

**IN THE MATTER OF AN APPEAL OF A DECISION  
BY THE ONTARIO VOLLEYBALL ASSOCIATION  
SCREENING COMMITTEE DATED MAY 16, 2014**

BETWEEN:

**STEWART AREVALO  
(Appellant)**

And

**ONTARIO VOLLEYBALL ASSOCIATION  
(Respondent)**

**DECISION**

**Background**

1. The appellant, Stewart Arevalo, is appealing the decision of the Ontario Volleyball Association Screening Committee (the "Decision") denying his application to fill a position in a "designated category", in particular coaching, pursuant to the Ontario Volleyball Association ("OVA") - Screening Policy. The Decision is set out in a letter to Mr. Arevalo dated May 16, 2014 and is signed by the chair of the OVA Screening Committee
2. This appeal is Mr. Arevalo's second appeal from a decision of the OVA Screening Committee on this matter. His first appeal, from a decision set out in a letter dated November 23, 2012, was upheld by Adjudicator Johnston on June 24, 2013.
3. Adjudicator Johnston found that Mr. Arevalo was a member of the OVA in 2009, and referred the matter back to the initial decision maker for a new decision. Adjudicator Johnston also directed that Mr. Arevalo attend an interview with a third party panel (the "Third Party") and that the Third Party shall make a report to the OVA Screening Committee.
4. In October 2013, an independent third party was retained to interview Mr. Arevalo. The Third Party's report is contained in a 12 page letter sent to the OVA Screening Committee on March 21, 2014.
5. The focus of the Third Party's report was Mr. Arevalo's status in the coaching membership category of the US Association of Volleyball, and an allegation that led to a suspension of his membership status with USAV pending an investigation. The

allegation related to an incident that occurred in Orlando, Florida in 2008, and despite the lengthy passage of time, no investigation by USAV was ever concluded. The Orlando police investigated the incident and according to Mr. Arevalo's criminal lawyer, the investigation was "tossed out in April of 2009". USAV was informed of the results but still has not done their own investigation, despite repeated requests by Mr. Arevalo.

6. The Third Party was not asked to provide an opinion on the 2008 incident, but did note that Mr. Arevalo was open and candid during his interview and wrote in his report "Throughout all manner of topics, from personal to professional, Mr. Arevalo appeared honest and credible."
7. After this report was received, the OVA Screening Committee met with Mr. Arevalo and his counsel for a further interview on April 28, 2014.
8. The OVA Screening Committee was also aware of a 2009 incident for which the OVA Discipline Committee sanctioned Mr. Arevalo. The letter to Mr. Arevalo, dated September 11, 2009, noted that the sanctions set out in the letter needed to be completed before his membership in OVA could be renewed. It is not disputed that Mr. Arevalo complied with the sanctions, namely writing a letter acknowledging the breach of the Code of Conduct and taking the Make Ethical Decisions module administered by the Coaching Association of Ontario.
9. On May 16, 2014, the OVA Screening Committee issued its decision, writing that Mr. Arevalo's participation in a designated category was denied "on three main grounds". These grounds are listed at paragraph 8 of the Decision and can be summarized as follows:
  - a) continued participation with an OVA club despite not being listed on the Club Information Form;
  - b) lack of a letter of good standing from the USAV "which is required by the OVA *Screening Policy*"; and
  - c) the OVA Screening Committee is not convinced that Mr. Arevalo is aware of the boundary lines that should exist between coaches and athletes which could potentially create problematic scenarios for Mr. Arevalo in the future.
10. Subsequent to receipt of this decision Mr. Arevalo filed a Notice of Intention to appeal, listing the following three grounds:
  - a) that the Decision was outside the jurisdiction of the OVA Screening Committee as set out in the OVA's governing documents;
  - b) that the OVA Screening Committee was influenced by bias; and
  - c) that the Decision was grossly unreasonable.
11. The OVA's responding submissions, dated July 7, 2014, denied all allegations and requested the appeal be dismissed. Mr. Arevalo submitted reply submissions on July 14, 2014, and a hearing was held by phone on July 17, 2014.

## **Decision**

12. I have read and considered all of the submissions and supporting documentation submitted by OVA and Mr. Arevalo, as well as the helpful oral submissions of both Mr. Arevalo and counsel for the OVA.
13. For the reasons that follow, it is my decision to allow the appeal and exercise my discretion under section 14(c) of the OVA's Appeal Policy. I direct that Mr. Arevalo be allowed to participate in a designated category. However, in the circumstances, it is appropriate that some temporary conditions be placed on his participation. If the parties cannot come to agreement on appropriate conditions by August 31 2014, they can make written submissions to me by September 4, 2014, and I will provide supplementary reasons regarding the type and duration of the conditions.

