

**UNIVERSITY OF HAWAII AT MANOA**

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**REPLY TO RESPONSE FROM THE  
COMMITTEE ON INFRACTIONS**

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**APPEAL OF  
INFRACTIONS REPORT NO. 428  
CASE NO. 00202**

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## I. INTRODUCTION.

The University of Hawaii at Manoa (the “University”) appreciates fully that the Committee on Infractions (“COI”) enjoys broad discretion in the imposition of penalties for a member institution’s violation of NCAA legislation. Broad discretion, however, is not unfettered discretion. In this case, the COI abused its discretion when it imposed a one-year postseason ban on the University’s men’s basketball program for the 2016-17 academic year. In fact, as the University demonstrated in its initial submission, and which the COI does not dispute in its response, the imposition of a postseason ban for exclusively Level II and III violations with no finding of failure to monitor or lack of institutional control is unprecedented no matter which version of the penalty guidelines is used. The postseason ban penalty in this case is excessive and should be vacated.

The COI’s response to the University’s appeal is grounded in little more than bald *ipse dixit* – the postseason ban penalty is proper because the COI says it is and nothing further need be considered. The COI attempts to defend its arbitrary imposition of an excessive penalty through a litany of unsupported, conclusory statements and rank speculation that find no support in the record of this case, and which, in some instances, are flatly contradicted by the record. NCAA bylaws require more before the extraordinarily severe penalty of a postseason ban may be levied against a member institution and its current student-athletes.

There are multiple grounds on which this Committee should vacate the postseason ban penalty. First, the COI imposed the penalty under the wrong version of Bylaw 19.9. The violations in this case predominately occurred before October 30, 2012, which requires that the COI impose penalties under the more lenient penalty structure. The COI concedes that a postseason ban would not be an appropriate penalty under the prior penalty guidelines.

Second, the COI incorrectly classified this case against the University as Level II – Aggravated given the existence of multiple mitigating factors applicable to the University, none of which applied to the involved individuals, the absence of any finding of failure to monitor or lack of institutional control and the COI’s consideration of an improper factor. The COI’s attempt to justify its classification of this case fails as it is based solely upon that improper factor – a so-called “contentious relationship” between the former head men’s basketball coach and the University’s compliance director – that had no causal effect for any violation found in this case.

Finally, the imposition of a postseason ban is excessive when the facts of this case are compared to other COI decisions, no matter which penalty structure those decisions employ, almost all of which involve far more egregious conduct than that found in this case. The COI offers no explanation for its severe deviation from this precedent. Accordingly, this Committee should vacate the postseason ban penalty.

## **II. ARGUMENT**

### **A. The Penalties In This Case Should Not Have Been Assessed Under The New Version Of Bylaw 19.9 Because The Violations Predominately Occurred Before October 30, 2012.**

The COI assessed the postseason ban using the wrong standard, which is an abuse of discretion. If this Committee agrees with the University’s position that the penalties should have been imposed under the 2012-13 Division I Manual because the violations predominately occurred before October 30, 2012, the postseason ban should be vacated. In fact, the COI implicitly concedes this point as it offers no argument that a postseason ban penalty would have been appropriate under the prior penalty guidelines. Similarly, the COI does not argue that the imposition of a postseason ban under the 2012-13 Division I Manual on the facts of this case

could possibly withstand a comparison and review of numerous prior COI decisions applying the former penalty guidelines where a postseason ban was not imposed for significantly more serious violations than those found in this case. In short, the COI does not dispute that the prior penalty structure would have been more lenient and that a postseason ban would not have been an appropriate penalty under that structure.

Instead, the COI asserts that it did not need to consider the older penalty structure at all even though the violations in this case straddle the effective date of revised Bylaw 19.9. The COI's attempt to push this case into the new penalty matrix falls short. The analysis is not complicated and does not present a close call. No reasonable person could review the violations in this case and conclude that they *predominately* occurred *after* October 30, 2012.

While the University acknowledges that violations occurred before and after the effective date (October 30, 2012) of the new penalty structure, the violations predominately occurred *before* that date. Oddly, the COI criticizes the University for “parsing” the violations, but that is precisely what the COI must do to determine the appropriate penalty guideline to apply where, as in this case, the violations straddle the effective date of the new guidelines.

