

UNITED STATES OLYMPIC COMMITTEE

DAVID GLEFKE	)	
and	)	
KELLEY FARMER,	)	
	)	
Complainants	)	
	)	
v.	)	DECISION DENYING
	)	MOTION FOR
	)	ATTORNEYS' FEES
UNITED STATES	)	
EQUESTRIAN FEDERATION,	)	
	)	
Respondent.	)	August 11, 2017

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I. THE PARTIES

1. David Glefke and Kelley Farmer (“Complainants”) are members of United States Equestrian Federation (“USEF”).
2. USEF is the National Governing Body (“NGB”) for the sport of equestrian 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. Complainants and USEF are collectively referred to as the “Parties”.

II. BACKGROUND

4. On May 22, 2017, Complainants filed a complaint with the USOC against USEF pursuant to Section 220527 of the Act and Section 10 of the USOC Bylaws.

5. On June 8, 2017, USEF filed a Motion to Dismiss on the basis that Complainants had not exhausted their administrative remedies within USEF, as required by Section 10.11 of the USOC Bylaws and Section 220527(b)(1) of the Act.<sup>1</sup>

6. Complainants were given until June 27, 2017, to file their response to USEF's Motion to Dismiss. One day before the deadline to submit their response, at 5:59 p.m. (MDT) on June 26, Complainants filed an Emergency Motion for Additional Time. Complainants claimed that USEF interfered with their right to a corrected transcript of an anti-doping hearing – a transcript that Complainants planned on using in the hearing on the Motion to Dismiss to show that their denial of due process would make it clear that further administrative remedies would cause unnecessary delay.

7. The following day, at 1:48 p.m. (MDT), USEF filed its Opposition to the Emergency Motion.

8. The Hearing Panel then conferred as to whether the Emergency Motion should be granted. Before the Hearing Panel was able to issue a decision on the Emergency Motion, Complainants filed their Response to the Motion to Dismiss at 3 p.m. (MDT) on June 27, 2017.

9. Since Complainants filed their Response to the Motion to Dismiss by the agreed-upon deadline, the Hearing Panel considered the Emergency Motion withdrawn.

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<sup>1</sup> The Hearing Panel granted USEF's Motion to Dismiss by Decision dated August 1, 2017.

### III. MOTION FOR ATTORNEYS' FEES

10. On June 30, 2017, USEF filed a Motion for Attorneys' Fees on the basis that (1) Complainants' filing of the Emergency Motion caused USEF's counsel to spend significant time responding to the allegations in the Emergency Motion, only to have Complainants file their Response to the Motion to Dismiss without need of the additional time moved for in their Emergency Motion, (2) the anti-doping hearing transcript, upon which the Emergency Motion was based, was irrelevant to the Motion to Dismiss, and (3) Complainants did not confer with USEF prior to filing their Emergency Motion on extending the deadline.

11. Complainants filed a response to USEF's Motion for Attorneys' Fees on July 12, 2017. Complainants argued that (1) the Hearing Panel does not have the power to award attorneys' fees because it is neither a court nor an administrative agency, (2) there is no requirement to meet and confer with opposing counsel before filing a motion for an extension of time, (3) Complainants did not act in bad faith in filing the Emergency Motion and (4) since the Emergency Motion was considered withdrawn there is no underlying basis for awarding attorneys' fees.

12. On July 17, 2017, USEF filed a Reply to Complainants' Response to the Motion for Attorneys' Fees. USEF argued that (1) the Hearing Panel has inherent authority to award costs and fees, as evidenced by case law and affirmed in two prior Section 10 cases, (2) Complainants' actions constituted bad faith sufficient to justify an award of attorneys' fees and (3) merely because the Emergency Motion was considered withdrawn does not eliminate the issue of whether attorneys' fees should be awarded.

13. Counsel for the Parties presented oral arguments on the Motion for Attorneys' Fees by telephone conference call on August 4, 2017.

14. In addition to Counsel for each Party, 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, and Bryan Bitzer, USOC Legal Intern, participated in the hearing on the Motion for Attorneys' Fees.

15. In its consideration of the Motion for Attorneys' Fees, the Hearing Panel reviewed all papers filed in support of and in opposition to the Motion. The Hearing Panel also considered the oral arguments presented by the Parties.

#### IV. DISCUSSION

16. In deciding USEF's Motion for Attorneys' Fees, the Hearing Panel considered two issues (1) whether this Hearing Panel has authority to award attorneys' fees and (2) whether such an award is warranted in this case.

##### A. Authority to Award Attorneys' Fees

17. Complainants correctly point out that neither the USOC Bylaws nor the Act itself explicitly grants a hearing panel the right to assess costs and attorneys' fees. However, the Hearing Panel finds that such explicit authority is not a prerequisite to a Section 10 hearing panel doing so. This issue has been addressed in two previous Section 10 cases, in which both hearing panels found inherent authority to award costs and attorneys' fees.