## **Reasons**

14. The OVA Appeals Policy limits appeals to procedural grounds (section 8) and further limits those procedural grounds to the following:
  - a) making a decision for which it did not have authority or jurisdiction;
  - b) failing to follow procedures as laid out in the .... approved policies of the OVA;
  - c) making a decision that is influenced by bias; and/or
  - d) making a decision that is grossly unreasonable.

## **OVA Screening Policy**

15. In the circumstances of this appeal, both the authority of the Screening Committee and the procedures to be followed when screening applicants for designated positions are of great importance. As a result, I will set out the provisions of the OVA Screening Policy in some detail.
16. The procedures the Screening Committee must follow are set out in sections 11 through 22 of the policy.
17. Section 11 requires that each person subject to the policy must obtain and submit a Police Records Check, a Vulnerable Sector Screening and Screening Disclosure Form (together, the "Mandatory Documents"). In addition, section 11 notes that "in the case of a transfer from out of province or country to the OVA", a letter of good standing from the previous volleyball organization is required.
18. Section 13 requires that if an individual has not submitted the Mandatory Documents, and letter of good standing, if required, he/she will be informed that his/her application will not proceed until such a time as all documentation has been received.

19. Once all documentation is required, sections 12 and 14 state that the documentation will be forwarded to the Screening Committee who will determine whether the Mandatory Documents, and the letter of good standing, if required, "reveal a relevant offence".
20. If the documentation does not reveal a relevant offence, section 16 requires that the Screening Committee "will notify the OVA Executive Committee that the individual is eligible for the volunteer or staff position". Section 16 does not provide the Screening Committee with any residual discretion if the documentation does not reveal a relevant offence.
21. If the documentation does reveal a relevant offence, section 17 requires that the Screening Committee render a decision in accordance with section 15. Section 15 provides the Screening Committee with the ability to approve participation in a designated category, deny such participation, or approve the participation subject to terms and conditions the Screening Committee deems appropriate.
22. Section 18 requires that if the Screening Committee denies or places conditions on an individual's participation in a designated category, "the reasons for such decision will be provided, in writing, to the designated member....".
23. Section 23 of the policy provides a definition of a "relevant offence". It begins "For the purpose of this Policy, a 'relevant offence' is any of the following offences for which pardons have not been granted:", and then continues to set out subcategories of offences that were "imposed" in the last 5 years, 10 years, or at any time.

#### Interpretation of the OVA Screening Policy

24. Section 3 of the policy sets out its purpose: "...[T]o identify individuals within the OVA who pose a risk to its members." This purpose is obviously a laudable one, and I agree with the OVA that this purpose should be considered when interpreting all other sections of this policy. However, I do not accept the submissions of the OVA that this purpose allows for an interpretation of the policy that is contrary to the plain and ordinary meaning of the provisions of the policy. A general statement of purpose, no matter how important, does not provide unlimited flexibility in the interpretation or application of the policy by the OVA Screening Committee. In particular, when the Screening Committee's review is specifically limited to looking for a "relevant offence" by section 14, and its subsequent actions are specifically prescribed by sections 15 - 17, there is no residual or inherent jurisdiction to base any decision on other concerns. There is no authority for the Screening Committee to base its decisions, as the OVA submitted during the hearing, to approving "persons who it feels comfortable with".
25. If the OVA wishes to provide its Screening Committee with the ability to consider matters beyond where there was a "relevant offence" when determining whether an individual poses a risk to OVA members, then the OVA Screening Policy needs to be amended. Such amendments are clearly contemplated by the policy itself, as the final section states that it is not a static policy and is subject to review on an annual basis.

