PEPPERDINE UNIVERSITY

Pepperdine Dispute Resolution Law Journal

Volume 10
Issue 1
Arbitrating Sports: Reflections on USADA/Landis, the Olympic Games, and the Future of International Sports Dispute Resolution

Article 6

12-1-2010

From the Trenches: The Landscape of Sports Dispute Resolution and Athlete Representation

John Ruger

Follow this and additional works at: https://digitalcommons.pepperdine.edu/drlj

Part of the Dispute Resolution and Arbitration Commons, Entertainment, Arts, and Sports Law Commons, International Law Commons, and the Litigation Commons

Recommended Citation
John Ruger, *From the Trenches: The Landscape of Sports Dispute Resolution and Athlete Representation*, 10 Pepp. Disp. Resol. L.J. Iss. 1 (2010)
Available at: https://digitalcommons.pepperdine.edu/drlj/vol10/iss1/6

This Speech is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

From the Trenches: The Landscape of Sports Dispute Resolution and Athlete Representation

John Ruger*

I. INTRODUCTION

The Act that gave the Olympic Committee its authority is the Ted Steven's Olympic and Amateur Sports Act. It was first passed in 1978 under the tutelage of Senator Stevens of Alaska. It was updated in 1998, and in the update there was a passage added regarding the creation of the position of athlete ombudsman. One of the primary authors of that actual language is Mr. Benz, who was, at the time, at the USOC. President Clinton signed the bill into law in October 1998 with a funding bill. I am the only one to have ever held this position, and I started in March 1999.

I am not legal counsel for athletes, because if I were I would have to represent the first athlete that comes to me and that is not the way it works. I have an obligation to all athletes, not just the first one that calls. Thus, I am a neutral provider of information to athletes in this process.

* John Ruger has served as the United States Olympic Committee Athlete Ombudsman since March 1999. He previously worked for the U.S. Olympic Committee as Manager of the Southeastern Operations for the Hometown '96 program, where he helped develop and implement a $4.25 million grant program to maximize the U.S. team's home-field advantage at the 1996 Games. Mr. Ruger was also a member of the 1980 U.S. Olympic Winter Games Team in biathlon, competed on three World Championship teams, and coached the U.S. biathlon team from 1987 to 1989. This transcript was adapted from Mr. Ruger's comments during *From the Trenches: The Landscape of Sports Dispute Resolution and Athlete Representation*, a panel discussion from the Pepperdine Dispute Resolution Law Journal's 2009 symposium entitled: *Arbitrating Sports: Reflections on USADA/Landis, the Olympic Games, and the Future of International Sports Dispute Resolution.* The symposium was held on February 27th, 2009, at Pepperdine University School of Law in Malibu, CA, and was co-hosted by the Straus Institute for Dispute Resolution.

Published by Pepperdine Digital Commons, 2010

II. ATHLETES' RIGHTS

Athletes' rights come from four areas: 1) the federal law, the Ted Steven's Olympic and Amateur Sports Act; 2) the IOC charter; 3) USOC bylaws; and 4) USOC policy. It is very important to note that there is no collective bargaining agreement in Olympic sport, with the possible exception of women's and men's soccer. However, men's soccer is a U-23, so it is not really the same pool. Women's soccer is really the only one with a collective bargaining agreement. Besides that exception, there is no collective bargaining agreement. You must get the athlete rights from the list above.

In the Act there are four basic athlete rights. There is the right to a hearing before being declared ineligible and the right to binding arbitration. There is also the right to representation and governance. Essentially this means that athletes make up twenty percent of all governance of Olympic Sport. Finally there is the right to independent advice on these issues, which is where I come in, with really the only federally mandated job in the Act. My job, again, is to provide independent advice to athletes involving their opportunity to participate in protected competitions, and assist in mediating those disputes.

The IOC Charter has an interesting statement about athlete rights. The preamble of the IOC Charter states that the practice of sport is a human right.

III. HISTORY AND BACKGROUND

American Arbitration Association (AAA) hearings are grouped into three areas. The first is Section Nine, which are complaints regarding eligibility to participate in competition in the Olympic Games. If there is a controversy on how an athlete was selected to be in a game, that would be a Section Nine claim. The second, Section Ten, is about a national governing body's (NGB) ability to adhere to the thirteen items within the Act that creates the NGB. Section Ten hearings occur about one or two times a year. They are very long. They usually take a couple of years and they are very expensive. Section Nine hearings are done very quickly. The third set of hearings, the anti-doping hearings, is probably the biggest topic for today.

Under Section Nine the bylaws say, and this is the fundamental right in the bylaws for athletes, "No member of the USOC may deny or threaten to deny an athlete the opportunity to participate in a protected competition." When an athlete challenges at the AAA, this is the rule used. The athlete receives a hearing, and the rules state that all the athletes involved in the controversy must show up for the hearing.

