

DISPUTE RESOLUTION POLICIES & PROCEDURES

# Complaints and Appeals Supplement



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## DISPUTE RESOLUTION POLICIES & PROCEDURES

# COMPLAINTS AND APPEALS SUPPLEMENT

Sask Sport Inc., in conjunction with the Sport Law & Strategy Group, have developed a comprehensive set of guiding policy templates and supporting resources to assist member organizations with managing complaints and disputes when they may arise. As one of these resources, this *Complaints and Appeals Supplement* is intended to provide relevant information to Sask Sport members that may or will be entering into a formal dispute process. Information in this supplement is intended to compliment the processes recommended through the “Discipline and Complaints Policy” and “Appeals Policy” templates and associated flowcharts provided.

Within this supplement, organizations will find information about managing disputes and other useful techniques for conducting internal hearings. In a perfect world, all disputes could be dealt with internally using the policies of the organization and the skills and resources of the organization’s volunteers and staff. However, there are many dispute situations that are best approached using outside resources. This may mean contracting out the administration of the hearing to an independent group, bringing in an independent person to chair a hearing panel, consulting with an outside person who can analyze and clarify a dispute, or using the services of an independent, skilled investigator. The moderate cost involved in tapping into the expertise of independent outsiders will prove to be, in almost all cases, an excellent investment.

*Disclaimer – The information in this supplement is intended as general legal information only and should not form the basis of legal advice or opinion of any kind. Readers seeking legal advice should consult with a lawyer.*

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### **What Governs the PSGB or District (Active and Affiliate Member Organizations of Sask Sport)**

The PSGB or District is a Non-Profit *Membership Organization* – it is an autonomous, self-governing, private organization that has the power to write rules, make decisions and take actions that affect its members, registrants, participants and constituents. The *Non-Profit Corporations Act* of Saskatchewan applies to incorporated entities and a body of law called *administrative law* prescribes the rules by which Non-Profit Membership Organizations must operate in Canadian society and allows for remedies when these rules are not followed and someone is harmed as a result.

To understand a PSGB’s and District’s legal duties and obligations one must understand two important principles that apply to Non Profit *Membership Organization* – the first is the notion of *contract* and the second is the notion of *natural justice*, now almost synonymous in Canada with *procedural fairness*.

#### **Contract**

As a Non Profit *Membership Organization*, the PSGB or District is self-governing and derives its authority from its constitution, bylaws, policies, procedures and rules. Taken together, these are the “governing documents” of the organization and form a contract between the organization and its members. This contract provides the organization with the legal authority to establish the rights, privileges and obligations of membership. As in any contract, the parties to the contract are expected to adhere to its terms and provisions and failure to do so may result in a breach of the contract.

#### **Procedural fairness**

The second fundamental legal principle is that Non Profit *Membership Organizations* are subject to the rules of procedural fairness. In other words, the PSGB or District must be fair in how it exercises its powers and makes decisions. Being fair in organizational decision-making means meeting, at a minimum, these four requirements:

1. The PSGB or District must have clearly documented Dispute and Complaints procedures (ie. processes and policies) that are accessible and readily available for the organization's members to review;
2. Authority to make the decision must be properly vested in the decision-maker (ie. Discipline Panel or Appeals Panel) by the PSGB or District organization;
3. The decision-maker (ie. Panel) has a duty to give persons affected by the decision a reasonable opportunity to know the case against them and present their case (commonly referred to as *right to a hearing*); and
4. The decision-maker (ie. Panel) has a duty to listen fairly to both sides and to reach a decision untainted by bias (commonly referred to as *rule against bias*).

### **Right to a hearing**

Before the PSGB or District can make a decision that adversely affects an individual, that individual has a right to know the case against them and to be given a reasonable opportunity to respond on their own behalf. There are two obvious purposes for this rule. Firstly, the person affected by the decision has an opportunity to defend their interests or to assert a claim. Secondly, the act of allowing the individual to provide information will allow the decision-maker to make a better-informed decision because he or she will have heard both sides of the dispute.

### **Managing the hearing**

Preparing for and administering a hearing can be extremely time-consuming as well as emotionally draining. In nearly all cases heard within the PSGB/District, the Panel Member(s) will be volunteers and will not have the resources or time to take care of administrative details of the hearing themselves. As such, the PSGB or District should appoint or secure the services of a Case Manager\*\* to ensure that communication with the parties is consistent and timely, that hearing rooms are booked, conference calls are organized, documents are circulated and the instructions of the Panel are carried out quickly and accurately.