The central core of this case plainly arises from events occurring before October 30, 2012:

- Former director of basketball operations (“DOBO”) Kerry Rupp’s impermissible coaching activities during the **2011-12 season** (Infractions Decision, Section IV. A., Page No. 12)<sup>1</sup>;
- Former head men’s basketball coach Gib Arnold’s unethical conduct in permitting and instructing Rupp to engage in impermissible coaching activities during the **2011-12 season** (Infractions Decision, Section IV. C., Page No. 16);

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<sup>1</sup> In the Notice of Allegations, the enforcement staff alleged that Scott Fisher, the DOBO during the 2010-11 academic year, also engaged in impermissible coaching activities, but the COI did not find that a violation occurred. It would be a perverse result for the University to receive a more severe penalty because a violation was *not* found than it would have received if that violation had been found.

- Then men's basketball student-athlete [REDACTED] complimentary use of Brian Uy's (a representative of the University's athletics interests) automobile for 48 hours in early September 2012 (Infractions Decision, Section IV. B., Page No. 14); and
- Arnold's unethical conduct based upon his failure to report his knowledge of [REDACTED] use of Uy's vehicle and his instructions to team members not to report the incident in early September 2012 (Infractions Decision, Section IV. C., Page No. 16).

The Level III violations predominately occurred before October 30, 2012, as well. The five impermissible tryouts all occurred in 2011, while the three hotel concierge lounge visits happened in 2013. In its response, the COI incorrectly refers to these violations as Level II violations. COI Response, Page Nos. 8-9. These violations all were found to be Level III. Infractions Decision, Section V., Page Nos. 21-22.

The COI attempts to force this case into the new penalty matrix by relying exclusively upon portions of the unethical conduct violations for Arnold and former assistant men's basketball coach Brandyn Akana. The COI found that Arnold provided false and misleading information regarding exclusively pre-October 30, 2012, events (Rupp's impermissible coaching activities in the 2011-12 season) in his October 14, 2014, interview with the enforcement staff and his December 10, 2014, supplemental written statement that he submitted *after* his employment with the University was terminated on October 28, 2014. That portion of Arnold's unethical conduct violation, however, is wholly derivative of conduct occurring entirely before October 30, 2012. In other words, but for the DOBO violation that occurred entirely before October 30, 2012, there would have been no basis on which to find that Arnold provided false and misleading information in his 2014 interview and supplemental written statement.

Next, the COI found that Akana engaged in unethical conduct when he (1) allowed then men's basketball student-athlete ██████<sup>2</sup> to retain an iPad valued at \$400 in December 2012 and did not divulge that fact during interviews with the enforcement staff, and (2) altered a Supplemental Information admissions form for student-athlete ██████ that the University detected the moment Akana submitted it and then suspended his employment. Akana's unethical conduct violation is the *only* violation that occurred entirely after October 30, 2012, and lacks any connection to pre-October 30, 2012, conduct. To conclude that Akana's violation was so much more significant as to predominate over all the other violations in this case and require application of the new penalty guidelines turns logic on its head.

In its response, the COI asserts that, while Kerry Rupp's impermissible coaching activities and ██████ ██████ receipt of an impermissible benefit all occurred before October 30, 2012, "the unethical conduct associated with these violations and others occurred after October 30, 2012." COI Response, Page No. 13. The COI's statement is wrong. Arnold's unethical conduct violation is grounded in the fact that he (1) instructed and permitted Rupp to engage in on-court coaching activities during the 2011-12 season; (2) failed to report to the University's administration his knowledge of ██████ receipt of an impermissible benefit in early September 2012; and (3) influenced members of the men's basketball team not to report the ██████ incident in early September 2012. Infractions Decision, Page No. 17. Each of those events occurred *before* October 30, 2012. Thus, the COI's argument (COI Response, Page No. 15) that "the unethical conduct violations tipped the balance in comparison to the other violations in both number and degree" has no factual support.

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<sup>2</sup> The COI continues to refer to ██████ as a "prospect," which is incorrect. He was an enrolled student-athlete at the time Akana allowed him to retain the iPad, not a prospect who later enrolled.

