

UNITED STATES OLYMPIC COMMITTEE

JAMES SALISBURY,)	
)	
Complainant)	
)	DECISION
v.)	ON
)	MOTION TO DISMISS
US BOWLING CONGRESS, INC.,)	
)	
Respondent.)	June 12, 2018

I. THE PARTIES

1. James Salisbury (“Salisbury or Complainant”) is a member of US Bowling Congress, Inc. (“USBC or Respondent”).

2. USBC is the National Governing Body (“NGB”) for the sport of bowling in the United States, as recognized by the United States Olympic Committee (“USOC”) pursuant to the Ted Stevens Olympic and Amateur Sports Act (36 USC §§ 220501-220529) (the “Act”) and Section 8 of the USOC Bylaws.

3. Salisbury and USBC are collectively referred to as the “Parties”.

II. COMMENCEMENT OF PROCEEDING

4. Salisbury submitted a Complaint on March 20, 2018, and an Amended Complaint on March 22, 2018, against USBC pursuant to Section 220527 of the Ted Stevens Olympic and Amateur Sports Act (36 USC §§ 220501-220529) (the “Act”) and Section 10 of the USOC Bylaws.¹ The required filing fee was received on March 23, 2018.

¹ These complaints are commonly referred to as Section 10 Complaints.

5. Section 220527 of the Act and Section 10 of the USOC Bylaws collectively provide that a person who belongs to an NGB may seek to compel the NGB to comply with the requirements of Sections 220522 - 220525 of the Act and Section 8 of the USOC Bylaws. Those provisions set forth the obligations and requirements of an NGB.

III. HEARING PANEL COMPOSITION

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

- Bill Marolt, Hearing Panel Chair and USOC Board Member;
- Keith Bryant, Chief Executive Officer of USA Judo and Member of the National Governing Bodies Council ("NGBC"); and,
- Han Xiao, Table Tennis athlete and Chair of the USOC Athletes' Advisory Council ("AAC").

7. The Parties were notified of the Hearing Panel members by letter from Ms. Lyons on April 18, 2018.

8. The Hearing Panel members notified the Parties in an Order dated April 27, 2018, that they had no conflicts that would prevent them from rendering a fair and impartial decision on matters coming before them. The Parties were given until May 4, 2018, to object to the appointment of a Hearing Panel member.

9. No Party objected or raised any issue to the appointment of any member of the Hearing Panel. Accordingly, the Hearing Panel was seated without objection.

IV. LEGAL COUNSEL

10. Salisbury is represented by Edward G. Williams of the firm Stewart Occhipinti, LLP. USBC is represented by Scott C. Beightol, Thomas A. Janczewski and Alexander M. DeGuire of the firm Michael Best & Friedrich LLP.

V. REQUIRED SIGNATURE OF COMPLAINANT

11. In its Order of April 27, 2018, the Hearing Panel noted that Salisbury had not signed the Complaint, as required by Section 10.2 of the USOC Bylaws. Salisbury was given until May 4, 2018, to sign and submit a declaration to the Hearing Panel that he had reviewed the Complaint and was filing it as his own.

12. On May 2, 2018, Salisbury submitted a signed declaration as requested.

VI. THE COMPLAINT

13. The Complaint alleges that USBC is not fulfilling its requirements as an NGB in four areas.

- a) USBC is not “free from outside restraint” in violation of Section 220522(a)(5) of the Act, in that the Bowling Proprietors’ Association of America has undue influence over USBC.
- b) USBC is not operationally transparent in violation of Section 8.7(n) of the USOC Bylaws, in that USBC (i) did not disclose it was moving its headquarters to Texas, (ii) does not publish its Board minutes, (iii) did not keep its members informed of the Section 10 case filed by Hightower, Hall and Digsby against USBC and (iv) does not publish a list of suspended members.
- c) USBC does not fulfill its responsibilities as an NGB in violation of Section 8.7(a) of the USOC Bylaws as it fails to comply with the requirements of Sections 220522(a)8 and 220522(a)(13) of the Act.
- d) USBC fails to fulfill its athlete safety obligations in violation of the USOC NGB Athlete Safety Policy in that it does not define “athlete” consistent with the definition of athlete in the Act.