It is imperative that the Case Manager be very careful to act in an absolutely neutral and transparent fashion. Communication with the Panel should be limited to administrative issues relating to the hearing and any and all communication should be copied to, or include the other parties. The person administering the hearing, usually the Case Manager, may well be perceived as being biased and must walk a very fine line to convey the perception that he or she is neutral and detached.

\*\*Case Managers may be sourced from third-party organizations that specialize in Dispute Management, or individuals with experience and knowledge of Dispute Resolution procedures and may come from within the organization.

### **Alternative Dispute Resolution**

More frequently, techniques of alternative dispute resolution are being used in the sport setting when disputes and complaints arise. These are some common dispute resolution techniques:

*Facilitation* – a process where an outside person works with and advises both parties and brokers a mutually agreeable solution between them; and

*Mediation* – a slightly more formal process than facilitation where an outside person brings the parties in a dispute together to understand and resolve their differences and find a mutually agreeable solution;

At any time in the dispute management process, either of these options for ‘Alternate Dispute Resolution’ might present themselves as being appropriate. The appointed Case Manager should offer this alternate process to the parties involved AND if all parties agree, the Case Manager can step steps to engage a Facilitator or Mediator to lead the process.

### **Format of the hearing**

Most of us think that the term *hearing* refers to a face-to-face gathering of the parties before a Panel. In fact, the term hearing simply refers to a mechanism by which an individual may be heard: that is, may respond to the matter at hand.

A hearing in the legal sense can occur in many different ways. These include interactions in person, on the telephone, by video conference, or through the exchange of written documents or interactions through a combination of these methods. The appropriate format for any hearing will depend on the nature and seriousness of the case in conjunction with the PSGB Discipline and Complaints Policy.

### **The Panel**

As noted in the PSGB Discipline and Complaints Policy, there are two manners to decide an issue, via single Panel or in rare cases a Panel of three individuals with an appointed chairperson.

#### *The Role of Chairperson*

A Panel of a hearing will only be effective if the Panel, in the case of a single decision-maker, or the Chairperson, in the case of a three-person Panel, is effective. A good Panel has the respect of the parties and can control procedures with a firm but fair hand. Ideally, the Panel knows legal procedures and will be adept at handling complex or aggressive arguments. In terms of personal attributes, the Panel should be perceived as being credible, unbiased, independent and fair.

#### *Independence of the Panel*

The independence of the Panel refers to the extent to which each decision-maker is free to make his or her own decision – free from the influence of other decision-makers, from outside third parties or from the influence of those who may have appointed them to the Panel. Panel members should be sufficiently independent of those who appoint them that they are free to make decisions without interference or repercussions.

#### *Bias of the Panel*

Bias refers to a decision-maker’s state of mind and reflects a lack of neutrality. Actual bias is extremely difficult to prove - however, one may have a “reasonable apprehension” that a decision-maker is biased and this may be sufficient to disqualify the decision-maker. A reasonable apprehension of bias exists where “a reasonable person, knowing the facts concerning the decision-maker, would suspect that the decision-maker may be influenced, albeit unintentionally, by improper considerations to favor one side in the matter he or she is to decide”.

Sometimes bias is alleged because the Panel member is too informed or knows too much. An informed decision-maker is always a good addition, provided the decision-maker has an open mind and is open to persuasion through the hearing process, which may not always involve an in-person hearing, but rather teleconference call or document review.

*Relationships and elements that may result in bias or a reasonable apprehension of bias can be grouped into six broad categories:*

*Personal relational bias*

*This includes personal relationships that might suggest favoritism such as friendship, kinship or a coach-athlete relationship. It also includes personal relationships that might invoke animosity or prejudice such as personality conflicts, a history of strained relations or involvement in a previous dispute.*

*Non-personal relational bias*

*This category of bias relates to a commercial or business relationship between a decision-maker and a party that might result in bias either in favor of or against a party. This might include an employee-employer relationship, competitors, or even one party's membership in a particular organization or interest group.*

*Informational bias*

*This category involves situations in which the allegation of bias is made because a decision-maker learns details about a person or a relevant issue as a result of some prior involvement, perhaps through a previous dispute or hearing. This typically arises where a decision-maker has participated in an earlier hearing that involved the same person or same issues.*

*Attitudinal bias*

*This category of bias relates to whether a view or a position taken by a decision-maker in the past, although not specifically directed to the matter under consideration, suggests a predisposition on the part of the decision-maker towards one side or the other. This is a tricky issue. Having an open mind does not mean having a blank or void mind! Decision-making bodies may, and often do, take positions and make general statements about issues, but they cannot be so entrenched in a position so as to have a "closed mind".*

