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Dec. 3, 2015

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NCAA Division I Infractions Appeals Committee modifies Syracuse coach's suspension

INDIANAPOLIS – The NCAA Division I Infractions Appeals Committee upheld the NCAA Division I Committee on Infractions panel's finding that the Syracuse University head men's basketball coach failed to create an atmosphere of compliance within his program. Also, the Infractions Appeals Committee determined that the coach's nine-game suspension during conference play will begin with the team's next game instead of the start of conference competition.

In his appeal, the coach stated that he believes the Committee on Infractions used the wrong standard to determine its finding that he did not create an atmosphere of compliance. He also argued that the Committee on Infractions abused its discretion when it prescribed a nine-conference-game suspension.

After an oral argument attended by the coach and Committee on Infractions, the Infractions Appeals Committee determined the Committee on Infractions had sufficient information to support the finding on the coach's failure to promote an atmosphere of compliance. However, the Infractions Appeals Committee determined the stipulation that the suspension be served during conference play was a departure from precedent. Because the coach was not directly involved in the underlying violations of the case, the appeals committee modified the penalty to begin with the team's next game.

In March, the Committee on Infractions found that over the course of a decade, Syracuse did not control and monitor its athletics programs and its head men's basketball coach failed to monitor his program. Syracuse self-reported a number of the violations, dating to 2001, including academic misconduct, extra benefits, the failure to follow its drug-testing policy and impermissible booster activity. The Committee on Infractions also found impermissible academic assistance and services.

Penalties prescribed by the Committee on Infractions earlier this year, not including those self-imposed by the school, included five years of probation; financial penalties; reduction of three men's basketball scholarships per year for four years; vacation of wins in which ineligible students participated; a nine-conference-game suspension

for the head basketball coach; and men's basketball recruiting restrictions for two years. Additionally, the panel accepted the school's one-year postseason ban in men's basketball it self-imposed after the NCAA hearing, among other measures outlined in the public decision.

The members of the Infractions Appeals Committee who heard this case were David Williams, committee chair and vice chancellor for university affairs and athletics and athletics director at Vanderbilt University; Susan Cross Lipnickey, associate athletics director for student-athlete services and senior woman administrator at Xavier University; Jack Friedenthal, professor emeritus at George Washington University; W. Anthony Jenkins, attorney in private practice; and Patti Ohlendorf, vice president for legal affairs at the University of Texas at Austin.

**DECISION OF THE
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
DIVISION I INFRACTIONS APPEALS COMMITTEE**

December 3, 2015

Report No. 414

Head Men's Basketball Coach

Syracuse University

Syracuse, New York

This report is filed in accordance with NCAA Bylaw 32.11 and is organized as follows:

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I. INTRODUCTION.

The head men's basketball coach appealed to the NCAA Division I Infractions Appeals Committee specific findings of violations and penalties as prescribed by a panel of the NCAA Division I Committee on Infractions. In this decision, the Infractions Appeals Committee addresses the issues raised by the head men's basketball coach (hereinafter referred to as head coach).

II. BACKGROUND.

The Committee on Infractions issued Infractions Decision No. 414 March 6, 2015, in which the committee found violations of NCAA legislation in the men's basketball and football programs. On the basis of those findings, the Committee on Infractions determined that this was a major infractions case and imposed penalties accordingly.

This case as it related to the head coach is centered on violations of NCAA bylaws governing the requirement to promote an atmosphere of compliance within the men's basketball program and monitoring the activities of all institutional staff members involved with the program who report, directly or indirectly, to the head coach.

After the Committee on Infractions issued its decision, the head coach filed a timely Notice of Appeal March 20, 2015. A written appeal was filed April 24, 2015. The Committee on Infractions filed its Response May 28, 2015. The head coach filed a Rebuttal to the Committee on Infractions Response June 16, 2015. The case was considered by the Infractions Appeals Committee October 5, 2015 (see Section VIII below).