14. USBC denies each of these claims, stating that they “are based upon misconceptions or misunderstandings of USBC’s bylaws and policies, or of the underlying facts”.²

15. In response to the four claims in turn, USBC states:

- a) USBC’s “bylaws codify conflict of interest principles in order to prevent any undue outside influence” and that the Bowling Proprietors’ Association has no unilateral ability to run or dictate USBC’s affairs.
- b) USBC either “discloses the information” Salisbury seeks or there “is no requirement to disclose” such information.
- c) USBC has adopted new grievance procedures that comply with Sections 220528(a)(8) and 220522(a)(13) of the Act.
- d) USBC has adopted an Athlete Safety Policy that has been approved by the USOC” and that Salisbury “is simply unaware of USBC’s current policies and bylaws” dealing with athlete safety.

16. Since these allegations and denials go to the merits of the Complaint and this Decision addresses the Motion to Dismiss, the Hearing Panel makes no determination as to the merits.

VII. MOTION TO DISMISS

A. Grounds for Dismissal

17. On April 23, 2018, USBC filed a Motion to Dismiss the Complaint. The Motion is based on two grounds.

18. The first ground is that the Complaint is premature as Salisbury has not exhausted his administrative remedies as is required by Section 220527(b)(1) of the Act and Section 10.11 of the USOC Bylaws.

19. The second ground is that the Complaint fails to state a claim as required by Section 10.12 of the USOC Bylaws.

² USBC responded to Salisbury’s allegations in its Motion to Dismiss.

B. Scheduling of Briefing and Argument on Motion to Dismiss

20. The Hearing Panel set a briefing schedule and hearing date on the Motion to Dismiss.

21. In accordance with the briefing schedule, Salisbury filed an opposition to the Motion to Dismiss on May 11, 2018. USBC filed its reply to Salisbury's opposition on May 18, 2018.

22. The Hearing Panel held oral argument on the Motion to Dismiss on May 22, 2018. Argument was held via conference call. Scott C. Beightol and Thomas A. Janczewski appeared and presented argument on behalf of USBC. Additionally, Chad Murphy, USBC Executive Director, Jason Overstreet USBC Deputy Executive Director and Mike Spridco, USBC Senior Director of Rules and Bonding were present on the call. Edward G. Williams appeared and presented argument on behalf of Salisbury. In addition to the Hearing Panel, Gary L. Johansen, USOC Associate General Counsel and legal counsel to the Hearing Panel, Lucy Denley USOC Senior Paralegal and liaison to the Hearing Panel, Sara Pflipsen USOC Associate Ombudsperson and Emily Azevedo USOC Ombudsperson Legal Intern were present on the call.

23. In consideration of the Motion to Dismiss, the Hearing Panel reviewed the Complaint and all 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.

VIII. RULING

24. It is the determination of the Hearing Panel that USBC's Motion to Dismiss is granted. In making this determination, the Hearing Panel finds that Salisbury failed to exhaust his administrative remedies with USBC and failed to prove by clear and convincing evidence that exhaustion of those remedies would cause unnecessary delay.

Since dismissal is based on this ground, the Hearing Panel makes no ruling on USBC's contention that Salisbury has failed to state a claim.

25. All members of the Hearing Panel reviewed and approved this written Decision and agreed with the finding.

IX. ANALYSIS

A. Factual and Background Information Related to Exhaustion Requirement

26. In order to fully understand the arguments presented relating to the requirement to exhaust administrative remedies a brief recitation of facts and background information on a previous Section 10 Complaint against USBC will be helpful.

27. In the earlier Section 10 proceeding, *Hightower v. USBC*, the hearing panel found that USBC's grievance process was lacking in two regards. The hearing panel found that in all cases USBC (i) did not provide "fair notice and an opportunity for a hearing" in violation of Section 220522(a)(8) of the Act and (ii) did not provide for the "prompt and equitable resolution of grievances of its members" in violation of Section 220522(a)(13) of the Act. *Hightower v. USBC*, Report, Decision and Recommendation (June 8, 2017) (Bill Marolt, Glen Schorr and Han Xiao, Pnl. Mbrs.).

