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Penalties appealed by Hawaii case sent back to Committee on Infractions

INDIANAPOLIS — The Division I Committee on Infractions must reconsider the penalties it prescribed to the University of Hawaii, Manoa, including the men's basketball postseason ban, scholarship reductions and fine, according to a decision issued by the Division I Infractions Appeals Committee.

In 2015, a Division I Committee on Infractions panel found violations of NCAA rules on impermissible coaching activities; coaching limitations; extra benefits; and participation of ineligible student-athletes.

The hearing panel assigned significant weight to the former head coach's provision of false and misleading information, and the unethical actions of the former assistant coach, which occurred after Oct. 30, 2012. The hearing panel concluded that those violations tipped the balance in comparison to the other violations when determining when the violations predominately occurred for the case. This resulted in the hearing panel using the new infractions structure, since the violations predominately occurred after Oct. 30, 2012, when prescribing penalties for the university.

In its appeal, the university argued that the penalties should have been imposed under the former infractions structure because the violations began before Oct. 30, 2012, the date the new infractions structure was adopted by the Division I Board of Directors.

After its review, the appeals committee determined while unethical conduct is egregious and can tip the balance, there needs to be a connection between the behavior of the coach and the university. It noted there is no indication that the university encouraged the behavior or failed to warn the coaches that such behavior would not be acceptable. The appeals committee did not find the connection needed to tip the balance to the new infractions structure. As a result, the appeals committee sent the case back to the hearing panel to determine which infraction structure is less stringent and review the postseason ban, scholarship reductions and financial penalty under that infractions structure.

Members of the Infractions Appeals Committee are drawn from NCAA membership and members of the public. The members who reviewed this case are David Williams, committee chair and vice chancellor for university affairs and athletics and athletics director at Vanderbilt University; Ellen Ferris, associate commissioner for governance and compliance at the American Athletic Conference; W. Anthony Jenkins, attorney in private practice; and Patti Ohlendorf, vice president for legal affairs at the University of Texas at Austin.

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

October 28, 2016

Decision No. 428

University of Hawaii, Manoa

Honolulu, Hawaii

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

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I. INTRODUCTION.

The University of Hawaii, Manoa, appealed to the NCAA Division I Infractions Appeals Committee specific penalties as determined by the NCAA Division I Committee on Infractions. In this report, the Infractions Appeals Committee addresses the issues raised by University of Hawaii, Manoa (hereinafter referred to as Hawaii).

II. BACKGROUND.

On December 22, 2015, the Committee on Infractions issued Infractions Report No. 428 in which the committee found violations of NCAA legislation in the men's basketball program. On the basis of those findings, the Committee on Infractions determined that this was a major infractions case and imposed penalties accordingly.

This case centered on violations of NCAA bylaws governing impermissible coaching activities; coaching limitations; extra benefits; and participation of ineligible student-athletes.

After the Committee on Infractions issued its report, Hawaii filed a timely Notice of Appeal January 6, 2016. A written appeal was filed February 8, 2016. The Committee on Infractions filed its Response March 24, 2016. Hawaii filed its Rebuttal to the Committee on Infractions Response April 8, 2016. The case was considered on the written record by the Infractions Appeals Committee July 14, 2016. (see Section [insert section] below).

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

See Committee on Infractions decision for Hawaii Page Nos. 3 through 12. A copy of the decision may be accessed via the NCAA Legislative Services Database for the Internet (LSDBi) at the following link: <https://web3.ncaa.org/lstdbi/>.

IV. ANALYSIS AS DETERMINED BY THE COMMITTEE ON INFRACTIONS.

See Committee on Infractions decision for Hawaii Page Nos. 12 through 21. A copy of the decision may be accessed via LSDBi at the following link: <https://web3.ncaa.org/lstdbi/>.

V. PENALTIES IMPOSED BY THE COMMITTEE ON INFRACTIONS.

See Committee on Infractions decision for Hawaii Page Nos. 23 through 30. A copy of the decision may be accessed via LSDBi at the following link: <https://web3.ncaa.org/lstdbi/>.

VI. ISSUES RAISED ON APPEAL.

In its written appeal, Hawaii asserted that the Committee on Infractions abused its discretion when it prescribed the penalties related to the postseason ban, scholarship reductions and imposed fine.

VII. APPELLATE PROCEDURE.

In considering Hawaii's appeal, the Infractions Appeals Committee reviewed the Notice of Appeal; the transcript of the institution's October 15, 2015, hearing before the Committee on Infractions; and the submissions by Hawaii and the Committee on Infractions referred to in Section II of this report.

VIII. 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. [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.

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. [NCAA Bylaw 19.10.1.1]

As we stated in the Alabama State University 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]

The NCAA Division I Board of Directors adopted a new enforcement model [Proposal No. 2012-16] October 30, 2012, after reviewing the recommendations of the NCAA Enforcement Working Group and significant discussion by the membership. The rationale for the revisions to Bylaw 19 noted that the proposed penalty guidelines “set a range of core penalties that the Committee on Infractions may prescribe in given situations depending on the violation level and aggravating/mitigating factors in each case.” The effective date of the proposal was August 1, 2013. However, in those cases in which the violations started before October 30, 2012, and continued after that date, the Committee on Infractions hearing panel was directed to apply the new penalty structure unless it determined the conduct constituting a violation predominantly occurred before October 30, 2012.

In the present case, the institution argued that the penalties should have been imposed under the former enforcement structure, which provided for more lenient penalties than current Bylaw 19. The hearing panel, however, found that using the current penalty structure was appropriate because, in its opinion, the violations in the case predominantly occurred after October 30, 2012.

