

Florida State University

CASE NO. M286

**REBUTTAL TO THE COMMITTEE ON INFRACTIONS'
RESPONSE TO APPEAL OF INFRACTIONS REPORT NO. 294**

JUNE 30, 2009

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I. INTRODUCTION.

In the selection of penalties, the Committee on Infractions must, under established precedent, discuss and specify the mitigating weight accorded to institutional cooperation and self-corrective actions. The failure of the Committee on Infractions to include in its Infractions Report any discussion of these long-established, mitigating factors is a clear and significant error in the process. It violates precedent, frustrates meaningful review on appeal, discourages institutional cooperation and self-correction, and undermines the legitimacy of the penalties imposed. It also compels reversal.

II. THE VACATION PENALTY IS EXCESSIVE AND AN ABUSE OF DISCRETION.

Institutional Cooperation and Self-Corrective Actions

The central failing of the Committee on Infractions' imposition of penalties was its failure to analyze and discuss *each* of the seven well-known factors prescribed in the University of Mississippi case. In its Infractions Report, the Committee claimed to have considered the University's cooperation and self-corrective actions, but it went no further. It did not explain—as it must do—how those mitigating factors might or might not have influenced its choice of penalties. If the Committee in fact weighed those factors, it did so in a black box that denies the University and this Committee a meaningful opportunity to review the appropriateness of its logic and its decision. Because the Committee did not even address these essential factors, the vacation-of-wins penalty must be reversed.

Incredibly, the Committee on Infractions now flatly denies that it must “discuss and assign weight” to each of the University of Mississippi factors. [Response to Appeal of Infractions Report No. 294, at 15 (the “Response”).] It is enough, the Committee argues, that it “considered” those factors—and that “it said so.” [*Id.* at 16.] The Committee is wrong. The decisions of this Committee expressly direct the Committee on Infractions not only to weigh all seven factors, but to include that discussion in its report. [Alabama State University, IAC Report (June 30, 2009); University of Oklahoma, IAC Report (Feb. 22, 2008); University of Georgia, IAC Report (June 3, 2005); Howard

University, IAC Report (July 16, 2002).] Under these precedents, the rote invocation of boilerplate language suggesting without elaboration that the Committee considered the University of Mississippi factors is wholly insufficient.

The reason is obvious. It is the Committee on Infractions that evaluates the evidence firsthand and makes the initial selection of penalties. Unless the Committee on Infractions, based on its assessment of the evidence, expressly articulates the significance or insignificance of each mitigating factor and its impact, if any, on the Committee's choice of penalties, this Committee cannot determine whether those factors were weighed and balanced and, if so, whether they were properly weighed and balanced. Indeed, the Infractions Report would be largely unreviewable. This Committee would be asked to ratify the Committee on Infractions' action without the benefit of its analysis or any direct insight into its thought processes. The Committee on Infractions must fully explain its decision in order to avoid the taint of arbitrariness and to facilitate review on appeal.

The Committee on Infractions' refusal to discuss the extent of consideration given to each mitigating factor is contrary to precedent. In fact, this Committee's recent decision in the Alabama State University case compels reversal here. That case involved academic fraud, including numerous instances of grade manipulation, as well as ineligible competition, recruiting violations, and lack of institutional control. [Alabama State University, IAC Report, at 1, 22.] The Committee on Infractions imposed five years of probation. [*Id.*] On appeal, this Committee articulated the proper standard to determine whether the imposition of penalties is an abuse of discretion. Specifically, an abuse of discretion occurs where *any* of the following factors is present:

- the penalty was not based on a correct legal standard or was based on a misapprehension of the underlying substantive legal principles;
- the penalty was based on a clearly erroneous factual finding;
- the Committee on Infractions *failed to consider and weigh material factors*;
- the penalty was based on a clear error of judgment, such that the imposition was arbitrary, capricious, or irrational; ***or***
- the penalty was based in significant part on one or more irrelevant or improper factors.

[*Id.* at 23.] Applying this standard, the Infractions Appeals Committee reversed on two independent grounds. [*Id.* at 23-25.] One of these was the Committee on Infractions' failure to discuss the mitigating weight of the institution's corrective actions, including a self-imposed, two-year period of probation. [*Id.* at 23-24.] As in the present case, the Infractions Report had noted cursorily that the Committee "considered the institution's self-imposed penalties and corrective actions." [*Id.* at 23.] This was insufficient. [*Id.*] This Committee explained that the Infractions Report "did not directly address the substance or effect of those self-imposed penalties, and in particular, the institution's two-year probation," which was "both public and substantial." [*Id.* at 23-24.] "The impact of this self-imposed probation was a material factor that the Committee on Infractions did not appropriately consider and weigh; its failure to do so constitutes an abuse of discretion within the meaning of the test set forth above." [*Id.* at 25.] As a result, this Committee reduced the five-year probationary period to three years. [*Id.*]

Here, the Infractions Report did not directly address the substance or effect of the University's extensive cooperation and self-corrective actions—including, as in the Alabama State University case, a self-imposed, two-year period of probation. Its failure to recognize these efforts cannot be discountenanced in one case and condoned in another.