26. In addition, section 23 of the policy provides a detailed definition of "relevant offence". It is an exhaustive rather than inclusive definition. During the hearing, OVA first took the position that "relevant offence" meant something for which there had been a criminal conviction, but later revised its position to submit that "relevant offence" was much broader, and could include any concerned revealed in the information the Screening Committee had before it.
27. I disagree with both of these interpretations of section 23. Section 23 uses the words "offence", "violation", and "crime". This includes more than criminal convictions. However, it is limited to matters where there has been some finding of wrongdoing or imposition of a sanction. I reach this conclusion due to the words "offence", "violation", "crime", "imposed" and "pardon" in that section. Further guidance on the scope of relevant offence is provided by the OVA Screening Disclosure Form, which is found at page 4 of the policy. Question 1 states, "Have you ever been convicted of a criminal conviction or been sanctioned by an independent body (sport body, private tribunal, government agency, etc.) for which a pardon has not been granted?....."
28. As a result, "relevant offence" is any finding of wrongdoing against the individual as outlined in subsections (a) through (c). This wrongdoing clearly includes criminal convictions, but also includes regulatory offences, and findings of wrongdoing or imposition of sanctions by a sports organization or private tribunal.
29. However, despite the wording of question 2 on the screening form, the definition does not include any allegations that are pending or threatened. If the OVA wishes this information to be considered by its Screening Committee, a desire that would be completely in keeping with the policy's overall purpose, the OVA needs to amend the Screening Policy to specifically provide for the consideration of such information.
30. This appeal also raises a question of what section 23 means when it refers to a pardon. The policy does not provide a definition, and Mr. Arevalo submitted he thought a pardon included a circumstance where an individual had completed the sanctions imposed for an offence. In my view, a pardon is more than completion of sanctions and includes some formal acknowledgement that the offence should be expunged. This could be a formal pardon in circumstances of a criminal conviction or regulatory offence, or potentially an acknowledgement by the body who imposed the sanction that, for any number of reasons (for example the passage of time), it is appropriate that the record be expunged and no longer be referenced or impact on the person in any way.
31. The final section that needs to be considered in interpreting this policy is section 18, which requires the Screening Committee to provide reasons for the decision in writing. In light of the significant impact the decisions on the Screening Committee can have on individuals, the Screening Committee needs to provide specific reasons for the decision. If these reasons include information in the Required Documents, that information needs to be outlined in the decision itself; the policy mandates that the Required Documents will be returned or destroyed, so it is inappropriate and unfair to all parties, and anyone

reviewing the decision on appeal, to seek to "read-in" information from the Required Documents that is not contained in the decision itself.

#### Application of the Policy to the Decision on Appeal

32. I agree with the submissions of the OVA that the OVA Appeals Policy only provides for limited grounds of appeal, and outside of issues of jurisdiction and bias, significant deference is to be accorded to the OVA Screening Committee. It is not necessary for the purposes of this appeal to determine whether "grossly unreasonable" requires even greater deference than "patently unreasonable", but an adjudicator such as myself must allow the OVA Screening Committee significant discretion when it is acting within its jurisdiction (section 8a) and following the procedures laid out in the applicable policy (section 8b).
33. Mr. Arevalo alleges that the OVA Screening Committee exceeded its jurisdiction in making its decision. I agree with the OVA that the Screening Committee had the jurisdiction to review Mr. Arevalo's application, but must also consider whether the reasons for denying Mr. Arevalo participation in a designated category were within the Screening Committee's jurisdiction. In particular, I must consider the Decision in light of the fact that the policy only gives the Screening Committee the jurisdiction to determine whether the Mandatory Documents and letter of good standing, where required, reveal a relevant offence.
34. As outlined above, the Decision listed three main grounds for denying Mr. Arevalo participation. The first is Mr. Arevalo's participation with an OVA club when he was despite not being listed on the Club Information Form.
35. I am unable to determine whether participation with an OVA Club without being listed on a Club Information Form is contrary to OVA's by-laws and code of conduct. The OVA did not provide a reference or make a specific allegation that such conduct, if established, could be subject to sanction. Further, and more importantly, it is clear that there was no complaint, investigation or sanction. It appears that the OVA was not even aware of Mr. Arevalo's work with the club in question (training sessions that he operated under his business and with his own insurance) until Mr. Arevalo mentioned it during his interview with the Screening Committee.
36. Mr. Arevalo's association with the OVA Club cannot be considered a "relevant offence", even on the broadest interpretation of that phrase. Indeed, the OVA did not suggest that the Screening Committee viewed this association as a relevant offence. Even if they had, such an interpretation would have been grossly unreasonable given the wording of section 23.
37. Section 16 of the OVA Screening Policy requires that where no relevant offence has been committed, the Screening Committee "will notify" the executive that the individual is eligible for the designated category position. The policy does not allow the Screening

Committee to deny participation on any other ground. In considering Mr. Arevalo's participation with the OVA club, the Screening Committee acted contrary to the OVA Screening Policy and thus exceeded its jurisdiction. The first reason for denying Mr. Arevalo's participation in a designated category cannot be relied upon.