*Institutional bias*

*This category of bias refers to the manner in which the organizational structure of an organization creates or builds in a bias or apprehension of bias. A classic case of such bias arises where a Board of Directors is authorized to make a certain decision and any appeal of such a decision is to be heard by the Executive Committee. In most sport organizations, the Executive is a sub-group of the Board and thus is in the position of hearing an appeal from its own decision.*

*Operational bias*

*This category of bias arises from the manner in which a hearing is conducted. More specifically, operational bias may be alleged where the procedure adopted by the decision-maker has created a situation of unfairness for one of the parties. Operational bias may also be alleged where the decision-maker becomes so involved that he or she appears to be an advocate for one side or another. Similarly, operational bias may be alleged where a decision-maker is overly adversarial during the conduct of the hearing.*

Disqualifying a Panel member for bias is more complicated than simply asserting that bias exists. The test for bias is an objective test and the party alleging bias must meet this test. While a previous or existing association, friendship, business relationship or family relationship might be perceived as biasing a decision-maker, it is important to note that it is not the relationship itself that creates the bias, or the apprehension of bias, but rather the extent to which the relationship influences or is perceived to influence the decision-maker.

*What to do when bias is alleged*

If one of the parties makes an allegation of bias, it is the Panel itself that makes a ruling on the allegation, based on the objective test described above. If the Panel finds no bias, the hearing may continue. If the Panel determines bias, then that person should withdraw.

In the event that a Panel member removes themselves because of bias, the Case Manager will appoint a new Panel member to hear the matter. In the case of a three person Panel, the parties can consent to continue the process with two decision-makers or request that the Case Manager appoint a third member of the Panel.

Allegations of bias should be addressed right at the beginning of a hearing. It is common practice for the Panel to pose the question of bias as a preliminary matter by ensuring that the parties have no objections about the constitution of the Panel. The only time a Panel should consider an allegation of bias later on in the hearing is if new information has come to light during the course of the hearing that might suggest a perception of bias.

Sometimes a party will allege bias after the hearing is over, particularly when the Panel decides against them. The Panel should not consider such claims: if there is a legitimate issue of bias, then it can be addressed through the next level of review and decision-making or through appeal or judicial review. Likewise, if a party alleges bias and the Panel rules that bias does not exist yet the party maintains its position that there is bias, the hearing should proceed and the party should challenge the Panel's ruling through the appropriate channel – typically an appeal or judicial review.

### **Guidelines for avoiding bias**

*Here are some useful guidelines for Panel members wishing to avoid bias:*

*Panel members should not prejudge a case. In other words, they should not have made up their minds so strongly in advance that they cannot be swayed or influenced to decide another way as a result of information that comes forward at a hearing. This does not mean Panel members should not hold opinions going into a hearing. However, all Panel members are expected to listen to and consider all the evidence presented at the hearing and to base their decision upon that evidence – and only that evidence.*

*Panel members should never meet with or communicate with one party in the absence of the other party, nor should a Panel ever hold private interviews with witnesses. This will always raise a reasonable apprehension of bias and is absolute grounds for a successful appeal of the Panel's decision.*

*Once a hearing has concluded but the decision has not yet been rendered, Panel members should not have any contact with the parties, particular when one of the parties is trying to provide the Panel members with more information. Considering such information will automatically make the Panel members biased. If there is a clear need to bring more evidence before the Panel, the hearing should be reconvened and the party seeking to introduce new evidence should make this request of the Panel, in the presence of the other party.*

*A Panel should never ask one of the parties to write its decision. This frequently happens when the hearing is an internal administrative hearing and the organization is a respondent. The Panel members, who are typically volunteers, may ask the staff of the organization to write their decision. This raises a reasonable apprehension of bias and should be avoided. In all cases, the Panel write its own decision, and in the case of a three person Panel, to delegate to one of its members, the task of preparing a draft decision for review and ultimate acceptance by all Panel Members.*

*Panel members must conduct themselves calmly and professionally in a hearing. Sometimes a decision-maker may make a blatant statement that suggests bias or prejudgment. Panel members must avoid flippant, derogatory or demeaning remarks about the parties or witnesses. They must not appear to be hostile, antagonistic, sexist or discriminatory.*

*Finally, while it might seem obvious, Panel members should not socialize with either party during the course of a hearing. The other party might reasonably assume that information relevant to the matter in dispute will be discussed while socializing.*

### **Identifying the issues**

#### *Know where you are going*

A Panel member cannot do its job if it doesn't know the purpose of the hearing. A critical task for every Panel before it starts a hearing is to agree on what needs to be decided and to confirm that the Panel has the jurisdiction and authority to make such decisions.