The Alabama State University case follows a line of precedent that requires the Committee on Infractions to discuss and specify the weight, if any, accorded to institutional cooperation and self-corrective actions. In the Howard University case, the Committee found an array of violations concerning academic fraud, academic eligibility, recruiting, extra benefits, and lack of institutional control. [Howard University, IAC Report, at 2.] Some student-athletes were fraudulently "awarded academic credit in classes, even though the young men performed little or no work, attended few or no classes and completed no written assignments or examinations in these courses." [*Id.* at 7.] The Committee placed the institution on probation for five years. On appeal, the Committee "advised the Infractions Appeal Committee that the mitigating factor of exemplary institutional cooperation . . . had been considered in determining penalties"

and acknowledged that “all of the major violations that were found in sports other than baseball were due to the investigation and self-reports by the institution.” [*Id.* at 29.]

The Infractions Appeals Committee was unsatisfied: “In reviewing the extent to which this mitigating factor was taken into account, the difficulty for the Infractions Appeals Committee is that *the report does not . . . indicate* the extent to which the penalties were mitigated by the institution’s cooperation.” [*Id.* at 31 (emphasis added).] This Committee recognized that the Howard University case “involved a large number of serious violations which warranted significant penalties,” but it determined that, “*absent an analysis of the mitigating factor* of institutional cooperation/self-investigation,” the five-year probationary period cannot stand. [*Id.* (emphasis added).] It concluded with an admonition: “We encourage the Committee on Infractions *to include in its report* in future cases a *fuller explanation* of . . . the extent of the consideration given to any degree of institutional cooperation sufficient to be a mitigating factor.” [*Id.* (emphasis added).] Thus, the short shrift given to the institution’s cooperation by the Infractions Report mandated a reduction in the severest penalty imposed, notwithstanding the Committee’s late acknowledgment of that cooperation on appeal.

The present case is analogous. Here, as in the Howard University case, the institution’s voluntary self-investigation disclosed substantially *all* of the violations at issue. Here, as there, the Infractions Report “does not . . . indicate the extent to which the penalties were mitigated by the institution’s cooperation.” Indeed, it is utterly devoid of any “analysis of the mitigating factor of institutional cooperation/self-investigation.” [*Id.*] The Committee’s self-serving, after-the-fact assertion that the University’s cooperation was “considered . . . to be a significant mitigating factor” [Response, at 16] is unpersuasive and cannot cure its failure to “include in its report . . . a fuller explanation of . . . the extent of the consideration given to any degree of institutional cooperation sufficient to be a mitigating factor” [Howard University, IAC Report, at 31].

Shortly after this Committee issued its decision in the Howard University case, it upheld the imposition of penalties in the University of Alabama case. [University of Alabama, IAC Report (Sept. 17, 2002).] In that case, the Infractions Report noted that

“university officials cooperated fully with the enforcement staff, often at great personal criticism, in a diligent effort to develop complete information regarding the violations,” and explained that, in light of the institution’s cooperation, the Committee on Infractions declined to impose the severest penalties. [University of Alabama, COI Report (Feb. 1, 2002), at 29.] On appeal, this Committee recognized the Committee on Infractions’ compliance with the requirements of the Howard University case:

The Infractions Appeals Committee commends the Committee on Infractions for its explanation of the rationale for the penalties it imposed and the extent to which the institution’s cooperation operated to mitigate those penalties. *It is clear from the Committee’s report* that it did properly consider institutional cooperation as a “significant factor” and accorded it “substantial weight in determining and imposing” penalties here.

[University of Alabama, IAC Report, at 20 (emphasis added).] In the present case, of course, it is not clear from the Committee’s report that it properly considered institutional cooperation as a “significant factor” or that it accorded *any* weight to institutional cooperation in determining and imposing penalties. The Infractions Report is silent.

Similarly, in the University of Kentucky case, the “Committee on Infractions, *in its report* and presentation to this committee, repeatedly complimented Kentucky on its overall compliance program and its cooperation in this case.” [University of Kentucky, IAC Report (Sept. 17, 2002), at 19 (emphasis added).] In upholding the penalties imposed, this Committee noted that the “*report demonstrates* that the Committee on Infractions considered the institution’s high degree of cooperation and that this factor did mitigate the penalties imposed.” [*Id.* at 20 (emphasis added).] Again, the present case affords a striking contrast. The Infractions Report pays no regard to the University’s extraordinary cooperation and self-correction, and does not demonstrate that the Committee gave any weight whatsoever to those factors as mitigations.

