

## **RESPONSE TO APPEAL OF INFRACTIONS REPORT NO. 294**

By the NCAA Division I Committee on Infractions

To the

NCAA Division I Infractions Appeals Committee

June 2, 2009

**Case No. M286 – Florida State University**

Pursuant to the appeal initiated by Florida State University under NCAA Bylaw 32.10.1, the NCAA Division I Committee on Infractions submits this response to the NCAA Division I Infractions Appeals Committee for consideration.

This response is organized as follows:

- I. ORIGIN OF THE CASE.
- II. VIOLATIONS OF NCAA CONSTITUTION AND BYLAWS, AS DETERMINED BY THE COMMITTEE ON INFRACTIONS.
- III. PENALTIES.
- IV. STANDARD OF REVIEW.
- V. ISSUE RAISED ON APPEAL AND COMMITTEE RESPONSE.
- VI. CONCLUSION.

**TABLE OF CONTENTS**

Response to Appeal of Infractions Report No. 294 – Florida State University

Introduction ..... 1

I. Origin of the Case ..... 1

II. Violations of NCAA Constitution and bylaws, as Determined by the  
Committee on Infractions ..... 2

III. Penalties ..... 2

IV. Standard of Review..... 3

V. Issue Raised on Appeal and Committee Response..... 3

*Issue: Is Penalty C-4, the vacation of records, excessive such that it  
constitutes an abuse of discretion? ..... 4*

VI. Conclusion ..... 21

**Exhibits**

Infractions Report No. 294 ..... Exhibit 1

Summary of Academic Performances in Online Music Course ..... Exhibit 2

August 21, 2007 Memo from COE to IAC Related to Imposition of Vacation  
Penalty ..... Exhibit 3

## RESPONSE TO APPEAL OF INFACTIONS REPORT NO. 294

### INTRODUCTION.

The NCAA Division I Committee on Infractions (COI) submits this response to the appeal of Florida State University (Florida State). The Institution did not appeal any of the findings in Infractions Report No. 294 but it is appealing Penalty C-4 as set forth in Infractions Report No. 289 (which is attached as Exhibit 1 to this response).

Through prior arrangements, the Infractions Appeals Committee has received a copy of the transcript of the hearing before the COI. Therefore, the transcript is not included as part of this response.

### I. ORIGIN OF THE CASE.

This case began in late March 2007 when institutional officials were made aware that Brenda Monk, assistant director and learning specialist within the Athletics Academic Support Services (AASS) department, had inappropriately assisted [REDACTED], a [REDACTED] student-athlete, with an online quiz in a sports psychology course. Specifically, Monk had asked [REDACTED] another [REDACTED] student-athlete, to sit at a computer and submit answers to the quiz on behalf of [REDACTED]. In April the institution's president requested that the university's Office of Audit Services review the matter and determine whether the incident involving Monk and the two [REDACTED] student-athletes was isolated or if there was evidence of a more widespread pattern of similar behavior among employees in the AASS.

During May and June the institution's internal auditors conducted their investigation of the AASS department and interviewed numerous individuals, including employees of the AASS and student-athletes. From the interviews, the auditors learned that [REDACTED], an academic tutor, had provided student-athletes with answers on exams in an online course entitled Music Cultures of the World. In late July the director of athletics notified the NCAA enforcement staff that the institution had begun investigating academic irregularities within the athletics department. In late September the enforcement staff was notified by letter that the institution completed its initial investigation and identified 22 student-athletes who were involved in varying levels of academic misconduct related to the online music course.

From November 2007 through May 2008 representatives of the institution and the enforcement staff interviewed numerous student-athletes and several institutional employees, including Monk and [REDACTED]. A third former employee of the AASS, Hillard Goldsmith, had left the institution in July 2007. Goldsmith refused to be interviewed and did not cooperate in the investigation. The investigation revealed that, in addition to the original 22 student-athletes who had been initially identified as having committed academic fraud in conjunction with the online music course, numerous other student-athletes also had done so. On February 12, 2008, the institution submitted a self-report to

the NCAA enforcement staff which outlined violations of NCAA legislation related to this case and contained corrective and punitive actions imposed by the institution.

On June 10, 2008, the enforcement staff submitted a notice of allegations to the institution, Monk, [REDACTED] and Goldsmith. The institution submitted its response to the notice of allegations on September 11, and institutional representatives participated in a prehearing conference on September 17.

The COI conducted a hearing on the matter on October 18, 2008. The committee released its report, finding the institution and the three former staff members in violation of NCAA legislation on March 6, 2009. The university submitted a timely notice of appeal on March 20 and an appeal on April 23.

## **II. VIOLATIONS OF NCAA CONSTITUTION AND BY LAWS, AS DETERMINED BY THE COMMITTEE ON INFRACTIONS.**

The university did not appeal any of the findings set forth in Infractions Report No. 294. (See Exhibit 1, Section B for a complete listing of the violations found in this case.)

## **III. PENALTIES.**

The university has appealed only one penalty, which is set forth below. (See Exhibit 1, Section C for a complete listing of all penalties and Exhibit 1, Appendix Two for a listing of the university's corrective actions.)

### **Penalty Appealed:**

**C.4.** The violations in this case involve all the factors identified by the committee as particularly relevant to imposition of a vacation penalty in a major case: there were a large number of violations – the violations were committed by a minimum of 61 student-athletes in 10 separate sports; the violations were serious and intentional; student-athletes competed while academically ineligible; there was a finding of institutional failure to monitor; there was wide-spread academic fraud; the academic fraud was perpetrated purposefully by three different individuals in the institution's academic athletic support services, including the former learning specialist. Their culpability was especially egregious as they were among the institutional staff members with particular responsibility to maintain academic integrity; their conduct resulted in unethical conduct findings against each of them. The institution evaluated its processes and staff culpability and concluded that it had prime responsibility for the academic fraud. Pursuant to NCAA Bylaws 19.5.2.2-(e)-(2) and 31.2.2.3-(b), the institution will vacate all wins in which the 61 student-athletes in the sports of football, men's and women's basketball, men's and

