

**UNIVERSITY**

**of**

**ALABAMA**

**Appeal from**

**Infractions Report No. 299**

**Submitted to the**

**Infractions Appeals Committee**

**July 27, 2009**

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## **I. Introduction.**

This is an appeal of an excessive penalty entered in a self-discovered and self-reported textbook infractions case. As part of its penalties imposed in this case, the Committee on Infractions vacated wins and performances in 3 sports, spanning 3 academic years – in effect, all contests in which 22 student-athletes who intended to take advantage of the University of Alabama’s textbook distribution procedures participated. Such a penalty is so excessive as to constitute an abuse of discretion. *NCAA Bylaw 32.10.4.1.*

Specifically, the vacation of wins penalty imposed by the Committee on Infractions (COI) abuses the COI’s discretion because:

- \* the imposed penalty departs from textbook case precedent;
- \* the imposed penalty departs from vacation-of-wins precedent;
- \* 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.

Those departures from precedent, inconsistencies, and failures constitute abuse of discretion as defined by this Committee; in particular, the imposed penalty “(1) was not based on a correct legal standard [and] was based on a misapprehension of the underlying substantive legal principles; (2) was based on a clearly erroneous factual finding,” in failing to consider certain important facts; “(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; [and] (5) was based in significant part on one or more 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.*

Accordingly, the vacation of wins penalty imposed against the University of Alabama (“University”) should be reversed, rendered and set aside.

## **II. Facts Applicable to this Case.**

The University takes no issue with the bare facts as set out in the Committee on Infractions report. In fact, the University admitted at the time of its response to the Notice of Allegations that it was guilty of a single major violation related to textbooks, and an additional charge of failure to monitor. However, there are certain characterizations and omissions from the Public Infractions Report that bear further discussion. These pertinent facts are as follows, with much of the same quoted verbatim from the Public Infractions Report:

### ***A. The University Found, Reported, and Fixed the Violations.***

The University of Alabama found, investigated, reported, and fixed these violations. As described in the Public Infractions Report:

The violations in this case were self-discovered and self-reported by the institution. The violations were first detected on October 17, 2007, when an employee of the institution’s bookstore, who was reviewing textbook charges for student-athletes, reported to student services that she had detected questionable textbook charges by a women’s track and field student-athlete. The charges were in excess of \$1,600 for the 2007 fall semester. This triggered an internal examination of scholarship student-athlete textbooks charges.

*University of Alabama, Tuscaloosa, Public Infractions Report, June 11, 2009, §A (“Public Infractions Report”).* In fact, the University began its review before the end of that week, *id. at*

*Appendix One* – a thorough and extensive review, some of the scope of which may be grasped in the timeline, *id.*, and in the self-imposed penalties, *id. at Appendix Two*. Moreover, although this fact was not discussed in detail in the report, it was uncontested at the hearing that the University began significant suspensions from athletic contests that same week, ultimately suspending several significant contributors in football for 4 games of that 2007 season, beginning with a game a mere three days after the violations were first found. *Id. at Appendix Two*, ¶1 (noting “appropriate suspension[s]”).

Additionally, within five days of the detection of the first secondary violation, the University commenced a comprehensive examination of its textbook distribution process. As a result of that examination, the University fixed the deficiencies in its policy by developing and adopting a comprehensive 21-page revised textbook distribution policy/process in approximately 2 months and implemented that new policy successfully for the spring 2008 book rush. *Id. at Appendix Two*.

***B. Only 22 Student-Athletes Acted with Any Intent (But No Intent to Violate the Rules).***

Twenty-two student athletes were found to have “exploited the institution’s textbook distribution system for scholarship student-athletes to acquire textbooks and materials of a value greater than \$100 for girlfriends, friends or other student-athletes.” *Public Infractions Report*, §B(1). Even among those students, however, there was no intent to violate NCAA rules; their intent instead was limited to “taking advantage of the institution and its bookstore,” by obtaining books for others that were later returned. *Id.* Obvious from its omission in the report, there was no evidence of any intent to violate NCAA rules, by student-athletes or others. Indeed, the student-athletes testified that they did not think they were breaking NCAA rules because they

either returned the books to the bookstore or were charged for the books if they failed to return them. Thus their intent was only to help some friends by taking advantage of gaps in the textbook distribution system – not to violate NCAA legislation.

***C. The Vast Majority of the Student-Athletes Acted Unintentionally.***

The other 90% of the involved student-athletes never intended to take advantage of the bookstore, much less to violate any NCAA rules or obtain an impermissible benefit. In short, these 179 student-athletes became involved mainly because of “book rush” distribution errors that possibly could occur at any large college bookstore. The COI found that these secondary violations were by

student-athletes who unintentionally received the impermissible use of non-required textbooks and materials. These optional or recommended materials were often included with students’ pre-packaged required materials. The student-athletes received optional or recommended items through either: 1) confusion or haste by bookstore employees during the ‘book rush’ at the beginning of the semester or; 2) mistaken packaging by bookstore employees, resulting from discrepancies among syllabi for different courses and for sections of the same course.

