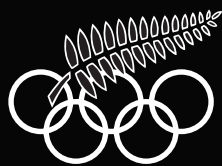


#4

Guidance Notes on Selection



GUIDANCE NOTE ON SELECTION¹ #4

Selection Appeals

This Guidance Note covers appeals by athletes against decisions not to select them to national teams by the Selectors.

The best way to avoid appeals altogether are:

1. Ensure Selectors are appointed that have appropriate expertise, sound judgement and are free from bias or real or perceived conflicts of interest;
2. Ensure the preparation of your selection documents are consistent with your Constitution, High Performance strategy/policies and are clear and unambiguous;
3. Ensure your selection documents are prepared and reviewed with an appropriately skills specialist sports lawyer;
4. Provide a sound legal briefing for your selection panel by the legal advisor that prepared your selection documentation to ensure the Selectors are clear on what they can and cannot consider and the process they are legally bound to follow;
5. Run the final decisions and logic for those decisions past your legal advisor (best done via a discussion between the Convenor of Selectors and your legal advisor);
6. Choose an appropriate person from your NSO to sensitively discuss non-selection with relevant athletes. Provide each non-selected athlete with an opportunity to discuss their non-selection with the Convenor of Selectors prior to the public announcement being made;
7. Ensure your communication around the selection decisions is consistent with the Selection Policy and the process (manage the message with a consistent voice).

Options for Resolution of Appeals

- In recent years an increasing number of athletes are formally appealing against selection decisions. This can result in significant costs and burden on both athletes and National Sports Organisations (NSOs). It is therefore important to have a fair, robust and transparent process for both the athletes and the NSO, and for the NSO to be prepared for appeals, including training of Selectors as well as NSO personnel and budgeting for legal advice and other appeal costs.

TIP: Make provision in the NSO's budget for legal advice to support an appeal², especially in years where selection appeals are more likely such as for World Championship, Olympic or Paralympic Games or other pinnacle events.

- NSOs which are funded by Sport NZ or High Performance Sport NZ are required to "accept the jurisdiction of the Sports Tribunal or implement an alternative dispute resolution process on terms acceptable to Sport NZ (acting reasonably)"³. This means the process for selection appeals may or may not utilise the Sports Tribunal.
- The cost of appeals in the ordinary courts can be prohibitive so it is strongly recommended that a process for selection appeals is set out in the NSO's rules or the Selection Policy which either exclusively refers any appeals to the Sports Tribunal⁴ or provides for another process, which limits referral to the courts.
- There are a number of steps which can be used for resolving selection appeals, or a combination of steps. In each case, the procedure for doing so needs to be in accordance with the NSO's constitution and detailed in the NSO's rules or Selection Policy. It is recommended that NSOs have an internal process to try and resolve the appeal before proceeding to a hearing so the athlete is clear on the facts and process used by the Selectors and the NSO is clear on the athlete's perspective.

¹ This Guidance Note is one of five Guidance Notes covering the process of selection of athletes by National Sports Organisations (NSOs) to national teams.

² The cost of an appeal can vary considerably depending on the scope and complexity however, assuming lawyers are engaged, the costs are likely to be between \$5,000 to \$10,000 (or more) per appeal.

³ Sports NZ Group NSO Relationship Agreement

⁴ This does not prevent an athlete seeking judicial review or taking other legal action in the ordinary courts, but a court will usually require the NSO's process to be exhausted before permitting it from proceeding.

- Any one or more of the following options may be considered:
 - Meeting with the athlete to explain and discuss the decision. This is recommended in every case to help the athlete understand the decision and minimise the impact of an adversarial process on the athlete - NSO relationship. It may also help recognise if there have been any failings by the NSO (in particular around the selection process or the information provided to selectors) which the NSO may look to rectify;
 - A meeting facilitated by an independent person with the athlete and the relevant NSO personnel to explain and discuss the decision;
 - Holding a mediation at which an independent qualified mediator⁵ between the athlete and the NSO to see if a resolution can be agreed in order to withdraw the appeal. It can often be difficult to mediate a selection appeal without impacting on another athlete's position as a selected athlete but in some instances it can be a very helpful process;
 - Referral to an ombudsman or other person independent of the NSO to review the selection decision and process and decide if it was a fair decision. If it is deemed not to be, it can be referred back to the NSO to reconsider or to make a decision (depending on the rules of the NSO);
 - A tribunal appointed by the NSO to hear and decide the appeal;
 - The Sports Tribunal to hear and decide the appeal. The Sports Tribunal may also refer the appeal to mediation;
 - A further right of appeal to the Court of Arbitration for Sport (CAS).