The Panel must have a clear sense of direction and purpose when approaching a hearing. In fact, all the parties should share the same sense of purpose and direction. This can only be achieved if everyone knows and agrees upon what the issue or issues are. The importance of this task should never be underestimated and if issues aren't clear at the outset, the hearing process simply will not work.

Clearly identifying the issues that are to be put before a Panel will help the Panel determine what information is relevant to the hearing and what information is not. The Panel must not consider irrelevant information. In practice, distinguishing between relevant and irrelevant information can be difficult. The Panel must walk a very fine line between focusing on information that is relevant to the issues to be decided and allowing the individual who is the subject of the hearing to make a full and complete case and, just as significantly, to *feel* that they have had every opportunity to make their case.

Identifying the issues that are in dispute in advance of the hearing will help to focus the agenda for the hearing. As well, in the process of identifying issues, certain procedural issues may emerge that need to be dealt with as preliminary matters before the hearing can even begin.

#### ***Some benefits of clearly articulated issues***

*The exercise of clarifying issues will help the Panel decide the best format for the hearing. For example, if the issues are purely factual or technical, a documentary hearing may be appropriate. If there is a dispute about factual events and credibility becomes a factor, then an in-person hearing may be the best.*

*In the course of identifying and confirming issues, it may become apparent that other dispute management techniques could work. For example, negotiation or mediation may present themselves as appropriate alternatives and the dispute may never have to go to a hearing.*

*Defining issues will help the Panel and the parties identify relevant witnesses and documents to be placed before the Panel. Often, by making the issues clear the Panel will be able to limit the number of witnesses or documents to those pertinent to these issues, thus keeping the hearing simpler, shorter and less costly.*

*Lastly, knowing the issues will help the Panel determine appropriate timelines for carrying out the hearing and rendering a decision.*

### **Starting the hearing**

When an oral hearing is ready to start there are a few items the Panel should first cover:

- Introduce the general nature of the hearing;
- Introduce the Panel or the members of the Panel and confirm that the parties have no objection on the basis of bias or conflict of interest;
- Outline and confirm the issues in dispute and to be decided by the Panel;
- Outline and confirm the facts on which the parties are in agreement;
- Identify the applicable policies of the organization that govern the issue or issues before the Panel and ensure that the parties have these policy documents before them;
- Confirm the remedies that the parties are seeking – in other words, clarifying what it is that each party is asking the Panel to decide; and

- Outline and confirm the order of presentation and the process to be used (see further information below).

### **Controlling the hearing**

#### *Keep the Hearing Moving*

The Panel must keep control of the hearing at all times. A good hearing is one that moves along smoothly while still allowing the parties to present their evidence fully. This requires technical skills from Panel members as well as sensitivity to the disputants' needs.

Where a Panel does not control a hearing and the parties are permitted to bring forward information that is not relevant or is repetitive, the hearing can become irritating, divisive and ultimately expensive and the Panel can lose credibility in the eyes of the parties and others.

At the same time however, the parties must feel at the end of the day that they have had a full and fair hearing before the decision-making body. This requires a careful balancing act and is one reason that the organization may consider using the services of a skilled, experienced and independent individual to serve as the Panel or Chairperson in the case of a three person Panel.

In almost all hearings a Panel will be asked to make procedural decisions. Many of these cannot be anticipated in advance and some of these decisions will be critical to the outcome of the decision. The Panel cannot avoid this responsibility. Furthermore, the Panel must conduct a hearing and make decisions that respect the principles of procedural fairness, given the facts and circumstances of the case.

#### *Conduct during the hearing*

Every Panel has the inherent power to control its own procedures and, in fact, has an obligation to the parties to do just that. Every Panel must also maintain its credibility in the eyes of the parties, the organization and the public. If a party becomes highly emotional the Panel must act with both compassion and firmness. If a party or a witness is behaving disrespectfully or improperly during a hearing, the Panel should take firm action, including disciplining the party through verbal warnings, curtailing the party's activities, restricting or stopping the party's testimony, or in extreme cases, stopping a hearing.