There were eight arbitrations prior to the Beijing Games, generally regarding discretionary selections. The question arises, "How did you choose me over this athlete?" Both athletes attend the arbitration and they explain to the arbitrator why they think they should be on the team. Most of the time the arbitrators side with the NGB that made the decision because the arbitrators are not sport experts. If the sport expert made a value judgment that this athlete should be on the team, then that is the way it is. The decisions more often get overturned if the NGB does not follow the rules. The simplest way to lose an arbitration is to not follow your own rules. Approximately one-third of the athletes won their cases because the NGB did not follow their own rules.

The hearing process in a Section Nine hearing, by law, is a hearing in front of the NGB. If an athlete does not like the outcome of that hearing, the athlete can file a Section Nine complaint with the USOC. We do not hold the hearing, but we will investigate and mediate. Athletes now have demanded written investigations and formal mediation, and there may be an adjustment to the bylaws in the future. However, it is our obligation to investigate, mediate, and try and resolve the conflict.

The next step is the AAA, which is a binding arbitration on all parties. Under Section Ten, there are thirteen requirements in the Act that an NGB must comply with in order to maintain the status as an NGB. There are only three possible outcomes from a Section Ten complaint: 1) the NGB keeps its status; 2) the NGB is put on probation; or 3) the NGB status is revoked. There are only about one or two cases a year. It is a long process. One must exhaust all remedies with the NGB first. Then one must have a USOC hearing, and only after a USOC hearing, does one have an opportunity for an AAA hearing.

There are different rules for the anti-doping process and anti-doping hearings. Under the first two types of cases, the Commercial Rules of the AAA are used. In the doping hearings, the supplementary rules are used, which address the doping cases specifically. The rules can be changed by an agreement between the athletes and NGBs. It is one of the few powers the athletes have within the Olympic Movement: to improve, along with the sports and the NGBs, changes to the AAA rules.

The original supplementary rules were written by Rich Young, who was the prosecutor in the Floyd Landis case, and also the writer of the World Anti-Doping Agency (WADA) code and the AAA rules. Subsequently, the rules have been modified by athletes and NGB council. The changes that were made regard the number of arbitrators and how the arbitrators are

Published by Pepperdine Digital Commons, 2010

chosen. Under the Court of Arbitration for Sport (CAS) rules, the athlete chooses one arbitrator, WADA chooses the other arbitrator, and CAS chooses the chair of the panel. Under our rules, the two arbitrators agree on the neutral chair, which is a substantial change because this removes the institutional biases and allows the arbitrators to choose who they think will be a neutral arbitrator and someone they can work with. This is administered by the AAA in Fresno, California, and cases are initiated by USADA. Any party under the other two systems can initiate arbitration, but only USADA can initiate arbitration in doping cases.

IV. CURRENT ISSUES

A. What Do Athletes Want Out of Their Hearing?

Athletes want a hearing that is fair, fast, and free. This phrase was coined by Michael Lenard for CAS arbitrations at the Games ad hoc. It is not free in the United States, but we are trying to make it affordable.

B. What are the Elements of Fairness that Athletes are Looking for?

USADA is the one constant in the process which gives athletes an advantage. The process is fair to athletes because there are a limited number of people working on the cases and they share some of that information. However, because USADA is involved in USADA cases, it is important that the arbitrators are truly neutral. The arbitrators are not playing just to one side because they know they will always be a party in the case.

C. Evidence: Are the Labs Beyond Reproach?

As soon as the lab results are returned positive then the athlete is generally considered to be positive, and then there is a merge shift. What are the checks and balances? How do we know that the labs do not make mistakes? The tests are presumed to be flawless, but some of the tests may warrant peer review. Once a test says the athlete is positive, there is a burden shift. Athletes want to, and have to, believe that the tests are flawless. If it is not true, then that creates a real problem within the system.

D. Discovery

There are problems with discovery. When I first took this job ten years ago, I asked lawyers what were some of the problems with the hearings.

The first thing that these lawyers said was, "Discovery. We don't get anything." The United States was the first country to require that a list of documents be presented to someone when they had a positive test. In the past, it was as if you received a letter in the mail that said, "You were speeding in Arkansas. Pay the fine." Not what day, or where, or when, or how fast you were going. You were positive and you took the penalty.

We now have the beginnings of some discovery. There are still some discovery issues out there, but we have made a start. Our list is better than the CAS list and the list in the WADA code. But I am always looking for athletes and lawyers to say, "You need to add this to the discovery list," because once we renew our agreement with USADA, those things can probably be changed.

E. Exculpatory Evidence

I do not think that I have ever seen USADA, in ten years, come forward and say "Here is some evidence that might help your client and we are just going to give this to you." It works the other way around.

V. SOLUTIONS

A. Hearing Opened to the Public

Opening hearings to the public was something that the athletes did when we changed the rules. We wondered if it is not old men behind closed doors making secret decisions, and we asked if there was a way to change that. The trigger for me was when Marion Jones said, "I don't want to go before the CAS. That's a Kangaroo Court." We decided that if she believes it is a kangaroo court, then we need to eliminate that possibility. And so we changed the rules. It was controversial and there was a little resistance at first. We really did not think through the ramifications of what an open hearing entailed. Fortunately, Maureen Weston took the first case and actually made it happen because we had no idea. It involved a lot of things that we never thought of and it worked in this case.