*Public Infractions Report*, §B(1).

***D. No Student-Athletes Profited Financially.***

“All of the textbooks and materials were either returned at the end of the semester or charged to, and recovered from, the student-athletes’ receivables account, as was required by the institution’s textbook system.” *Id.* at §B(1). In short, none of the student-athletes were allowed to keep, without charge, the books at issue other than for one semesters’ time – in effect, the books were borrowed for others’ use. Further, the “investigation did not reveal that anyone

converted the books or materials to cash by reselling the items, and did not reveal that anyone acquired items that were not academic in character, such as personal electronics devices or clothing.” *Id.* at §B(1).<sup>1</sup> In conclusion, no student-athlete profited financially from the violations.

***E. The COI Found Three Failures or Gaps.***

The COI concurred with the University’s finding that its system fell short, specifically in 3 areas. One, the rules education did not reach down far enough, primarily to the hourly employees who pulled books for student-athletes. “Rules education was ineffective as there was a lack of knowledge of a key distinction in the applicable NCAA rule by some of the lower-level bookstore employees,” to wit, the rule that student-athletes may only receive “required,” but not optional or recommended textbooks. *Id.* at §B(2). Two, there were insufficient controls as the student-athletes left the store (at the check-out register, etc.) *Id.* Three, there was insufficient monitoring of the accounts and billing reports, which could have detected the violations. *Id.*

***F. Additional Facts Deserving of Emphasis.***

A few additional facts – given short or no mention in the COI Report, but important and uncontested at the hearing – also deserve discussion:

1. It is important to note that a system was in place, albeit one which the University did not monitor adequately. The textbook systems reviewed in prior textbook cases at other institutions discussed below often involved a monetary credit at a bookstore, a much less

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<sup>1</sup> Unlike non-student-athletes who could sell their used textbooks at the end of a semester, under the textbook distribution system, scholarship student-athletes could not profit from selling them because they either had to return the books or pay for them if not returned.

developed distribution system than the book loan program at issue here. The COI Report mentioned that the University had a “system,” but only in the context of noting deficiencies. *Public Infractions Report*, §B(2).

2. This case involves no evidence of academic fraud or unethical conduct. The violations did not result from any active or intentional conduct on the part of University officials or coaches, and no officials or coaches benefitted from, consented to, or permitted, wrongdoing.

3. Although it is relegated to a brief mention in the introduction and a paragraph in Appendix Two of the decision, it is likewise important to note that the University

required all involved student-athletes with eligibility remaining to make full restitution for the improperly obtained texts and materials. Moreover, those student-athletes with violations involving an amount greater than \$100 were required to serve the appropriate suspension and to seek reinstatement from the NCAA.

*Id.* at Appendix Two, ¶1.<sup>2</sup>

#### ***G. The COI Imposed Additional Penalties.***

The Public Infractions Report includes three pages of single-spaced type describing the University’s self-imposed penalties. *Id.* at Appendix Two. While the COI found those penalties to be “meaningful,” they also found them to be “not sufficient in light of the facts and circumstances of the case.” *Id.* at §C. The COI briefly mentioned the University’s cooperation, giving short shrift to a factor that this Committee has found more important in other cases (see section VI below). *Id.*

The COI found the violations to be “limited,” but to consist of a large “scope.” *Id.* Ultimately, enhanced penalties for repeat violators were not imposed.<sup>3</sup> The COI abused its

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<sup>2</sup> Approximately 125 student-athletes with eligibility remaining unintentionally received recommended or optional books of a value of \$100 or less.



discretion, however, by imposing a vacation of “all wins in which any of the seven football student-athletes” identified as intentional wrongdoers; and a vacation of all individual records of the intentional wrongdoers who competed in tennis and track, with a subsequent reconfiguration of team point totals. *Id.* at p. 8. These vacations of wins and records would also apply to the records of the head coaches and would affect all records of such activities. *Id.* The COI based this vacation on three factors:

- 1) there were a large number of violations – the violations were committed by approximately 200 student-athletes in 16 separate sports and the violations in some instances were serious and involved amounts in the thousands of dollars; 2) at least 22 of the student-athletes committed willful and intentional violations; and
- 3) the institution admitted that it failed to monitor the student-athlete textbook distribution system

*Id.* at p. 3. Curiously, this finding failed to note the “large number” was a large number of **secondary** violations, which were aggregated together to constitute a **single major violation**, a clear misapprehension of the facts and misapplication of precedent. Further, this finding failed to note that the few student-athletes whose actions were “willful and intentional” never meant to violate NCAA rules, only to take advantage of the bookstore, again a clear misapprehension of the facts and misapplication of precedent.