The COI's determination to assess penalties under the new version of Bylaw 19 was not correct. Because the violations predominately occurred before October 30, 2012, the COI was required to conduct an analysis under former Bylaw 19.5.2 and current Bylaw 19.9 and prescribe penalties using the more lenient penalty structure. Deviating from that procedure is an abuse of discretion, not an exercise of discretion. There is no dispute that the former guidelines provide for less stringent penalties and that a postseason ban would not have been an appropriate penalty under the former penalty guidelines. Accordingly, this Committee should vacate the postseason ban penalty.

**B. The COI's Classification Of The Case Against The University As Level II – Aggravated Was Incorrect, Unprecedented And Based Upon The Consideration Of Irrelevant And Improper Factors.**

A determination that the former, more lenient penalty guidelines should have been applied ends the analysis, as the COI does not defend the imposition of a postseason ban under that structure. But even if penalties should have been assessed under the new penalty guidelines, the COI's imposition of a postseason ban would not be appropriate because this case was not classified correctly. The COI abused its discretion in classifying the case against the University as Level II – Aggravated rather than Standard.

The distinction is outcome determinative because the lower end of a Level II – Standard case does not mandate a postseason ban.<sup>3</sup> Importantly, in its response, the COI does not assert that, if the case had been classified as Level II – Standard, it would nonetheless have chosen to impose a postseason ban penalty using the high end of the Level – II Standard classification.

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<sup>3</sup> The Figure 19-1 Penalty Guidelines provide for a postseason ban of 0 to 1 year for a Level II – Standard case.

**1. The COI's Classification of This Case As Aggravated And Its Imposition Of A Postseason Ban Is Contrary To Precedent.**

The violations the COI ultimately found in this case were significantly less severe than as alleged by the enforcement staff in the Notice of Allegations. The COI did not find that Scott Fisher, the DOBO for the 2010-11 season, engaged in impermissible coaching activities as alleged. Infractions Decision, Page No. 22. The COI found that the tryout and concierge lounge violations were not severe enough to be treated as Level II violations as alleged, but were more appropriately treated as Level III violations, and with respect to some of the tryouts, were not violations at all. Infractions Decision, Page Nos. 21 & 23. Finally, the COI did not find that any Level I violations occurred. Yet, solely because the case was improperly classified as Level II – Aggravated, the University received penalties commensurate with much more severe violations. In fact, as confirmed by the COI's inability to direct this Committee to any comparable case, the University is the first institution to ever receive a postseason ban penalty for violations of the kind found here. This illogical result cannot be what was intended to occur under the new penalty guidelines.

The COI identified five aggravating factors, several of which are duplicative, and three mitigating factors as applicable to the University. The COI failed to consider and weigh properly material factors in reaching its classification decision and based its decision almost entirely upon an irrelevant and improper factor, which constitutes an abuse of discretion.

In the Notice of Allegations, the enforcement staff identified four potential aggravating factors for the COI's consideration as to the University, two of which the COI did not apply.<sup>4</sup> The COI added three additional aggravating factors, however, two of which are duplicative and

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<sup>4</sup> The COI did not apply 19.9.3-(a) (multiple Level I violations) or 19.9.3-(b) (a history of major violations by the institution).

solely derivative of the fact that Arnold and Akana were involved in the violations.<sup>5</sup> Because those factors were not discussed at the hearing and were identified for the first time in the Infractions Decision, the University never had the opportunity to address their application or relative weight.

The COI also found that three mitigating factors applied to the University, but classified the case against the University as Level II – Aggravated, the same classification it applied to Arnold and Akana for whom no mitigating factors were identified. This is the first time the COI has ever classified a case in such a manner.

Initially, the COI says simply that there have been seven other cases where the COI has applied common aggravating factors to the individual and the institution. COI Response, Page No. 17-18. Three of those cases, *Northeastern University* (2014), *Georgia Institute of Technology* (2014) and *St. Francis University* (2014), were decided through a Summary Disposition Report (“SDR”) in which the parties agreed to the applicable aggravating and mitigating factors or at least had the opportunity to argue for or against a particular factor unlike this case where additional aggravating factors were imposed without prior notice to the University. The application of common aggravating factors between the involved individuals and institutions in those cases was by agreement.