III. FINDING OF FACT AS DETERMINED BY THE COMMITTEE ON INFRACTIONS.

See Committee on Infractions report for Syracuse University, Page No. 3, Section III.A. A copy of the report may be accessed via the NCAA Legislative Services Database for the Internet (LSDBi) at the following link: <https://web1.ncaa.org/LSDBi/exec/homepage>.

IV. ANALYSIS AS DETERMINED BY THE COMMITTEE ON INFRACTIONS.

See Committee on Infractions report for Syracuse University, Page No. 29, Section IV.A. A copy of the report may be accessed via LSDBi at the following link: <https://web1.ncaa.org/LSDBi/exec/homepage>.

V. CORRECTIVE ACTION TAKEN AND PENALTIES (PROPOSED OR SELF-IMPOSED)

See Committee on Infractions report for Syracuse University, Page No. 93, Appendix Three. A copy of the report may be accessed via LSDBi at the following link: <https://web1.ncaa.org/LSDBi/exec/homepage>.

VI. PENALTIES PRESCRIBED BY THE COMMITTEE ON INFRACTIONS.

See Committee on Infractions report for Syracuse University, Page No. 65, Section V. A copy of the report may be accessed via LSDBi at the following link: <https://web1.ncaa.org/LSDBi/exec/homepage>.

VII. ISSUES RAISED ON APPEAL.

The appellant asserts that the hearing panel erred in finding that the head coach failed to create an atmosphere of compliance (IV K. – head coach responsibility) and abused its discretion in prescribing Penalty V8.

VIII. APPELLATE PROCEDURE.

In considering the head coach's appeal, the Infractions Appeals Committee reviewed the Notice of Appeal; the transcript of the October 30-31, 2014, hearing before the Committee on Infractions and the submissions by the head coach and the Committee on Infractions referred to in Section II of this report.

The oral argument on the appeal was held by the Infractions Appeals Committee October 5, 2015 in Indianapolis, Indiana. The head coach was present and was represented by his attorneys. The Committee on Infractions was represented by the appeal coordinator for the Committee on Infractions, and the managing director of the Committee on Infractions. Also present were the vice president of enforcement, the managing director of enforcement, the director of enforcement and director of legal affairs and deputy general counsel of the NCAA. The general counsel for Syracuse University attended as a silent observer. The oral argument was conducted in accordance with procedures adopted by the committee pursuant to NCAA legislation.

IX. INFRACTIONS APPEALS COMMITTEE'S RESOLUTION OF THE ISSUES RAISED ON APPEAL.

In reviewing this case, the Infractions Appeals Committee may overturn factual findings and conclusions that one or more violations occurred only if:

- a. The hearing panel's finding clearly is contrary to the evidence presented to the panel;
- b. The facts found by the hearing panel do not constitute a violation of the NCAA constitution and bylaws; or
- c. There was a procedural error and but, for the error, the hearing panel would not have made the finding or conclusion. [NCAA Bylaw 19.10.1.2]

"A showing that there was some information that might have supported a contrary result will not be sufficient to warrant setting aside a finding nor will a showing that such information might have outweighed the information on which the committee based a finding. The Infractions Appeals Committee . . . will set aside a finding only on a showing that information that might have supported a contrary result clearly outweighed the information on which the Committee on Infractions based the finding." [University of Mississippi Infractions Appeals Committee Public Report May 1, 1995, Page No. 10.]

The hearing panel determines the credibility of the evidence.

The bar to overturning a factual finding by the hearing panel that one or more violations have occurred is quite high. It is not merely finding support for another conclusion based on the evidence presented before the hearing panel; rather that its conclusion is clearly contrary to the evidence presented.

