

SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)

Nº: SDRCC 17-0333
(ORDINARY TRIBUNAL)

RAKESH KAPILA (FALCONS SOCCER INC.)
(Claimant)

- AND -

SASKATCHEWAN SOCCER ASSOCIATION
INCORPORATED
(Respondent)

Before:

Charmaine Panko (Arbitrator)

Appearances and Attendances:

On behalf of the Claimant: Rakesh Kapila and Jim Kroczyński

On behalf of the Respondent: Doug Pederson and Mark Mulatz

In person hearing: 11 September 2017 and 25 September 2017

Written submissions provided: 5 October 2017

Closing Arguments: 12 October 2017 (via telephone conference call)

AWARD

30/10/2017

SUMMARY

1. The Claimant, Rakesh Kapila ["Kapila"], filed a request on behalf of Falcons Soccer Inc. [the "Falcons"], pursuant to Section 3.4 of the Canadian Sport Dispute Resolution Code [the "Code"], to initiate proceedings offered by the SDRCC [a "Request"].
2. The Falcons have been denied membership with Saskatchewan Soccer Association Incorporated ["SSA"] and allege the following:
 - a. SSA's decision was arbitrary;
 - b. The Board of Directors and the Executive Director for SSA violated the SSA Code of Conduct and Ethics [the "Code of Conduct"]; and

- c. The Board breached its fiduciary duty in respect of its decision making related to the Falcons' application for membership.
3. The Falcons' Request asks for the following:
 - a. review of their application for membership;
 - b. full disclosure of the results of SSA's consultation with existing member organizations in Regina and area and an opportunity to provide a response;
 - c. full disclosure of the reasons for rejection of their membership application; and
 - d. an opportunity to provide a response with ensuing input and guidance and support from SSA in addressing the deficiencies, if any, in their application.
4. The Falcons ultimately seek to obtain membership status with SSA.
5. SSA provided an Answer to the Request pursuant to Section 3.7 of the Code, suggesting the Falcons are attempting to do indirectly what they could not do directly since there is no appeal of the membership decision of the Board. Notwithstanding, SSA attempted to resolve the complaint by providing in its Answer the rationale for the decision to deny membership.
6. SSA challenged the SDRCC's jurisdiction and a hearing on the sole issue of jurisdiction was held on August 22, 2017, by telephone conference call with a decision being rendered on August 28, 2017, in which I granted SDRCC jurisdiction in this matter.
7. The hearing of the substantive issues was set for Monday, September 11, 2017, and continued on September 25, 2017.
8. Written submissions were provided by each party and closing arguments were heard on October 12, 2017, by telephone conference.
9. Having considered all the evidence before me I find that SSA's decision to deny membership was not arbitrary; the Board of Directors and the Executive Director for SSA did not violate the SSA Code of Conduct; and that the Board did not breach its fiduciary duty, all for the reasons set out herein.
10. This is not to say the Falcons' concerns are entirely without merit with respect to the manner in which the decision was subsequently communicated to them and SSA's refusal to engage in further discussion or provide direction to the Falcons.

HISTORY

11. There is a lengthy and troubled history in this soccer community and much evidence was led with respect to same. There is little utility in repeating the

details as it is a belabored history that is already well known within the community and it is a history that the community desperately needs to set aside so that there can be a fresh start for the benefit of the membership at large and, in particular, the children and youth who are the future of the sport.

12. A brief summary is nonetheless appropriate so as to set the context for the discussion of the Falcons application for membership with SSA.
13. Starting back in August, 2011, the Regina Soccer Association ["RSA"] went through a process to develop a strategic plan [referred to as the "Fraser Report"] that resulted in changes to the Regina soccer community. Governance workshops were held throughout the city; in 2013 there was an overhaul of the discipline code; and a management advisory committee was formed [referred to as "MAC"].
14. MAC subsequently underwent a consultation process with the four clubs that operated in Regina at that time, to get feedback and really understand how the clubs felt about the state of soccer, assess what was broken, and what was needing to be fixed.
15. On August 6, 2014, RSA ultimately held a meeting for individual members to vote to move to a "one club" model.
16. Though not the first or only controversy faced by the Regina soccer community, the "one club" vote certainly triggered a number of emotionally taxing, costly, and time consuming events: there were complaints, jurisdictional skirmishes, jostling for positions to maximize opportunities for membership, problems at the board level. There was an investigation. Internal review and appeal mechanisms were sought as were court interventions.
17. Communication was poor, assumptions were made, and conflict escalated.

