University of

Alabama

Rebuttal

to the Brief Submitted by the

NCAA Division I Committee on Infractions

(Appeal from Infractions Report No. 299)

Submitted to the

Infractions Appeals Committee

September 17, 2009

I. Introduction.

The brief submitted on behalf of the Committee on Infractions ("COI") in this matter is distinctive in two respects: an omission and an addition. First and most strikingly, the COI Brief omits any discussion of other textbook cases that have come before the NCAA, a factor which is both relevant and necessary for the determination of whether the penalty in this case is an abuse of discretion. The fact that no vacation-of-wins penalty was entered in any prior textbook case is a fact which cannot be avoided, and a fact which warrants a reversal of that unprecedented penalty in this case.

Second, the COI Brief compounds its initial error of omission with the error of addition, adding a justification for its vacation-of-wins decision beyond that set out in the Public Infractions Report. That purported justification – the University's status as a repeat violator – is not a stated basis for the actual decision of the COI; is contrary to the statements made by the COI during its oral explanation of its decision; and, even if supported by the decision, would be further evidence of an abuse of discretion, as it ignores bylaws and precedent addressing repeat violator penalties.

For those and additional reasons discussed herein, the vacation of wins penalty imposed in this case is due to be reversed, rendered, and set aside.

II. The Error of Omission – The COI Brief Fails to Discuss Prior Textbook Cases.

Nine pages of the 27 page appeal brief filed by the University detail how the vacation-of-wins penalty imposed by the COI departs from prior textbook cases. Precedent established in prior similar cases is, of course, a factor which the Appeals Committee has charged the COI to consider. *Report of the NCAA Division I Infractions Appeals Committee, May 18, 2006, Report*

No. 238, Georgia Institute of Technology ("Georgia Tech Appeal") at §VII. While acknowledging that each case has its own factors, this Committee reversed the COI in the *Georgia Tech Appeal* for imposing a vacation penalty which was "inconsistent with its action in prior cases," cases which involved a "pattern of violations similar to those" committed by Georgia Tech. This Committee went on to explain that, in the least, "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 . . . "

In this case, the COI has failed not only to explain its departure from textbook case precedent in the Public Infractions Report, the COI has compounded that error by failing even to acknowledge the existence of those prior textbook cases in its brief. Nothing about the change to an abuse-of-discretion standard of review has done anything to erase the basic requirement – indeed, a basic principle of fairness – that like cases should be treated alike, and dissimilar cases should be treated differently. In the recent decision involving Alabama State University, this Committee explained that the "abuse-of-discretion" standard is met, and a reversal should occur, when the COI fails to apply "correct legal standards" or principles; fails to "consider and weigh material factors;" acts "arbitrary, capricious or irrational;" or bases its decision on "irrelevant or improper factors." *Report of the National Collegiate Athletic Association Division I Infractions Appeals Committee, June 30, 2009, Report No. 289, Alabama State University, Montgomery, Alabama ("Alabama State Appeal") at §VIII.*

When the COI intentionally foregoes a comparison of this case to prior textbook cases, or even fails to acknowledge the existence of such cases, an abuse-of-discretion is clearly shown. In fact, the only attempt at such justification appears to be a statement on page 8 of the COI Brief that "for the three years since the May 18, 2006, IAC report in Georgia Tech, the COI has

imposed its vacation penalty in a consistent manner." That justification fails on at least two counts.