women's swimming, men's and women's track, baseball, softball and men's golf competed while ineligible during 2006 and 2007. This includes regular season contests, postseason contests and any NCAA championship competition. The individual records of the student-athletes shall be vacated as well. Further, the institution's records regarding all of the involved sports, as well as the records of the head coaches of those sports will reflect the vacated records and will be recorded in all publications in which these records are reported, including, but not limited to, institution media guides, recruiting material, electronic and digital media plus institution and NCAA archives. Any public reference to tournament performances won during this time shall be removed, including, but not limited to, athletics department stationery and banners displayed in public areas such as the venues in which the specified teams compete. Finally, to ensure that all institutional and student-athlete vacations, statistics and records are accurately reflected in official NCAA publication and archives, the sports information director (or other designee as assigned by the director of athletics) must contact the NCAA director of statistics to identify the specific student-athlete(s) and contest(s) impacted by the penalties. In addition, the institution must provide a written report to the NCAA statistics department detailing those discussions with the director of statistics. This document will be maintained in the permanent files of the statistics department. This written report must be delivered to the NCAA statistics department no later than 90 days following the initial Committee on Infractions release or, if the vacation penalty is appealed, the final adjudication of the appeals process.

#### **IV. STANDARD OF REVIEW.**

Under Bylaw 32.10.4.1, a penalty imposed by the Committee on Infractions "shall not be set aside on appeal except on a showing by the appealing party that the penalty is excessive such that it constitutes an abuse of discretion."

#### **V. ISSUE RAISED ON APPEAL AND COMMITTEE RESPONSE.**

The university does not contest any of the COI findings. Nor does it contest several of the penalties; the only penalty at issue on appeal is the vacation of records (Penalty C-4).

*Issue: Is Penalty C-4, the vacation of records, excessive such that it constitutes an abuse of discretion?*

As noted in the infractions report (Exhibit 1, p. 16), this case involved *all* of the factors identified by the COI (and by the IAC) as particularly relevant to imposition of a vacation penalty in a major case:

- There were a large number of violations committed by three institutional staff members and at least 61 student-athletes in 10 different sports;
- The violations were serious and intentional;
- Student-athletes competed while academically ineligible;
- There was an uncontested finding of institutional failure to monitor various aspects of the AASS program;
- There was widespread academic fraud; and
- Three institutional staff members in the AASS program engaged in unethical conduct by encouraging and/or participating in the academic fraud. Their involvement was especially egregious because of their positions as individuals charged specifically with maintaining academic integrity within the athletics program.

In light of these aggravating factors, the university cannot begin to make its required showing that the vacation of records is “excessive such that it constitutes an abuse of discretion” by the Committee on Infractions. Thus, it takes every opportunity to try to minimize the violations and to deflect attention from the wrongdoing by portraying this case as some sort of “philosophical” battle between the COI and the IAC. At bottom, though, this is a case about dozens of student-athletes (aided by their academic advisors) cheating, gaining fraudulent academic credit, and then competing while ineligible due to their academic misconduct. Under such circumstances, what possibly could be “fair” about allowing the contest results to stand?

As noted in the university’s appeal, the IAC set forth seven factors in its 1995 University of Mississippi report that were to be considered in determining, under the former standard of review, whether a penalty was “excessive or inappropriate.” That standard of review, of course, changed in January 2008, with the deletion of the word “inappropriate,” the placement of the burden of proof squarely on the appealing party, and a requirement that the appellant show that the COI “abused its discretion.” The IAC has not specifically addressed the bylaw change in its reports since January 2008, but from all indications, the seven-factor test still governs, so the COI will address each of those seven factors.

The university relies heavily on two of the seven factors – institutional cooperation and corrective actions – but the COI urges the IAC to consider the factors, and the evidence in the case, in their *entirety*, without undue weight to any single factor. Just as the IAC has cautioned that a case comparison “cannot be made by mechanically applying a formula” (Georgia Institute of Technology, Public Infractions Appeals Committee

Report, at page 11, May 18, 2006 (quoting Mississippi report)), the IAC surely did not intend a formulaic approach to application of the seven-factor test.

*Nature, Number, and Seriousness of the Violations*

There can be little question that the nature, number, and seriousness of the violations in this case warrant severe penalties. Academic fraud “strikes at the heart of institutional integrity,” and “[t]he most severe penalties are appropriate when the academic mission of the university has been compromised.” (Clem Haskins/University of Minnesota, Public Infractions Appeals Committee Report, at page 21, April 6, 2001.) The COI found widespread academic fraud involving at least 61 student-athletes in 10 different sports. Institutional staff members were actively involved in nearly all of the violations, compromising the integrity of the athletics academic support program. Indeed, three staff members were found to have engaged in unethical conduct for knowing involvement in Academic fraud (and one for refusing to cooperate in the investigation). The university itself took much of the blame for the violations because of its failure to monitor various aspects of the AASS program. The university does not contest any of these findings.

In the Georgia Tech case, the IAC indicated that the factors most often associated with a vacation penalty included “academic fraud, serious intentional violations, direct involvement of a coach or high-ranking school administrator or a much greater number of violations than are involved in the present case.” (Georgia Institute of Technology, Public Infractions Appeals Committee Report, at page 11, May 18, 2006.) All four of these factors are present in this case.

The university attempts to minimize the seriousness of the violations, asserting that “[t]he violations at issue grew out of a single, ‘contaminated’ course.” (FSU appeal, p. 19.) No, the violations did not *grow out of* the online music course; what happened in that course was simply a symptom of a much larger disease – a systemic, “environmental” problem among a large group of student-athletes and three staff members in the AASS program. Monk, the learning specialist, provided exam answers to student-athletes in the online music course, but also engaged in academic misconduct in at least one other course.<sup>1</sup> Her “example” led the tutor, ██████████, to provide exam answers to dozens of student-athletes. And the academic advisor, Hillard Goldsmith, funneled student-athletes into the music course and to ██████████ because he knew that ██████████ would give them answers to the exams. (Exhibit 1, p. 12.) At least 61 student-athletes took those answers and used them on exams, and not a single one reported any impropriety until after the university began its investigation. (FSU Appeal, Exhibit B, Attachment C.)