THE FALCONS

18. Meanwhile, life continued and come winter of 2016, Kapila set up a small soccer organization that was niche in flavour - the Falcons. This was a program designed to provide skills development training in a unique fashion.
19. Jim Kroczyński ["Kroczyński"] joined Kapila to lead the Falcons. Both Kroczyński and Kapila have been very active in the Regina soccer community for many years. There is ample evidence of their tireless commitment to the sport and much gratitude on the part of parents for their coaching efforts.
20. The Falcons provided witnesses who spoke highly of the Falcons' program and of the coaching quality and style.
21. Early in 2017 the Falcons applied to SSA for an associate membership. This would open up opportunities for the Falcons not otherwise available to them.

22. As part of that process, SSA directed Falcons to contact existing Member Organizations ["MOs"] to solicit support. The Falcons reached out to the MOs but no response was received and so the Falcons asked SSA to intervene to get the feedback on their behalf.
23. On June 23, 2017, the Falcons' application for membership with the SSA was denied.
24. On July 5, 2017, a Formal Complaint was filed in accordance with Article 1.6.1 of the SSA Formal Complaints Policy based on:
 - a. an alleged violation of the Code of Conduct by the Board of Directors and the Executive Director; and
 - b. an alleged breach by the Board of its fiduciary duty in respect of its decision making related to the Falcons' application for membership.
25. SSA declined to hear the Formal Complaint.

THE CLAIMANT'S POSITION

26. The Falcons allege that SSA's decision to deny membership was arbitrary, that the Board and Executive Director violated the SSA Code of Conduct, and that the Board breached its fiduciary duty in its decision making.
27. The Falcons complain in particular that:
 - a. they were not provided an opportunity to respond;
 - b. no particulars were provided as to why the SSA Board felt that the Falcons could not meet the criteria for membership;
 - c. no reasons were given nor concerns or issues expressed; and
 - d. no further advice was offered as to how the Falcons could meet the criteria in order to gain membership, now or in the future.
28. The Falcons take issue with the words used to describe Falcons' leadership as being "...at the centre of virtually all controversy in Regina and with the SSA as it relates to Regina...", and that they engage in a "...pattern of vexatious complaints, litigation and intimidation tactics, along with the exclusionary and divisive actions..."
29. The Falcons challenge the resulting assumption that their leadership, namely Kapila and Kroczyński, was the source, or at the very least a contributing cause, of the problems within the Regina soccer community.
30. The Falcons allege that as a result of this faulty assumption they were unfairly denied membership. There was much time devoted in the hearing to demonstrate that there was no basis for this assumption and that there was an unfair bias against them.

THE RESPONDENT'S POSITION

31. SSA does not deny the connection it sees between the Falcons' leadership and the difficulties in the Regina soccer community. However, SSA is adamant in its position that this did not result in bias or cause the Falcons' application for membership to be dismissed unfairly; that instead it was but one part of the assessment process in determining whether or not to grant membership status; and further that it was appropriate for SSA to take that into consideration along with the other relevant factors.
32. SSA states that in the first instance the application was deficient. The onus is on the applicant to ensure the application is thorough and complete and that they meet the criteria. SSA notes that the application form clearly states and outlines what is required.
33. The glaring shortfall in the application was the absence of any letters of support from MOs. The Falcons acknowledged that they didn't have letters of support but that they did try to get them and asked SSA to apply pressure to the MOs to respond.
34. SSA reached out to the MOs and received their responses. The general tenor of the responses was negative to say the least. SSA did not share these responses with the Falcons or advise that they had been received. SSA viewed the letters as being just for the Board to consider (in fact, some correspondence was explicitly so, being marked as such - "confidential") and that there was no obligation or benefit to share the letters or content with the Falcons.
35. SSA maintains that it followed its policies and procedures in reviewing the Falcons' application. It states that all factors of the application were considered thoroughly and in its entirety, including letters that were provided from parents, and the commitments set out in the application. However, there was simply no substance in the application regarding intended efforts to repair the relationships that by the Falcons' own admission were damaged.
36. SSA's Executive Director led evidence that SSA had to put its mind to the question as to whether the Falcons could be a good partner and work in harmony with the MOs; would the leadership come to grow the game of soccer and to not constantly fight. He asserted that the Board made the decision on the basis of the cumulative impact of all the factors to be considered.
37. The SSA Board made the decision to deny the application for membership and to advise the Falcons of that decision by simply parroting the policy without getting into reasons. The crux of the problem that the Board felt it faced was that for years, any time the SSA Board asked for something or tried to explain itself, it was its experience that a debate would ensue. SSA evidence was that there was no intention to be disrespectful or demeaning.

