

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

February 13, 2018

Infractions Decision No. 453

University of Notre Dame

South Bend, Indiana

This decision is filed in accordance with NCAA Article 19 and is organized as follows:

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I. INTRODUCTION.

The University of Notre Dame appealed to the NCAA Division I Infractions Appeals Committee a specific penalty as determined by the NCAA Division I Committee on Infractions. In this decision, the Infractions Appeals Committee addresses the issues raised by Notre Dame (hereinafter referred to as Notre Dame).

II. BACKGROUND.

On November 22, 2016, the Committee on Infractions issued Infractions Decision No. 453 in which the committee found violations of NCAA legislation in the football 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 academics.

After the Committee on Infractions issued its infractions decision, Notre Dame filed a timely Notice of Appeal December 7, 2016. A written appeal was filed February 6, 2017. The Committee on Infractions filed its Response March 16, 2017. Notre Dame filed its Rebuttal to the Committee on Infractions Response April 20, 2017. The case was considered by the Infractions Appeals Committee July 20, 2017 (see Section VIII below).

III. PARTIES' AGREED-UPON FACTUAL BASIS, VIOLATIONS AND VIOLATION LEVELS OF NCAA LEGISLATION.

See Committee on Infractions decision for appellant Page Nos. 3 through 7. A copy of the infractions decision may be accessed via the NCAA Legislative Services Database for the Internet (LSDBi) at the following link: <https://web3.ncaa.org/lbdbi/>.

IV. REVIEW OF CASE BY THE COMMITTEE ON INFRACTIONS.

See Committee on Infractions decision for appellant Page Nos. 8 through 11. A copy of the infractions decision may be accessed via LSDBi at the following link: <https://web3.ncaa.org/lbdbi/>.

V. CORRECTIVE AND OTHER REMDEIAL ACTION.

See Appendix in the Committee on Infractions decision for appellant. A copy of the infractions decision may be accessed via LSDBi at the following link: <https://web3.ncaa.org/lbdbi/>.

VI. PENALTIES IMPOSED BY THE COMMITTEE ON INFRACTIONS.

See Committee on Infractions decision for appellant Page Nos. 14 through 19. A copy of the infractions decision may be accessed via LSDBi at the following link: <https://web3.ncaa.org/lbdbi/>. In this case, penalty V.6 was appealed:

The institution acknowledged that the student-athletes referenced in Violations No. 1 and No. 3 competed while ineligible and would be subject to NCAA Bylaw 19.9.7-(g) (vacation of records). Therefore, pursuant to NCAA Bylaws 19.9.7-(g) and 31.2.2.3, the institution shall vacate all regular season and postseason records and participation, including bowl contests, from the time football student-athletes became ineligible through the time they were reinstated as eligible for competition during the 2012-13 and 2013-14 football seasons. The individual records of the ineligible student-athletes shall also be vacated. However, the individual finishes and any awards for all eligible student-athletes will be retained. Further, the institution's records regarding its athletics programs, as well as the records of its head coach, will reflect the vacated records and will be recorded in all publications in which such records are reported, including, but not limited to, institutional media guides, recruiting material, electronic and digital media plus institutional, conference and NCAA archives. Any institution that may subsequently hire the affected head coach shall similarly reflect the vacated wins in his career records documented in media guides and other publications cited above. Head coaches with vacated wins on their records may not count the vacated wins toward specific honors or victory "milestones" such as 100th, 200th or 500th career victories. Any public reference to the vacated contests shall be removed from the athletics department stationary, banners displayed in public areas and any other forum in which they may appear. Any trophies awarded by the NCAA in the sport of football shall be returned to the Association.

Finally, to ensure that all institutional and student-athlete vacations, statistics and records are accurately reflected in official NCAA publications and archives, the sports information director (or other designee as assigned by the director of athletics) must contact the NCAA Media Coordination and Statistics office and appropriate conference officials to identify the specific student-athletes and contests impacted by the penalties. In addition, the institution must provide the NCAA Media Coordination and Statistics office with a written report, detailing those discussions. This document will be maintained in the permanent files of the NCAA Media Coordination and Statistics office. This written report must be delivered to the office no later than 45 days following the release of this decision. The sports information director (or designee) must also inform the Office of the Committees on Infractions of this submission to the NCAA Media Coordination and Statistics office.

VII. ISSUES RAISED ON APPEAL.

In its written appeal, Notre Dame asserted that the Committee on Infractions abused its discretion when prescribing penalty V.6.