38. The second reason cited in the Decision was the lack of a letter of good standing from USAV. At the hearing, the OVA, reasonably in my view, did not rely on this reason when submitting the Decision should be upheld. In Mr. Arevalo's first appeal, Adjudicator Johnston found as a fact that Mr. Arevalo was a member of OVA in 2009. As a result, he was not a transfer from another province or country and, in accordance with the Screening Policy, no letter of good standing was required.
39. Further, if a letter of good standing had been required, the OVA Screening Policy, section 13, specifically prohibits consideration of an application before that letter is provided.
40. Either way, in considering the lack of a letter of good standing as a factor in determining Mr. Arevalo's eligibility, the Screening Committee acted outside of the mandate given to it by the Screening Policy and committed a second jurisdictional error. As with the first reason named in the Decision, this reason for denying Mr. Arevalo's participation cannot be sustained.
41. The final "main ground" for denying participation was that the OVA Screening Committee "is not convinced that you are aware of the boundary lines that should exist between coaches and athletes.....". This portion of the Decision does not specify the basis for this conclusion. However, paragraph 6 of the Decision does refer to Mr. Arevalo integrating himself into the personal lives of athletes and their families and his apparent proclivity to be on friendly terms with athletes in non-coaching situations.
42. The Decision does not refer to any conduct that the Screening Committee considered a relevant offence, and only referred to general behaviours without specifics. As mentioned above, without a finding of a relevant offence, the Screening Committee does not have jurisdiction to deny participation in a designated category. Further, section 18 of the Screening Policy requires that the Decision include the underlying reasons, in writing. As a result, the third "main ground" for denying participation in a designated category also cannot be supported by the policy and exceeds the jurisdiction.
43. At the hearing, the OVA took the position that both the 2008 USAV incident and the 2009 OVA sanction were "relevant offences" that justified the Decision. While both the 2008 USAV suspension and the 2009 OVA sanction could reasonably come within the definition of "relevant offence", I find that the Decision cannot be upheld on that basis for the following reasons:
  - 1) the Decision did not mention either incident and did not conclude that either incident was a relevant offence; I cannot therefore conclude that either was the basis for a decision; and

- 2) the 2009 OVA sanction contemplated renewed membership for Mr. Arevalo once he had completed the requirements set out in the Disciplinary Committee's letter.

44. It is a trite principle of law that Mr. Arevalo cannot be punished a second time for this same offence. If the Disciplinary Committee felt the 2009 incident was worthy of a denial of participation in a designated category, they could have made that determination. However, that decision specifically contemplated renewed membership for Mr. Arevalo.
45. That is not to say that an incident for which the sanction has been fulfilled can never form the basis of denying participation in a designated category. There are many circumstances where it may be reasonable. However, where it does, the Screening Committee will need to set out what the relevant offence is and why it justifies denying participation. Once that occurs, a decision can only be reviewed for gross unreasonableness or bias.
46. A decision is reviewed based on its content, not the additional information that was before the Screening Committee that may or may not have been deemed important. As the Decision does not reveal that any of the three "main grounds" for denying Mr. Arevalo's participation constituted a "relevant offence", the Screening Committee exceeded its jurisdiction and the appeal must be allowed.
47. Given my findings on jurisdiction, it is not necessary to consider Mr. Arevalo's allegations of bias against the decision maker. However, I will briefly state that I would not have allowed the appeal on that basis. While I understand Mr. Arevalo's concerns with the comments made by the Chair of the Screening Committee to Mr. Arevalo's lawyer, those comments fall short of demonstrating bias.

## Remedy

48. Turning now to remedy, the Appeals Policy provides two options. Section 14(b) allows for the matter to be referred back to the initial decision-maker for a new decision, and section 14(c) allows me to vary the decision where I find that the error cannot be corrected by the original decision maker for reason of lack of clear procedures, lack of time, or lack of neutrality.
49. In this circumstance, I find that the appropriate remedy is found within section 14(c). Although I find that the Screening Committee is not biased within the meaning of the Screening Policy, they have now denied Mr. Arevalo the ability to participate in a designated category on two occasions and both decisions have been overturned. I am further concerned that one of the main grounds in the second decision, the lack of a letter of good standing, is contrary to the findings of Adjudicator Johnston that Mr. Arevalo was already a member of OVA in 2009. As a result of that finding, a letter of good standing would not have been required and cannot therefore form a valid ground for a denial of participation .



50. As a result of the foregoing, I find the Screening Committee could now be seen as lacking neutrality by a reasonable observer and therefore it is appropriate for me to vary the Decision.
51. It is my finding that the 2008 USAV suspension and the 2009 OVA sanction are both "relevant offences" as defined by section 23 of the Screening Policy. However, given the content of the Third Party report and the fact that Mr. Arevalo completed the sanctions imposed on him by the OVA in 2009, I find that Mr. Arevalo should be approved to participate in a designated category subject to terms and conditions as authorized by paragraph 15 (c) of the Screening Policy.
52. I direct that Mr. Arevalo be allowed to participate in a designated category of membership within the OVA. However, in the circumstances, it is appropriate that some temporary conditions be placed on his participation.
53. It is my hope that given the significant amount of time already invested by the parties in exploring possible conditions they can now reach an agreement on what they feel are appropriate temporary conditions. If the parties cannot come to agreement on appropriate conditions by August 31 2014, they can make written submissions to me by September 4, 2014, and I will provide supplementary reasons regarding the type and duration of the conditions.

July 31, 2014

A handwritten signature in black ink, appearing to read 'Barbara Carmichael', with a long, sweeping horizontal stroke extending to the right.

Barbara Carmichael  
Victoria, BC