28. Specifically relating to Section 220522(a)(13), the *Hightower* hearing panel found that USBC's grievance process was inadequate for administering and hearing member complaints against USBC that alleged that USBC was not fulfilling its NGB requirements.

29. As a result of the finding in *Hightower*, USBC was placed on probation by the USOC Board of Directors on June 20, 2017. During the probationary period, USBC worked on revising its grievance process.

30. On April 9, 2018, USBC notified the *Hightower* hearing panel that it had approved revamped grievance procedures, which would go into effect on April 30, 2018, following USBC's Annual Meeting.

31. The revamped grievance procedures were accepted by the hearing panel and as a result, on April 18, 2018, the USOC Board of Directors lifted USBC's probationary status, contingent upon USBC's implementation of the revamped procedures on April 30, 2018, which USBC fulfilled.

32. As stated previously, Salisbury submitted his Complaint on March 20, 2018, submitted an Amended Complaint on March 22, 2018, and then submitted his required filing fee on March 23, 2018. However, Salisbury never signed the Complaint. By order of the Hearing Panel, Salisbury was given until May 4, 2018, to sign and submit a declaration that he had reviewed the Complaint and was filing it as his own. Salisbury submitted the declaration on May 2, 2018.

B. Failure to Exhaust Administrative Remedies

33. In considering the exhaustion requirement, the Hearing Panel considered three issues. First, did USBC have an administrative grievance procedure available to its members for seeking to compel USBC to comply with its obligations under the Act and USOC Bylaws.³ Second, did Salisbury exhaust his internal remedies pursuant to USBC's administrative grievance procedure. Third, if Salisbury did not exhaust his internal remedies, was he excused from exhausting them

³ Section 220522(a)(13) of the Act requires that an NGB have a procedure for the prompt and equitable resolution of grievances of its members. Without such a procedure, a member would not be able to fulfill the exhaustion requirement of Section 220527(b) of the Act and Section 10.11 of the USOC Bylaws. *Hightower* at Para 74; *Glefke v. US Equestrian Federation*, Decision On Motion to Dismiss, Para. 31 (August 1, 2017) (Jim Benson, Rich Bender and Emily Azevedo, Pnl. Mbrs.).

34. As to the first issue, Salisbury argues that at the time he filed his Complaint in March 2018, USBC had no internal grievance procedures. Salisbury states that “since USBC has no grievance procedure for members to grieve against USBC, [Salisbury] is unable to even begin to exhaust remedies within USBC, let alone satisfy them, because there are none”.

35. In making this claim Salisbury relies on the decision in *Hightower*.

36. In particular, pursuant to the *Hightower* decision, revised grievance procedures were not implemented until April 30, 2018. Salisbury submitted his Section 10 Complaint prior to April 30, 2018. Salisbury relies on the fact that since USBC did not have revised grievance procedures implemented at the time of his initial submission, no procedures could be presumed to be available to him.

37. USBC responds that Salisbury’s presumption is inaccurate because after the *Hightower* decision it implemented interim procedures that were in place by the fall of 2017. Thus, Salisbury could have filed his grievance with USBC and it would have been heard.

38. USBC states:

While USBC and USOC were working toward a final version of the new Bylaws and policies, USBC provided all USBC member claimants an “in person” hearing before a three member (including at least one athlete member) USBC hearing panel. At these hearings, claimants were afforded the opportunity to present evidence and witnesses, cross-examine opposing witnesses, and present legal arguments.

39. Salisbury counters stating that despite his belief that no grievance procedures existed, he still made an effort to confirm such. Salisbury states that his attorney, Mr. Williams, who also represented the complainants in *Hightower*, reached out to USBC regarding its administrative procedures. Salisbury states that Mr. Williams’ “[i]nquiries were either ignored or, if acknowledged, no substantive response was made”.

40. During argument on the Motion to Dismiss the Hearing Panel made further inquiry regarding Salisbury's attempt to have his grievance heard. The Hearing Panel questioned Mr. Williams on whether Salisbury ever directly asked USBC about filing a grievance or, if filed, what grievance process would be utilized to hear Salisbury's claims.