Relative to the finding that the head coach failed to create an atmosphere of compliance, much of the appeal before this committee centers on what is the proper test to make that determination. The head coach suggests that the hearing panel imposed a strict liability test in its determination that he failed to create an atmosphere of compliance within his program. The head coach rightfully submits that the use of a strict liability standard would be improper. If a strict liability standard were to be used, the fact that violations had occurred within the program by members of a head coach's staff would be the end of the discussion and those findings alone would determine the head coach's violation. The

use of such a strict liability standard was ultimately rejected during adoption of the underlying bylaw, and the Committee on Infractions, during this appeal, acknowledged that application of a strict liability standard would not be proper. We find that the hearing panel recognized that point and did not use such a standard to determine the head coach's liability.

With a determination that strict liability is not the proper standard and was not the standard used by the hearing panel, the question of what is the proper standard and was it properly applied becomes paramount. A review of the legislation and its intent demonstrates that once a serious violation(s) occurs in a program and a member of that program is determined to be responsible for that violation, then there is a strong presumption that the head coach of that program has ultimate responsibility for not creating an atmosphere of compliance in his or her program. At that point, the burden of rebutting the presumption passes to the head coach. In order to rebut the presumption and escape responsibility, the head coach must establish that he or she has done all that is necessary to create an atmosphere of compliance in his or her program. This is the burden that the head coach must meet to convince a hearing panel of the Committee on Infractions that the head coach has created an atmosphere of compliance within his or her program under this rule. The initial burden of proof in this case did not rest with the hearing panel, but rather with the head coach. It is not enough for the head coach to state that the hearing panel did not prove that the head coach did not create an atmosphere of compliance or that hearing panel did not tell the head coach what should have been done. That is not required of the hearing panel. In order to shift the burden, the head coach must establish what was affirmatively done to create the atmosphere of compliance.

In order to properly determine whether the conclusion reached by the hearing panel that the head coach did not affirmatively meet his burden was clearly contrary to the evidence (which is our charge), the Infractions Appeals Committee has attempted to determine what attributes could be expected of a head coach to appropriately move in the direction of rebutting the presumption of failure to create an atmosphere of compliance and failure to monitor in a situation where the head coach may not have been directly involved in the violation, but where serious violations did occur. The head coach responsibility legislation does not establish a safe harbor and nor will this committee. It is clear that this requires a facts and circumstances review and determination; however, this committee does believe some guidance is in order. While this list is not exhaustive, it should provide a contextual framework to help view the current appeal and give some guidance to the membership moving forward.

The Infractions Appeals Committee will consider the following factors when determining whether the presumption has been rebutted by a head coach:

- A program where it is demonstrated that compliance is a shared responsibility through establishment of clear expectations for NCAA compliance, including expectations for immediately reporting actual and potential NCAA rules issues to compliance staff and allowing for an independent inquiry into any issues or potential issues.
- Demonstrating that there is an understanding in the program that ultimate responsibility for the integrity of the program rests with the head coach, including understanding that the actions of the staff reflect on the head coach and violations will result in clearly articulated discipline.
- Development of written policies regarding potential elite athlete issues.
- A hands-on approach to spot checking frequently within the program to uncover potential or existing compliance problems including a propensity by the head coach to actively look for and evaluate red flags for potential violations; asking pointed questions; and regularly soliciting honest feedback to determine if monitoring systems are functioning properly.
- Avoidance of any potential conflicts between the duties of staff toward program success and overall compliance efforts and/or explicit oversight by individuals outside of the program.
- Timely and personal take charge by the head coach with respect to any violations or potential violations in the program, including an ongoing dialogue with staff to review any potential issues involving prospective student-athlete or current student athletes.
- An explicit expectation that persons who report violations or potential violations will be protected from any potential retribution.
- Timely, consistent and continuing education of all coaches, staff and student-athletes as to rules and regulations, including written agendas and evidence of subjects covered and issues discussed.
- A clear understanding to consult with compliance staff on a regular basis; to ask compliance staff before acting, especially in any potential grey area.