18. In *Farry v. United States Rowing Assn.*, Decision, page 21 (Jun. 29, 2007) (James McCarthy, Stacey Johnson, Robert Mitchell, Lee Todd & Mark Henderson, Pnl. Mbrs.), the hearing panel noted that it was "inclined to assess [the complainant] with

those costs and fees incurred by USRowing in preparing for and appearing at the...Motion to Dismiss,” and that it “may assess costs if it determines that such assessment is justified.”

19. The hearing panel in *Fogarty v. USA Badminton, Inc.*, Award, para. 13 (Jul. 14, 2008) (Mary McCagg, Robert Latham, Max Cobb, Debbie Hesse & Courtney Johnson, Pnl. Mbrs.), reaffirmed the *Farry* panel’s ruling that costs and attorneys’ fees may be assessed by a Section 10 hearing panel. The *Fogarty* panel determined that the complainant’s actions demonstrated a “calculated plan of harassment and bad faith” sufficient to justify an award of costs and attorneys’ fees.<sup>2</sup>

20. This issue was also extensively analyzed in a Section 9 (opportunity to participate) arbitration. In that proceeding the arbitrator found that a party is entitled to reasonable attorneys’ fees and costs “where there exists some form of egregious misconduct during the course of the litigation or proceeding that might have prolonged the proceedings or unnecessarily or unreasonably increased the attorneys’ fees or costs of their opponent.” *Carr v. U.S. Speedskating*, AAA 77 190 E 00276 12, para. 4.22 (Dec. 15, 2012) (Jeffrey G. Benz, Arb.).

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<sup>2</sup> The Hearing Panel made an award of costs and attorneys’ fees totaling \$10,000.000 (which was paid by the complainant).

21. Further, the Hearing Panel relies on several cases cited by USEF, in which the bad faith of a respective party has provided inherent authority for an arbitral body to award costs and attorneys' fees.<sup>3</sup>

22. Accordingly, the Hearing Panel finds that it has the authority to make an award of costs and attorneys' fees associated with this Section 10 proceeding.

#### B. Fee Assessment

23. USEF's argument that attorneys' fees should be awarded rests upon Complainants' actions in the days leading up to the deadline to file a Response to the Motion to Dismiss. USEF asserts that in filing the Emergency Motion for Additional Time, Complainants were acting in bad faith.

24. First, USEF argues that the reason for the Emergency Motion was unfounded, given that the anti-doping hearing transcript was irrelevant to the subject matter of the Motion to Dismiss.

25. Second, USEF argues that Complainants' timely filing of the Response to the Motion to Dismiss is evidence of bad faith, since Complainants knew full-well that USEF would be forced to spend a considerable amount of time and effort responding to the Emergency Motion.

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<sup>3</sup> See *Marshall & Co. v. Duke*, 114 F.3d 188, 190 (11th Cir. 1997)(holding that arbitrators were acting within 3 different sources of power when they awarded attorneys' fees, chief among them the right to award attorneys' fees under the common law bad faith exception to the American Rule that each party bear its own attorneys' fees); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1064 (9th Cir. 1991)(holding that in light of both the broad powers of arbitrators to formulate appropriate remedies and the bad faith exception to the American Rule, it was appropriate for the arbitration panel to award attorneys' fees); *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, No. 15 CIV. 1784 PAE, 2015 WL 4393060, \*2043-44 (S.D.N.Y. July 14, 2015)(holding that when arbitration agreements provide for "any and all controversies" to be submitted to arbitration without express limitation of attorneys' fees, the arbitrators are empowered to consider the assessment of such fees).

26. Complainants position is that they wanted to use the anti-doping hearing transcript as part of their Response to the Motion to Dismiss, but that in the end they felt it was necessary to file their Response when due.

27. After careful consideration of the matter, the Hearing Panel concludes that Complainants' submission of the Emergency Motion, while misguided and seemingly unnecessary, was not so egregious as to constitute bad faith.<sup>4</sup>

28. Accordingly, the Hearing Panel finds that an award of attorneys' fees is not warranted in this case.

V. ORDER

29. USEF's Motion for Attorneys' Fees is denied.

Dated this 11th day of August, 2017.



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Jim Benson, Chair  
Rich Bender, Panel Member  
Emily Azevedo, Panel Member

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<sup>4</sup> However, the Hearing Panel would like to make one further comment on the action of Complainants' counsel. Although not required, it is a common courtesy within the legal profession to confer with opposing counsel when an extension of time is likely to be sought. Complainants' counsel could have easily reached out to USEF's counsel to discuss his intent to seek an extension of time; and while his failure to do so does not constitute a showing of bad faith sufficient to award attorneys' fees, it does display a lack of professionalism that the Hearing Panel finds troubling.