



ZONE BOARD OF REVIEW WORKSHOP

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Background



Why do we have Zone Boards 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. As of 1/1/2015, LSC BORs will be replaced by Zone BORs. See handouts ZBOR Policies and ZBOR Procedures.

What is a Zone Board of Review?

The Zone Board of Review is the *independent and impartial* “judiciary” for the Zone to hear and decide disputes, with the right to appeal to the National Board of Review.

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

- Procedural due process is required.
- Section 220522(a)(8) - before declaring any athlete, coach, trainer, manager, administrator, or official ineligible to participate, he/she must be provided a fair notice and an opportunity for a hearing.

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

Examples:

- Regular Zone BOR matters per Part Four of the Rules;
- Athlete does not behave on Zone or LSC trip and Zone or LSC wants to send athlete home.

What administrative and rule making powers does a Zone Board of Review have?

- administer and conduct the affairs and achieve the purposes of the ZBOR,
- establish additional policies & procedures not inconsistent with the Mandatory Procedures and Zone Policies for the ZBOR (e.g., create regional ZBORs),
- elect ZBOR Chair, Vice Chair(s), etc.

Administrative and rule making powers (cont'd)

Rule Making Powers -

The Zone 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 Zone Board of Review shall have the same force and effect as if they had been adopted as part of the Zone Bylaws.

What investigative and judicial powers does the Zone Board of Review have?

The Zone Board of Review may conduct hearings, make decisions and orders with regard to any matter effecting the Zone or its constituent LSCs, the status as or conduct of a LSC or the administration of the sport of swimming within the Zone boundaries *which involves the following:*

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

- Only member(s) of that Zone;
- Matters arising in LSC, regional or zone competition;
- Matters within **304.3.15 – 304.3.19** involving:
 - One or more member or participating non-member of the Zone; and
 - Not brought by USA Swimming.

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

- Violation of any team misconduct rule as established by the USOC, USA-S, any LSC, Zone or team authority;
- Any other act or omission not provided for in 304.3.1 through 304.3.14 of the Code of Conduct, **which is detrimental to the image or reputation of USA Swimming, a LSC, Zone or the sport of swimming.**

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

Exclusive Jurisdiction:

- any conflict that involves athletes or other USA-S members from different Zones;
- any conflict involving athletes or other USA-S members that occurs at a national or international event;
- any complaint brought under Code of Conduct Sections 304.3.1 through 304.3.14.

Note: Questions on whether issues within Zone BOR jurisdiction are resolved by the NBOR Chair (and are not appealable).

Discretionary Statute of Limitations:

The Board of Review need not [but may, if it so chooses] exercise its jurisdiction with respect to a Petition the subject matter of which occurred **more than 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 are **decided by a majority vote of the ZBOR hearing panel.**
- The views of any dissenters must 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 lies solely in its discretion and the interests of justice and the sport of swimming.

Exercise of authority (contd.)

ZBOR must exercise its power in response to a timely filed Petition, subject, in appropriate circumstances, to the power and discretion of the ZBOR Chair to dismiss a Petition with permission to refile for a stated period.

Exercise of authority (contd.)

- In connection with any preliminary investigation, the Chair may offer the services of a ZBOR member to act as a mediator or similar position under other alternative dispute resolution mechanisms.
- **Such a member must recuse himself/herself from the hearing panel.**

What types of penalties can the Zone Board of Review impose?

The ZBOR, 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;
- place the Respondent on probation for a definite period of time, meaning any further violation of any rule will be dealt with more severely;

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 Zone or any constituent LSC;
- vacate, modify, sustain, reverse, remand or stay any decision or order of an LSC House of Delegates, Board of Directors, Zone Director or any officer, or committee, or official of the Zone or 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, LSC or Zone Bylaws, other policies, rules, regulations and procedures of USA-S or the Zone, the Amateur Sports Act, and other applicable laws, rules and regulations; *and* adjudicate alleged inconsistencies and claims of supremacy and invalidity;

Types of penalties (contd.)