One, as a point of fact, two of the four textbook cases to which this case is comparable – Ball State University and Temple University – were decided after May 18, 2006, the date which the COI brief claims that its consistency began. *Ball State University Public Infractions Report (October 16, 2007) (not imposing vacation-of-wins in a textbook infractions cases); Temple Univ. Public Infractions Report (May 10, 2007) (imposing vacation of wins for fraud committed by coach, but not imposing vacation-of-wins for textbook violations).* Not only did the COI Report and its Brief fail to consider such prior cases, the Brief's argument touting consistency fails to even note its own inconsistency with the dates that the Ball State and Temple cases were decided. Two, the cases which are mentioned in the COI Brief do not meet the Appeals Committee's requirement that comparable cases involve a "pattern of violations similar to those" involved in the case in question. *Georgia Tech Appeal at §VII.* The cases are strikingly dissimilar.[1]

[1] The Texas A&M-Corpus Christi case involved a vacation-of-wins imposed when an international student-athlete was certified for competition despite the former head women's volleyball coach's knowledge of previous collegiate enrollment; and a vacation-of-wins imposed when a second student-athlete was given scholarships for years in which he was a non-qualifier. The case also involved impermissible telephone contacts; recruiting inducements; unethical conduct; and lack of institutional control. The Middle Tennessee State case involved ineligible participation by an international student-athlete who was known by an assistant coach to have competed as a professional in Europe, the head coach failed to monitor the program, and the student-athlete was told to withhold that information from the international student-athlete form. Florida International University's 2008 case involved competition by student-athletes who should have never been certified by the University, including competition by 6th year students, less-than-full-time students, and other issues. In addition, the institution over-awarded scholarships. The violations resulted from an overall lack of institutional control caused by FIU's rapid change in classification. None of the cases cited in the COI Brief are similar to this case.

III. The Error of Addition – The COI Brief Attaches a Significance to Repeat Offender Status that is Neither Supported by the COI Decision, NCAA Bylaws, Nor Precedent.

The University does not deny that it is a repeat violator. That is a fact. However, instead of addressing the relevant precedents to this case, the COI Brief simply asserts that status as the rationale for its flawed decision. For examples, the COI Brief claims that the University's status as a "serial repeat violator" was the "driving force behind the imposition" of the vacation-of-wins penalty, *COI Brief at p. 4*; that the penalty is justified by the University's "abysmal infractions track record;" *id. at p. 5*; that the University's "extensive recent history of infractions cases is unmatched by any other member institution in the NCAA;" *id.*; and even that "[w]hat truly distinguishes this case . . . is that the COI faced an institution with an appalling and unprecedented recent infractions history," *id. at p. 9.*

As an initial matter, these statements are overreaching. According to the NCAA's database, at least 27 (of the 120) Division I, Football Bowl Subdivision (FBS) institutions have experienced the same number or more major infractions cases than the University. Characterizing the University as "abysmal," therefore, maligns almost a quarter of the schools in the FBS, including half of the Pac-10, half of the Big 12, 3 schools in the ACC, and 4 members of the Big 10. Moreover, limiting oneself to the undefined "recent history" cited by the COI Brief leads to no different conclusion. At least one FBS school came before the COI in successive settings in 2006 and 2007 (Oklahoma). Such statements also mischaracterize the University's past infractions cases, one of which occurred 45 years ago and is memorialized in the NCAA's database by a single sentence (1964); the second of which involved violations during the 1993 football season, 16 years ago (1995 football); the third of which involved a fired assistant coach but no institutional penalties, and included the COI "commend[ing] the university for its effective institutional control" (1999 basketball); and the most recent of which primarily

involved booster violations that occurred in the year 2000 and before, almost a decade ago (2002 football).

In addition to being overreaching and irrelevant to the real matter at hand, these statements in the COI Brief are also a revisionist history of the COI decision issued in this case for at least three reasons. First, that rationale is not found in the actual COI Public Infractions Report in this case. In fact, in its Public Infractions Report the COI's entire analysis of the repeat violator issue is contained in two sentences:

> Finally, because of the institution's status as a repeat violator, the Committee on Infractions considered both a ban on postseason competition and the enhanced penalties for repeat violators set forth in Bylaw 19.5.2.3.2. The committee decided against those penalties because the violations were spread across several sports and other penalties, such as vacation of records, were more appropriate. . . .

