

WESTERN ZONE SWIMMING BOARD OF REVIEW HEARING PROCEDURE

**THIS MEMORANDUM IS MERELY A GUIDELINE AND IS NOT
INTENDED TO REPLACE OR SUPERSEDE THE PROVISIONS CONTAINED
IN PART FOUR OF THE USA SWIMMING RULES.**

The function of the Board of Review of The Western Zone Swimming (the "Board") is to determine whether there has been a violation of USA Swimming Rules (the "Rules") when a Protest has been filed alleging that there has been such a violation. This Memorandum sets forth generally the procedure that the Board and the Parties shall follow when there is an evidentiary hearing.

1. The threshold question is whether the Protest alleges that there has been a violation of the Rules. This preliminary determination is made by the Board before a hearing is scheduled with the Board assuming that everything alleged in the Protest is true. If the Board determines that the Protest does not concern an alleged violation of the Rules, then the Protest shall be dismissed without an evidentiary hearing. If the Board determines that the facts alleged in the Protest, if true, would be a violation of the Rules, then the Board shall determine whether it has original jurisdiction or whether the National Board of Review has original jurisdiction.
2. If the Board determines that the National Board of Review has original jurisdiction, the matter shall be immediately referred to the National Board of Review and the Board shall give the Parties written notice of the referral to the National Board of Review. If the Board determines that it has original jurisdiction, then the matter shall be scheduled for an evidentiary hearing.
3. At any hearing, it is the burden of the Complainant to go forward with evidence sufficient to support a decision by the Board that there has been a violation of the Rules. This can be done by documentary evidence, affidavit/declaration or direct evidence. This can consist of whatever evidence the Complainant submitted with the Protest and whatever additional evidence the Complainant or Respondent offers at the hearing, such as witness testimony.
4. It is possible that a Response will raise an issue whether the Complainant or some third person also violated the Rules. If so, the Board will have to decide whether all claimed Rule violations shall be determined at a single evidentiary hearing or whether the claims raised in the Response will be separated and decided as a separate Protest. If the claims concern only the Parties to the original Protest, it is probably best to determine them at one evidentiary hearing. If third parties are implicated in the Response, then the claims should probably be handled in separate and independent evidentiary hearings unless it appears that the same evidence will be used to determine all of the claimed violations of the Rules.

5. The standard of proof whether there has been a violation of the Rules is "**more likely than not.**" This is called a **preponderance of the evidence.** The Party with the burden of proof will prevail only if the Board determines from the evidence presented that it was **more likely than not** that there was a violation of the Rules. Please note that this standard of proof is less than "clearly convincing evidence" which is used in selected civil cases and less than "proof beyond a reasonable doubt" which is generally used in criminal cases.

6. The Party who is alleging that there has been a violation of the Rules has the burden of proof--that is, the burden of proving with evidence that it was "more likely than not" that the Rules were violated. Generally, the Complainant has the burden of proof. If new matters are raised by the Respondent, it will be necessary to consult with counsel to determine who has the burden of proof on any of the new matters.

7. If the Complainant presents evidence sufficient to support a finding that it was more likely than not that there was a violation of the Rules, then the burden of going forward with the evidence shifts to the Respondent to show that there has been no violation of the Rules. This can be done by evidence addressed to the substantive issue (was there a violation of the Rules) or evidence placing into question the evidence proffered by the Complainant. The Respondent can proffer such evidence by documentary evidence, affidavit/declaration or evidence at the hearing. Please note that the same process will be followed if the Response raises an issue of Rule violation and the Panel decides to consider all claims in a single evidentiary hearing.

8. The Board shall not pre-judge any of the contentions prior to the evidentiary hearing. Each member of the Board must keep an open mind.

9. Prior to the evidentiary hearing, the Parties should be advised in writing that:

- (a) It is their responsibility to determine what evidence they want to offer with respect to the issues raised in the Petition and Answer;
- (b) The standard for the burden of proof to establish that the Rules were violated is "**more likely than not**";
- (c) It is the responsibility of each Party to present whatever evidence they want the Board to consider;
- (d) Character evidence will be limited to issues of credibility which may include the motives of the Complainant and the Respondent; and
- (e) Character attacks will not be permitted.

10. The Board shall not advise either Party what evidence to proffer or whether evidence should be presented by documents, affidavit/declaration or live witnesses. Each Party will have to make that decision.

11. The Board shall advise the Parties in writing through a Notice of Hearing sent at least thirty (30) days before the evidentiary hearing:

- (a) the date, time and location of the evidentiary hearing;
- (b) the issue at the evidentiary hearing is whether there have been any violations of the Rules including

- (i) the designation of the persons or entities charged with violating the Rules,
 - (ii) the identification of the specific Rules in question,
 - (iii) the possible penalties if there has been a violation,
 - (iv) a violation of the Rules will only be found if the evidence is found by the Board to be "more likely than not" that there was a Rule violation, and
 - (v) the Board will consider all evidence presented at the evidentiary hearing which supports or rebuts the contention that there has been a violation of the Rules;
- (c) The Board will consider evidence in writing or in live testimony; and
 - (d) Written testimony will be given greater weight by the Board if it is submitted under penalty of perjury using the following language immediately before the signature--"I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct."
12. The Parties should also be advised in the Notice of Hearing that
- (a) the official record will be made by the Board, but there will be no transcript of the proceedings or the testimony unless either Party takes the steps necessary to provide a court reporter at the Party's sole expense;
 - (b) neither the Board nor Southern California Swimming will provide a court reporter or an attorney;
 - (c) any Party may use a court reporter at that Party's sole expense;
 - (d) any Party may elect to be represented by an attorney at that Party's sole expense; and
 - (e) the evidentiary hearing will not be continued simply because a Party decides that he/she wants to be represented by an attorney.