- deny, grant, suspend or restore the eligibility or right to compete of an Athlete Member of the Zone;
- deny, grant, suspend or restore membership in the Zone 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 Zone, 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 participating in any capacity whatsoever in the affairs of USA-S, the Zone, its LSCs, Group Members or other Zones and their LSCs and Group Members;
- assess any filing fee against the non-prevailing party or refund any filing fee paid by the prevailing party;
- or any other remedies deemed appropriate under the circumstances.

Pre-Hearing Matters



The Petition (406.1)

A request for a hearing is started by a written Petition submitted to the Zone Board of Review Chair (or a Zone Director) setting forth:

- a description of the action, inaction or conduct that is believed to have been improper or incorrect; and
- name of the person or group believed to have acted improperly or the circumstances believed to require answers, explanations or clarifications.
- include any filing fee required under Zone By-Laws.

Is Formality Needed?

“Last weekend, at the XYZ meet, my underage son was swimming for the JK Barracudas and Coach Bates of the ABC swim club solicited him without permission and I think he should be punished!”

- Description of the action?
- Name of person or group charged?



Review by BOR Chair -

- The ZBOR Chair can review a Petition and dismiss or suggest revisions;
- If Chair dismisses the Petition, it can be reviewed by a ZBOR panel.



The Notice of Hearing

Written notice must be given to each Respondent at his/her last known address (by express mail, Federal Express or personal delivery), as soon as practical but no later than 20 days after receipt by the ZBOR Chair. Sample Notice of Hearing is available as a hand-out.

The Notice (contd.)

- **406.4.1 requires the Notice to include:**
- a statement in reasonable detail of the charges;
- a statement of Respondent's right to counsel;
- a description of the type of hearing to be held (in-person, conference call, etc.); 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);

The Notice (contd.)

406.4.1 requires the Notice to include:

- a request for answer by Respondent, with directions as to whom and where the answer should be sent; and
- a statement of the right to appeal.



Respondent's Answer

Respondent must answer the charges in writing delivered to the ZBOR Chair at least **14 days** prior to the hearing, with a copy to the Petitioner(s), and counsel, and anyone else specified in the Notice.



Reply by Petitioner

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



Alternative dispute resolution

Mediation by the ZBOR Chair or designee (who will not be part of the ZBOR panel hearing the case) is sometimes helpful where the parties really just want a chance to be heard and understood by the other party, or when neither party is acting like a grown-up.

Alternative dispute resolution....

- In an emotional case, an informal conference with the parties may be productive.
- *Whatever else works and is fair to everyone involved.*
- Sometimes, parties just need someone to say: “How can we make this go away?”
- Don’t make the resolution more complicated than necessary.

Pre-Hearing Investigations and Fact-Finding:

No *ex parte* communications –

- BOR members and Petitioner and/or counsel;
- BOR members and Respondent and/or counsel;
- Copy everybody on everything.



Pre-Hearing Investigations and Fact-Finding:

BOR must be objective and unbiased:

- No independent fact-finding investigations;
- No independent visits;
- No independent witness interviews.

Pre-Hearing Investigations and Fact-Finding -

- The parties are masters of their own case (for better or worse);
- The parties need to marshal evidence to support their respective cases, including arranging for its witnesses;
- **The BOR is a hearing body, not an investigative body.**



Pre-Hearing Conferences with Panel Chair

- Very good for complicated cases and multiple party cases;
- Good for cases in which lawyers involved;
- Use to streamline the hearing by:
 - Framing the factual issues;
 - Framing the legal issues;
 - Resolving any “witness availability” issues;
 - Considering motions, if any.

Pre-Hearing Conferences (contd.)

For example, in a falsified times case, the factual issues might be . . .

- *Whether meet results for the Winter Invitational Meet, hosted by BC Club, were modified to reflect times for BC Club athletes that were faster than those actually achieved?*
- *Whether such modifications were made with the intent to defraud or deceive?*
- *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.)