#### *Be prepared*

Where possible the organization should appoint a Panel or Panel members who are knowledgeable and who have had some experience in conducting hearings or being part of a hearing process. Panel members should prepare themselves fully by making themselves familiar with governing policies, procedures or rules that have been established for the hearing, all the documents presented to it by the parties, as well as any prior decisions that may be helpful. These should be read *before* the hearing starts. Panel members should also familiarize themselves with basic hearing procedures.

### **Order of Presentation in a Hearing**

Typically, the party having the burden of proof goes first. Thus, in a discipline hearing the complainant has the onus of proving that there was a breach of the code of conduct (or whatever policy document applies) and should present its case first. In an appeal, the individual bringing the appeal has the burden of proving that the original decision was made in error, so that individual should present his or her case first.

The party responding to the party that has the burden of proof should go second and any affected parties or intervener parties should make presentations after that.



Typically, each party presents its evidence through the introduction of documents, other records such as video tape, audio tape or oral testimony from themselves or from other witnesses. This is called the “evidence” stage. The other parties may be given an opportunity to ask questions or seek clarification on evidence. In a formal hearing, this would be called “cross-examination”. Cross-examination can occur in a number of ways: for example, by means of questions through the Panel or questions directly of the witness. The purpose of cross-examination is to “test” the evidence – that is, check it for consistency and completeness.

Once all the parties have presented their evidence and have been questioned on their evidence, then each party must be given an opportunity to tie all the evidence together in the most persuasive way possible. This is called the “argument” stage.

Finally, the party having the onus of proof has an opportunity to come back and respond to anything raised by the other side or the other parties in either their evidence or their argument. This is called the “rebuttal” stage. No new evidence should be allowed at this stage.

When all of these stages have occurred, the hearing can then be adjourned for the Panel to make its decision.

### **Witnesses**

Sometimes a party will line up a whole list of witnesses to support their position. The Panel has the implicit authority to determine which witnesses should be allowed in the hearing, keeping in mind that the greater the number of witnesses, the longer, more drawn out and more expensive the hearing will be. On the other hand, the parties must have the opportunity to make a full response and if this requires three witnesses and not just one, then the three should be allowed.

### ***Admitting witnesses to a hearing***

The admission of witnesses should be based on the extent to which they can provide information that is relevant to the issue in dispute. As well, witnesses should not duplicate each other. Often a witness is used simply to support the evidence of another witness and brings very little, if any, new information to the hearing. Such witnesses should not be allowed.

As well, witnesses should be credible and should not come to the proceeding with a conflict of interest or an “axe to grind”. As well, the Panel should be consistent in how it deals with the parties and their requests for witnesses. If one party is allowed by the Panel to bring five witnesses who will speak to good character, then the other party should not be restricted to a single witness.

The use of “will say” statements is one way to filter and screen witnesses. A will say statement is a written summary of what a witness is expected to say during the course of the hearing. Such statements are provided to all parties in advance so that they can anticipate the evidence and are not surprised at the last minute. A well-run hearing is one that contains no surprises and the use of will say statement is one technique to prevent surprises.

### **Disclosure and confidentiality**

One of the basic rules of fairness is that the affected party must know the case against them. This means full and meaningful disclosure. Without full knowledge of the matters at issue a person cannot properly exercise their right to be heard. There are very few situations where full and complete disclosure will not be warranted.

A general rule of thumb that may guide a Panel dealing with the issue of disclosure is that any information that a party wants the Panel to consider should be disclosed to the other parties. If the party supplying the information doesn’t want the other party to know of it, then the Panel should refuse to receive it, unless the safety of a minor is in question and then particular thought will have to be implemented to ensure procedural fairness and ensuring the safety of a minor.

Wherever possible, the general rule of full disclosure should be followed. Where the release of information will cause serious harm, it may be possible to limit disclosure, but to do so only to the extent necessary to avoid the harm. For example, it may be possible to disclose a précis or summary of the information for certain purposes.

## **EVIDENCE**

### **What is evidence?**

Information and evidence are similar, but not the same. Evidence is a certain type of information – it is information that is used to prove a fact, disprove a fact or support or contradict an argument. Evidence is usually verbal testimony, written documentation or material objects that are offered to prove the existence, or non-existence of a fact.

Evidence can also be described as information that has been judged or filtered. The purpose of this process of judging or filtering is to:

- Determine if the information should be accepted or rejected in the decision-making process. In other words, not all information reaches the standard required of evidence.
- If the information is accepted, placing a value or weight on it. In other words, some evidence is more solid and relevant than other evidence.