The University of Georgia case involved a broad range of serious violations, including academic fraud, and the institution was a repeat violator. [University of Georgia, IAC Report, at 28.] In reducing the institution’s grants-in-aid by one, the Committee on Infractions “did not acknowledge” the institution’s release of five student-athletes who had signed National Letters of Intent to attend the institution. [*Id.*] The

institution's corrective action was a "powerful self-imposed penalty that seriously affected its men's basketball program" and merited discussion by the Committee on Infractions. [*Id.*] The Committee's failure to account for the weight accorded to the institution's self-corrective action warranted reversal of the grant-in-aid reductions. [*Id.*]

Of course, the University of Oklahoma case supports the same conclusion. The Committee on Infractions contends that the University "reads far too much into" the University of Oklahoma case and that "any number of factors may have played a role in the IAC's overall judgment in the Oklahoma case."¹ [Response, at 14.] This Committee's decision in that case cannot be so easily blurred. First, this Committee noted the "powerful self-imposed penalty" which the institution had prescribed and concluded that the "Committee on Infractions report did not *acknowledge or discuss* this action nor *specify what weight, if any, it was given.*" [University of Oklahoma, IAC Report, at 7 (emphasis added).] Second, it observed that "the institution's cooperation was a significant factor in the ultimate detection of the violations" and explained that the failure to accord institutional cooperation "substantial weight in determining and imposing penalties would be a disincentive to the fullest possible institutional cooperation." [*Id.*] "As with the corrective action discussed above, the Committee on Infractions report did not *acknowledge or discuss* the nature or extent of the institution's cooperation, nor *specify what weight, if any, it was given.*" [*Id.* at 8 (emphasis added).] It is clear, therefore, that the severe penalty in the University of Oklahoma case, like the severe penalties in the Alabama State University, Howard University and University of Georgia cases, was reversed because the Committee on Infractions did not include in its Infractions Report a discussion of the degree to which the laudable efforts of the affected institutions to detect and redress misconduct might have mitigated the penalties.

The Committee nevertheless protests that the seven University of Mississippi factors cannot be applied "mechanically" [Response, at 5, 14], and that those factors must

¹ Elsewhere, the Committee displays less confusion about the "factors [that] may have played a role in the IAC's overall judgment" and candidly (though inconsistently) acknowledges that "the IAC reversed because the COI did not accord sufficient weight" to the institution's self-corrective actions. [Response, at 13.]

be “balanced” [*id.*, at 10, 14-19, 21] and considered “in their *entirety*” [*id.* at 5 (emphasis in original)]. True enough. But it does not follow that the Committee may *totally ignore* certain factors and thus reduce seven factors to five (or fewer) factors. Stated otherwise, the Committee does not appropriately balance the seven factors, or even purport to consider the seven factors in their entirety, when it discusses only five factors. Nor is it “formulaic” [*id.* at 5] to require the Committee to address all seven factors explicitly. To do otherwise—to permit the Committee to select the factors it pleases to address, while it passes over the others in silence—renders the seven-factor test manipulable and destroys its tendency to afford valued guidance and predictability. It requires this Committee and affected institutions to accept, without scrutiny and on faith alone, the Committee on Infractions’ generic assertions that it took all relevant considerations into account.

This cannot be. This Committee cannot be compelled to accept at face value the Committee on Infractions’ implicit assertion that no amount of cooperation or self-corrective action might have justified a lesser penalty. And an institution threatened with the severest sanctions—and this Committee in review of those sanctions—cannot be bound to accept the unhelpful assurance that, in secrecy, the Committee on Infractions actually and properly performed a complete and coherent analysis. Fair play demands a full explanation of that Committee’s assessment of each mitigating factor. Its reasoning must be open, available, and subject to scrutiny—not concealed. Considering the gravity of the sanctions, the requirement of an explicit discussion of all seven factors is not a mere diversion or an attempt to “deflect attention.” [*Id.* at 4, 17.] It is vitally important to the basic fairness of this proceeding, the essential interests of the University, and the very legitimacy of the penalties imposed. And it should be addressed squarely.