I am only aware of two cases that were public. One was the case involving Michelle Smith De Bruin, the swimmer who had a lot of controversy surrounding her in Atlanta. She had a public hearing. In the long run, the public hearing may have worked against the two athletes.

B. Fairness

Athletes are exposed to an appeal process, which is another de novo hearing. I think they should have one hearing only. These athletes do not have enough money for a second hearing. There should only be a chance for a procedural appeal, not a de novo appeal. Essentially what happens in the second hearing is jury shopping because if the athlete did not like the decision of the first three people that heard the panel, he can just appeal it.

C. Making Sure that the Punishment Is Appropriate

I have had long discussions with USADA and some arbitrators about whether you can actually say that a rule is "bad." I can read the rules and tell you whether you are guilty or innocent. But what if the rule is bad? The poster child for this is Zack Lund. The finasteride rule was incorrect. And for every argument that Howard Jacobs brought forward in the finasteride case, those were the exact arguments or reasons why finasteride was taken off the list. However, we were not allowed to make that case at the time. Here was Zack Lund, a man who was the current world champion in the skeleton, and a favorite to win a gold medal three years ago, who was excluded from the games. The lead arbitrator in Zack Lund's case, Peter Lieber, was one of the best and he said, "I know he did not cheat but the rules say I have to give him a hearing." It was wrong.

D. Speed

Athletes have a very short career. The Rules contemplate a case lasting three to four months. We have expedited rules, but unfortunately, we have three examples of slow cases. These were the three cases that lead us to make some changes in the AAA. The cases of Floyd Landis, Justin Gatlin, and LaTasha Jenkins all took longer than a year. Because of these cases, there were complaints from the athlete's side, and from the USOC. Even the USADA chimed in and said these cases were taking too long. We moved the AAA offices from Atlanta to San Jose and initiated an AAA training webinar last June to put emphasis on completing these cases faster. We have to complete the cases in a reasonable time frame.

E. Affordability

Athletes generally do not have any money. USADA is well funded. The 'B' samples are paid for by USADA or the USOC in this country, but they are not paid for in a lot of international federations. You can get an 'A'

positive on an international test, but the IF may state that the test has to be paid for in order to confirm it. We do not think this is right. An athlete should not have to pay for that. Appeals are reviewed de novo. And there is a point where the athlete has just spent all they could for the first hearing, and maybe even won that case or received a reduced sentence, but then the athlete is appealed against and he has to start all over again.

When we first set up the arbitrations, USADA paid for it. However it appeared like a conflict of interest for USADA to pay when they were the constant party in the cases and the arbitrators knew where they were getting their money from. This was not a good thing. So we changed it. The athletes pushed for this and said that the USOC should pay for all the arbitrations and so they do.

Athletes also have a say in the location. One of the best things I did in the past ten years is talk to Mike Straubel at a clinic. He said, "What can I do to help?" I said, "Why don't you set up a clinic at your law school and provide pro bono work for athletes that can't afford the cases?" Valparaiso won the first outright win in an anti-doping hearing, and one of their graduates is now working for the USADA as one of their chief prosecutors.

VI. THE FUTURE

Looking towards the future, the length of the sanctions is going to be the critical element in doping cases. I think you are going to see a majority of cases not be about whether someone is guilty or innocent, but rather what sanctions they will receive. The range now has gone from zero to four years; so if you prove aggravated circumstances, the two year penalty can double to four years. If the Floyd Landis case occurred today, USADA would undoubtedly say that there were aggravated circumstances; "If you want to go to trial, we are going to expose you to a four year penalty, but if you accept today, you will get a two year penalty and save everyone a lot of costs." I think this rule is a direct result of the Floyd Landis case and the Tyler Hamilton case.

There is a lot more substance added to the specified substance list. It can be from zero to two years. There is an interesting play on the interpretation in the recent cases where USADA said that the sanction is two years with a chance to reduce. But in actuality, the rules say the penalty is zero to two years. Therefore, can the arbitrators look at it and say it should be anything from zero to two years? It is a different mindset that you are getting. Is the standard two years, and you have to reduce from two years? Or it is from zero to two years? I prefer the zero to two year range.

VII. CONCLUSION

I want to resolve this in one hearing. I think athletes should only be exposed once. There should only be procedural appeals. The penalty should fit the facts. Let the arbitrators make decisions based on what they see. If we are going to have the Supreme Court of sports, and it is going to be the AAA and CAS, then we should have quality people. If they are not quality people, we should get rid of them. We should let them make a one-shot-only choice. Let them make the decision and base the penalty on the facts. We still have to work on discovery and exculpatory evidence.

As mentioned in the press, the European athletes have stood up and said, "Hey, this one hour rule and the whereabouts does not work, and we are not going to take it any longer." They are going to court in Belgium. Rafael Nadal and a number of other tennis players have spoken out against it. This is the first real active, athlete involvement in trying to change some rules that the athletes did not have a say in.