Panels are not bound by strict rules of evidence, the way civil or criminal courts are bound by them. Panels may make their own rules and, typically, they will relax the rules relating to evidence. For example, “hearsay” evidence is not admissible in a criminal court but may be admissible before an Panels, provided it is given less weight than other more direct and more reliable sources of evidence.

While it is not necessary to understand fully the evidentiary rules that exist in civil and criminal law, it is important to understand that not all information is evidence and that not all evidence is good. The decision-maker must sift through many sources of information to determine what information comprises relevant and material evidence, to determine what weight to apply to this evidence and, from there, to make a decision based upon evidence and policy.

## **MAKING THE DECISION**

### **Authority of the Panel**

The Panel may only decide matters for which it has jurisdiction. In other words, the Panel can only decide those things that it is expressly authorized to decide. Usually, this authority is set out in the policy documents governing the hearing and the Panel. If this authority is not clearly stated, the Panel should determine *in advance* what its authority is, prepare terms of reference that describe that authority and ensure that all the parties understand what the Panel can and cannot do.

No Panel has the authority to change the organization’s policies, regulations or rules. These changes must be made through proper policy-making channels. However, it is not uncommon or improper for a Panel to make decisions and order changes when policies are ignored, not followed, improperly interpreted or wrongly applied.

### **Consensus vs. majority decision**

Unless the policy governing the hearing stipulates otherwise, where the Panel is made up of more than two members, the majority rules – the decision need not be unanimous. But be forewarned: a majority decision, as opposed to a unanimous decision, is never desirable. It indicates a split in the opinions and views of the Panel members and often leads to the parties losing confidence in the Panel and ultimately, losing confidence in the decision. Experience has shown that majority decisions often give rise to appeals.

A unanimous decision is always the best and this is what the Panel should strive for.

### **What is a decision based on?**

The Panel must be very clear about what it is being asked to decide. It must know “what test the applicant must meet”. For example:

- In a *discipline* matter, the Panel will be asked to determine whether the individual has breached a code of conduct or some similar standard of behaviour.
- In a *selection* matter, the Panel will be asked to determine if the athlete or coach has met the selection criteria.
- In an *appeal* of any type, the Panel will be asked to determine if the original decision-maker made a procedural error.

The Panel must make its decision on the basis of applicable governing documents, policies, rules and regulations as well as other evidence provided by the parties through the course of the hearing. In making its decision, the Panel must consider this information and this information only – it may not consider extraneous information supplied to it by outside parties, supplied to the Panel previously, or supplied to the Panel once the hearing has concluded. Nor should it consider views and opinions expressed in the media.

## **WRITING THE DECISION**

The law does not require a Panel to give reasons for decisions and failure to give reasons will not necessarily result in a breach of natural justice or procedural fairness. However, for reasons of fairness, risk management and good governance, written reasons are *always recommended*. Without written reasons, a party adversely affected by a decision may not be satisfied that the Panel properly considered policy and evidence. When written reasons are provided the parties can have confidence in the Panel's decision-making and often all the parties will be satisfied that the Panel considered the case carefully and that they received a full and fair hearing.

### **Qualities of a good decision**

A good written decision is one that:

- Clearly and correctly interprets the governing policy or rule;
- Sets out the correct legal test to be satisfied;
- Describes the facts of the case, based upon relevant evidence;
- Justifies its decision based on both policy and facts;
- Is clearly written so that the decision-makers' reasoning process is transparent; and
- Gives reasons that are understandable to a fair-minded, reasonable and disinterested observer.

### **Format of the decision**

Written decisions should follow this format:

- *Issue to be decided* – This opening section should clearly state the issue that the Panel has been asked to decide. The essence of the complaint or matter being heard is set out here, along with what it is the applicant needs to prove to succeed.
- *Background* -- This section should set out background information on the matter, including the parties' names, the dates and locations of the incident in question and other factual information relating to the matter being heard.

- *Statement of the facts* -- This section summarizes the facts as the Panel has determined them, based upon the evidence and the weight that the Panel has assigned to the evidence. In this section, the Panel should identify contradictory evidence and should set out how the Panel resolved these conflicts. The parties reading the decision should appreciate fully what evidence was considered by the Panel and that relevant evidence was not considered.
- *Authorities considered* -- This section would identify the relevant sections of the policy documents that the Panel considered in making its decision. Authorities might also include relevant precedent decisions.
- *The decision* -- This section gives the decision of the Panel. For example, in the case of a disciplinary matter it should set out their determination on whether misconduct occurred and, if there was misconduct, the sanction to be taken against the individual. The decision should be worded very carefully so that both the purpose and the details of the sanction are clear. If there are timelines these should be set out clearly; if costs are to be assessed it should say what they are or how they will be determined; if publication of the sanction is to occur it should specify when and where and what the notice will say; if the sanction is not complied with, it should specify what will the repercussions be. The decision should be clear, complete and explicit.
- *Reasons for the decision* -- This section provides detailed reasons to support the Panel's decision. These reasons should be based upon policy and fact and should refer to any mitigating or aggravating circumstances. Reasons should be written in such a way that an outsider would be able to follow the analytical and reasoning process used by the Panel to arrive at its decision.