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<sup>3</sup> Imposition of a repeat violator enhancement in this case would have been a clear and substantial abuse of discretion. Such enhanced penalties have not been found to be applicable in analogous circumstances. For example, the COI declined to impose such enhancements in the University of Colorado, Boulder’s 2007 case regarding training table violations. *University of Colorado, Boulder Public Infractions Report, June 21, 2007, at §C* (“The committee considered applying the enhanced penalties of NCAA Bylaw 19.5.2.3.2 due to the institution’s status as a repeat violator but declines 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 violations involved in this 2009 Alabama case are “1) limited in nature and scope to the [book distribution process;] 2) inadvertent; 3) discovered by institutional staff and promptly investigated and reported; and 4) unrelated to the previous major violations case.”

### **III. The Standard on Appeal.**

Prior to discussing the application of precedent to the instant facts, some discussion of the standard applicable to this appeal is necessary. Effective January 1, 2008, the standard for an appeal of penalties was changed from “excessive and inappropriate” to “excessive such that it constitutes an abuse of discretion.” *NCAA Bylaw 32.10.4.1*. This Committee has recently provided a more comprehensive definition of abuse of discretion after giving some consideration to use of that term in other contexts. In the *Alabama State Appeal* decision released June 30, 2009, and cited above, this Committee noted:

The abuse-of-discretion standard of Bylaw 32.10.4.1 was adopted by the NCAA in 2008, and the Committee on Infractions and the institution fully briefed the issue in this case. Based on that briefing, as well as this committee’s thorough legal analysis of the issue based on judicial case law, 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. Applying this analysis to this case, we conclude that imposition of the five-year probation constituted an abuse of discretion.

*Alabama State Appeal, supra* at §VIII.

The University contends that the vacation of wins penalty for the 2005 through 2007 seasons is an abuse of discretion, as viewed under the five factors of this standard. One, the COI did not apply the “correct legal standard . . . , misapprehend[ding] . . . the underlying substantive legal principles” as set out in prior textbook, vacation-of-wins, and other case precedent of this Committee. Two, the COI based its decision, in part, on “clearly erroneous factual finding[s],” especially its finding that there were a “large number of violations,” and its failure to adequately

note and consider the suspensions, the absence of academic fraud, and the absence of involvement of coaches and University officials. Three, the COI “failed to consider and weigh material factors,” including the facts set out above and the factors enumerated in vacation-of-wins and other penalty cases. Four, the COI decision was “based on a clear error of judgment” and arbitrarily, capriciously, and irrationally departs from the penalties imposed in prior textbook, vacation-of-wins and other cases. And, five and finally, the COI failed to consider the proper and relevant factors as established in prior cases. Accordingly, this penalty should be reversed, rendered and set aside.

#### **IV. The Imposed Penalty Departs from Textbook Case Precedent.**

In its decision in this case, the COI failed to take into proper consideration and arbitrarily and unreasonably departed from precedent of prior textbook cases. As set out in the Alabama State Appeal, the Committee on Infractions should have applied the appropriate legal standards and principles, and factors from prior cases.

The NCAA database includes four major infractions cases that involve a violation of the textbook rule and are relevant to this appeal. The vacation of wins penalty entered in this case is inconsistent with those entered in prior textbook cases; hence, excessive and an abuse of discretion. Those cases are discussed in turn.

##### ***A. Ball State University, October 16, 2007.***

Any discussion of textbook cases must begin with the Ball State case, which is the most recent, arguably the most serious, and easily the most publicized of textbook cases. The case was resolved by summary disposition and publicly announced on October 16, 2007, the same

week that UA's problems arose. *Ball State University Public Infractions Report (October 16, 2007)*.

The Ball State case involved both textbook violations, as well as practice violations by the softball program. *Id.* at §A. The textbook violations included "89 student-athletes in 10 sports," who obtained textbooks valued at \$26,944 "on loan . . . for classes in which the young men and women were not enrolled or for classes in which student-athletes obtained multiple copies of the same book." *Id.* at §B(1).