More importantly, penalties in those three cases were assessed under the prior penalty guidelines, which were more lenient. The application of common aggravating factors did not enhance the penalties assessed against the institutions. And in two of the cases, *Northeastern University* (2014) and *Georgia Institute of Technology* (2014), the COI did not classify the case at all after identifying the agreed upon aggravating and mitigating factors. Finally, in *St. Francis*

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<sup>5</sup> Those two aggravating factors are 19.9.3-(h) (persons of authority condoned, participated in or negligently disregarded the violations or related wrongful misconduct) and 19.9.3-(j) (conduct or circumstances demonstrating an abuse of a position of trust).

*University* (2014), the case against the institution was classified as Level II – Standard notwithstanding the application of common aggravating factors.

Of the four remaining cases the COI references, *California State University, Sacramento* (2015) and *St. Peter's University* (2016) also were decided based upon an SDR where, once again, the parties agreed to or addressed fully the applicable aggravating factors. In addition, *St. Peter's University* (2016) and *Louisiana Lafayette University* (2016) were decided *after* the University's case. That leaves a single decision, *Southern Methodist University* (2015), that was decided before the University's case was heard in which the COI applied a common aggravating factor to an involved individual and the institution, classified the case and assessed penalties under the new guidelines.<sup>6</sup> This is hardly a "routine" determination as the COI describes it in its response.

The COI goes on to list four cases where the COI did not assign the same aggravating factors to the institution and involved individuals. The "explanations" the COI offers for the assignment of aggravating factors in those four cases between the institutions and involved individuals, however, do not appear anywhere in the actual decisions.

The fact remains that the COI's decision in *Coastal Carolina University* (2015), which the COI expressly relied upon in this case to apply additional aggravating factors against the University, calls for the exact opposite result. In that case, the enforcement staff proposed that the same aggravating factors, including 19.9.3-(h), that applied to the involved individual should also apply against the institution. In response, the institution argued that these factors should not be attributed to it "because aggravating and mitigating factors are party specific" and the factors at issue

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<sup>6</sup> As discussed herein, even though the COI applied some of the same aggravating factors to the involved individuals and the institution in *Southern Methodist University*, it still placed the institution in a less severe classification than two of the involved individuals. On April 8, 2016, the COI did the same thing in the *University of Southern Mississippi* case.

should apply only to the individual. *Coastal Carolina University*, at Page No. 5. The COI expressly rejected the enforcement staff's attempt to attribute all of the coach's aggravating factors to the institution:

The panel partially agrees with the institution, but determines that NCAA Bylaw 19.9.3-(i) is an aggravating factor for the institution because the conduct resulted in a student-athlete being ineligible for competition and subsequently competing for the institution.

*Coastal Carolina University*, Page Nos. 5-6. The COI did not apply 19.9.3-(h) to the institution and it should not have done so in this case.

Further, the COI asserts that it does not assign common aggravators to the institution and involved individuals where the cases involve "secretive" behavior by the involved individuals. COI Response, Page No. 19. Such behavior is precisely what existed in this case and is the reason the enforcement staff did not allege a failure to monitor charge. Hearing Transcript, at 277 (describing the secretive nature of the violations). Accordingly, using the COI's own stated rationale, 19.9.3-(h) & -(j) should not have been applied to the University in this case. With or without those factors, nothing about the particular factors applied to the University justifies calling this case "Aggravated."

In the end, the COI's response misses the point. The issue here is not simply whether the same aggravating factor could be applied to an involved individual and the institution. The question before this Committee is whether the COI properly applied those factors under the facts of this case to elevate the classification, and with it, the penalties, against the University from Standard to Aggravated. The five aggravating factors the COI applied establish only three things: (1) coaches were involved in the underlying violations; (2) there was more than one Level II violation in the same sport (men's basketball); and (3) the violations resulted in two student-athletes being ineligible. Those factors do not in any way distinguish this case from all of the

other cases where the COI has classified the case against the institution as Standard or Mitigated, and a postseason ban has not been imposed.

A review of the applicable precedent establishes plainly that the COI's analysis here is flawed. This Committee need not decide whether the COI may attribute the same aggravating factor to an involved individual and the institution because, even assuming the COI may do so notwithstanding that its practice has been not to do so in the absence of the parties' agreement, the COI has not explained how these factors distinguish this case from all others where the case against the institution is classified in a less severe manner than that against an involved individual.