41. Mr. Williams reiterated that he had made inquiries to USBC regarding whether USBC had adopted new grievance procedures resulting from the *Hightower* decision. Mr. Williams restated that his inquiries were left unanswered.

42. Counsel for USBC responded that at no time did Mr. Williams ever indicate that he was representing Salisbury or that Salisbury wished to file a grievance with USBC. Given that Williams had represented the complainants in the *Hightower* matter, counsel for USBC presumed that his inquiries were related to that matter. Had Williams indicated that he wanted to file a grievance on behalf of Salisbury, counsel for USBC stated that USBC would have obliged his request. USBC repeated that it had interim grievance procedures in place since the fall of 2017 and that those procedures had been utilized in other grievance matters.

43. USBC reiterated the statement made in its brief:

To be clear, however, at no point prior to filing his complaint with the USOC did Salisbury or his counsel ever contact USBC with regards to this dispute or Salisbury's allegations. Rather, Salisbury's counsel sought updates on the Hightower case. Salisbury made no attempt to present his grievance to USBC.

44. USBC's brief went on to state, "[h]ad he done so, USBC would have given him a full in person hearing on the issues". USBC argues that not only did it have procedures, but also that Salisbury made no attempt to have the Salisbury grievance heard. USBC made the point that inquiring about administrative procedures under the

guise of a previous complaint provided no notice to USBC that Salisbury sought to have his grievance heard by USBC pursuant to those procedures.

45. When asked about this during the hearing, Williams responded that he was under no obligation to disclose that he was representing Salisbury when making his inquiries.⁴

46. After considering the representations made by USBC, the Hearing Panel is convinced that USBC had an interim grievance process in place for administering grievances.

47. It is also clear to the Hearing Panel that Salisbury never attempted to file a grievance with USBC or even inquire about what process would be used if Salisbury filed a grievance. He may have made general inquiries about whether USBC had formally revised its grievance process as a result of the *Hightower* case, but that is all.

48. A grievant must make some showing that an attempt to have the matter heard was made. It is not enough just to claim that no grievance process exists. *Fogarty v. USA Badminton*, Decision, Para. 58 (April 28, 2008) (Mary McCagg, Robert P. Latham, Max Cobb, Debbie Hesse and Courtney Johnson, Pnl. Mbrs.) (finding that where a complainant fails to refile his complaint and correct deficiencies when afforded an opportunity to do so, the complainant “cannot use his own failure to act as a means to subvert the exhaustion requirement”); *Smith v. USA National Karate-Do Federation*, Decision, Pages 5-6 (November 10, 2003) (James McCarthy, Chuck Milam, Robert Mitchell, Bonny Warner and Nancy Wightman, Pnl. Mbrs.) (stating that complainant was

⁴ The Hearing Panel is puzzled by this response. If Mr. Williams intended to file a grievance upon behalf of Salisbury, there is no reason why he would not have informed USBC of his representation of Salisbury and his intention to have the grievance heard. Williams never provided a motive for keeping USBC in the dark about Salisbury’s grievance.

not excused from exhausting his administrative remedies when he did not inquire about his internal appeal rights pursuant to the grievance process, but instead filed a complaint with the USOC); *Brown v. US Tennis Association*, Decision on Motion to Dismiss, Para. 19 (April 18, 2013) (Robert Bach, Jim Tooley and Jessica Galli, Pnl. Mbrs.) (holding that “email correspondence complaining about an NGB’s actions does not constitute filing a grievance” nor “does it substitute for actually pursuing the grievance process pursuant to an NGB’s procedures”); *Farry v. USRowing*, Decision, Page 18 (June 29, 2007) (James McCarthy, Ron Radigonda, Virginia Jasontek, Robert Latham and Courtney Johnson, Pnl. Mbrs.) (commenting that as a matter of sound policy, the administrative process would have been better served had complainant “filed a grievance...rather than bypassing this process” and filing a complaint directly with the USOC).

49. The Hearing Panel finds that USBC did have an interim grievance process in place and concludes that, had Salisbury filed his grievance, USBC would have sent his grievance to a hearing panel for adjudication.