The violations in this case fall into four areas (all are Level II unless otherwise noted):

1. Impermissible Coaching Activities:

- The Director of Basketball Operations No. 1 engaged in coaching activities (occurred during the 2011-12 academic year).

2. Impermissible Tryouts:
 - Coaches observed prospects scrimmaging with enrolled student-athletes (Level III; five violations occurred in 2011).
3. Extra Benefits:
 - (a) Representative of athletics interest provided an extra benefit to Student-Athlete No. 3, who subsequently competed while ineligible. The benefit was provided in September 2012 but reinstatement was not sought until 2014, resulting in Student-Athlete No. 3 competing while ineligible for two seasons.
 - (b) Former Assistant Coach No. 1 provided a free Apple iPad device to Prospect No. 5 (occurred in December 2012).
 - (c) Former Assistant Coach No. 1 arranged for prospects to have access to a concierge's lounge on their official paid visits (Level III; three visits occurred in 2013).
4. Unethical Conduct and Failure to Promote an Atmosphere of Compliance:
 - (a) Former Head Coach. [Committee on Infractions Report Page No. 16]
 - (1) Permitted and instructed Director of Basketball Operations No. 1 to participate in coaching activities, knowing it was impermissible (2011-12 academic year);
 - (2) Failed to report his knowledge of Student-Athlete No. 3 using the representative's vehicle to the athletics administration and influenced members of the men's basketball team not to report the violation (September 2012); and
 - (3) Provided false or misleading information regarding Director of Basketball Operations No. 1's activities in his statements during the investigation (October 17, 2014, and December 10, 2014).
 - (b) Former Assistant Coach No. 1. [Committee on Infractions Report Page No. 19]
 - (1) Allowed Prospect No. 5 to retain an iPad (December 2012);

- (2) Failed to divulge the circumstances of the situation in two interviews (2014); and
- (3) Altered Student-Athlete No. 1's supplemental information admissions form (occurred in January 2014).

Based on the timing noted above, the hearing panel “concluded with regard to the case as a whole ‘that the violations commenced before October 30, 2012, and continued after that date; however, the conduct constituting the violations predominately occurred subsequent to October 30, 2012.’” [Committee on Infractions Response Page No. 13] In addition, the hearing panel noted that “while several of the violations did occur before October 30, 2012, (notably the conduct related to impermissible coaching activities of the former director of basketball operations and the conduct related to the impermissible benefits received by Student-Athlete No. 3), the unethical conduct associated with these violations and others occurred after October 30, 2012.” [Committee on Infractions Response Page No. 13] The hearing panel “assigned significant weight to the former head men’s basketball coach’s provision of false and misleading information and the unethical actions of the former assistant coach,” [Committee on Infractions Response Page No. 13] and those “unethical conduct violations tipped the balance in comparison to the other violations in both number and degree.” [Committee on Infractions Response Page No. 15]

The Infractions Appeals Committee agrees with the concept that unethical conduct, specifically conduct based on false and misleading information or creating false documentation, is egregious and can tip the balance in comparison to other violations when determining when the violations predominantly occurred, and, thus, whether to apply the old penalty structure or the current version. However, the Infractions Appeals Committee believes that, when assigning weight to a violation in order to hold an institution accountable for the coaches’ unethical conduct, there must be a nexus between the behavior of the coach and the institution.

The record in this case contains minimal information establishing any link between the actions of the institution and the coaches with regard to the unethical conduct on which the hearing panel used to determine when the predominance of the violations occurred. There is no evidence in the record presented to the committee that the institution either encouraged such behavior or failed to warn the coaches that such behavior would not be acceptable. The only potential argument for such a nexus in the record is related to the relationship between the former head coach and the director of compliance.

In both the infractions decision and the response to the appeal, the hearing panel noted the tense relationship between the former head coach and director of compliance and

postulated that the strained relationship exacerbated the violations, inasmuch as many of the underlying violations in this case could have been avoided had the two individuals communicated directly (instead of through intermediaries) and had the director of compliance maintained more of a presence in monitoring the activities of the program. [Committee on Infractions Report Pages No. 4 and 18 and Committee on Infractions Response Page No. 9]

The institution, on the other hand, argued there is no causal nexus between it and the “contentious relationship” between the former head coach and the director of compliance with regard to the violations that were found. [Rebuttal to Committee on Infractions Response Page No. 15] In addition, the institution argued the violations were “the product of intentional actions that were designed to conceal the violations from discovery,” and that is the reason the enforcement staff did not make an allegation of failure to monitor against the institution. [Rebuttal to Committee on Infractions Response Page No. 15]

The committee shares the hearing panel’s concern about the strained relationship between the former head coach and the director of compliance. However, the nexus must be based on more than mere employment status or concerns about a poor relationship. To assign significant weight in the predominance analysis to the coaches’ unethical conduct, there must be a direct correlation between the actions (or lack thereof) of the institution and the coach. In this case, we find no such nexus. As a result, the hearing panel failed to use the correct legal standard, and, therefore, abused its discretion in the imposition of penalties.

IX. CONCLUSION.

The case is remanded to the Committee on Infractions to apply penalties from either the current bylaws 19.9 et al or 2012-13 Division I Manual, whichever is less stringent.

NCAA Infractions Appeals Committee

David Williams, chair
Ellen Ferris
W. Anthony Jenkins
Patti Ohlendorf.