Answers About Resolving Disputes” including a brief summary of what **due process** means:

- A quick and effective remedy to disputes;
- A fair hearing by objective, unbiased people, with an opportunity to present your side of the matter; and
- The right to appeal the decision.

# *Pre-Hearing Investigations and Fact-Finding*

- BOR Members should not speak with the Petitioner or the Respondent (or their counsel) without the other party present (*ex parte* communications). Keep both sides equally informed.
- Remember that the role of the Board of Review is to judge the evidence that is presented to it by the parties. To do so fairly, you must remain objective and unbiased.
- The Petitioner and the Respondent have the responsibility to marshal the evidence to support their respective cases, not the Board of Review.



# *Pre-Hearing Conferences*

In more complicated cases, it may help to have a pre-hearing conference (particularly when lawyers represent both sides) to streamline the case for hearing.

- Frame the factual and legal issues to be decided at the hearing so everyone is on the same page and there are fewer surprises.

## *Pre-Hearing Conferences (contd.)*

- For example, in a falsified times case, the factual issues might be. . .
- *Whether the meet results for the Winter Invitational Meet, hosted by the Bay Swim Club and conducted on January 22-24, 2009, were modified to reflect times for Bay Swim Club athletes that were faster than those actually achieved.*
- *Whether such modifications were made with the intent to defraud or deceive, or otherwise constituted act(s) of intentional dishonesty.*
- *If the times were so modified, whether Respondent committed the actual act(s) of modifying the meet results for the Winter Invitational Meet, or the acts were done by someone else at his express direction.*

## *Pre-Hearing Conferences (contd.)*

- Make the parties figure out what witnesses they are going to use and schedule a date when they must exchange witness lists (with a brief summary of the area of testimony for each).
- Determine the need for any depositions or other formal discovery.
- Have the parties exchange copies of any documents or other evidence they will use at the hearing.

## *Pre-Hearing Conferences (contd.)*

- Encourage the parties/counsel to prepare Stipulations of any undisputed facts and legal issues, so the number of witnesses is reduced.
- Discuss the standard of proof and the burden of proof in Board of Review cases.
- Explain that the judicial rules regarding the admissibility of evidence do not apply in BOR cases. More to come on this later.



# *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 Petition).
2. Record Appearances -
  - Board of Review panel members
  - Petitioner and counsel, if any
  - Respondent and counsel, if any
  - Witnesses and others present, if any

## Hearing Agenda (contd.)

- 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.)

- 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.)

- 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
  
- Rebuttal evidence by Petitioner

## Hearing Agenda (contd.)

- Questions from Board of Review Panel Members (appropriate at anytime during the hearing)
- Closing Statements (ask if there are any objections to the fairness of the hearing) -
  - Petitioner
  - Respondent
- Adjournment of Hearing
- Closed Deliberations of Panel

# *Rules of Evidence*

406.2.6 of the Rulebook provides:

- 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 Petition. 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 how far the trier of fact must be convinced that the charges have been proven. There are essentially 3 possible standards of proof:

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

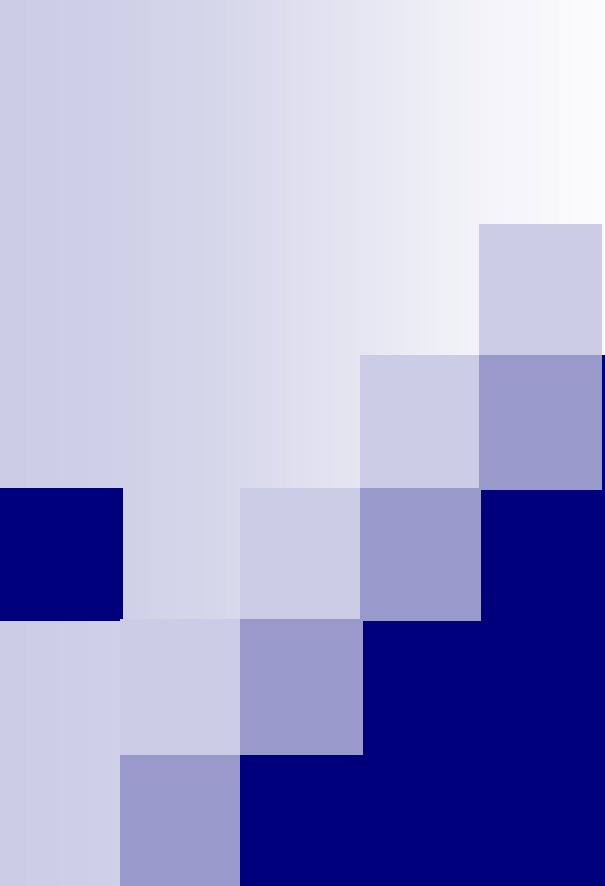


## *A Preponderance of the Evidence*

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 Petition, but the credible evidence says Petitioner's claims are more likely true than not.

# *Athlete Representation*

- Every LSC and every BOR hearing panel must include at least 20% athlete representation.
- If not, the hearing cannot go forward!  
No exceptions – this is required by the Amateur Sports Act (federal law).



*The Board of Review  
Written Decision*

# *Requirements for the Decision*

406.4.1E of the Rulebook provides that:

- The decision of the Board of Review may be rendered at the time of the hearing and, if not so rendered, as soon as possible thereafter and in no event more than fourteen (14) 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.)*

- The decision shall be in writing, or in case of a decision rendered at the hearing, reduced to writing promptly, and delivered to the Petitioner, each Respondent, their respective counsel, any other party to the proceeding, the LSC General Chair and Secretary, as well as USA-S National Headquarters (Christine Schemmel).

## *Requirements for the Decision (contd.)*

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



## *Stay Orders*

Both the LSC Board of Review and the National Board of Review have the power and discretion, but not the duty, to stay the Decision of the LSC Board of Review, in whole or in part, during the period within which an appeal may be filed. This can also be handled by simply making the penalty effective thirty (30) days after the Decision is entered.



# *Appeals to the NBR*

# *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.** This is a pretty high standard.

## *The Standard of Review on Appeal (contd.)*

- This standard of review recognizes that 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 National Board of Review 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.

## *The Standard of Review on Appeal (contd.)*

- In a *de novo* hearing, or any hearing where additional testimony or evidence is accepted, the National Board of Review has complete discretion to overturn, modify or affirm both the findings of fact and the conclusions of law of the LSC Board of Review. *De novo* hearings essentially start the hearing over.

# Question and Answer Period