38. The Falcons' subsequent Formal Complaint alleging violation of the Code of Conduct and breach by the SSA Board of Directors of its fiduciary duties, was rejected.
39. SSA interpreted the Formal Complaint as an attempt to appeal the membership decision and therefore relied on Policy section 1.3.7 that specifically states that membership status is not appealable. SSA also relied on section 1.6.3 that grants SSA discretion to accept or reject a complaint. The Falcons however had the expectation that the Formal Complaint would trigger the requirement that a case manager be appointed as required by the policy.
40. Though SSA failed to appoint a case manager, there was nonetheless an invitation extended to the Falcons to bring their concern to the Board. By this point the Falcons could not see what value there would be in doing so and did not take advantage of that opportunity.

ANALYSIS

41. SSA holds itself out as the only pathway to membership in the SSA and the worldwide soccer community (Article 1.1.1 of the Member Policy). It states that its core values are those of integrity, openness and transparency, and that it seeks to promote and encourage participation and inclusion (Article 1.2.1 of the SSA Formal Complaints Policy).
42. The Board then reserves unto itself the sole discretion and responsibility for approving and managing membership in the SSA and, by extension the worldwide soccer community (Article 2.0.1 of the SSA Member Rights and Responsibilities Policy [the "Member Policy"]).
43. Being the sole pathway to not only the local community but also purporting to be the sole pathway to the entire world of soccer brings to bear an enormous responsibility that comes along with corresponding obligations and accountability to ensure that the stated objectives of promoting and encouraging participation and inclusion are met. Not only must that gatekeeper operate without bias, it must also vigilantly guard against even the mere appearance of bias.
44. As such it is of the utmost importance that decisions related to membership are made based on objective criteria, with openness and transparency. Failing to provide reasons for a decision leaves a vacuum, quickly to be filled with assumptions in the absence of information.
45. And this is indeed what transpired in this matter.
46. The Falcons characterize SSA's response on the application for membership as "curt" and "terse" - they were advised that the denial of membership was not appealable and that SSA would provide no further comment. Full stop.

47. SSA admits this was intentional, believing the fewer words the better so as to mitigate against the pattern of debate and confrontation experienced in other instances. Though it would be hard to fault SSA for this trepidation, the refusal to comment further was nonetheless an aggravating factor in the escalation of the matter.
48. It was reasonable on the part of the Falcons to expect at least an explanation and reasons for having their application for membership rejected, regardless of the history between the parties. If the Falcons had been provided the courtesy of an explanation and reasons, they would not have had to continue to seek same.
49. SSA was given a second opportunity to respond when the Falcons' subsequent Formal Complaint was made pursuant to the Code of Conduct.
50. The Falcons state this complaint was based on an alleged violation of the Code of Conduct and a breach of fiduciary duty, which the right of complaint was indeed available. The Falcons also point to Article 1.10.1 which requires that a case manager be appointed. This did not happen. SSA states that it interpreted the Formal Complaint as an appeal of the denial of membership and as there is no appeal of a membership decision, there was no rationale for appointing a case manager. With hindsight once can see that here again, if SSA had appointed a case manager the matter may not have escalated further or ultimately ended up in arbitration.
51. The Falcons identified three issues to be determined. The first was: Did the SSA Board of Directors act in contravention of its "fiduciary duties" that guide its authority and responsibility for decision making related to applications for membership? I find that it did not.
52. The second issue put forward was: Did the SSA Board of Directors and the Executive Director contravene provisions of the Code of Conduct? I find that they did not.
53. The third issue put forward was: Did the SSA Board of Directors "fairly" exercise its discretion in denying Falcons' Membership Application? I find that it did.
54. I do however find that the SSA failed to act in a reasonable matter with respect to openness, transparency, and in assisting in the promotion and facilitation of harmonious working relationships. The SSA was not negligent in its failure but rather misinformed and erred in its judgment as to the best way in which to balance the best interests and needs of the soccer community at that time.