VIII. APPELLATE PROCEDURE.

In considering Notre Dame's appeal, the Infractions Appeals Committee reviewed the Notice of Appeal; the record and transcript of the institution's September 23, 2016, hearing

before the Committee on Infractions and the submissions by Notre Dame and the Committee on Infractions referred to in Section II of this decision.

The oral argument on the appeal was held by the Infractions Appeals Committee July 20, 2017, in Dallas Texas. Notre Dame was present and was represented by its president, director of athletics, faculty athletics representative, senior compliance administrator, vice president and general counsel and associate general counsel. The Committee on Infractions was represented by the appeals coordinator for the Committee on Infractions, the managing director of the Office of Committees on Infractions and associate director of the Office of Committees on Infractions. Also present was the deputy general counsel of the NCAA. The enforcement staff was represented by the vice president of enforcement, managing director of enforcement, director of enforcement and associate director of enforcement, via teleconference. The oral argument was conducted in accordance with procedures adopted by the committee pursuant to NCAA legislation.

On October 30, 2017, Notre Dame notified the Infractions Appeals Committee that it would be submitting supplemental written material for consideration as part of the appeal. The supplemental written material, which sought to address the relevance of the University of North Carolina, Chapel Hill Committee on Infractions Decision (October 13, 2017) to its appeal, was submitted to the Infractions Appeals Committee November 27, 2017. After reviewing the submission, the Infractions Appeals Committee determined that the submission was new information and December 13, 2017, the committee stayed the appeal and remanded the matter to the Committee on Infractions panel to address whether the supplemental written material affects the panel's decision. (Bylaw 19.10.4) December 22, 2017, the Committee on Infractions panel stated that the supplemental written material would not have affected its decision. Therefore, the Infractions Appeals Committee continued to process the appeal.

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

In reviewing the infractions decision in this case, a penalty imposed by the Committee on Infractions may be set aside on appeal if the imposition of the penalty constitutes an abuse of discretion by the Committee on Infractions.

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, Public Infractions Appeals Committee Report, Page No. 23, June 30, 2009]

Notre Dame appealed the Committee on Infractions prescription of a vacation of records penalty for its football program. The institution argued that:

1. The panel failed to consider the primacy of the institution’s role in addressing core academic matters;
2. The vacation of team records penalty is excessive in light of the lack of institutional involvement in or knowledge of the underlying academic conduct; and
3. The panel breached its obligation under Bylaw 19 to accord the institution a fair process. (Written Appeal Page No. 1)

Consideration of the Primacy of the Institution’s Role in Addressing Core Academic Matters

In this case, several incidents of academic misconduct were discovered. The institution’s administrators and faculty members charged with administering the honor code determined that they would best serve the moral and intellectual formation of the students found responsible for the academic misconduct by retroactively reducing the students’ grade, thus ensuring that those students could not count toward a degree courses in which they had committed serious improprieties. (Written Appeal Page No. 3) This resulted in student-athletes being declared ineligible retroactively for competition. The institution argued that the Committee on Infractions hearing panel’s imposition of a vacation of records penalty attached some punitive consequences to an institution’s exercise of its best academic judgement. (Written Appeal Page No. 3) Further, in the institution’s view, the hearing panel should not attach punitive consequences to an institution’s exercise of academic judgements when an institutional failure does not compel it to do so and no institutional failure exists. (Written Appeal Page No. 2)

An institution does have a responsibility to adopt and enact academic policies in the manner that its administration and faculty deems appropriate. However, the institution is also a member of the NCAA and as part of Association membership, the institution agrees to be subject to and abide by the Association’s legislation which includes rules related to academic misconduct and the ability to impose penalties for academic misconduct violations¹. In this case, the acknowledged academic misconduct impacted the eligibility of student-athletes and resulted in their participation in competitions for which they were not eligible, thus impacting a core principle of the NCAA, fairness of competition. Therefore, the Committee on Infractions did not abuse its discretion, as imposition of

¹ See NCAA Constitution 2.10 and 3.01.3.

penalty or punishment by the institution does not preclude or override the NCAA’s ability to take action and impose penalty(ies).