Ball State's book program is sometimes referred to in the decision as a "loan" program; however, the decision also describes a system in which each student-athlete was given a \$1000 credit at the bookstore and was given receipts which showed a credit remaining after books were purchased. *Id.* This caused student-athletes to "realize[] they could use the remainder in their bookstore accounts to obtain books on loan for friends and student-athletes who did not receive athletics aid." *Id.*

In addition to the textbook violations, Ball State's case also involved numerous violations caused by its softball program exceeding practice hour limitations. *Id.* at §B(2). Moreover, Ball State had discovered some of these practice problems, but failed to report them to the NCAA. *Id.*

Ball State's violations were held to constitute lack of institutional control, a more serious finding than that made against the University in this case. *Id.* at §B(3). The NCAA found that Ball State "failed to establish adequate systems for ensuring compliance at the bookstore and failed to provide adequate rules education to student-athletes and staff;" "failed to monitor the distribution of textbooks;" failed to monitor its softball program; and "failed to investigate and report violations of NCAA legislation." *Id.*

Despite being found responsible for the more serious charge of lack of institutional control, and despite having “failed to investigate and report violations of NCAA legislation,” Ball State received no vacation of wins. There were some scholarship losses, but those appear to be based upon exceeding squad size limitations, which was not made an issue in this case. *Id.* at §C.

***B. Temple University, May 10, 2007.***

Temple University was found guilty of major violations involving, in part, textbooks on May 10, 2007. *Temple Univ. Public Infractions Report (May 10, 2007)*. The textbook violations only played a small part in the overall infractions at Temple. Primarily, the case involved “fraud in the sport of men’s tennis,” specifically a scheme by a coach to have an ineligible player compete under an assumed name and “erroneous student-athlete eligibility certifications, impermissible student-athlete textbook purchases, unethical conduct and the university’s failure to monitor certain aspects of its athletics program,” which was discovered by another school. *Id.* at §A.

Despite the addition of fraud, unethical conduct, and several secondary violations, Temple received only two years probation, less than the University. *Id.* at §E. Moreover, the vacation of records that was imposed was based on the fraud that occurred in tennis. *Id.* at §E, ¶4. No vacation of wins appears to have been imposed based upon the textbook violations.

***C. Weber State, January 19, 2006.***

Weber State was found to lack institutional control in regard to textbooks in a summary disposition report issued on January 19, 2006. *Weber State Univ. Public Infractions Report*

(January 19, 2006). The violations took place “over a three year period and involved student-athletes in all 15 . . . sports.” *Id.* at §I. Through the summary disposition process, the school admitted to a lack of institutional control, again a more serious charge than is present in this case. *Id.*

The public infractions report also finds an important fact not present in this case -- the students were using “book-related store credit [of \$200] to purchase personal items and class supplies in addition to or instead of their course-required textbooks.” *Id.* at §II(A). Items that were obtained included “miscellaneous academic-related supplies, such as tablets, highlighters, pencils and pens, as well as personal items such as clothing, socks, a camera, various compact disc holders, a compact disc repair kit, a music compact disc and a personal music player.” *Id.* The violations were attributed by the University to “turnover in positions at the bookstore, a coincidental gap in . . . internal audit review of student-athlete textbook purchases at the bookstore, and inadequate training.” *Id.*

Despite the fact that Weber’s case involved both a lack of institutional control and the acquisition of non-textbook items, Weber State received only public reprimand and censure; two years of probation; lost one scholarship in football (based on exceeding squad sizes); and was required to make reports and filings. *Id.* at §III. Again, no vacation of wins was imposed, and only two years probation were given, despite the fact that the case involved lack of institutional control.

***D. Texas State University – San Marcos, March 10, 2005.***

Texas State University-San Marcos (TSUSM) was found guilty of major violations on March 10, 2005. *Texas St. Univ.-San Marcos Public Infractions Report (March 10, 2005).*

There were two categories of violations involved: (1) “widespread abuse by student-athletes of the system for obtaining textbooks” over a four year period; and (2) violations of practice rules by the football program. *Id.* at §I.

The textbook violations apparently developed when TSUSM changed its software system, creating a system whereby student-athletes were given a \$500 credit at the bookstore each semester. *Id.* There was no system in place to “track whether [the student-athlete] . . . was purchasing books solely for his or her own classes.” *Id.* Student-athletes began to notice the credits on receipts, and “in short order . . . realized that they could purchase books other than those required for their classes, not only for themselves but also for teammates, family members and friends.” *Id.* More than 135 individuals were implicated, involving an amount of \$73,845.<sup>4</sup> *Id.*

In addition to the textbook violations, the Committee on Infractions was “troubled by evidence showing that on two occasions the institution received information regarding possible abuse of the book purchasing system and failed to conduct adequate investigations.” *Id.* In fact, the investigation was expanded “only because the conference commissioner urged that a full investigation be undertaken.” *Id.* (*emphasis added*).