Based on its review of the record before it, the Infractions Appeals Committee finds that there is sufficient evidence for the hearing panel of the Committee on Infractions to have

determined that the head coach failed to meet his burden. While the head coach stated a number of times that he follows the rules and expects others to do the same, there was not sufficient evidence presented to establish that he actually created an atmosphere of compliance that would rebut the required presumption. Additionally, there is no support in the record that the head coach was not provided sufficient opportunity to provide such evidence, and the Infractions Appeals Committee finds no credence to the argument that a procedural error resulted in an erroneous finding. This committee upholds the hearing panel's findings that the head coach failed to create an atmosphere of compliance and, therefore, is liable under the head coach's responsibility legislation. [Bylaw 11.1.1.1]

A penalty prescribed by the hearing panel, including determinations regarding the existence and weighing of any aggravating or mitigating factors, shall not be set aside on appeal except on a showing by the appealing party that the hearing panel abused its discretion. [Bylaw 19.10.1.1]

As we stated in the Alabama State case:

"...we conclude that an abuse of discretion in the imposition of a penalty occurs if the penalty: (1) was not based on a correct legal standard or was based on a misapprehension of the underlying substantive legal principles; (2) was based on a clearly erroneous factual finding; (3) failed to consider and weigh material factors; (4) was based on a clear error of judgment, such that the imposition was arbitrary, capricious, or irrational; or (5) was based in significant part on one or more irrelevant or improper factors." [Alabama State University Infractions Appeals Committee Public Report June 30, 2009, Page No. 23.]

Central to the resolution of whether the hearing panel abused its discretion is the role and effect of precedent – whether it was considered and weighed in this case. In the appeal submissions, the appellant and the Committee on Infractions compared and contrasted this case with a number of previous major infraction cases. This Infractions Appeals Committee has reviewed those cases and believes that, given the violations found in this case, the imposition of a nine (9) conference game suspension, as opposed to a similarly defined suspension from the first nine (9) games, is a departure from precedent based on no direct involvement or acquiescence by the head coach in the underlying violations in this case. This is in sharp contrast to cases such as University of Tennessee, Knoxville, (impermissible contact and unethical conduct); University of Connecticut (awareness of impermissible recruiting calls and failure to report recruit and representative of athletics

interest relationship); and St. Mary's College of California (awareness of and arrangement of potential impermissible extra benefits; failure to monitor recruiting activities by individual with previous red flags).

We recognize that the Committee on Infractions should not be strictly bound to previous decisions when circumstances of intercollegiate athletics were qualitatively different than those which presently obtain. However, this does not mean that prior decisions provide no restraint on or guidance to the Committee on Infractions and this committee, or that changes in the environment in which NCAA member institutions operate, alone, can justify ignoring those prior decisions. It means only that the guidance provided by prior decisions is, and always has been, a matter of judgment. [University of Southern California Infractions Appeals Committee Public Report May 25, 2011, Page No. 21].

In appeals, the Infractions Appeals Committee looks to the hearing panel's infractions decision for explanation of the rationale for prescribed penalties especially in the circumstances where there is a departure from precedent. In reviewing, the infractions decision there appears to be no evidence that the head coach's lack of direct involvement or acquiescence in the underlying violations was taken into account in linking the penalty to the number of conference games as opposed to the next or first nine games.

The hearing panel failed to consider and weigh material factors, and, therefore, while the Infractions Appeals Committee finds the penalty of nine (9) games to be justifiably sound, the hearing panel abused its discretion in the imposition of Penalty V8 by moving those nine games to conference games only rather than the next or first nine (9) games.

X. CONCLUSION.

Finding IV K. (head coach responsibility) is affirmed. Penalty V8 is modified to cover a total of nine (9) games to begin at the first opportunity.¹

NCAA Infractions Appeals Committee

David Williams, chair
Susan Cross Lipnickey
Jack Friedenthal
W. Anthony Jenkins
Patti Ohlendorf.

¹ According to the Division I Infractions Appeals Committee Policies and Procedures [See 3. b. (2) (d) at Page No. 4], any penalty that is appealed is automatically stayed through the course of the appeal process. This stay is triggered with the filing of the notice of appeal by the appellant and ends with the public release of the committee's decision.