---

<sup>1</sup>See Exhibit 1, p. 3. Finding B-1-a involves unethical conduct by Monk in a sports psychology course. The COI also encourages the IAC to consider pages 8-10 of the infractions report, which provides a flavor of the general environment within the AASS with respect to tutor involvement with student-athletes in the completion of online exams.

The violations did not result from “confusion” or “mistaken impression,” as the university suggests (FSU Appeal, pp. 19-20) – either on the part of the AASS staff members of the student-athletes. Monk began working in the AASS department in 2001, and for *several years* after Monk arrived, Professor Olsen, the teacher of the music course, used a closed-book format. While he was on a sabbatical leave in spring and summer of 2006, two other professors taught the course in an open-book format, which still would not have authorized the assistance the student-athletes received on their exams. Professor Olsen was back at the helm in fall 2006, however, and the AASS staff certainly should have been aware that he was using the closed-book format that he always used. Any doubt surely was dispelled by the instructions for each online exam, which the student-athletes (and the advisors assisting them) encountered when they logged onto the computer. Those instructions could not have been clearer:

The following examination is a closed book exam. This means that you are not allowed to use the internet lessons, the Olsen Study Guide and Workbook, your notes or any person to help you find the answers. By opening this exam, you are committing yourself to the following honor code established by the Florida State University, “I have not received aid from any unauthorized source during this examination.” (FSU Appeal, Exhibit B, Attachment A.)

The university tries to minimize the nature and seriousness of the student-athletes’ misconduct by asserting that “none of the student-athletes was charged with a violation of the University’s academic honor code.” Indeed, “many students, though suspicious, believed that the assistance they received was permissible.” (FSU Appeal, p. 20.) That is disingenuous at best in light of the explicit exam instructions set forth above. And the fact of the matter is that fifteen student-athletes did sign agreements during the initial stages of the reinstatement process acknowledging that they “cheated” in violation of the university’s academic honor policy; those findings were only later rescinded as part of the global reinstatement remedy the university negotiated with the NCAA student-athlete reinstatement staff. (FSU Appeal, Exhibit B, Attachment B.)

The university’s effort to turn the first prong of the seven-part test into a *mitigator* fails. On all counts, the nature, number, and seriousness of the violations in this case fall heavily on the aggravator side of the scale.

#### *Conduct and Motives of the Individuals Involved in the Violations*

Remarkably, the university attempts to convert even these factors into mitigating factors, even though the conduct of the institutional staff members in particular was reprehensible. As the COI noted in its infractions report, “[t]heir culpability was especially egregious as they were among the institutional staff members with particular

responsibility to maintain academic integrity; their conduct resulted in unethical conduct findings against each of them.” (Exhibit 1, p. 16.)

The university consistently has portrayed the involved student-athletes almost as victims, placed in an “unfortunate position” and “university-created predicament.” (FSU Appeal, Exhibit A.) At the hearing, for example, the university president stated that “[w]e don’t really believe [the student-athletes] cheated. They got inappropriate help.” (Hearing Transcript, p. 32.) But numerous student-athletes admitted to cheating in the university’s academic honor policy process. And even though the NCAA student-athlete reinstatement staff ultimately accepted the university’s proposed global reinstatement remedy,<sup>2</sup> based in part on *institutional* culpability, the staff nonetheless made a point of describing the student-athletes’ conduct for what it was:

However, the staff believes that the conduct was so serious in nature (i.e., receiving answers on a test) and clearly violated NCAA ethical conduct standards that the staff was not comfortable granting further relief beyond 30 percent withholding, which was submitted by the institution as the appropriate reinstatement condition. All student-athletes knowingly violated the test instructions which specifically stated that students are not allowed to use outside materials, notes or any person to help find the answers. The syllabus for the course also states that students are responsible for upholding academic integrity; yet, the student-athletes knowingly accepted help from the tutor and did not object to or report the assistance. Thus, student-athletes should have realized the receipt of assistance was impermissible and inappropriate. (FSU appeal, Exhibit B, Attachment C.)

Certainly the language of this agreement, which was embraced by the university, belies any contention that “[m]any student-athletes . . . were unaware that the assistance they received was improper until interviewed by the University.” (FSU Appeal, p. 22.) The fact that 39 additional student-athletes came forward and admitted wrongdoing after the global reinstatement remedy was approved is another indication that the student-athletes knew full well that their conduct was improper. Indeed, the remedy itself was proposed in part as a means of coaxing the truth out of student-athletes who had not yet been forthcoming about their academic misconduct. (FSU Appeal, pp. 5-8.)

---

<sup>2</sup>The student-athlete reinstatement staff accepted the university’s recommendation to place all involved student-athletes on the same footing, with a 30% withholding condition rather than the usual penalty in academic fraud cases of a minimum condition of “sit a year, charge a year.” FSU Appeal, Exhibit B, Attachment C.

Even if it is true, as the university asserted in its request for modification of the reinstatement remedy, that the university bears “primary responsibility” for the violations and the student-athletes simply “exercised poor judgment” (FSU Appeal, Exhibit A), that argument cuts *in favor* of a vacation penalty. The university hardly can have it both ways, downplaying the improper motives of its student-athletes by accepting *institutional* responsibility for their misconduct and then arguing that this cuts against the institutional penalty of vacation of records.

The university attempts to assign a majority of the improper motives to the “rogue tutor,” [REDACTED], who was only a graduate student and part-time tutor with no supervisory responsibility. (FSU Appeal, p. 21, Exhibit A; Hearing Transcript, p. 25.) But that ignores the fact that [REDACTED] was following the *example* of Monk, who purposefully engaged in academic misconduct herself. (FSU Appeal, pp. 19, 21-22.) The university’s argument also fails to acknowledge the complicity of Goldsmith, who instructed [REDACTED] to provide exam answers to student-athletes, encouraged student-athletes to enroll in the online music course, and directed student-athletes to [REDACTED] because he knew [REDACTED] would provide answers to the online exams. (Exhibit 1, pp. 5, 11-12.)