CONCLUSION

55. These proceedings provided an opportunity for the Falcons to obtain full disclosure of the reasons for denial and to provide a response. They are satisfied that that has occurred.

56. The Falcons now ask that the SDRCC exercise its authority and jurisdiction, pursuant to section 6.17 of the Code, which allows the arbitrator to substitute her decision for the decision that gave rise to the dispute. In other words, that I review SSA's decision and grant a membership status to the Falcons on the basis that SSA lost its objectivity and can no longer act as an impartial decision making body as required by the principles of natural justice.
57. Alternatively, the Falcons request a ruling that approves the Falcons as a Regular Member of SSA for a one-year probationary period with conditions of membership.
58. The parties do not have a common understanding of the meaning of the word "achieve" as it relates to the option of a probationary membership set out in Article 2.1.7.
59. The Falcons submit that it is during the one-year probationary period that the SSA Board can assess the applicant's ability to achieve the criteria and maintain the obligations of membership; become a member first and then show you can meet the criteria. SSA however submits that the applicant must first meet the criteria before it can become a member and that the one-year probationary period is to provide an opportunity to achieve and maintain obligations; the criteria is first met, the organization then becomes a member, and then has one year to achieve and maintain obligations. (my emphasis)
60. Regardless of which interpretation is correct, SSA understandably expresses concern as to the viability of even a probationary membership at this time and I agree.
61. I decline to substitute SSA's decision in any event. Deference must be accorded to the administrative body when reviewing its decision as the administrative body is presumed to have specific knowledge and experience to make choices. Of course, deference is not absolute. The standard of review is reasonableness.
62. Having considered the voluminous evidence tendered through this process I have concluded that SSA's decision to deny membership to the Falcons was reasonable and as such deference must be accorded to that decision.
63. This leaves then the question of where do the parties go from here. The negative sentiment toward Kroczyński and Kapila is apparent. How will it be possible for the Falcons, as prospective future members, to work in harmony and collaboration with existing MOs and with SSA to grow the game of soccer in Saskatchewan?
64. The Claimant asks the SDRCC to guide the parties in addressing this challenge.
65. The SDRCC's Mission Statement for 2016-2020 is that it "provides global leadership in sport dispute prevention and resolution, while fostering a culture of

integrity, fairness, and respect in Canada” (SDRCC 2016-2020 Long-Term Strategic Plan, p.3).

66. Section 6.17 of the Code also provides that the arbitrator “[...] may [...] grant such remedies or relief [the arbitrator] deems just and equitable in the circumstances.”
67. As such I direct that SSA shall work with the Falcons leadership to develop and implement a strategy to assist in building harmony among MOs in the City of Regina.
68. This will not happen overnight nor will it be without growing pains. The first step shall be a joint meeting/workshop to be scheduled within 45 (forty-five) days of this award, with a view to the sharing of thoughts and brainstorming initiatives for the building of more positive relationships.
69. It is recommended, and the parties are encouraged, to consider utilizing a neutral facilitator from outside of the soccer community to assist them with this meeting/workshop and overall strategy. I bring to the parties’ attention that the SDRCC offers a workshop titled Causes of Disputes and Prevention Strategies, along with other options that may be of assistance to them.
70. I retain the jurisdiction to deal with any issues arising from this decision and to provide further direction on steps to working together to create and implement a strategy to assist in building harmony amount MOs in the City of Regina.

COSTS

71. In light of the mixed success in outcome, I invite the parties to provide written cost submissions of no more than 3 pages, plus copies of relevant invoices. The parties are to provide their submissions within 7 (seven) days after the issuance of this award. Each party will then be granted the right to reply to be received no later than 3 (three) days after receipt of the opposing party’s original submission and limited in length to no more than 3 pages each.
72. I thank both parties and their counsel for the tremendous amount of work that was invested in providing the background and documents for this difficult matter. I also commend you in your patience and professional courtesy towards each other.



Charmaine Panko
Arbitrator