The written decision should be able to stand alone, without other documents or supporting materials. This may mean repeating within the body of the decision the relevant excerpts of governing policies, precedent decisions or documentary evidence. A written decision that is all-inclusive and can stand alone is easier to distribute to the parties to the hearing and to outside parties. As well, such a practice helps to address confidentiality issues as full documents are not disclosed, only their relevant portions.

In the case of a three person Panel, and not a single person Panel, all of the Panel members should sign the decision as an indication they concur with the decision. If time is of the essence, the Chairperson can sign the decision on behalf of the other Panel Members if they provide their consent. If a Panel member does not concur with the decision, this should be stated, along with that Panel member's reasons for dissenting.

The written decision should be sent to all parties simultaneously.

## **COMMUNICATIONS**

After the Panel reaches a decision, the written decision is communicated to the parties, a remedy may be enacted and sanctions, where ordered, are imposed and the dispute ends. But does it? Who else gets to know what happened? Is the result public? Does the decision stay between the two parties or does the entire membership learn the results?

The publication of a sanction can be considered a sanction in and of itself. Any publication reveals the identity of parties and publicly announces the results of the hearing. Such publication could have serious ramifications on the parties – professionally, socially and emotionally.

Whether or not the individuals involved are minors should also be considered. There may also be scenarios where the facts of the case should be kept confidential but the sanctions or remedies may be distributed. In other cases, the outcome of the case can be public but the full decision – with reasons - may need to be private.

### ***Who Decides?***

Some organizations include a form of confidentiality clause within their dispute resolution policies that reference how a decision should be communicated. The clause might state that the decision should be limited to the two parties, or it might say that the decision is a matter of public record. In other policies, the disclosure of the decision is left to the Panel for that particular case – which would indicate in the decision whether it was confidential or whether it was a matter public record.

Panels weigh various items to determine when a decision should be public. They will consider legal issues, whether the individual is a minor, the type of infraction, whether other individuals were implicated, and the result of the decision.

In essence, the decision should be disclosed at a minimum to ensure the enforceability of the decision and the applicable sanctions. Such disclosure may include other Clubs or the NSO. For example, if a participant is restricted from participation as a result of a ruling, applicable Clubs will need to be informed to ensure the enforceability of the sanction, until such time as the sanction has been completed. The disclosure should likely only include the sanction and not the particulars that lead to the decision.

### ***Publication***

Decisions from hearings typically take the form of a written document with a specific format. The background of the case is explained, followed by the positions of both parties, the decision, and finally any sanctions or remedies. The written submissions from both parties are not included and neither are any witness statements or other materials. Both parties receive the decision document but the witnesses and third parties do not.

Even when the decision is publicly disclosed, the decision, with reasons, may not be distributed unless necessary or determined by the Panel. Instead, organizations may select from a variety of means to make a decision ‘a matter of public record’ or how best to inform members of the result.

## **CONFIDENTIALITY**

While it is standard practice in court proceedings that those proceedings are confidential to the parties, a confidentiality clause is highly recommended which requires the parties to keep all matters related to the proceedings confidential. Such a provision will create a more precise and fair process.

Disclosing information related to a proceeding cannot provide any sort of benefit to those involved. If an organization, case manager or party to a proceeding is requested information related to the matter, the party should acknowledge the matter is being managed in accordance with PSGB Policy and it would be inappropriate to speak to the matter prior to a decision being rendered. Upon the conclusion of a matter, any further information request can be answered by indicating the decision speaks for itself or providing options for appeal.

## **SUMMARY**

In summary, effective dispute management involves two elements:

- *Prior planning* – ensuring that governing policies are sound;
- *Proper execution* – interpreting and implementing governing and policies properly.

## Appendix 1:

### SAMPLE DISCIPLINE HEARING SCRIPT

Today is the (#) day of (month), 20\_\_ and we are here to decide the case between (Complainant/Appellant) and Respondent with regard to the alleged violation(s) of \_\_\_\_\_ Policy.