TIP: Review the NSO constitution to ensure the process for resolving a selection appeal in the Selection Policy is not inconsistent with an appeal process in the constitution.

⁵ To find a qualified mediator go to Arbitrators and Mediators Institute of New Zealand at https://www.aminz.org.nz/Category?Action=View&Category_id=663. Also HPSNZ may be able to assist in providing some names of mediators who have previously mediated sports related disputes.

Notification of an Appeal

- An NSO may be notified of an appeal against the Selectors' decision not to select them in several ways. The NSO may be told by the athlete directly or indirectly by third person (eg a parent), by email, or by formal letter from the athlete or their lawyer.
- The first step the NSO should take is to review the relevant rules on selection appeals to be sure of the process. These rules should be set out in the Selection Policy⁶, but the constitution should also be checked as it may also apply.
- The appeal can only proceed if it is made in accordance with the rules. Matters to check are:
 - Has the appeal been made in the correct format? – usually verbal indication is insufficient, and it must come from the athlete or a person authorised on their behalf;
 - Does the notification clearly state that the athlete is "appealing" or simply that they disagree with the decision?
 - Was it made within the specific timeframe stated in the Selection Policy or rules?
 - Are there any steps to be undertaken before the appeal can proceed such as a meeting or mediation?
- If any of these requirements have not been properly met, you may not need to proceed with the appeal but to be sure, legal advice should be sought.

CASE STUDY:

In *Quickenden v Canoe Racing NZ (2015)* the Sports Tribunal dismissed the athlete's appeal due to it being filed out of the time. The Selection Policy required the appeal to be filed "within 48 hours", which period ran over a weekend. The athlete's lawyer assumed the time period excluded weekends, and filed the appeal the following Monday which was out of time. The Tribunal concluded "regrettably" that the appeal was out of time, and dismissed the appeal as it had no power or discretion to extend the time period. It also noted its concern for the athlete who was "left without an opportunity to air his grievance."

- In most cases athletes appeal because they do not understand why they have not been selected. For this reason it is recommended that the NSO offer to meet with the athlete and provide an explanation.
- Having read the relevant rules, the NSO should follow the process specified. NSO's should consider seeking initial legal advice from a lawyer specialising in sports law early in the process. It is important to seek advice to ensure the NSO doesn't do anything which may comprise the defence of its appeal.

TIP: To find a lawyer with expertise in sport and selection appeals go to the Sports Tribunal's Legal Assistance Panel at <http://www.sportstribunal.org.nz/rules-and-procedures/legal/> or the Australia and New Zealand Sports Law Association Legal Contact List at <https://anzsla.com/content/legal-contact-list>.

- A senior NSO person (such as the High Performance Director/Manager or Chief Executive) should be allocated the responsibility to manage the appeal. It is likely to be time consuming and require urgent action, so a person dedicated to this task should be identified. It is also preferable that only one person be authorised to liaise with the athlete (and any advisors) to ensure consistency and coordination of the appeal.

TIP: Designate one person within the NSO to coordinate and manage an appeal for the NSO.

- This person should collect and collate all the material complied by the NSO and the Selectors in relation to the selection decision. This will include the documents required to confirm the athlete's eligibility (e.g. athlete application form) as well as the Selectors' notes, minutes, results and other information on matters that were relied upon by the Selectors (eg test results, assessments, medical reports etc). These should not be given to the athlete (or their representative) without the NSO first seeking legal advice.
- The Selectors and Board should be briefed on the appeal and kept up to date with the steps taken. Any communication with the athlete (and any representative) should be limited to the person authorised to manage the appeal.

⁶ See Guidance Note #3 "Selection Policies" on drafting the Selection Policy.