If the hearing panel knows these are the questions that need be answered, a number of extraneous issues can likely be eliminated:

- The effect of these times;
- Who they involved;
- Other issues that could delay the actual fact-finding.

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). Encourage the avoidance of repetitive testimony from multiple witnesses.
- Have the parties exchange copies of any documents or other evidence they will use in advance of the hearing.
- Establish time constraints for each side to present their respective cases.

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.



Due Process Considerations



For the purposes of due process, what is USA Swimming?

- NGB under the Amateur Sports Act;
- A member of USOC; and
- A “Place of Public Accommodation” under the ADA.



What USA Swimming is not. . .

- USA Swimming is not a “state actor.” It does not operate under color of state or federal law.
- As a result, Constitutional Due Process is not required, just procedural due process.

The Bottom Line -

Even if USA-S is not a “state actor,” it is still subject to 36 U.S.C. 220529:

- (a) Party aggrieved by NGB decision “may obtain review” through arbitration;
- (b) “Final decision of the arbitrators is binding on the parties if the award is not inconsistent with the constitution and by-laws of the corporation.”

Basic Rudiments of Due Process -

- Were parties provided fair notice?
- Were parties given an opportunity to be present?
- Were parties present at hearing (was there an *ex parte* hearing)?
- Were parties permitted to present their case?
- Was there a decision on the merits?
- Was there good faith by decision maker?
- Is the judge also the prosecutor or linked so closely to the prosecutor that it appears so?



What are we balancing?

A strict adherence to traditional judicial standards of evidence is too arduous and might impair the efficiency of our process.

vs.

The procedure used cannot be a sham designed merely to give colorable propriety to an inadequate process.

What is Reasonable?

- Don't deny the right to a hearing before deciding a case.
- Allow parties the right to present their case:
 - Don't needlessly limit questioning (but reasonable limits are acceptable, and are common when it comes to limits on opening/closing statements;
 - Don't needlessly complicate the process;
 - Don't deny parties the right to have witnesses testify on relevant issues;
- Don't hesitate to change your mind.
- Get parties to agree that you have been fair.
- Ask - what else do the parties want to say?

Prepare and Distribute a Hearing Agenda

1. Call the 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 charges against Respondent as set forth in the Notice of Hearing or Petition).
2. Record appearances -
 - ZBOR panel members (20% athlete representation on panel required for a hearing)
 - Petitioner and counsel, if any
 - Respondent and counsel, if any
 - Witnesses and others present, if any (witnesses may only be allowed to participate in hearing only while they testify)

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
 - Opening statements are not required - in simple case, may just go into evidence;
 - Opening statements should be subject to a time limit, e.g., 5-10 minutes;

Hearing Agenda (contd.)

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

Hearing Agenda (contd.)

- After all of Petitioner's witnesses have testified, then Respondent calls its witnesses:
 - Respondent's direct examination
 - Petitioner's cross examination
 - Redirect examination by Respondent
- Rebuttal evidence, if any, by Petitioner

Hearing Agenda (contd.)

- Questions from ZBOR panel members are appropriate at any time 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 (not recorded)

Rules of Evidence – Article 406.4(d)(4)

- Direct Testimony;
- In addition -
 - Hearsay,
 - Letters,
 - Affidavits,
 - News media articles and reports, etc.
- As to each: Is Panel Chair satisfied as to the relevance and non-repetitive nature of the evidence?

Rules of Evidence (cont.)

- Claims of privilege will not be entertained by the ZBOR, except in extraordinary circumstances;
- But you must recognize:
 - attorney-client privilege;
 - other privileges under federal law – such as the privilege against self-incrimination;
 - other privileges under state law, such as husband/wife; religious person/parishioner.



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

- 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 ZBOR cases and most civil cases).



Preponderance of the Evidence means -

Based upon all of the credible evidence, the allegations are *more likely than not true*.