COI Public Infractions Report at §C. Moreover, repeat violator status is not even mentioned in the specific paragraph imposing the vacation-of-wins penalty. *Public Infractions Report, §C(3).*

Second, the fact that the repeat violator status played little to no part in the COI's decision was clarified in the statement given by the COI chair at the time the decision was announced. The COI Chair Paul Dee described the repeat offender status as part of the "milieu" that the COI considered. When responding to a specific question from Cecil Hurt of the *Tuscaloosa News*, however, Dee denied that he "can attach a direct part of the penalty to the repeat offender status."

Third, even if the COI had attempted to justify the vacation-of-wins based on the University's repeat violator status, that argument would have constituted a further abuse of discretion. To begin, repeat violator enhancements are a distinct list of four potential penalties contained within Bylaw 19.5.2.3.2: (a) "prohibition of some or all outside competition . . . ; (b)

"elimination of all grants-in-aid . . . " (c) "the requirement that all institutional staff members" resign and be ineligible for NCA committees and boards; and (d) a "requirement that the institution relinquish its voting privilege . . . ."[2] The NCAA's rule book does not include vacation-of-wins as a repeat violator enhancement, thereby further highlighting the COI's arbitrariness in this case.

Moreover, the COI has set forth standards for imposing repeat violator penalties which are not met. In 2007, the COI declined to impose such enhancements in the University of Colorado, Boulder's case regarding training table major violations. *University of Colorado, Boulder Public Infractions Report, June 21, 2007, at §C.* The COI declined "to do so because the violations, though major because of the amount of extra benefits involved, were 1) limited in nature and scope to the training table program; 2) inadvertent; 3) discovered by institutional staff and promptly investigated and reported; and 4) unrelated to the previous major violations case." The University's case meets those same standards.

In conclusion, the vacation-of-wins penalty assessed against the University in this case is not based on its repeat violator status. The Public Infractions Report did not make that assertion. The COI chair's statement rebuts that assertion. In addition, the rules themselves, and COI precedent, do not even make vacation-of-wins available as a repeat violator penalty. The COI Brief's argument that such penalties were justified by repeat violator status is, at best, a revisionist history of this case, the NCAA's rules, and its own precedent.

[2] During the teleconference announcing its decision, COI Chair Paul Dee stated that the "death penalty" was not considered in this matter.

IV. Additional Arguments Deserving of Rebuttal.

A few additional aspects of the COI Brief demand a rebuttal. They are as follows:

A. The COI Brief failed to apply the correct substantive standard established in vacation-of-wins precedent. This Committee has delineated the substantive standards that should be considered before a vacation-of-wins should be imposed: (1) academic fraud; (2) serious intentional violations; (3) direct involvement of a coach or high-ranking school administrator, and (4) a large number of violations. *Report of the National Collegiate Athletic Association Division I Infractions Appeals Committee, February 22, 2008, Report No. 270, University of Oklahoma ("Oklahoma Appeal"); see also Georgia Tech Appeal, discussed above.* The *Oklahoma Appeal* reversed a vacation-of-wins, even though one factor was present. As detailed on pages 21-22 of the University's appeal brief, none of those factors is present in this case.[3]

In its brief, the COI has stated only that the change to an abuse-of-discretion review standard somehow erases this substantive legal test governing vacation-of-wins. In the place of that substantive test, the COI has substituted a rationale based on a COI subcommittee "policy document" which was purportedly shared with this Committee, a seven factor analysis in which a vacation-of-wins may occur if only a single factor is present. *COI Brief at 6-8.* To the knowledge of the University, that subcommittee "policy document" is not published (other than a brief reference to it in one COI case) and has not been adopted by the NCAA membership. Moreover, this Committee's substantive legal standards – to borrow legal parlance, higher court

[3] The only one which is arguably present would be a "large number of violations." However, even that factor has been misapplied by the COI. At best, the University's case involved a "large number" of secondary violations, which under Rule 19.02.2.1 "may collectively be considered as a major violation." Only two major violations were found, the first resulting from an aggregation of secondary violations.

decisions – are not subject to being overturned by a lower decision-making body such as the COI, much less a subcommittee of the COI. The COI failed to address and apply the appropriate substantive standard governing vacation-of-wins in its decision.