Preparing for a Hearing

- For an appeal to proceed in the Sports Tribunal, a Notice of Appeal (in the form prescribed by the Tribunal⁷) must be filed with the Tribunal by the athlete, and copied to the NSO, within the timeframe specified in the Selection Policy or NSO rules.
- The Athlete will need to file an Appeal Brief which sets out the grounds on which they are appealing and the information they are relying on. The grounds of appeal can only be those set out in the NSO rules/Selection Policy or if there are none, then under the Tribunal's rules as follows:
 - The Selection Policy was not properly followed or implemented (for example, the Selectors did not look at all the results as specified in the Policy);
 - There was no reasonable opportunity for the athlete to satisfy the requirements of the Selection Policy (for example, the Policy applied retrospectively to events which had already taken place);
 - The decision not to select the athlete was affected by actual bias (for example, a selector has a personal connection to another athlete);
 - There was no material on which the selection decision could reasonably be based (for example, the Selectors chose another athlete based on results, such as past Olympics, which are not listed in the Selection Policy as results which can have been considered).
- There will be a pre-hearing teleconference chaired by a Tribunal member, with the NSO (and its lawyer, if any), and the athlete (and their lawyer, if any). Also any other athletes who may be affected by the appeal (e.g. an athlete who was selected ahead of the appealing athlete) may be part of the teleconference. They are known as an "Interested Party". At this teleconference, a timetable will be established which sets out when documents are to be filed by the athlete, the NSO and, any Interested Parties, and also the hearing date and venue. The specific Tribunal members who will hear the appeal⁸ will usually be advised at this time, or soon thereafter as well.
- For the NSO, a Statement of Defence will need to be filed which respond to the athlete's grounds of appeal, and copied to the athlete.
- In addition, statements will usually need to be prepared by each of the Selectors and possibly others (such as the Chief Executive or High Performance Director/Manager, coaches and experts) setting out the process they undertook in the selection process and, for the selectors, the basis for their decision.

TIP: As soon as an appeal is filed, ask the Selectors to prepare their draft statement and send in their notes, minutes and the information relied upon, so it is ready and available for the appeal.

Hearing Process

- The hearing is usually structured but is not as formal as in a court room. Sometimes hearings are held by telephone (especially if the relevant people cannot practically come together easily) or otherwise in person.
- The format of a hearing is decided by the Tribunal, however generally it follows a typical hearing format as follows:
 - The athlete (or their lawyer) presents their case – including a statement and evidence from the athlete, and any from other people in support of the athlete. The athlete and any other people giving evidence may be questioned by the NSO (or its lawyer) and the Tribunal.
 - The NSO (or its lawyer) presents their case – including statements and evidence from the Selectors and any from other people in support of the NSO. The people giving evidence for the NSO may be questioned by the athlete (or their lawyer) and the Tribunal.
 - The athlete (or their lawyer) then summarises their case and makes submissions.
 - The NSO (or its lawyer) also summarises its case and makes submissions.
 - The Tribunal then indicates the timeframe within which it will make and issue its decision. If a decision is required urgently, (for example due to entry deadlines or teams departing for competition), the Tribunal may issue an oral decision shortly after the hearing. Otherwise it issues its decision in writing as soon as practicable after the hearing. Usually the athlete and NSO are told of this before it is published on the Sports Tribunal's website.
- The duration of the hearing will depend on the number of people giving evidence and the complexity of the case, but it is rarely more than one day.
- It is important that the Selectors are available for a hearing if possible, and the NSO should take all reasonable steps it can to support them attending, whether in person or calling into the hearing by telephone (which is permissible).

Media

- A hearing before the Sports Tribunal is confidential, so neither the NSO nor the athlete are permitted to tell anyone that an appeal has been made or on what it is about, unless authorised by the Tribunal. However, sometimes the fact an athlete has appealed becomes known to the public so the NSO should be prepared for media comment, and may wish to see PR advice.

⁷ The Rules of the Tribunal including the prescribed forms can be found at www.sportstribunal.org.nz

⁸ The Tribunal usually sits as a panel of 3 members, chaired by one of the Tribunal members who is a lawyer and two other members, including non-lawyers who have past experience in sport.