Again the university attempts to characterize the case as one of “honest confusion as to the extent of permissible assistance” (FSU Appeal, p. 21), but the conduct both of the AASS staff and of the student-athletes went well beyond a misunderstanding. At the hearing the university provost characterized Monk’s position on permissible assistance to student-athletes during exams as “unethical and unacceptable” (Exhibit 1, p. 10), and the COI would urge the IAC to consider the hearing transcript (pp. 190-98, 205-16) to put Monk’s motives in full context.

The rule-violators in this case, both student-athletes and staff members, acted on one simple motive – to get academic credit (and good grades<sup>3</sup>) with a minimum level of effort (or, in the case of staff members, to assist the student-athletes in gaining that credit and those grades). Goldsmith funneled student-athletes to the course and to [REDACTED] because he knew that goal would be achieved. Monk and [REDACTED] provided exam answers, and the student-athletes accepted them, for the same reason. The natural consequence of that conduct, of course, is that the university gained a competitive advantage because it made it easier for the student-athletes to remain academically eligible to compete. The student-athlete reinstatement staff concluded that “some student-athletes needed the course credits [in the online music course] to satisfy the 18-hour rule, the 24-hour rule and for progress-toward-degree eligibility requirements.” (FSU Appeal, Exhibit B, Attachment C.)

---

<sup>3</sup>During the academic terms of fall 2006, spring 2007, and summer 2007, 74% of the student-athletes in the online music course received grades of A or A-, while 43% of the non-student-athletes received grades of A or A-. (Exhibit 2.) In spring 2008, all 61 student-athletes with remaining eligibility were required to retake the online music course. Two of those students received the same or higher grade, while the other 59 received a lower grade. (Exhibit 1, p. 12.)

There are plenty of “nefarious motives” (FSU Appeal, p. 21) to go around in this case, but the bottom line is this: the violations involved not only basic NCAA principles involving academic integrity, but also flagrant violations of one of the most basic principles in any educational setting – one does not cheat on exams by giving or receiving assistance that is specifically unauthorized. Prong two of the seven-factor test weighs heavily in favor of severe penalties.

*Corrective Actions Taken by the Institution*

As noted in its infractions report (Exhibit 1, p. 14), the COI considered the university’s self-imposed penalties and corrective actions in determining its penalties. The care with which the committee considered those actions is evident from a review of the grant-in-aid reductions. The COI reviewed each of the ten sports with student-athletes involved in violations in light of the self-imposed penalties and the university’s scholarship averages in each sport over the previous four years. It accepted the university’s self-imposed reductions in six sports and added modestly to the reductions in the other four sports. Notably, the committee made clear that the grant-in-aid limitations “would have been more stringent” *had no vacation penalty been imposed*.

The university asserts that it self-imposed corrective measures and penalties are meaningful, and the COI concurs. The fact that the committee imposed additional penalties beyond those imposed by the university does not detract from the university’s efforts. The university’s actions constitute a significant mitigating factor that the COI took into account in determining penalties. Nonetheless, the committee had to balance this mitigating factor against the many aggravating factors, including violations that go to the core of academic and institutional integrity. Serious violations demand serious sanctions, and the COI faced a delicate task in determining penalties that were sufficiently harsh, yet fair. For example, because of the widespread academic fraud, the COI specifically considered a ban on postseason competition, but ultimately rejected such a penalty precisely *because* the violations were so widespread, spanning ten different sports. When some substantial penalties are unavailable to the committee, others must be considered in determining an overall array of appropriate penalties. In a case in which dozens of student-athletes competed while ineligible due to academic fraud, a vacation penalty is particularly appropriate.

The university takes the COI to task for not “specifying the weight” it gave to the university’s corrective actions. This issue will be considered in more depth in the discussion of institutional cooperation, but the university reads too much into the IAC’s precedent. The IAC has made clear that *all* of the seven factors are to be considered in an assessment of penalties, and no single factor can be given a life of its own. Indeed, in its Mississippi report that first set out the seven-factor test, the IAC noted that the COI in that case *had not even mentioned* the institution’s corrective measures in its report. (University of Mississippi, Public Infractions Appeals Committee Report, at page 12,

May 1, 1995.) Yet the IAC also recognized that the overall determination of penalties requires a careful balancing of mitigating and aggravating factors, and it upheld the COI penalties because the aggravating factors outweighed the mitigating factors, including the university's "commendable" corrective actions.

Florida State's long list of corrective measures in the present case is admirable, and shows a serious commitment to addressing the issues it faced. The university deserves credit for its actions, and it received that credit in the COI's determination of penalties, even though the credit may not be quantifiable. Unfortunately, the long list of corrective measures also is a reflection of the depth of the problem the university faced, particularly in light of its deficiencies in monitoring the AASS program. Despite a strong mitigating factor in this instance, it is clearly outweighed by the many aggravating factors.

#### *Comparison of the Penalty or Penalties Imposed*

The university rests its comparison analysis on one point, asserting that "the vacation penalty will not generally apply in the absence of intentional misconduct by a coach," and that the "common attribute . . . of almost all cases in which a vacation penalty was imposed is unethical behavior by a member of a coaching staff in an apparent attempt to gain a competitive or recruiting advantage." (FSU Appeal, pp. 22-23.) The university widely misses the mark. The COI has imposed a vacation penalty in numerous cases that did not involve intentional misconduct or unethical behavior by a coach. Indeed, a quick look at COI precedent will reveal three such cases within the last 13 months:

- Texas A&M-Corpus Christi (March 25, 2009). Vacation self-imposed and adopted by the COI – in two separate sports, each involving *one* student-athlete competing while ineligible. No coaches were even at risk in the case.<sup>4</sup>
- Middle Tennessee State (May 22, 2008). Vacation imposed by COI in a case involving *one* student-athlete competing while ineligible. The evidence "did not provide a sufficient basis for concluding that the former head coach knew or should have known of the student-athlete's ineligibility." The coach was found for failure to monitor, but not intentional misconduct or unethical behavior. No show-cause penalty was imposed.
- Florida International (May 7, 2008). Vacation imposed by COI in a case in which the institution misapplied NCAA legislation relating to full-time enrollment, progress-toward-degree, the "five-year" rule, squad lists, and transfers. No coaches were at risk in the case. Vacation of wins in which 45 student-athletes in 15 sports competed.