B. The COI failed to adequately weigh the University's cooperation. This argument was detailed on pages 22-24 of the University's initial appeal brief. But for the University's self-discovery and decisive actions, this case would have never existed. Such cooperation is to be viewed as a "significant factor" and given "substantial weight" according to the standards set forth by this Committee. *Oklahoma Appeal at §VII.* The COI decision in this case failed to accord such weight, choosing instead to merely acknowledge that the University's cooperation was "consistent with its obligation."

Rather than acknowledge that failure on the COI's part, the COI Brief instead attempts to change the substantive standard. On page 12, the COI Brief states that only "extraordinary" cooperation by an institution would warrant "special consideration" from the COI. Changing the substantive standard is an abuse of discretion by the COI. Moreover, even if the standard required "extraordinary" cooperation, that standard was met by the University in this case.

C. The majority of the COI Brief analyzes this case in light of the seven factor test set out in the *University of Mississippi Infractions Appeals Committee Report, May 1, 1995 ("Mississippi Appeal") at §VI(B).*[4] The University believes, of course, that those seven

[4] This approach is remarkable in light of the COI Brief's assertion elsewhere that decisions rendered before the change to the abuse-of-discretion standard are somehow questionable. *See COI Brief at p. 9* (discussion of Oklahoma's successful appeal of its 2008 vacation of wins).

substantive standards are relevant to a determination of a penalty in this and other cases. But the University believes those factors compel a reversal of the vacation-of-wins penalty in this case:

1. "Nature, Number and Seriousness of the Violations." The intent of this factor is to find whether there are "[n]umerous major violations" as were present in the *Mississippi Appeal.* To the extent that it considered this factor in its decision, the COI misapplied it in the instant case. The COI Brief continues that error. At most, there were numerous secondary violations, which pursuant to Bylaw 19.02.2.1 "may collectively be considered as a major violation."

2. "Conduct and Motives of the Individuals Involved in the Violations." In its short discussion of this factor the COI Brief acknowledges that "no coaching staff members facilitated the violations" and makes no attempt to address the conduct and motives of any other institutional officials. Instead, the COI Brief makes the astounding statement that "It is not particularly relevant whether the students intended to violate NCAA Bylaws." *COI Brief at p. 6.* Clearly, the COI is misapplying the standard which requires it to look to the "conduct and motives of the individuals involved."

3. "Corrective Actions Taken by the Institution." As detailed above, the COI decision failed to adequately weigh this factor. Rather than acknowledge this error, the COI Brief again merely recites its mantra that the University is a "triple repeat violator." Repetition of this invective does not substitute for the absence of analysis. The corrective actions taken by the institution – including multiple suspensions, requiring student-athletes to make restitution, reprimands of individuals, ramped-up training and processes – were substantial, but were given short shrift by the COI.

4. "Comparison of the Penalty or Penalties Imposed." As detailed in section II of this Rebuttal, the COI failed to analyze or even discuss any of the prior similar, textbook cases. That failure is striking and sufficient for reversal, even if viewed alone.