The key point that the COI omits from its response is that it has never before applied one or more aggravating factors to an involved individual and the institution, whether some or all of those factors are in common or not, and proceeded to classify the case against both as Aggravated and then assessed penalties under the new penalty bylaw. The flaw in the COI's analysis is all the more apparent upon consideration of the fact that the COI identified three mitigating factors that applied to the University while it identified a greater number of aggravating factors that applied to the involved individuals but identified no mitigating factors at all for those individuals.<sup>7</sup>

The COI's decision to classify this case against the University as Aggravated runs contrary to all precedent involving the application of penalties under the new penalty structure. In fact, this case marks the first time the COI has ever classified a case against an institution as Aggravated and imposed penalties under the new structure. It also is the first time the COI has ever classified a case against an institution as "Aggravated" where:

- multiple mitigating factors were found to apply to the institution;

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<sup>7</sup> The COI identified 5 aggravating factors for the University, 6 for the former assistant men's basketball coach and 7 for the former head men's basketball coach.

- exclusively Level II and III violations were found; and
- no finding of lack of institutional control or failure to monitor was made against the institution.

A party specific analysis is required when assessing aggravating and mitigating factors. In this case, the COI classified the case against Arnold and Akana as aggravated based upon their unethical conduct violations and the fact that there were no mitigating factors that applied to either individual. It is not proper for the COI to hold the institution strictly liable to the same degree as the involved individuals; the classification of a case against an involved individual does not dictate the classification level for the institution automatically. The analysis for each must be conducted separately.

A review of the COI's precedent establishes that the result in this case is a severe departure from the manner in which cases involving even more serious conduct have been handled. Since the new penalty guidelines became effective, the COI has imposed penalties under that structure in 16 cases, not including this one, which are set out in the list attached as Exhibit A. In those 16 cases, the COI has imposed a postseason ban only twice and neither case is similar to this one. In *St. Peter's University* (2016), which was decided after this case, the institution self-imposed a one-year postseason ban. In *Southern Methodist University* (2015), the COI classified the case against the institution as Level I – Standard and imposed a one-year postseason ban on its men's basketball and men's golf programs. That case, which was the institution's tenth major infractions case, involved academic fraud where a former administrative assistant completed an online private summer school course and fraudulently obtained academic credit on behalf of a student-athlete, impermissible recruiting contacts and unethical conduct. These violations are not similar to those found in this case, which both the enforcement staff and

COI acknowledged at the hearing were much less serious than other violations that are often found. Hearing Transcript, at 35 & 90.

In 10 of those 16 cases, the COI addressed violations against an institution and an involved individual.<sup>8</sup> Out of those 10 cases, there have been six instances in which the COI classified the case against an involved individual as Aggravated. In every one of those six cases, which are highlighted on Exhibit A, the case against the institution was classified less severely as Standard or Mitigated. In an additional case, *Southeastern Louisiana University* (2015), the COI classified the case against the involved individual as Level I – Standard, but classified the case against the institution as Level II – Standard without a postseason ban.

The fact that the COI has never before classified a case against an institution and an involved individual as Aggravated does not, of course, mean that it could never do so in the appropriate case where, for example, the institution's failure to monitor or lack of institutional control gave rise to or exacerbated the underlying violations. Whatever such a case might look like, this is not it. There is no qualitative distinction between this case and the 10 other cases the COI has decided involving allegations against an involved individual and an institution where the COI imposed penalties under the new system.

There has only been one other case in which the COI has classified a case against an institution as Aggravated under any circumstances. In *Syracuse University* (2015), the COI classified the case as Level I – Aggravated, but did not specifically identify any mitigating factors at all that applied to the institution. The conduct at issue, which occurred over a 10 year

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<sup>8</sup> There are, of course, several other cases processed under the new penalty bylaw for classification purposes, but where, as should have been done in this case, the COI imposed penalties under the older guidelines because they were more lenient. In its response, the COI asserts that the only relevant precedent is a case in which the penalties were assessed under revised Bylaw 19.9. Accordingly, the University's analysis of purposes of this Reply focuses on those very cases, which show clearly that the COI departed, without explanation, from its precedent by imposing a postseason ban penalty in this case.

period, included 12 Level I or II violations involving academic fraud, instances of extra benefits, the institution's failure to follow its written drug policy, impermissible activities surrounding the conduct of a representative of the institution's athletics interest and student-athletes' involvement in promotional activities and outside competition. The nature of the underlying violations alone is significantly dissimilar to this case.