---

<sup>4</sup>There were unethical conduct violations, but against the athletics director for failing to report violations and against the compliance director for authorizing and arranging transportation for one prospect and for attempting to enhance his financial situation by threatening to disclose unreported violations.

The university cites two other important cases in which the COI imposed a vacation penalty even though there was no misconduct by any coach – Oklahoma (July 11, 2007) and Georgia Tech (November 17, 2005). The IAC reversed the vacation penalty in both cases, but the reasons for the reversals had little, if anything, to do with the fact that coaches were not involved. So the university’s “common attribute” analysis for vacation cases simply does not hold water.

The Georgia Tech case, however, is very instructive. On appeal in that case, the IAC conducted its own review of vacation cases and concluded:

. . . [W]e have reviewed all of the decisions cited by the Committee on Infractions and the university and observe that this case does not include factors present in prior cases in which this penalty was imposed, *such as academic fraud, serious intentional violations, direct involvement of a coach or high-ranking school administrator or a much greater number of violations than are involved in the present case.*

. . .

We do not conclude that any factor noted above, or any other specific factor, is required for vacating team records. Indeed, we recognize that “the Committee on Infractions must have latitude in tailoring remedies to the particular circumstances involved in each case and that the universe of relevant cases is not static but evolving.” [University of Alabama, Tuscaloosa Infractions Appeals Committee Report (September 17, 2002) Page No. 20] We also recognize that the universe of relevant factors is equally evolving. Nevertheless, when the Committee on Infractions departs from a series of decisions in which a particular penalty has been imposed, or not imposed, it should explain the facts or circumstances which lead them to depart from any pattern established by the prior cases.

(Georgia Institute of Technology, Public Infractions Appeals Committee Report, at pages 11-12, May 18, 2006) (emphasis added).

The IAC report in Georgia Tech is very significant because it provided the impetus for a thorough reexamination of the COI’s use of the vacation penalty. The COI took to heart the IAC’s comments on consistency in penalties, and shortly thereafter the chair of the COI appointed a subcommittee of COI members and one enforcement staff representative to examine the issue of vacation penalties on institutions that have violated NCAA legislation. The subcommittee, chaired by Paul Dee, then director of athletics at the University of Miami, met on two occasions, in February 2007 and April 2007, and thoroughly discussed the issue in light of the IAC’s Georgia Tech report and other considerations. The subcommittee presented its recommendations to the full COI in June 2007, and the recommendations were approved unanimously. The recommendations

were incorporated into a COI policy document that delineates certain factors to be taken into consideration by the COI in determining whether a vacation of records is appropriate. That policy document was provided to the IAC in August 2007. (Exhibit 3.)

The policy, which takes its cue from the IAC report in Georgia Tech, states in part:

. . . Although the COI agrees with the IAC that it should have the discretion to apply the vacation penalty under any circumstances it believes to be appropriate, the likelihood of its application is significantly increased when any [emphasis in original] of the below “aggravating factors” are present in an infractions case:

- academic fraud;
- serious intentional violations;
- direct involvement of a coach or high-ranking school administrator;
- a large number of violations;
- competition while academically ineligible;
- ineligible competition in a case that includes a finding of a failure to monitor or a lack of institutional control;
- when vacation or a similar penalty would be imposed if the underlying violations were secondary.

Thus, for the last three years since the May 18, 2006 IAC report in Georgia Tech, the COI has made every effort to impose its vacation penalty in a consistent manner. While the committee retains discretion to impose the penalty (or not impose the penalty) when the particular circumstances of a case warrant it, the COI has examined every case in light of the factors listed in the policy. In the Southeast Missouri State case (June 18, 2008), the COI spelled out its policy (and the history leading up to the policy) in the body of the infractions report and noted that three of the aggravating factors were present. In the cases mentioned previously (Texas A&M-Corpus Christi, Middle Tennessee State, and Florida International), between two and four aggravating factors were present.

The IAC has had the opportunity to review only two cases involving vacation penalties since its Georgia Tech report. As the university has noted, the IAC reversed the vacation penalty in the Oklahoma case. That case involved two aggravating factors (serious intentional violations and failure to monitor), but the IAC reversed because the COI did not accord sufficient weight to the university’s immediate, permanent dismissal of two involved student-athletes, a “powerful self-imposed penalty which seriously affected the football program.” (University of Oklahoma, Public Infractions Appeals Committee Report, at page 7, February 22, 2008.)

The Arkansas case involved three, possibly four, aggravating factors (serious intentional violations, direct involvement of a coach, failure to monitor, and arguably a large number

of violations), in addition to the fact that the university was a “double repeat violator.” The IAC upheld the vacation penalty even though the underlying recruiting violations were “not egregious.” The IAC focused on the aggravating factors and also noted that the COI considered, but did not impose, other penalties such as a postseason ban. (University of Arkansas, Fayetteville, Public Infractions Appeals Committee Report, at pages 8-9, September 22, 2008.) Similarly, in the present case, the COI considered, but not impose, other penalties, such as a postseason ban or harsher grant-in-aid reductions.

In this case, the COI was confronted, for the first time in at least a decade, with egregious academic fraud and *all* of the other factors that it considers critical in assessing a vacation penalty, including all four of the factors set forth by the IAC in its Georgia Tech report. In light of this extraordinary number of aggravating factors, imposition of the vacation penalty was an easy, virtually compelled, decision for the COI.

#### *Institutional Cooperation in the Investigation*

The IAC certainly has made clear that the COI must consider institutional cooperation in its determination of penalties. But once again, this is one of many factors that must be weighed in the committee’s overall analysis. As noted previously, in its Alabama and Georgia Tech reports, the IAC emphasized that “the Committee on Infractions must have latitude in tailoring remedies to the particular circumstances involved in each case.” In tailoring those remedies, the COI cannot mechanically “assign weight” to the cooperation factor any more than it can assign weight to any factor. They all influence the balance between aggravating and mitigating circumstances and contribute to the full range of committee penalties.