The University does not ask that “undue weight” be assigned to any factor [*id.* at 5] or that any “single factor . . . be given a life of its own” [*id.* at 10]. Instead, it asserts that, when the Committee on Infractions does not even *discuss* particular factors, it becomes impossible to determine whether the Committee assigned undue weight, the proper degree of weight, or *any weight at all* to those factors. The Committee, for example, asserts in retrospect that the University “received . . . credit” for its “admirable”

corrective measures [*id.*], but this assertion finds no support in the Infractions Report, which does not even begin to discuss the extent of “credit,” if any, “received” by the University. Likewise, the Committee now asserts that it “appreciated” the University’s cooperative efforts and “considered them to be a significant mitigating factor” [*id.* at 16], but this assertion also finds no support in the Infractions Report, which nowhere expresses appreciation or explains the significance allegedly accorded to the University’s cooperation as a mitigation of penalties. The Committee’s failure to discuss and specify the weight, if any, assigned to the University’s exemplary cooperation and self-corrective actions undermines the validity of its analysis. To overlook the omission on the strength of subsequent assurances undermines the seven-factor University of Mississippi test itself.

Like a trial court that must state its findings of fact and conclusions of law to facilitate appellate review, the Committee on Infractions must set forth its analysis for the same reason. Absent a written analysis, this Committee cannot determine whether the Committee on Infractions properly appraised the relevant considerations. Indeed, the Committee on Infractions’ revealing observation that the University “*arguably* did ‘go the extra mile’ to determine the truth and uncover additional violations” is strong evidence that the Committee *still* does not properly comprehend the nature and extent of the University’s cooperation. [*Id.*] As detailed in the University’s Appeal, the University voluntarily investigated and, through hundreds of interviews and extensive internal audits of computer data, brought to light *each and every one* of the violations at issue. Indeed, the majority of violations were discovered only in response to a reinstatement arrangement proposed by the University and accepted by the Enforcement Staff. The Committee’s position that the University’s cooperation is “arguable” is precisely the sort of mistaken perception which a full and deliberate discussion of the mitigating factors in the Infractions Report would have disclosed. Instead, because the Infractions Report did not include any explanation or discussion of mitigating circumstances, the University and this Committee can only conjecture whether the Committee on Infractions accurately “appreciated” the University’s actions [*id.*] and imposed the appropriate penalties.

In the University of Mississippi case, for example, the Committee on Infractions properly discussed the weight accorded to institutional cooperation. It described the institution's cooperation in detail and characterized it as "complete and commendable." [University of Mississippi, IAC Report, at 16-18.] Nevertheless, the Committee concluded that, because the violations were serious, the institution was a repeat violator, and the former violations were similar to the present violations, the institution's cooperation "did not reduce or mitigate its penalties." [*Id.* at 18.] On appeal, this Committee expressed concern "that the balance struck by the Committee on Infractions does not accord appropriate weight to the institution's cooperation," but upheld those penalties. [*Id.* at 18.] Importantly, it was the deliberate and thorough discussion contained in the Infractions Report that enabled this Committee to evaluate the "balance struck" by the Committee on Infractions, and either to agree or disagree with the Committee's reasoning. While this Committee disagreed with the Committee on Infractions, it at least *knew* from the Infractions Report what that balance was. This information was critical to its review on appeal.

By contrast, in the present case, the Infractions Report contains no similar discussion. Here, unlike the University of Mississippi case, this Committee is prevented from determining whether "the institution's cooperation was . . . accorded appropriate weight in imposing penalties" [*id.* at 22] because the weight, if any, accorded to the University's cooperation is shrouded in silent mystery. The failure of the Committee on Infractions to explain the particular balance it struck stifles this Committee's review.

To escape the precedential impact of the Howard University, University of Georgia, and University of Oklahoma cases, the Committee describes the development of case law as an "evolutionary process." [*Id.* at 17, 20.] Thus, the Committee argues, there is an "ongoing discussion of the role of cooperation in the assessment of penalties." [*Id.*] The Committee on Infractions, however, is not free to ignore the prior decisions of this Committee—including the University of Mississippi case, which prescribes a *seven*-factor analysis—under either the "evolutionary process" or "ongoing discussion" rubric.

Otherwise, precedents would afford little stability or consistency. This Committee must reverse decisions of the Committee on Infractions that contravene established precedent.

The Committee, however, suggests that it considered the University's corrective actions—and did so with “care”—when it increased the University's self-imposed grant-in-aid reductions. [Response, at 9.] This observation misses the mark. The Committee's obligation is not merely to know of the existence of self-corrective actions, but to acknowledge and discuss them as potential *mitigations*. This the Committee did not do. Similarly, the Committee's suggestion that *its* reductions in grants-in-aid would have been more stringent absent *its* vacation of wins is beside the point. [*Id.*] The relevant (and unanswered) question is whether the penalties imposed *by the Committee* would have been more stringent absent the penalties voluntarily imposed *by the University*.²