5. "Institutional Cooperation in the Investigation." This factor is discussed in detail in this brief. This factor was not given appropriate weight by the COI. But for the University, this case would have never existed.[5]

6. "Impact of Penalties on Innocent Student-Athletes and Coaches." As argued in more detail in the University's initial brief, this factor metaphorically shouts for reversal of the vacation-of-wins entered in this case. For example, despite the fact that there were only seven football players who were intentional wrongdoers involved at various times over three seasons, the COI vacated every victory over all three seasons in which any of those student-athletes participated, until October 17, 2007. Such a penalty is unfair to the 80 or so uninvolved football student-athletes, not to mention the impacts on numerous track and tennis athletes, coaches, and administrators. While all penalties will certainly have "some effect on innocent students and coaches," the penalty in this case is an extreme penalty against more than 100 "innocent students and coaches." *Mississippi Appeal at §VI(B).* The COI Brief can only dismiss such effect as a "harsh reality." Later, the COI Brief argues that the penalty is appropriate because it provides "relief to innocent student-athletes and coaches from other institutions." *COI Brief at 10.* That assertion is a stunning misunderstanding and misstatement of the effect of a vacation penalty. A

[5] Paul Dee, in the teleconference following the public announcement of this case, referred to the University as "very forthcoming" in response to a question from Josh Moon on the *Montgomery Advertiser*. He also stated that the University is doing a "terrific job" in its compliance efforts, and that, "on the overall, the University of Alabama appears to be doing a fine job." Praise given at a teleconference hardly suffices for the adequate weight that such cooperation should have been given in the Public Infractions Report.

vacation-of-wins does nothing for "other" institutions – it is not a forfeiture. In this section, the COI Brief misunderstands the penalty that the COI imposed.[6]

7. "NCAA Policies Regarding Fairness in, and Equitable Resolution of, Infractions Cases." Again, this factor is discussed in detail above. The vacation-of-wins penalty assessed in this case is unprecedented in prior similar, textbook cases. As explained in the *Georgia Tech Appeal*, *supra*, "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 Tech Appeal at §VII.* That was not done by the COI in its Public Infractions Report, and the COI Brief has continued to fail in that regard.

D. The COI Brief fails to understand the University's argument regarding the student-athlete withholdings from competition. On pages 14-15 of its brief, the COI argues that the reinstatement process is "entirely separate" and therefore the University's self-imposed suspensions of players bear no relevance in this matter. This assertion is contrary to the Appeals Committee's decision in the *Oklahoma Appeal*, which stated that the dismissal of two involved student-athletes was a "powerful self-imposed penalty which seriously affected the football program." *Oklahoma Appeal at §VII.* The University began withholding student-athletes from athletic contests before the NCAA was involved in this case. Although the University's actions against the student-athletes in this case were not as severe as those in the *Oklahoma Appeal* (understandably so), those actions should have been, but were not, adequately weighed by the COI.

[6] Paul Dee explained the distinction to a newspaper reporter during the teleconference.

E. Finally, on pages 15-16 of its brief, the COI argues that it could have imposed even harsher penalties. If the COI had vacated all contests for all student-athletes who received impermissible benefits, it would have found itself vacating contests based on benefits as small as 35-cents. The failure of the COI not to proceed to that illogical extreme is no justification for the arbitrary penalty that was imposed.

V. Conclusion.

The vacation of wins penalty imposed against the University of Alabama in this matter is due to be set aside for the reasons set out in detail in the University's initial appeal:

* the imposed penalty departs from textbook case precedent (precedent which the COI failed to address in its brief);

* the imposed penalty departs from vacation-of-wins precedent (precedent which the COI brief wants to ignore, in favor of its own non-public subcommittee "policy documents");

* the COI failed to adequately weigh the University's cooperation;

* the imposed penalty is inconsistent with the requirements of this Committee; and

* the imposed penalty is inconsistent with guidelines applicable to student-athletes in cases of ineligibility.

Such a penalty is a clear abuse of discretion in this case. It involved the application of incorrect legal standards, misapprehended substantive legal principles, was based in part on erroneous factual conclusions; failed to consider materials factors; erred in judgment to such a degree to be arbitrary, capricious, and irrational; and was based on irrelevant and improper factors. Meeting

any one of those standards under the *Alabama State Appeal* is sufficient for reversal. This case meets them all.

Accordingly, the decision to impose a vacation of wins is due to be reversed, rendered, and set aside.