But what makes *Syracuse University* even more divergent is that, unlike this case, the COI found a lack of institutional control and failure to monitor extending over a 10-year period. Yet, the institution in that case received the same penalty – a one-year postseason ban – as the University has here where the violations are not remotely comparable in terms of severity, length or the number of student-athletes involved, and where there has been no allegation or finding of lack of institutional control or failure to monitor. Notwithstanding that penalties were assessed under the prior penalty guidelines in *Syracuse University*, the result in that case and this case cannot be reconciled.

Given the stark disparity between the COI's entire body of precedent under the new structure and this case, the question naturally arises as to what makes this case so different. This 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." *Syracuse University*, Infractions Appeals Committee Decision, (Nov. 25, 2015). There is no valid explanation for the COI's decision in either its Infractions Decision or response to this appeal.

**2. A “Contentious Relationship” Between The Former Head Men’s Basketball Coach And The University’s Compliance Director Is Neither A Violation Of NCAA Legislation Nor A Valid Factor That Elevates This Case To “Aggravated” Status.**

As expected, the COI attempts to distinguish this case based solely upon what it characterizes as the “contentious relationship” between the former head men’s basketball coach and the University’s compliance officer. COI Response, Page No. 19. The COI now posits that, if there had been “better communication” between compliance and men’s basketball, the compliance officer *might* have noticed the DOBO engaging in coaching activities or members of the men’s basketball staff observing prospects in pickup games. COI Response, Page No. 19. The COI also asserts, for the first time, that if the relationship had been “more professional,” the former head men’s basketball coach *might* have come to compliance to report the incident involving the student-athlete’s use of the booster’s vehicle. COI Response, Page Nos. 19-20.

These statements are not findings of fact; they are nothing more than after-the-fact speculation and guesswork that are no more likely to be true than not. Notably, the COI does not direct this Committee to any portion of the record in support of these statements. It cannot do so because it was presented with no evidence of any kind to bolster these conclusions. There simply is no evidence in the record that in any way established a causal nexus between this relationship and the violations that were found.

In fact, the evidence that was actually presented to the COI established that the violations involving the DOBO’s impermissible coaching activities, the impermissible tryouts and the former head men’s basketball coach’s failure to report the [REDACTED] incident were the product of intentional actions that were designed to conceal the violations from discovery, not because of a “contentious relationship” between a coach and compliance. It is for that very reason that the enforcement staff determined that a failure to monitor against the University was not appropriate.

Hearing Transcript, at 276-277. Nowhere in the Infractions Decision or its reply here does the COI disagree with the enforcement staff's conclusion.

Addressing the DOBO and impermissible tryout issues, the enforcement staff stated to the COI at the hearing:

In those situations, we felt like the information showed that Mr. Arnold and his staff took steps to conceal these activities from outsiders, including the Compliance Office.

Had compliance done in person spot checks of practice or had a physical presence during official visits, they wouldn't have found violations, because they would have ceased that activity and would have assumed (sic) once Amanda walked out of the door.

Hearing Transcript, at 277.

On the [REDACTED] issue, Arnold himself refuted the very theory the COI now advances. At the hearing, Arnold's representative made clear that Arnold did not report the [REDACTED] issue because he did not believe it was a violation, not because of anything having to do with his relationship with the compliance director. Hearing Transcript, at 231.

Further, when the COI asked Arnold specifically why he did not report the incident to compliance, Arnold stated:

Yeah, more than any other thing we're talking about, I really wish I did, to be perfectly straight and honest. Because, you know, this is a situation that was at the time I felt I did a real good job with it. I heard about it, put an end to it . . . I messed up. I should have talked about it, but I really at the time it occurred to me, I thought I was doing the right thing teaching a good lesson, that there was no violation, and the kids were taught it wouldn't happen again.

Hearing Transcript, at 175-77.

As the University made clear in its original submission, the nature of the relationship between the former head men's basketball coach and the University's compliance director, who was not at risk under any allegation and whose conduct did not give rise to a failure to monitor

violation, did not constitute a violation of NCAA legislation for which the University should be punished with a postseason ban. And the COI did not find that this “strained relationship” would be applied as an additional aggravating factor under Bylaw 19.9.3-(n), which provides for consideration of “[o]ther facts warranting a higher penalty range.” Finally, as detailed above, the actual evidence presented at the hearing strips away the lone aspect of the case the COI claims justifies the “Aggravated” classification.