The Committee cites the University of Mississippi and University of Arkansas cases in support of its position that the Infractions Report need not include a discussion of all mitigating factors. In the University of Mississippi case, the Infractions Report did not discuss self-corrective actions, but the penalties were upheld. [*Id.* at 10.] In that case, however, “there was no reference to these actions in the Infractions Report because ‘they were not included in the written materials submitted to the Committee on Infractions.’” [University of Mississippi, IAC Report, at 14.] No such excuse is available here. The Committee was fully apprised of the University's self-corrective actions, and ignored them. In addition, the seven-factor analysis was not fully articulated until this Committee issued its report in the University of Mississippi case, and it has since been developed in subsequent cases. As the Committee emphasized in its Response, the “development of case law” is an “evolutionary process.” [Response, at 17, 20.] Thus, even if this Committee did not fully implement its seven-factor test retroactively in the University of Mississippi case, more recent cases have established that the Committee on Infractions must include in its Infractions Report an explanation of the extent of consideration given

² The Committee rejected a ban on postseason competition, but it did so expressly because the violations spanned ten sports—not because it gave any mitigating weight to the University's cooperation and self-corrective actions. [Response, at 10.]

to cooperation and self-corrective actions. [University of Oklahoma, IAC Report; University of Georgia, IAC Report; Howard University, IAC Report.]

The Committee's reliance on the University of Arkansas case is still more tenuous. [Response, at 14.] There is no suggestion in this Committee's Report in that case that the failure of the Committee on Infractions to discuss mitigating factors was raised as an issue on appeal. [University of Arkansas, IAC Report (Sept. 22, 2008).]

Tellingly, the Committee on Infractions' Response does not contain a statement of the corrective actions taken by the University, as required by NCAA Bylaw 32.10.2(c). Bylaw 32.10.2 requires the Committee's Response to contain a statement of the case, the violations found by the Committee, the disciplinary or corrective actions taken by the institution, the penalties imposed, the issues raised on appeal, the Committee's response to those issues, and, as an attachment, the transcript of any hearing conducted by the Committee. The transcript, of course, is available on the NCAA's custodial website. The other required elements—a statement of the case (Response, Section I), violations found (Response, Section II), penalties imposed (Response, Section III), issues raised (Response, Section V), and the Committee's response (Response, Section V)—are each distinctly contained in the Response, *except* that the Response contains no statement of the University's corrective actions. Whether the unique omission was inadvertent or reflects the Committee's determined unwillingness, in the face of bylaws and precedents, to discuss facts that tend to mitigate penalties is highly questionable.

Time and again, this Committee has recognized that, where an institution “fully accepts its membership obligations and makes every effort to participate in and assist the enforcement process,” the “[f]ailure to accord such cooperation substantial weight in determining and imposing penalties would be a disincentive to the fullest possible institutional cooperation.” [University of Oklahoma, IAC Report, at 7; Howard University, IAC Report, at 30; University of Mississippi, IAC Report, at 17.] Likewise, the failure to accord substantial weight to self-corrective action disincentivizes remedial measures. Institutions must find in the precedents of this Committee an incentive and a roadmap to guide their efforts to detect, disclose, and correct misconduct.

Of course, an institution's cooperation and self-corrective actions cannot afford complete immunity. But in the imposition of the severest sanctions, such as a vacation of wins, the total failure to discuss the extent of consideration, if any, given to important, mitigating circumstances compels reversal. Here, the Committee on Infractions afforded the scantest lip service to the University's unprecedented efforts to investigate and remedy allegations of wrongdoing, and it presented no discussion—*none*—of the extent to which those efforts should or should not have influenced the choice of penalties. The Committee's total failure to discuss mitigating circumstances is a clear and fatal error in the process. It did not observe established procedure. Regardless of the facts of this case, the vacation penalty, as the product of a flawed process, cannot be permitted to stand.

The Nature, Number, and Seriousness of the Violations

The Committee on Infractions accuses the University of an attempt to minimize the seriousness of the violations. [Response, at 4-6.] On the contrary, the University has fully acknowledged and accepted complete responsibility for the violations that occurred. The University and the Committee on Infractions agree that those violations should not be minimized. But it would be equally improper—as the Committee does—to exaggerate those violations. Thus, the Committee objects to the University's uncontroversial statement that the violations at issue grew out of an online music course. It instead depicts the violations as the product of a pervasively diseased environment:

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.

[Response, at 5 (emphasis in original).] This is mere hyperbole. It is unquestioned that *virtually all* of the violations at issue are associated with a single, online music course. If academic fraud had been pandemic in the AASS, the disease would have infected course after course. Violations would indiscriminately have tainted multiple courses. This did not happen. The violations were linked, with remarkable uniformity, to a single course and, still more narrowly, to the sabbatical period of its professor. The Committee's

attempt to infer a systemic problem from a *single instance* of misconduct in *one course* other than the online music course is clearly forced. [*Id.* at 6 n.1.]