Most of the TSUSM report focuses on the widespread football violations. *Id.* at §II(B) and II(C). TSUSM was ultimately found guilty of both failure to monitor with regard to the football compliance issues, and lack of institutional control related to textbooks. *Id.* at II(D) and II(E). The NCAA cited TSUSM for failing to establish proper systems for compliance; failing to adequately educate student-athletes and staff; failing to monitor the process; and failing to

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<sup>4</sup> This is more than three times the aggregate value of the benefits obtained by the intentional wrongdoers in this case, and nearly double the total amount involved in the present case.

investigate when problems arose. *Id.* at §II(E). The intentional failure to investigate was said to be a “major contributing factor to the lack of institutional control finding.” *Id.*

Again, although TSUSM case involved additional violations – football practice issues – and it involved a failure on TSUSM’s part to investigate and a lack of institutional control, the penalties did not include a vacation of football wins. Moreover, TSUSM received the same number of years of probation. Scholarship limitations were imposed, but those were based upon the University’s recommendations.<sup>5</sup>

#### ***E. Conclusion Regarding Prior Textbook Cases.***

The *Alabama State Appeal* clarifies that it is an abuse of discretion not to look to proper factors and legal standards when imposing penalties. One such standard must be the precedent established by prior similar cases. Failing to look to, and consider, such precedent is, on its face, an abuse of discretion.

This argument is analogous to the arguments put forth by the Georgia Institute of Technology in its 2006 appeal before this Committee. *Report of the National Collegiate Athletic Association Division I Infractions Appeals Committee, May 18, 2006, Report No. 238, Georgia Institute of Technology (“Georgia Tech Appeal”).* The *Georgia Tech Appeal* was not a textbook

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<sup>5</sup> Other cases have mentioned the textbook rule; however, those were within the scope of much larger cases and hence, are not pertinent to this case. The University of Colorado’s 2002 infractions are also categorized as a textbook case (in part) on the NCAA’s database. Colorado was found guilty of multiple major infractions in 2002, primarily related to impermissible recruiting contacts and other recruiting violations.

The oldest reported case involving the textbook rule is the 1995 University of Miami (Florida) case. Overall, the case involved about \$213,000 worth of fraudulent Pell Grants and \$412,000 of extra benefits including improper employment, cash awards to players based on performance, and other unethical conduct. There was found to be a lack of institutional control over the football program. Like the Colorado case, textbooks involved only a small part of the infractions.



case; instead, it was a situation where the school was found to lack institutional control and to have inappropriately certified 17 student-athletes who competed while ineligible. *Id.* at §§ II and III. The case also involved an “inadequate review” when the “administration became aware of problems related to student-athletes’ satisfactory progress toward degrees.” *Id.* at §III. Among other penalties, Georgia Tech received two years probation, as well as vacation of the records for the contests in which student-athletes participated.

This Committee reversed the Georgia Tech vacation of records, however, because the COI failed to be consistent with its prior decisions. Just as in the instant case, there were prior situations similar to Georgia Tech, which did not result in similar penalties:

In this case, however, we have reviewed all of the decisions cited by the Committee on Infractions and the university and observe that this case does not include factors present in prior cases in which this penalty was imposed, such as academic fraud, serious intentional violations, direct involvement of a coach or high-ranking school administrator or a much greater number of violations than are involved in the present case.

**Further, in the two recent cases with a pattern of violations similar to those in the present case, the schools’ team records were not vacated. [Rutgers . . . and Stony Brook University . . . ] Thus, while each case which comes before the Committee on Infractions and this committee presents its own factors of aggravation and mitigation, we conclude that the Committee on Infractions’ imposition of this penalty in this case is inconsistent with its action in prior cases in which the vacation penalty was imposed and that the penalty here is therefore excessive and should be reversed.**

. . . Nevertheless, 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 (emphasis added).

In the instant case – as shown by the comparisons to Ball State, Weber State, Temple, and Texas State-San Marcos – the COI has “depart[ed] from a[] pattern established by the prior

cases,” without explanation or reason. *Id.* Such inconsistency is, by its very definition, an abuse of discretion. Precedent in prior similar cases is a “material factor[],” and it is “arbitrary, capricious, and irrational” to depart from such precedent without explanation or reason. *Alabama State Appeal* at §VIII.

A chart emphasizes the degree to which the COI arbitrarily departed from precedent in imposing a vacation of wins against Alabama for textbook violations. Prior textbook cases did not involve such a penalty. Moreover, prior cases often involved more significant charges of lack of institutional control and other factors, the absence of which should mitigate in favor of a lighter penalty against Alabama, not the unprecedented sanction of a vacation of wins for three seasons.