Athlete Representation



Athlete Representation -

- USA-S Rules and the Amateur Sports Act require that the ZBOR hearing panes have at least 20% athlete representation.
- The hearing may not start until the 20% athlete representation requirement has been met, i.e., the athlete is in attendance/participating.

Athlete Representation Required -

On appeal to the NBOR, the NBOR Chair will summarily vacate the ZBOR Decision if it is determined that the athlete representation requirement was not satisfied.

What constitutes an “athlete” for this purpose?

Under the Amateur Sports Act, the USOC makes 2 classifications of athletes:

- International athletes – (a) those who have represented the USA within the last 10 years in the Olympics, Pan American Games, an Olympic Gold event, or a World Championship recognized by FINA; or (b) those who, within 24 months of election finished in the top half of the NGB’s national championships or Olympic/PanPac Games team selection competition.
- Actively competing athletes – those who are currently actively engaged in athletic competition.

Definition of Athlete (cont.)

- Merely registering as an athlete member does not meet the test.
- Swimming a time trial does not constitute “actively engaged in athletic competition.”

This requirement is mandated by federal law and the Rules of the USOC and USA Swimming. *It is not optional!*

*The Zone Board of
Review Written
Decision*



Decision Requirements:

- May be rendered at the time of the hearing or subsequently; in either event it must be reduced to writing and delivered within 14 days of hearing.

Requirements for a Decision (cont.)

The decision must include:

- Findings of facts;
- A conclusion as to whether and what rule/code section was/was not violated;
- A statement of remedies ordered or penalties imposed; and
- A statement of the rights to appeal.

Requirements for the Decision (contd.)

- Make the punishment fit the crime.
- Be reasonable and fair!
- Assess filing fees rarely.

The Bottom Line:

- Your role is to impartially decide if Petitioner, by a preponderance of the evidence, proved that the allegations against Respondent are true;
- whether those facts constitute a violation of the USA Swimming Rules;
- You do *not* decide if the Respondent is a saint, jerk, good coach or bad coach;

Stay Orders (406.4.3)

The Zone Board of Review has the power and discretion, but not the duty, to stay the Decision of the ZBOR during the period within which an appeal may be filed.

Stay Orders (cont.)

- Don't make Stay Request overly formal;
- Have the requesting party contact the ZBOR Chair in writing;
- State factual reason for stay and any hardship that will result without stay.

Stay Orders (cont.)

- Make sure other parties know of request;
- Allow other side to file a written response to the stay request;
- Decide quickly.

Appeals to the
NBOR



Appeals from Zone Board of Review Decisions -

- Must be a real party in interest to appeal.
- May appeal any ZBOR decision to the NBOR.
 - File appeal with the Executive Director of USA-S within 30 days after the ZBOR Decision is entered.
 - Include filing fee of \$250.
 - Attach all available documentation.
- NBOR Chair has the authority to deny or reject an appeal he/she deems to be without merit.

Review on Appeal

NBOR can hear appeals in two ways:

- *De novo* hearing - a completely new hearing of the case;
 - This rarely occurs;
 - Would only take place if there was a major gaffe in the process below; or
 - If the hearing below involved a unique question of law, not fact.
- As an appeal based only on the record and briefs.

The Standard of Review on Appeal

When the NBOR hears an appeal:

- It is decided on the record below;
- Thus, NBOR looks at the documents/exhibits at the ZBOR hearing and the recorded testimony of witnesses;
- NBOR sits in panels of 3, which includes one athlete.

The Standard of Review on Appeal

As a result -

- The findings of fact of the ZBOR 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:

- ZBOR's presence during the presentation of testimonial & other evidence
- Provides unparalleled opportunity to determine the credibility of the witnesses and the weight to be afforded the evidence.

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 ZBOR, e.g., whether a set of facts constitutes a Code of Conduct violation or how to interpret the language of the Code of Conduct.

Further Review

- NBOR decisions can be appealed to National Board of Directors;
- NBOD has discretion to accept appeal;
- If appeal accepted, heard in panels of 5 Board members;
- Follows earlier rules.

Questions?

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