The Committee states that Hillard Goldsmith, an academic advisor, “funneled” student-athletes to ██████████, a tutor and graduate student, and that Goldsmith either “knew that ██████████ would give them answers to the exams” or “instructed ██████████ to provide exam answers.” [*Id.* at 5, 8.] The evidence is far less clear. The only evidence that offers any support to the assertion is the interview of ██████████. ██████████, however, did not identify Goldsmith. In fact, ██████████ statements as to the complicity of academic advisors are ambiguous. The Committee stretches ██████████ testimony to an extreme when it asserts unequivocally that Goldsmith was complicit in academic fraud.

The Committee aggressively denies that the violations resulted “from ‘confusion’ or ‘mistaken impression.’” [Response, at 6.] The evidence is to the contrary. Dr. Brenda Monk acknowledged at the hearing in this case that she was “in error in the fall of 2006 in believing that the music class was still an open book exam”—which she wrongly believed permitted students to consult staff members and former examination questions and answers while they took exams. [Trans., at 217:18-20.] The evidence also establishes that, in February 2007, Dr. Monk reviewed the class syllabus and discovered that the class had changed to a closed-book format. [*Id.* at 217:25-218:5.] She promptly presented the issue at a staff meeting and was “adamant” that examination procedures must be “changed.” [*Id.* at 218:6-220:10; 220:18-221:8.] The notebook that contained past examination questions and answers became unavailable to students during testing. [*Id.*] Dr. Monk conceded that she “should have known it in the fall of 2006,” but “did not.” [*Id.* at 219:22-24.] These circumstances do not excuse the misconduct, but they refute the suggestion of knowing and deliberate misconduct.

To impeach the motives of Dr. Monk, the Committee refers this Committee to the hearing transcript. [Response, at 8.] Far from establishing bad motives, the transcript illustrates Dr. Monk’s honest confusion about the permissible scope of assistance:

MS. MONK: . . . The academic advisor would be the one that would be the first line of defense as to defining open book to those students. It was not going to be me, but for me open book means open resources, that it

doesn't just mean—it did not clarify that you could only use your textbook, it did not clarify in there that you could not use the tutor.

It did not clarify in there that you could not look up the answers online. So, to me open book would mean open resource, unless the professor specifically said only use your textbook to glean answers for the questions.

[*Id.* at 193:22-194:9.] Dr. Monk's interpretation was wrong, but the error does not impugn her motives. Her motive, though misguided in its implementation, was to help learning-disabled student-athletes learn: "I saw myself as almost an in-house specialist in how to sit down with the student with a learning disability and help them learn how to learn. I did exactly what my job description said, and that was to provide strategies for learning for those students." [*Id.* at 105:24-106:5.] "It was not my purpose," she added, "to give them any information. That is not teaching. Teaching only occurs when the student can learn and can find out information on their own." [*Id.* at 128:1-4.]

Quite correctly, the Committee does not argue that the violations were motivated by an intent to gain a competitive advantage. Instead, it suggests that the University "gained a competitive advantage" as a "natural consequence" of those violations. [Response, at 9.] If so, that advantage did not arise from the moment the misconduct took place, but, at the earliest, when the academic credits improperly achieved entered into the subsequent certification of those student-athletes as academically eligible.

The Conduct and Motives of the Individuals Involved

Next, the Committee labels as "disingenuous" the suggestion that certain student-athletes believed the assistance they received was permissible. [*Id.* at 6.] This judgment is too aggressive. To be sure, some student-athletes read the examination instructions and correctly understood them to prohibit all outside assistance. Other student-athletes, however, confided in institutional personnel. They naturally assumed that institutional personnel would not offer assistance forbidden by the principles of academic honesty and, of course, that it was safe to accept assistance offered *seemingly* by the University itself. These assumptions, though regrettably incorrect, were eminently reasonable.

Statements provided by student-athletes in connection with their reinstatement requests support this conclusion and refutes the accusation of disingenuousness:

- I was simply doing what I was instructed to do and I trusted in them to not lead me in harms (*sic*) way.
- I believed the tutor's presence was authorized. As a freshman, taking an online class for the first time, I was under the assumption that the tutor was allowed to provide direction.
- Since I saw [the tutor] doing the same thing with other students in the computer lab, I just assumed this was the norm and did not think to say anything to anyone about it being a problem.
- I honestly did not know that we weren't allowed to ask this tutor for help and I thought he was there to clarify any question on the test.
- At the time, being a freshman, I had not taken an online test before, so I didn't . . . know what the tutors were there for or how much they were supposed to help. . . . As far as I know, the tutor was authorized because he was receiving some sort of payment from the FSU athletics/academic services.
- I felt that I did not do anything wrong because the people in charge led me down this path for getting help in this class.
- I did not question the decision of ██████████, who at the time I believed to be a qualified FSU academic tutor, either on that occasion or any subsequent occasion.