The university reads far too much into the IAC’s observation in the Oklahoma report that the COI did not “acknowledge or discuss the nature or extent of the institution’s cooperation, nor specify what weight, if any, it was given.” (University of Oklahoma, Public Infractions Appeals Committee Report, at page 8, February 22, 2008.) Like COI decisions, IAC decisions are based on many considerations that form a coherent whole. In the Oklahoma report, for example, the IAC discussed the fact that the COI had “nowhere mentioned or analyzed” in its infractions report the aggravating factors that specifically guide the COI in assessing a vacation penalty. (That, of course, is not true here. The discussion of the aggravating factors in the penalty section of the Florida State report is detailed and complete.) The IAC also discussed its guidance in the Georgia Tech case and noted that only one of the aggravating factors set forth in that case was present in the Oklahoma case. (All four of the IAC’s aggravating factors are present here, along with all of the other factors set forth in the COI vacation policy.) The IAC discussed the “powerful self-imposed penalty which seriously affected the football program” in Oklahoma. (As significant as the Florida State corrective actions were, they probably do not compare to the self-imposed penalty highlighted in the Oklahoma

report.) Thus, any number of factors may have played a role in the IAC's overall judgment in the Oklahoma case.

The university suggests that if the COI does not "discuss and specify the weight" given to institutional cooperation, its penalty is subject to automatic reversal. That clearly is not what the IAC intended by its observations in the Oklahoma case. If it were, the IAC would not have upheld the vacation penalty in the Arkansas case seven months later. The COI did not discuss and assign weight to the university's cooperation in that case, other than to acknowledge the university's "full cooperation and thorough investigation after the possibility of violations came to light." (University of Arkansas, Public Committee on Infractions Report, at page 8, October 25, 2007.) Yet the IAC upheld the vacation penalty because the aggravating factors in the case clearly warranted a severe penalty. There are even more aggravating factors present in this case.

Perhaps an even better example is the case that set forth the seven-part test – the 1995 IAC decision in Mississippi. In that case, the IAC specifically expressed "concern that the balance struck by the Committee on Infractions does not accord appropriate weight to the institution's cooperation in this case." (University of Mississippi, Public Infractions Appeals Committee Report, at page 15, May 1, 1995.) Yet, the ultimate decision on whether the COI penalties were excessive or inappropriate came down, as it had to, on an overall assessment of aggravating and mitigating circumstances. In the final analysis, the IAC *upheld* the COI penalties despite its "concern":

In determining whether the specific penalties imposed in this case are "excessive or inappropriate," consideration must be given not only to the aggravating factors summarized in the preceding paragraph but also to mitigating factors. Those mitigating factors are the corrective actions taken by the institution and its cooperation in the investigation. Consideration of these factors is also consistent with the mission and primary goals of the NCAA enforcement program.

As previously indicated, the Infractions Appeals Committee is concerned that the institution's cooperation was not accorded appropriate weight in imposing penalties in this case. The institution's chief executive officer, together with other members of the institution's administration, addressed the problems in the institution's football program with courage and integrity. That performance argues strongly for some credit or relief. However, *given the many aggravating factors* summarized above, which involved less praiseworthy conduct by other representatives of the institution, the Infractions Appeals committee concludes that the penalties imposed by the Committee on Infractions are neither excessive nor inappropriate.

(University of Mississippi, Public Infractions Appeals Committee Report, at page 18, May 1, 1995) (emphasis added).

Thus, it is clear that the COI need not specifically discuss and assign weight to any particular factor, including institutional cooperation, in order for its penalties to be upheld. What the COI must do, though, is *consider* institutional cooperation, in the context of “different levels or degrees of cooperation,” to determine whether the level of institutional cooperation warrants “special consideration,” as discussed in the 1995 Mississippi report (pp. 14-15). In other words, most cases will involve thorough, diligent investigation and cooperation by institutions that meet the cooperative principle set forth in Bylaw 32.1.4. Some cases, however, involve *extraordinary* efforts that warrant special consideration and potential relief from severe penalties. But there is a sliding scale in terms of “degrees of cooperation,” and even in the most compelling of cases, extraordinary aggravating factors may outweigh extraordinary mitigating factors, depending on *all* of the circumstances in the case.

The COI in this case considered the university’s cooperation, and it said so. (Exhibit 1, p. 14.) The committee concluded that the university met its obligation under Bylaw 32.1.4. By its comments the COI does not diminish the efforts of the university. It conducted a thorough, diligent investigation, and did what it needed to do to ferret out wrongdoing in its AASS program. The COI appreciated those efforts and considered them to be a significant mitigating factor in the committee’s determination of penalties. Once again, though, the COI had to weigh the mitigating circumstances against the many aggravating factors, particularly those that are especially relevant to a vacation penalty.

The university has detailed at great length in its appeal its cooperative efforts and corrective actions. Those actions are indeed commendable, and the COI has no intention of diminishing them. But in the final analysis, the committee did not believe they were so extraordinary as to warrant relief from the vacation penalty in a case in which there are so many relevant aggravating factors. In considering the appropriate balance between aggravating factors and mitigating factors, language from another IAC report is instructive:

Even though the Infractions Appeals Committee realizes that an institution is expected to cooperate during an investigation, it is imperative that the imposition of penalties recognize those institutions that go the “extra mile” to determine the truth and, in so doing, uncover violations. Failure to do so could result in a weakening of the NCAA enforcement program. Nonetheless, the cooperation of the institution in this case must be weighed against the conduct of the head men’s ice hockey coach as outlined above. The Infractions Appeals Committee concluded that in large measure the head men’s ice hockey coach’s failure to exercise proper control over his program and his involvement in significant

violations offset the good work of the institution. (University of Maine (Orono) Public Infractions Appeals committee Report, February 13, 1997.)

In the present case, the university arguably did “go the extra mile” to determine the truth and uncover additional violations. In doing so, it helped to validate and strengthen the NCAA enforcement program. Nonetheless, the unethical conduct of three of its institutional staff members and at least 61 of its student-athletes, the university’s failure to monitor the operations of the AASS program, and the other aggravating factors in this case, including widespread academic fraud, “offset the good work of the institution” during the investigation.