[chart follows on separate page]

### Comparison of Textbook Violation Precedent

<u>School</u>	<u>Lack of institutional control?</u>	<u>Investigation issues?</u>	<u>Other violations or factors?</u>	<u>Vacation of wins?</u>
Ball State	Yes	Yes – Ball State “failed to investigate and report violations”	Yes – Significant practice issues. Credit given at bookstore.	No
Temple	No		Yes – fraud and unethical conduct in tennis. Secondary issues.	No for textbook issues(only for fraud in tennis)
Weber State	Yes		Yes – Credit given at bookstore, resulted in personal items being acquired.	No
TSUSM	Yes	Yes – “failed to conduct adequate investigations” despite notice; involvement of conference commissioner required.	Yes – violations of practice rules by football. Amounts greatly exceed Alabama.	No
Alabama	No	No – violations were self-discovered and self-reported	No	Yes

## **V. The Imposed Penalty Departs from Vacation-of-Wins Precedent.**

In addition to the COI's arbitrary, capricious and irrational departure from textbook case precedent, the COI has also arbitrarily, capriciously, and irrationally departed from vacation-of-wins precedent. Although the appeal standard may have changed, nothing has changed the factors and substantive legal standards which the COI must consider in vacation-of-wins cases. Those factors and legal principles were not adequately weighed, nor reasonably applied, in this case.

The leading, recent case on vacation of wins was the University of Oklahoma's appeal of its 2008 penalties in football. *Report of the National Collegiate Athletic Association Division I Infractions Appeals Committee, February 22, 2008, Report No. 270, University of Oklahoma ("Oklahoma Appeal")*. Oklahoma had been found responsible for failure to monitor and for violations related to a booster at an "automobile dealership [who] compensated three football student-athletes for work not performed." *Id.* at §III. The violations were determined to be "intentional on the part of both the involved student-athletes and the dealership's manager, who was also a representative of the institution's athletics interest." *Id.* at §IV. Further, the student-athletes at issue "competed while ineligible." *Id.* At the time of the finding, Oklahoma was already on probation, which was extended by two additional years. *Id.*

Among other penalties, Oklahoma was assessed a vacation of all wins in which the "two ineligible student-athletes competed." *Id.* This Committee reversed the vacation-of-wins penalty, finding that the COI failed to analyze the factors relevant to a vacation of wins, and failed to analyze and weigh the institution's cooperation. *Id.* at §VII.

Factors relevant to a vacation-of-wins penalty as set out in the Oklahoma appeal include the following:

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.

*Id.*; see also *Georgia Tech Appeal*, discussed above. Only one of the relevant factors was found to be present in Oklahoma's case, "the extra benefit violation was serious and intentional." *Oklahoma Appeal* at §VII.

In the instant Alabama textbook case, the COI purported to analyze these factors, yet misapplied at least one, and failed to adequately consider the absence of the others:

1. The University of Alabama's case does **not** involve academic fraud.
2. The University of Alabama's case does **not** involve serious intentional violations. At best, approximately 10% of the student-athletes involved (22 of 201) intended to take advantage of the University's bookstore. Even those student-athletes, however, were not aware of the NCAA impact of their actions.
3. The University of Alabama's case does **not** involve "direct involvement of a coach or high-ranking school administrator." This factor was not discussed, and apparently was not considered by the COI.
4. The University of Alabama's case does **not** involve a "large number of violations." Here, the COI misapplied this factor, holding that there were a "large number of

violations.” The COI failed to distinguish, however, that the Alabama case involves a large number of “secondary” violations, which were aggregated into a single major violation, and a failure to monitor. There were not a “large number of violations,” only two.

Again, to borrow the language of the *Alabama State Appeal*, the COI (1) based its decision on a misapprehension of the legal standards and “underlying substantive legal principles;” (2) erred in its factual conclusion that there was a large number of violations; (3) “failed to consider and weigh material factors,” (4) imposed a penalty that, in light of the *Oklahoma Appeal* and other precedent is “arbitrary, capricious, or irrational;” and (5) did not consider all of the relevant and proper factors. *Alabama State Appeal* at §VIII. The *Oklahoma Appeal* and *Georgia Tech Appeal* establish four factors to be considered in a vacation of wins, none of which are present in the Alabama textbook case. Accordingly, the vacation of wins imposed against Alabama is an abuse of the COI’s discretion.