The COI’s decision to classify the case against the University as Aggravated was based in significant part on an irrelevant or improper factor, i.e., the relationship between the former head men’s basketball coach and the University’s compliance director. Accordingly, the COI abused its discretion. *Alabama State University*, Page No. 23 (abuse of discretion occurs if penalty “was based in significant part on one or more irrelevant or improper factors). There is no qualitative distinction in the record that would warrant the extent of the departure from prior precedent that was undertaken by the COI in this case. The imposition of a postseason ban on the facts of this case is excessive and should be vacated.

## **II. CONCLUSION.**

The imposition of a postseason ban against the University’s men’s basketball team is excessive when the specific facts of this case are considered. The COI assessed this penalty under the wrong guideline given that the violations predominately occurred before October 30, 2012. There is no dispute that, if the prior penalty guidelines had been used, a postseason ban would not have been imposed. Moreover, even under the new penalty guidelines, such a penalty would not be appropriate because there is no objective evidence establishing that this case should be established as Aggravated. The COI has deviated sharply, without explanation, from applicable precedent. This case does not involve a single Level I violation or a finding of lack of

institutional control or failure to monitor. Under these circumstances, the COI abused its discretion in imposing the postseason ban on the University's men's basketball program. Accordingly, the University respectfully asks this Committee to vacate that penalty.

# EXHIBIT A

## **DIVISION I COMMITTEE ON INFRACTIONS DECISIONS APPLYING PENALTIES UNDER REVISED BYLAW 19.9**

INSTITUTION	CLASSIFICATION		POSTSEASON BAN?
	INSTITUTION	INDIVIDUAL(S)	
<i>Southeast Missouri State University (02/12/16)</i>	II – Mitigated	II – Aggravated	No
<i>St. Peter's University (02/02/16)</i>	II – Standard	I – Aggravated	Yes (self-imposed for (swimming teams))
<i>Louisiana Lafayette University (01/12/16)</i>	I – Mitigated	II – Aggravated	No
<i>University of Hawaii at Manoa (12/22/15)</i>	II – Aggravated	II- Aggravated (former head men's basketball coach & assistant men's basketball coach)	Yes (one-year for men's basketball)

INSTITUTION	CLASSIFICATION		POSTSEASON BAN?
	INSTITUTION	INDIVIDUAL(S)	
<i>Indiana University-Purdue University, Fort Wayne (11/24/15)</i>	II – Standard	N/A	No
<i>Florida A&amp;M University (11/20/15)</i>	II – Standard	N/A	No
<i>California State University, Sacramento (11/04/15)</i>	II – Standard	II – Aggravated for both coaches	No
<i>Southern Methodist University (09/29/15)</i>	I – Standard	I – Standard (Head men’s basketball coach) I – Aggravated (Administrative Ass’t.) I – Aggravated (Head men’s golf coach) II – Standard: (Compliance Director)	Yes. (One year for men’s basketball and men’s golf)

INSTITUTION	CLASSIFICATION		POSTSEASON BAN?
	INSTITUTION	INDIVIDUAL(S)	
<i>University of North Carolina at Greensboro</i> (06/25/15)	II – Standard	N/A	No
<i>Oklahoma St. University</i> (04/24/15)	II – Mitigated	N/A	No
<i>Southeastern Louisiana University</i> (04/09/15)	II – Standard	I – Standard (Head men's volleyball coach)	No
<i>University of Florida</i> (02/20/15)	II – Mitigated	II – Mitigated	No
<i>West Virginia University</i> (02/18/15)	II – Standard	II – Standard	No
<i>Wichita St. University</i> (01/29/15)	II – Mitigated	II – Mitigated Administrative Assistant	No
<i>University of Georgia</i> (12/16/14)	II – Mitigated	II – Aggravated Swimming & diving coach	No

INSTITUTION	CLASSIFICATION		POSTSEASON BAN?
	INSTITUTION	INDIVIDUAL(S)	
<i>Weber State University (11/19/14)</i>	I – Standard	N/A	No
<i>University of New Hampshire (06/27/14)</i>	II – Standard	N/A	No