The university attempts to deflect attention from its aggravating factors by portraying the COI as bent on “ignoring” or even “defying” IAC precedent. But development of case law – at both the IAC and COI levels – is an evolutionary process, as is ongoing discussion of the role of cooperation in the assessment of penalties. It is true that the COI has discussed that role at length in recent years, most recently in the context of a thorough review of the NCAA penalty structure by a subcommittee of the COI. It might surprise the university that one of the current members of the IAC was an active participant in the discussions of that penalty subcommittee and had concurred in a draft recommendation of the subcommittee that full and complete cooperation in an infractions case is an obligation of membership that should not mitigate penalties. But that review process, like the development of case law, also is an evolutionary process. In April 2009, after input from various sources, including the IAC, the enforcement staff, and other NCAA officials, the COI has submitted penalty recommendations that do *not* include the draft recommendation on mitigation through cooperation. So to suggest that the COI is at odds “philosophically” with the IAC and thus *refuses* to abide by IAC precedent is simply wrong. Indeed the development of the COI’s vacation policy, based largely on the IAC report in Georgia Tech, demonstrates just the opposite.

Institutional cooperation is one factor to be considered and weighed by the COI in its determination of penalties. The committee did weigh that factor, which it considered to be a significant mitigating factor, against an array of other mitigating and aggravating factors. Based on that balancing, the COI imposed a reasonable set of penalties that is proportionate to the violations in the case. The COI urges the IAC to consider not only the full range of mitigating and aggravating factors, but also the full range of penalties – for example, the lighter grant-in-aid reductions resulting from imposition of the vacation penalty.

#### *Impact of Penalties on Innocent Student-Athletes and Coaches*

It is true that a vacation penalty, like other penalties, often has an adverse impact on innocent student-athletes and coaches who were not involved in violations. Seldom will

significant institutional penalties fail to have such an impact. The IAC has recognized that harsh reality on numerous occasions:

[I]t would be impossible for the Committee on Infractions to carry out its functions and responsibilities under Bylaw 19.01.1 without having some effect on innocent students and coaches. That bylaw directs the committee, in imposing penalties, to provide fairness to uninvolved parties. However, the bylaw also makes it clear that the primary mission of the committee is “to eliminate violations of NCAA rules and impose appropriate penalties should violations occur.” (University of Mississippi, Public Infractions Appeals Committee Report, at page 16, May 1, 1995.)<sup>5</sup>

Most of the other cases in which this issue arises have involved postseason competition bans. In those cases, innocent student-athletes and coaches at the involved institution are unable to compete or coach in postseason contests – indeed, a regrettable consequence of a harsh sanction. A vacation penalty is a bit different, however, because it attempts to provide at least modest redress to innocent student-athletes and coaches from *other institutions*, who may have lost contests to institutions that were competing with ineligible student-athletes. The university in this case quotes from Bylaw 19.01.1 (FSU Appeal, p. 24), but ignores the fact that the bylaw also addresses fairness to “competitors and other institutions.” A vacation penalty is almost unique in its basic fairness, by vacating contests an institution won while competing with student-athletes who *should not have been competing*.

The university seeks to make a distinction between student-athletes and coaches, but the fundamental principle – that wins should not stand if the victorious team competed with ineligible student-athletes – necessarily carries the same impact for coaches as it does for student-athletes. Indeed, it would be *unfair* and arbitrary to take away a victory from innocent student-athletes who competed with ineligible teammates while leaving the victory intact for the coach, who also “earned” his victory illegitimately. The COI consistently has adjusted coaches’ records along with vacation of team records, and there is no reason to depart from that consistent precedent in this case.

---

<sup>5</sup>See also University of California, Berkeley, Public Infractions Appeals Committee Report, at page 18, November 18, 2002 (“The committee has consistently recognized that in most cases a ban on postseason competition will affect innocent student-athletes. As we have pointed out before, this is inherent in the nature of the penalty.”); University of Kentucky, Public Infractions Appeals Committee Report, at page 21, September 17, 2002 (noting the “unfortunate consequence” of a postseason ban); University of Nevada, Las Vegas Public Infractions Appeals Committee Report, at page 11, February 16, 2001 (“The imposition of penalties always involves a balancing of interests. Almost every ban on competition impacts some innocent individuals. We hope the regrettable consequences of this penalty are appreciated fully . . . so that there will not be a recurrence of the facts that gave rise to the violations . . .”).

The university's analogy to the innocent pitcher on a baseball team is inaccurate. The vacation of the team victory necessarily carries with it the consequence that the pitcher loses his victory as well. He cannot claim a "win" on his win-loss record if the team victory is gone – and for good reason, because he does not win a game without the efforts of his teammates. If one or more of those teammates competed while ineligible, *any* "win," even an individual one, is tainted. The IAC faced a similar situation recently in the Arkansas track case. When one relay team member competes while ineligible, the entire points earned by the relay team are vacated. While it may be unfortunate for the three innocent relay team members that they no longer can claim their place in the relay team standings, they did not "earn" that place legitimately.

Surely it is ironic that the university should use the LSU case to anchor its argument on this factor. While the IAC may have vacated a postseason ban in that case because of its hardship on innocent student-athletes and coaches, the institution *self-imposed* a **vacation** of records penalty. (Louisiana State University Public Infractions Appeals Committee Report, at page 2, March 19, 1999.) Obviously, that institution did not believe that a vacation penalty was fundamentally unfair to its innocent student-athletes and coaches. And that is because the vacated "wins" were achieved with the assistance of ineligible student-athletes.

In the words of the IAC, "[t]he imposition of penalties always involves a balancing of interests," and the "regrettable consequences" of that balancing often include an adverse impact on innocent student-athletes. (University of Nevada, Las Vegas Public Infractions Appeals Committee Report, at page 11, February 16, 2001.) But in a vacation penalty, that impact at least is tempered by the positive impact on, and fairness to, innocent competitors whose "losses" at the hands of a team that competed with ineligible student-athletes also are effectively vacated. Thus, this factor in the seven-factor analysis is not a strong mitigator in the assessment of penalties.