50. A second issue was raised by the Parties relating to when the complaint was effectively filed and when USBC’s revamped grievance procedures were formally implemented.

51. USBC contends that Salisbury’s Section 10 submission in March was ineffective and could not be considered properly filed, as it was unsigned. USBC states that the declaration submitted by Salisbury cannot resurrect his improper filing and make it retroactively filed effective March 2017. Thus, USBC asserts that Salisbury’s Section 10 Complaint could only be considered “filed” on May 2, 2018, the time Salisbury submitted his declaration. At that time USBC’s revamped grievance procedures were officially in place, having been implemented on April 30, 2018. USBC’s position is that

Salisbury cannot claim that it had no grievance procedures, because when the Complaint was filed, procedures were formally in place.

52. Salisbury counters by stating that his Complaint should be effective when first submitted in March 2017, as his declaration confirmed his intent to file at that time.

53. Since the Hearing Panel found that there was a grievance process available to Salisbury, there is no need to discuss the timing issue surrounding the submission of Salisbury's Section 10 Complaint in March 2018, Salisbury's declaration on May 2, 2018, and the implementation of USBC's revised grievance procedures on April 30, 2018.

54. The second question, whether Salisbury exhausted his internal remedies pursuant to USBC's administrative grievance procedure was answered in the discussion above. Although Salisbury may have made some generalized inquiries about USBC's grievance process, he did not file or attempt to file a grievance with USBC.

55. The final question is whether Salisbury is excused from exhausting his administrative remedies because to do so would cause unreasonable delay.

56. Salisbury states:

In any event, in view of USBC's now well - demonstrated and documented unwillingness to comply with mandates from the US Olympic Committee, any perceived requirement to file a Grievance with USBC prior to filing this instant Section 10 Complaint should be excused, in accordance with Section 10.11 of the USOC bylaws, as being futile, and that the filing of such Grievance would result in unnecessary delay.

57. Of course, USBC disagrees. USBC states that "[i]t did not wait until final approval of its new Bylaws, however, to begin to implement interim procedures to address the spirit of the prior hearing panel's ruling" in the *Hightower* case.

58. Salisbury provides no basis, other than the statement made above, to support his assertion that requiring him to exhaust his administrative remedies would be futile or would result in unnecessary delay.

59. Accordingly, the Hearing Panel finds that Salisbury provided no justifiable reason for not exhausting his administrative remedies. Requiring Salisbury to do so would not result in unnecessary delay.

60. The exhaustion requirement serves important policy objectives. Internal filing of grievances (1) “grants an NGB proper notice of the relevant allegations”, (2) provides “an important forum to have those allegations fleshed out and heard”, and (3) “affords an NGB the opportunity to properly review its actions and resolve or correct those actions as needed”. *Glefke* at Para 43; *accord Leach* at Para 47-48; *Brown* at Para. 34; *Farry* at Page 18. Further, it may minimize the necessity for intervention by the USOC. *Farry* at Page 18.

61. Thus, USBC’s Motion to Dismiss is granted for Salisbury’s failure to exhaust his administrative remedies as is required by Section 220527(b) of the Act and Section 10.11 of the USOC Bylaws.

62. In light of the Hearing Panels determination that Salisbury must first exhaust his administrative procedures prior to filing a Section 10 Complaint, and considering the history surrounding USBC’s grievance procedures, as discussed in *Hightower*, the Hearing Panel wants to stress the following: 1) Salisbury should file his grievance with USBC promptly, if it is his determination to proceed with this matter, 2) USBC should not retaliate against Salisbury for bringing his grievance, 3) USBC should administer the grievance in accordance with its newly established grievance procedures, 4) the grievance should be heard timely and 5) the hearing should be fair and non-biased.

C. Failure to State a Claim

63. In light of the Hearing Panel's determination to grant USBC's Motion to Dismiss for Salisbury's failure to exhaust his administrative remedies, it is not necessary for the Hearing Panel to address USBC's contention that the Complaint fails to state a claim.

X. ORDER

64. It is so ordered.

Dated this 12th day of June 2018.


Bill Marolt, Chair

Keith Bryant, Panel Member
Han Xiao, Panel Member