#### **VI. The COI Failed to Adequately Weigh the University’s Cooperation.**

The COI also failed to give adequate credence to the level of substantial cooperation exhibited by the University in this case. This Committee has made clear that such cooperation “must be a significant factor in determining and imposing penalties” and must be accorded “substantial weight:”

As we also stated in the Mississippi report, and repeated in our Howard University report: “Where an institution fully accepts its membership obligations and makes every effort to participate in and assist the enforcement process, its conduct must be a significant factor in determining and imposing penalties. The chief executive officer who requires his or her institution to open

itself to the NCAA enforcement process, often in the face of powerful opposition, must be supported by the Association. Failure to accord such cooperation substantial weight in determining and imposing penalties would be a disincentive to the fullest possible institutional cooperation.” [University of Mississippi Infractions Appeals Committee Report, Page No. 15 and Howard University Appeals Committee Report (July 16, 2002) Page No. 30]. In this case, the institution’s cooperation was a significant factor in the ultimate detection of the violations. As with the corrective action discussed above, the Committee on Infractions report did not acknowledge or discuss the nature or extent of the institution’s cooperation, nor specify what weight, if any, it was given.

*Oklahoma Appeal at §VII.*

In the instant case, the COI’s analysis of the University of Alabama’s cooperation consisted of the following: “the committee considered the institution’s cooperation in this case and determined that the cooperation exhibited by the institution consistent with its obligation under Bylaw 32.1.4, Cooperative Principle, which requires member institutions to cooperate in investigations.”

That bare sentence does not meet the Appeals Committee’s requirements that cooperation be considered a “significant factor” or that it be given “substantial weight.” Indeed, the sentence appears to be little more than boilerplate.

In the instant case, the University of Alabama found, reported, and fixed the violations at issue. *See* Facts, §A, above. The initial discovery by bookstore staff “triggered an internal examination,” which eventually led to multiple suspensions and requirements of repayment by the student-athletes involved, with eligibility remaining. *Id.* Moreover, the University instituted, at the next semester after the discovery, a new 21 page procedure to fix all issues. *Id.* But for the University’s significant cooperative efforts, this major infractions case would have never existed.

This Committee has held, numerous times, that such cooperation must be considered a “significant factor” which is to be given “substantial weight.” In its decision in this case, however, the COI could only come up with a boilerplate statement. Again, to borrow the *Alabama State Appeal* language, the COI “failed to consider and weigh material factors,” resulting in a decision based upon irrelevant and improper legal standards and principles. *Alabama State Appeal* at §VIII. The COI abused its discretion in failing to consider the full import of the University’s cooperation.

#### **VII. The Imposed Penalty is Inconsistent with the Requirements of this Committee.**

The COI decision to impose a vacation-of-wins penalty also constitutes an abuse of discretion, when viewed in light of the seven factors to be considered in assessing and appealing penalties. *University of Mississippi Infractions Appeals Committee Report, May 1, 1995* (“*Mississippi Appeal*”) at §VI(B). Those factors compel a reversal of the challenged penalty. Each is discussed in turn:

1. “Nature, Number and Seriousness of the Violations.” Again, this case involves only one major violation and one finding of failure to monitor. 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, the COI misapplied it in the instant case. There were not numerous “major” violations. There were numerous secondary violations aggregated to a major.

2. “Conduct and Motives of the Individuals Involved in the Violations.” As discussed in detail above, at most 22 of the 201 student-athletes involved intended to take advantage of the



bookstore. No one, not even the 22 intentional wrong doers, was found to have intended to violate NCAA rules. Further, the four sub-factors relevant to this analysis mitigate in favor of the University:

- a. No one in a “position that carried supervisory responsibility” engaged in any conduct or had motives to violate the rules.
- b. The violations do not involve a “basic NCAA principles, such as academic integrity.”
- c. The violations are not “flagrant violations of clearly understood rules.” The great majority were termed unintentional. There was no personal gain for the student-athletes involved.
- d. The violations are not “improper attempts to gain recruiting or competitive advantages.” The so-called “intentional” violators intended, at most, to take advantage of the University and its book distribution program. There is certainly no recruiting or competitive advantage in the classic sense of those terms. Moreover, to the extent that there was some competitive advantage in the sense that student-athletes who had rendered themselves ineligible competed thereafter (without any knowledge of the University), the University remediated the same in the suspensions that were imposed. *See* Section VIII below.

*Mississippi Appeal*, §VI(B).

3. “Corrective Actions Taken by the Institution.” As discussed in detail above, this was a self-discovered, self-investigated, self-reported, and self-remedied case. The actions taken by the institution in investigating this matter were impressive, thorough, and have now created a

book distribution system which is unrivaled. *Public Infractions Report, Appx. 1 and 2; Mississippi Appeal, §VI(B).*

4. “Comparison of the Penalty or Penalties Imposed.” As set out in detail in section IV of this brief, the challenged penalty is excessive and an abuse of discretion when “compared with the penalty or penalties imposed in other cases with similar circumstances.” *Mississippi Appeal, §VI(B).* The COI failed to properly apply this factor; thereby abusing its discretion.