The same statements indicate that some student-athletes did not read the examination instructions as carefully as they should have, and that ██████████ insistently provided improper assistance even when the assistance was unsolicited and unwelcome. The Committee's efforts to impeach the motives of *all* involved, rather than to examine the facts without partiality or cynicism, reflect its tendency to magnify the violations.

The fact that 39 student-athletes acknowledged misconduct after the global reinstatement remedy was approved simply does not prove, as the Committee contends, that, at the time they received improper assistance, "the student-athletes knew full well that their conduct was improper." [*Id.* at 8.] It is at least equally likely that student-athletes became aware of the improper nature of ██████████ assistance at some point during the University's investigation, and then withheld their acknowledgement until the reinstatement remedy devised by the University incentivized disclosure.

Impact of Penalties on Innocent Student-Athletes and Coaches

Even if the Committee upholds the vacation penalty, it should tailor that penalty to minimize or eliminate the unnecessary impact on innocent student-athletes and coaches. To the extent that wins are reflected in the individual records of innocent student-athletes and coaches, it serves *no* valid purpose to rewrite those records. The NCAA should protect—and not penalize—those who play by the rules.³

The Committee argues that, if any student-athlete “competed while ineligible, *any* ‘win,’ even if an individual one, is tainted.” [*Id.* at 18-19 (emphasis in original).] Thus, the Committee contends that the individual win-loss record of an innocent pitcher on a baseball or softball team, or of an innocent coach, must fall victim to the misconduct of others. [*Id.*] This is not a necessary consequence. It is not at all impracticable to vacate *institutional* records while permitting *individual* records of innocent student-athletes and coaches to stand untouched. And it is a basic tenet of fundamental fairness that innocents should not be penalized unnecessarily for misconduct in which they had no complicity.

The Committee argues that vacation provides redress to competing institutions that “may have lost contests to institutions that were competing with ineligible student-athletes.” [*Id.* at 18.] Competing institutions, however, derive no benefit from a vacation-of-wins penalty. It neither credits them with new wins nor vacates their losses. A vacation of *institutional* wins might provide competing institutions, at best, a sense of retribution or vindication, but a vacation of the *individual* win-loss records of innocent student-athletes and coaches offers competing institutions no redress. It remedies nothing.

The Committee argues that individual win-loss records must be vacated because the victories “were achieved with the assistance of ineligible student-athletes.” [*Id.* at 19.] This argument, if pursued to its logical consequences, could invalidate virtually any individual record. Because most sports involve interactions between student-athletes, examples of individual records “achieved with the assistance of” teammates are countless.

³ The Committee misunderstands the University’s position. The University does not “make a distinction between student-athletes and coaches.” [Response, at 18.] It makes a distinction between *guilt* and *innocence*. The individual records of *all* innocent parties—student-athletes and coaches—should be unaffected by the wrongdoing of others.

An innocent receiver might score a touchdown “with the assistance of” an ineligible quarterback. An innocent basketball player might make a basket “with the assistance of” an ineligible point guard. Or an innocent baserunner might score a run “with the assistance of” an ineligible batter. It would make no sense, however, to deprive the innocent student-athlete of the touchdown, the three-pointer, or the run scored. And it makes no better sense to deprive an innocent pitcher of a win, even if an ineligible teammate drives in the winning run, while permitting the innocent baserunner to retain the run scored as an individual record. Both players benefited *individually* from the assistance and participation of an ineligible teammate. Neither should be deprived of an individual record. There is no justification in reason or policy to extend the vacation penalty to the *individual* records of innocent student-athletes and coaches.

In many cases, individual records other than wins—such as touchdowns and runs scored—will be more directly attributable to the assistance of ineligible teammates than the individual wins of an innocent pitcher or coach. Where a softball team leads by five runs, and adds one more run in the last inning on a hit by an ineligible batter, clearly the baserunner is more indebted to the ineligible batter for the run scored than the pitcher is indebted to that batter for the win. In basketball, an assist by an ineligible player might lead to a field goal, while the ineligible player has no effect on the outcome of the game. Completely apart from the injustice of penalizing innocent student-athletes and coaches, the invalidation of individual wins, but not other individual records, on the ground that wins are achieved with the assistance of ineligible teammates, is largely arbitrary.