#### *NCAA Policies Regarding Fairness in, and Equitable Resolution of, Infractions Cases*

The university makes two arguments under this category. The first is that the COI's vacation penalty "conflicts with the principle of the arrangement between the University and the Enforcement Staff and SAR [student-athlete reinstatement] Staff." (FSU Appeal, p. 26). This issue was thoroughly discussed at the hearing (Hearing Transcript, pp. 312-30), and what was made clear during that discussion is that the student-athlete reinstatement process and the enforcement/infractions process are completely separate. They have different processes, focuses, and purposes. Reinstatement is focused exclusively on resolving future eligibility of student-athletes after they have been found to be in violation of NCAA rules. The COI process is focused on the findings of violations and penalties on institutions for those violations.

As was made clear to the university at the hearing, a student-athlete's ineligibility to compete begins from the time of the student-athlete's commission of a violation of

NCAA legislation. In this case, the student-athletes' academic misconduct during fall 2006, spring 2007, and summer 2007 rendered them ineligible for competition until their eligibility was *reinstated* through the SAR process. The reinstatement decision was made in December 2007 and imposed a 30% withholding penalty *going forward*, from December 2007 on. Clearly, that decision could have no impact on the student-athletes' ineligible competition prior to reinstatement.

Just as the COI has no role in the SAR process, the SAR staff has no role in the infractions process. The COI's sole focus in imposing a vacation penalty was to address the tainted wins achieved *while the student-athletes were ineligible* because of their academic misconduct. That penalty is completely unrelated to reinstatement.

The university is simply wrong in suggesting that "[n]ullification of the [online music] course would remove the taint, since none of the student-athletes would ultimately receive improperly secured academic credit." (FSU Appeal, p. 26.) It is one thing for the student-athlete not to need the tainted credit for academic-progress purposes; it is quite another to cheat and compete until the student-athlete's wrongdoing is discovered. In other words, while the student-athlete might not be ineligible from a satisfactory-progress standpoint because he or she ultimately will not use the tainted course for *academic* eligibility, the student-athlete still is ineligible to compete *because of the academic fraud* until he or she is reinstated. The university's argument is misplaced.

Finally, the university objects to the COI's use of a "new policy" related to aggravating factors that make imposition of a vacation penalty more likely. The development of that policy has been discussed previously; the COI would simply reiterate that the policy was put into place in response to IAC precedent, particularly the Georgia Tech report. More than three years have elapsed since the release of the Georgia Tech report, and the COI has consistently focused on the aggravating factors listed in the policy in determining whether to impose a vacation penalty. As noted, this case is unprecedented in involving *all* of the aggravating factors.

The university complains that the policy has not been "approved by the membership," but the IAC knows full well how its work, and the work of the COI, would be hamstrung if the committees did not have latitude to respond in a timely fashion to the "evolving" universe of relevant factors and relevant cases. (Georgia Institute of Technology, Public Infractions Appeals Committee Report, at pp. 11-12, May 18, 2006.) Indeed, the seven-factor test itself was "impose[d] . . . without notice or approval of the membership." (FSU, Appeal, p. 27.) The same could be said for innumerable IAC and COI "policies," practices, or decisions that have developed necessarily in the evolutionary environment in which both committees operate. Certainly if the membership does not like that evolution (or the COI's allegedly "overbroad" policy), it can seek a modification of the bylaws. To date, however, the clear message the COI has been receiving from "the membership" (at least those institutions that are not currently in trouble) is to impose meaningful (harsher)

penalties. Similarly, the IAC has ample authority to let the COI know if it does not approve of the policy or the COI's application of the policy in any particular case. But it bears repeating that the policy was crafted with the tacit encouragement, if not urging, of the IAC, and it should be allowed to develop and mature.

The university's argument that the COI's vacation policy is being applied "retroactively" also rings hollow. Under its rationale, every policy change would have to be put on hold for at least four years – the timeframe for the statute of limitations under bylaw 32.6.3. The policy does not create new violations; it addresses appropriate factors to consider in imposing penalties for violations that have occurred. Surely the university cannot claim that it relied to its detriment on the COI's past practice in imposing the vacation penalty, which was applied without reliance on a set of specific guidelines. Would the violations in this case *not have occurred* if the COI's current vacation policy had been in place at the time?

The seventh factor in the IAC's seven-factor analysis focuses on NCAA policies regarding fairness in, and equitable resolution of, infractions cases. In the end, the COI would point once again to the IAC's guidance from its 1995 University of Mississippi report that first set forth the seven-factor test: the "primary mission" of both the COI and the NCAA enforcement program generally is "to eliminate violations of NCAA rules and impose appropriate penalties should violations occur" (p. 16, quoting Bylaw 19.01.1). Given the many aggravating factors in this case, the COI balanced its functions and responsibilities under Bylaw 19.01.1 appropriately. The result of that careful balancing – a set of penalties, including vacation of records, tailored to the nature and scope of the violations committed – should not be set aside on appeal.

## VI. CONCLUSION

The IAC has made it clear that "[t]he most severe penalties are appropriate when the academic mission of the university has been compromised." (Clem Haskins/University of Minnesota, Public Infractions Appeals Committee Report, at page 21, April 6, 2001.) In this case, the vacation penalty is not even particularly severe – it is a penalty that flows naturally from the university's use of ineligible student-athletes in competition, and it is a penalty often imposed in cases that have far fewer aggravating factors than those that exist here.

In light of those aggravating factors, the COI's consistent application of a vacation policy that incorporates those factors, and the committee's careful crafting of a *set* of appropriate penalties (for example, lessening the impact of grant-in-aid reductions in light of the vacation of records and forgoing a ban on postseason competition), the COI certainly did not abuse its discretion in imposing the vacation penalty. The current

standard of review under Bylaw 32.10.4.1 places the burden squarely on Florida State University to make a showing of abuse of discretion, and it falls well short in this case.

For the reasons set forth in this response, the Committee on Infractions submits that the vacation of records penalty should be upheld.

Respectfully submitted,

NCAA Division I Committee on Infractions

BY: Jerry R. Parkinson, Coordinator of Appeals  
Dean, University of Wyoming College of Law