5. “Institutional Cooperation in the Investigation.” This factor is discussed in detail in section VI of this Brief, above, yet was given short shrift by the COI in its analysis. Instead, the COI should have considered this factor to be “significant” and have given the same “substantial weight.” *Mississippi Appeal, §VI(B).*

6. “Impact of Penalties on Innocent Student-Athletes and Coaches.” This factor was apparently not considered at all by the COI. 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 those student-athletes participated, until October 17, 2007. Such a penalty is unfair to the 80 or so uninvolved football student-athletes, track and tennis athletes, the coaches, and administrators. *Mississippi Appeal, §VI(B).* While all penalties will certainly have “some effect on innocent students and coaches,” the penalty in this case is an extreme penalty against dozens of “innocent students and coaches.” *Mississippi Appeal, §VI(B).*

7. “NCAA Policies Regarding Fairness in, and Equitable Resolution of, Infractions Cases.” Again, this factor is discussed in detail in section IV of this Brief, above. The vacation-of-wins penalty assessed in this case is unprecedented in prior textbook cases, excessive, and a clear abuse of discretion. *Mississippi Appeal*, §VI(B). 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 this case.

### **VIII. The Imposed Penalty is Inconsistent with Guidelines Applicable to Student-Athletes in Cases of Ineligibility.**

Finally, but perhaps most importantly, the University argues that the vacation-of-wins penalty is inconsistent with the very rules that were enforced in this case. NCAA Division I Student-Athlete Reinstatement Guideline 16.11.2.1 specifies an appropriate withholding period for student-athletes who receive extra benefits. The stated withholding period is calculated on a dollar amount, increasing up to 30% of a season for violations above \$500. *Id.*

In the instant case, the University “required all student-athletes with eligibility remaining to make full restitution for the improperly obtained texts and materials.” *Public Infractions Report*, Appendix Two (¶1). In addition, the University required “those student-athletes with violations involving an amount greater than \$100 . . . to serve the appropriate suspension and to seek reinstatement from the NCAA.” *Id.* For example, several football players were required to miss four contests (30% of a season) after the University discovered the violations on October 17, 2007 (3 of which the University lost). Track student-athletes and other student-athletes were also required to miss the requisite percentage of contests.

The vacation-of-wins penalties imposed in the case do not fully consider this factor, however. Indeed, the only references to these withholding penalties are short mentions in the introduction, and a statement in Appendix Two of the decision, which simply lists the University's corrective actions. The failure to fully and adequately weigh and consider those suspensions is an abuse of discretion. *Alabama State Appeal* at §VIII.

The COI's failure to consider this self-imposed penalty is not the only problem, however. There is also an issue with the inherent contradiction between the requirement that these student-athletes serve a withholding period, and the *ex post* imposition of a vacation of wins after the withholding period has been served. In effect, two punishments have been imposed for the same offense – one by withholding the student athletes from competition and a second by vacating wins for the same season in which the withholding punishment has been served, and prior seasons.

In effect, by vacating wins for all of three seasons in the cases of football and track, the COI effectively increased the withholding period from 30% of a season as set out in the Guidelines, to a 300% *ex post* suspension (in the form of a vacation) from all contests played over three seasons. In fact, a vacation of wins is more severe than a withholding because the team – in this case, the other 80 or so members of a football team – are not even allowed to have their participation in a competition recognized. *See Mississippi Appeal factors, discussed above.* The team is held to lose, after the fact, no matter what the impact of the particular student-athletes involved may have been. Such a penalty is unfair to the other student-athletes involved, unfair to the coaches involved, and amounts to little more than an Orwellian attempt to rewrite history, to the detriment of dozens, if not hundreds, of uninvolved parties. The same is arbitrary, irrational, and an abuse of discretion.

## **IX. Conclusion.**

One of the fundamental principles of law and sound judgment – a principle recognized by this Committee in the *Georgia Tech Appeal*, discussed above – is that like situations should be treated alike, and disparate situations should be treated differently. The COI has imposed penalties in at least 4 prior cases that primarily involved textbooks. None resulted in a vacation of wins. This Committee has established factors that must be considered before a vacation of wins is imposed. None are present in this case. Moreover, this Committee has frequently reiterated the importance of considering an institution's cooperation, established seven factors to be considered in all penalties, and the NCAA has established guidelines for suspensions based on the receipt of improper benefits. None were adequately weighed and considered in this case.

Less than one month before the submission of this brief, this Committee defined an abuse of discretion to include applying incorrect legal standards or misapprehending substantive legal principles; basing a decision on erroneous factual determinations; failing to consider material factors; erring in judgment such that a penalty is arbitrary, capricious, or irrational; and basing a decision on irrelevant or improper factors. Meeting one of those definitions is sufficient for a reversal of a penalty as an abuse of discretion. This case meets them all.

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