Under the Committee’s approach, all *innocent* pitchers on the University’s baseball and softball teams would be completely deprived of all wins for the relevant period. Presumably, their win-loss records would continue to reflect *all losses*, but *no wins*. For example, an innocent pitcher who compiled a winning record of 15 wins and 12 losses would—through no fault of his or her own—officially be credited with a record of zero wins and 12 losses. This result represents an obvious and needless miscarriage of justice. This result arbitrarily targets those innocent student-athletes whose individual records happen to reflect wins and losses rather than touchdowns and rushing yards. It is

highly offensive not only to basic fairness, but to the central principles of the NCAA enforcement program: the equitable resolution of infractions cases and fairness to parties uninvolved in violations of NCAA legislation. [Bylaw 19.01.1.]

Some penalties are, in their nature, indivisible, and must affect innocent student-athletes and coaches as well as those who transgress NCAA legislation. A ban on post-season competition, for example, falls equally on all student-athletes and coaches, whether innocent or not. The vacation penalty, however, can easily be tailored by leaving untouched the individual records of innocent student-athletes and coaches.

The Committee contends that it has “consistently . . . adjusted coaches’ records along with vacation of team records.” [*Id.* at 18.] If so, this Committee, in the “evolutionary process” of case-law development [*id.* at 17, 20], should put an end to the practice. Retribution against innocents is not an inherent or necessary consequence of a vacation penalty. It serves no useful function and offends universally held notions of fundamental fairness. If the vacation penalty is sustained, it should not needlessly be used as a sword to punish innocent student-athletes and coaches. Student-athletes and coaches who have fulfilled their responsibilities should be protected—not punished.

NCAA Policies Regarding Fairness in and Equitable Resolution of Infractions Cases

Finally, the University would never have consented to the resolution it forged with the NCAA Enforcement Staff and Student-Athlete Reinstatement Staff had it known that the agreement was *not* a global resolution of all eligibility issues. It was the NCAA Enforcement Staff and Student-Athlete Reinstatement Staff that first proposed that the University nullify the online music course for student-athletes and require them to retake the course the following semester. Under this agreement, the University withheld for 30 percent of a season all student athletes who previously or immediately thereafter acknowledged academic impropriety—including some student-athletes who had been found by their professor *not* to have engaged in academic misconduct. Critically, because the course was nullified, the agreement required the University to terminate the ability of student-athletes to exercise their due process rights to challenge the finding of misconduct and establish their innocence. On the assurance that this agreement would

resolve all eligibility issues and otherwise hold student-athletes harmless, the University presented this resolution to its student-athletes as an incentive to acknowledge misconduct and waive their due process rights—rights which some student-athletes had already begun to exercise. In essence, the University’s agreement with the NCAA Enforcement Staff and Student-Athlete Reinstatement Staff called for a complete do-over.

The vacation of wins at this stage—*after* the student-athletes waived their opportunity to establish their innocence—is inequitable. It contradicts the central idea of the University’s agreement with the NCAA: that nullification of the course and of the student rights cases it spawned, together with a 30-percent penalty, would resolve all eligibility issues, impose a uniform penalty, and thus incentivize the disclosure of academic misconduct. To continue to regard student-athletes as ineligible for a window of time prior to their reinstatement contradicts this agreement.⁴ Indeed, had it known that further penalties based on the purported ineligibility of its student-athletes would be imposed, the University would never have consented to an arrangement that deprived its student-athletes of a forum in which to prove their innocence.

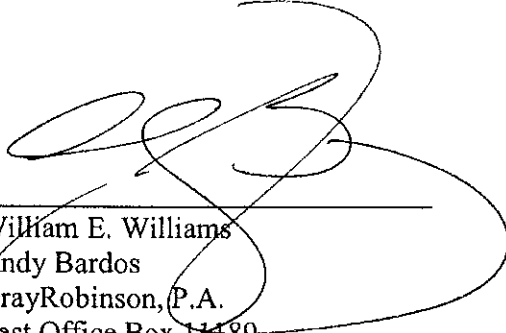
III. CONCLUSION.

The NCAA “is committed to fairness of procedures” and the “equitable resolution of infractions cases.” [Bylaw 19.01.1.] These high and worthy ideals compel reversal where, as here, the Infractions Report failed to evaluate essential elements of the well-established analysis that guides the selection of penalties. The rationale offered for the imposition of penalties did not include a discussion of substantial mitigations and was, accordingly, woefully inadequate. The vacation penalty must be reversed.

Even if this error can be overlooked, however, the Committee should not permit the vacation penalty to extend to the individual records of innocent student-athletes and coaches. It should not unnecessarily subject the innocent to punishment.

⁴ It also holds the University strictly liable for misconduct—without regard to the date of discovery or the irrelevance of the improperly achieved academic credits to the student-athletes’ satisfactory progress requirements.

Respectfully submitted this thirtieth day of June, 2009.



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