Excessive in Light of the Lack of Institutional Involvement in or Knowledge of the Underlying Academic Conduct

The institution argued that there was no institutional involvement in the underlying academic conduct because the student employee should not be considered an institutional employee under the legislation related to academic misconduct. (Written Appeal Page Nos. 7-11) Effective August 1, 2016, Bylaw 14.02.11.1 changed what is required for a student employee to become an institutional employee for post-enrollment academic misconduct. Going forward, for post-enrollment academic misconduct, a student employee is not an institutional employee unless they have institutional responsibilities to provide academic services to student-athletes or engages in academic misconduct or provides impermissible academic assistance at the direction of a nonstudent employee, or a representative of the institution’s athletics interests.

By considering the student trainer to be an institutional employee, the institution believes that the hearing panel ignored “the membership’s clear recognition that student tutors hold a distinct status among student employees.” As well as, that to the “extent that the hearing panel believed that the student employee involvement in student-athlete academic misconduct, without regard for the nature of the student employee’s role or knowledge of or involvement of any other institutional staff member in the underlying misconduct, justifies a vacation of team records penalty, the panel failed to weigh material factors.” (Written appeal Page No. 11)

When reviewing infractions cases, the Committee on Infractions uses the bylaws and interpretations contemporaneous to the conduct being reviewed. Therefore, under the bylaws in place at the time of the violations, a student trainer would be considered an institutional employee. Further, we have noted that the Committee on Infractions has significant discretion in its ability to fashion appropriate penalties for the overall infractions at issue in any particular case. (St. Mary’s College of California Infractions Appeals Committee Public Report October 14, 2013, Page No. 5) In this case, although the Committee on Infractions had the discretion to use the bylaw change as a mitigating factor, the Committee on Infractions did not abuse its discretion when it determined that the student trainer was an institutional employee.

Breach of Obligation Under Bylaw 19 to Accord the Institution a Fair Process

The institution argued that the Committee on Infractions hearing panel violated the fundamental fairness guaranteed in the infractions process by Bylaw 19. (Written Appeal

Page No. 13) This relates to the notification and consideration of Violation No. 2 in the imposition of the vacation of records penalty.²

There were a series of communications related to this argument:

1. A communication was sent to the institution July 5, 2016, outlining additional penalties the Committee on Infractions believed should be imposed for the case and requested a response from the institution as to whether it would accept the additional penalties. In this letter, there was no reference to Violation No. 2 in the discussion of imposition of a vacation of record penalty.
2. After the expedited hearing, the Committee on Infractions sent a letter dated October 20, 2016, to the institution requesting confirmation of whether it would adopt the same arguments made related to the vacation of record to the student-athletes included in Violation No. 2. Further, the institution was provided the option of submitting in writing different arguments on this matter.
3. In a November 3, 2016, letter to the Committee on Infractions, the institution questioned the hearing panel's authority to consider Violation No. 2 at that stage of the summary deposition process, post-hearing, and questions of fairness.
4. In a November 17, 2016, letter, the Committee on Infractions reiterated its commitment to fairness and that the institution's November 3, 2016, letter is its resolution in the case and the Committee on Infractions did not prescribe a vacation of records for Violation No. 2.

In its Committee on Infractions written response to the appeal and during the Committee on Infractions appeal advocate's statements during the oral argument, the Committee on Infractions made a distinction between imposing a vacation of record penalty based on Violation No. 2 and imposing a vacation of records penalty based on the entire Summary Disposition Report, which includes information related to Violation No. 2. (Committee on Infractions' Response Page Nos. 16-17)

The October 20, 2016, letter from the Committee on Infractions could have been framed in a clearer and more direct manner regarding the error of not including in its July 5, 2016, letter a reference to vacating records for Violation No. 2. However, the October 20 letter provided the institution the opportunity to provide arguments regarding vacation of records

² Violation No. 1 and No. 3 involved instances in which student-athletes engaged in academic misconduct and Notre Dame's honesty committee imposed grade changes that retroactively undermined the basis on which Notre Dame had certified the student-athletes' eligibility. Violation No. 2 involved instances in which a student athletic trainer provided impermissible academic assistance to student-athletes, but that assistance did not trigger grade changes that retroactively undermined the basis on which Notre Dame had certified the student-athletes' eligibility. (Committee on Infractions Public Infractions Decision Page No. 8)

and Violation No. 2. With provision of this opportunity, the Committee on Infractions corrected an error and the institution was not prejudiced.

Further, if just Violation Nos. 1 and 3 were considered, the imposition of vacation of records would not have been an abuse of discretion. Therefore, the Committee on Infractions did not abuse its discretion by prescribing a vacation of records.

X. CONCLUSION.

Penalty V.6 is affirmed.

NCAA Infractions Appeals Committee

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