My name is \_\_\_\_\_ (Name) and I am the Chair of this Discipline/Appeal Panel charged with the responsibility of maintaining order and presiding over these proceedings.

To my left is \_\_\_\_\_ from \_\_\_\_\_ and to my right is \_\_\_\_\_ from \_\_\_\_\_ . We, the Panel, have been charged with deciding this case.

Would the parties please introduce themselves, starting with the Complainant/Appellant? (Record names of all persons in attendance and their relationship to the parties (e.g. lawyer for complainant/respondent, complainant's/respondent's witness, etc.).

If you have an objection to the composition of the Panel, please indicate so at this time with reasons. If no objections, please confirm orally your confirmation and acceptance of the Panel's composition.

\_\_\_\_\_ is the Case Manager and outside of today's proceedings, all communications, whether by letter, telephone or in-person, are to flow through him/her.

Before we begin, I would like to remind all parties that the information in this hearing is confidential and closed to the public. Please remain seated and address all comments to myself, the Chair of this Panel. All Parties are expected to act in a civil manner at all times.

I want to talk with you about this hearing process and your participation.

Each party may present evidence. The Complainant will present their evidence first. That party will present all of their witnesses and other evidence and then the other party may do the same. Each witness can be questioned by both parties: first the party who called the witness (direct examination), then the other party (cross examination). Each party then gets a second opportunity to ask follow-up questions (re-direct and re-cross examination).

Stick to the issues. Present the essential points, and support them with your exhibits or the testimony of your witness(es). Avoid confusing the issue with irrelevant information. Focus on the key issues of the case.

The weight of evidence is not determined by the amount of testimony. Therefore, the number of witnesses to testify about the same facts may be limited. Call witnesses with the most reliable, first-hand knowledge of the situation.

After all the evidence has been presented; each side may make a closing statement. You may summarize or comment on the evidence that has been presented. You may also argue how the case should be decided.

Would all witnesses please leave the room at this time? You will be called in individually to present your information regarding this case.

***Note to Chair: The administrative announcements have been completed and you will now begin opening statements and the presentation of the evidence.***

At this time, I will read the notice of complaint and the alleged behavior. (Read the notice of charges and alleged behavior).

The parties will now proceed with their opening statements, beginning with the Claimant and then the Respondent.

The Complainant will now proceed with the presentation of their information and evidence.

Are there any questions from the Respondent?

Are there any questions from the Panel? (Remember the Panel members can ask questions at any time).

I ask the Respondent to please present their information and evidence.

Are there any questions from the Complainant?

Are there any questions from the Panel?

Each party may make a closing argument. The parties are directed to limit their closing argument to a summation of what he or she believes has been proven. The parties may now begin their closing argument, beginning with the Claimant.

I ask the Complainant to make a closing statement.

I ask the Respondent to make a closing statement.

Do the parties have any further evidence or testimony to present?

The decision will be forwarded to the parties, and/or counsel in accordance with the OSA Discipline/Appeals Policy.

I would like to thank each of you for your time and remind you that all information in this hearing is confidential. This hearing is adjourned.

**Appendix 2:**

**SAMPLE WRITTEN DECISION**  
**IN THE MATTER OF A COMPLAINT BETWEEN**

Name (Complainant)

- and -

Name (Respondent)

**DECISION**

**APPEARANCES**

Name (Complainant) appeared on behalf of the Complainant and Name (Respondent) and appeared on behalf of the Respondent.

The Panel was composed of [insert names]. The Parties had no objections to the composition of the Panel.

This complaint was carried out pursuant to provisions of the \_\_\_\_\_ Discipline and Complaints Policy and Code of Conduct.

**MATTER IN DISPUTE**

1. Whether the Respondent breached the \_\_\_\_\_ [insert policy, code or other relevant reference] by.....

**SUMMARY OF FACTS**

On [Date] a complaint was filed with the \_\_\_\_\_ by the Complainant against the Respondent.

The Complainant submitted that on [date], the Respondent [describe facts].

**FINDINGS AND REASONS**

The Panel reviewed numerous submissions and documents. The Parties were given ample opportunity to make their respective cases.

The Panel finds as follows:

1. The Panel is satisfied that [describe facts and correlation to policy, code, or other relevant reference.]

**DECISION**

1. Having read the submissions, and having carefully considered all the evidence placed before it, the Panel makes the following decision:
  - Describe sanctions

\_\_\_\_\_  
[Chair of Panel] for the Panel  
Date