

MAR 08 2011

THE OHIO STATE UNIVERSITY'S REINSTATEMENT APPEAL TO COMMITTEE

DATE: March 8, 2011
TO: Division I NCAA Student-Athlete Reinstatement Committee
FROM: Dr. John Bruno, Faculty Athletics Representative
SUBJECT: Appeal of Staff Decision for Violations of NCAA Bylaws 16.1.4, 16.11.1.6, and 12.1.2.1.6; Sale of Participation Awards and Receipt of Discounted Services

INSTITUTION'S REQUEST. This student-athlete reinstatement appeal is on behalf of The Ohio State University's (OSU) football program. Specifically, the Division I NCAA Student-Athlete Reinstatement (SAR) staff determined on December 22, 2010 that as a result of the secondary violations reported on behalf of OSU's football program, five OSU student-athletes would be subject to a five-game suspension for the impermissible sale of participation awards. In addition, three of the five student-athletes impermissibly received discounted services. The suspensions begin with the first game of the 2011 football season. The institution is requesting the committee to consider the appropriateness of the 40 % (five-game) withholding condition for the five affected OSU student-athletes.

The institution's self-report was submitted to the NCAA on December 19, 2010 (self report attached as Exhibit 1 and Exhibits to self report attached as Exhibit 2). The involved student-athletes - [REDACTED] - unknowingly violated legislation that prohibits the sale of awards received for intercollegiate athletics participation. The institution provided general rules education regarding extra benefits, but acknowledged that it did not provide specific, targeted rules education related to the inability to sell bowl gifts and other institutionally issued items to the student-athletes during the time period when the violations occurred (isolated to their freshmen and sophomore years, with the exception of one student-athlete). Beginning in November, 2009, the University explicitly explained that student-athletes could not sell or trade equipment or apparel that a student-athlete purchased or received from the equipment office and/or the athletic department (ex. championship rings, game jerseys, gold pants awards, Rivalry Jersey [jerseys given by Nike for use only in that year's Michigan-OSU game], pants, gloves, helmet or any other item). Beginning in November, 2009, student-athletes also signed statements attesting to such rules education. In addition, each had his own compelling individual, family-based financial circumstances for selling the participation awards.

REASONS FOR THE INSTITUTION'S APPEAL. The staff imposed a 40% withholding condition based on review of all circumstances, case precedent and SAR guidelines for impermissible extra benefits/preferential treatment violations. However, the university believes that this five-game withholding condition is excessive. In particular, the institution is appealing because the staff's rationale that "SA's failed to come forward with information" in arriving at the 40% withholding condition is inconsistent with case precedent. The institution is also appealing because the staff's consideration of the student-athletes' ability to participate in the 2011 bowl contest as a factor in arriving at the 40% withholding condition is inconsistent with stated NCAA procedures. The institution believes that a 40% penalty is excessive and unfairly punitive for the violations cited based on case precedent, NCAA policies and procedures and SAR guidelines.

1. Case Precedent does not Support Failure to "Come Forward with Information" as a Contributing Factor in Imposing a 40% Withholding Condition (See Exhibit 3)

While the institution appreciates and shares the expectation of its student-athletes to "self-report", the reality is that the vast majority of violations reported to the NCAA are discovered by the institution, conference office, or NCAA national office staff and not as a result of a student-athlete coming forward to self-identify a violation. In fact, it is rare for a student-athlete to self-identify an impermissible benefits violation.

Of the two case precedents on the database for similar Bylaw 16.1.4 violations – student-athletes who sold participation awards and/or apparel given to them by their institution – neither cite an additional withholding for the student-athlete for failure to "come forward with information." It is not consistent with case precedent for the NCAA to do so in this case.

- Case 32254: Three student-athletes sold their conference championship award to a representative of the institution's athletics interests in exchange for \$300. The staff imposed a 10% withholding condition, which is consistent with its guidelines for that dollar value. In this case, the staff complied with its guidelines and did not increase the withholding condition to 20% for failing to come forward with information.
- Case 36547: Student-athlete sold his game jersey to a sports memorabilia collector for \$1000. Similar to our case, the collector approached the student-athlete and offered to buy his jersey. Also similar to this case, the student-athlete did not know that it was impermissible to sell his jersey. The staff imposed a 30% withholding condition, which is consistent with its guidelines for a \$1000 dollar value. The staff did not impose a 40% withholding condition due to the fact that he did not come forward.

There is also precedent from the A.J. Green / Georgia case processed during September, 2010 for a student-athlete who sold his bowl game jersey for \$1000 to an agent. The staff imposed a 30% withholding condition, which is consistent with its guidelines for a \$1000 dollar value. The staff did not impose a 40% withholding condition due to the fact that he did not come forward even though the case involved benefits from an agent, considered to be a more serious violation with higher penalties. This 30% withholding condition was upheld by the committee after an appeal.

The case precedents for this exact same type of violation all show that the NCAA did not cite an additional withholding for the student-athlete for failure to "come forward with information." It is not consistent with case precedent for the NCAA to do so in this case.

- a. Additional Withholding for Failure to Come Forward when a Student-athlete Knowingly Commits a Violation or Realizes he/she has Committed a Violation after Receiving Rules Education is not Consistent with Case Precedent and Should not be a Factor in the 40% Withholding Condition.

It is not uncommon for student-athletes to know a violation has occurred – and in some cases the student-athletes are keenly aware of the rules at the time of the violation or have a high degree of culpability. Despite this fact, no case precedent has imposed additional sanctions upon the student-athlete because he/she did not "come forward" with knowledge of a violation either at the time of committing the violation or after receiving rules education and then recognizing that a violation has occurred. None of

the cases cite failure to "come forward with information" as a factor in arriving at an additional 10% withholding event when a student-athlete admits knowing the rules.

Four of the relevant cases are highlighted below:

- Case 37209: On four occasions, a student-athlete sold complimentary admission tickets while knowing that it is impermissible to do so. The student-athlete received a 30% withholding, which is consistent with its guidelines for a \$525 dollar value received. In this case, the staff complied with its guidelines and did not increase the withholding condition to 40% for failing to come forward with information.
- Case 31425: Student-athlete used her grant-in-aid to purchase textbooks for non-grant-in-aid student-athletes. She knew that she could purchase the textbooks due to the bookstore's lax policies and also because several teammates had told her of the opportunity. The student-athlete received a 30% withholding, which is consistent with its guidelines for a \$682 benefit received. In this case, the staff complied with its guidelines and did not increase the withholding condition to 40% for failing to come forward with information.
- Case 36675: Student-athlete living on campus incorrectly received additional off campus room/board checks from the university due to a university computer error. The student-athlete received \$7686 in benefits despite knowing that she was not entitled to receive this money and did not inform the institution of the error. The student-athlete received a 30% withholding, which is consistent with its guidelines for a \$7686 benefit received. In this case, the staff complied with its guidelines and did not increase the withholding condition to 40% for failing to come forward with information.
- Case 31309: Student-athlete sold complimentary tickets in exchange for \$300. The student-athlete was a senior and was well aware that selling his complimentary tickets was in violation of NCAA legislation. The student-athlete received a 20% withholding, which is consistent with its guidelines for a \$300 benefit received.¹ In this case, the staff complied with its guidelines and did not increase the withholding condition to 30% for failing to come forward with information.

b. Since Case Precedents Make Clear that Coming Forward and Disclosing a Violation does not Reduce Penalties, Coming Forward or the Failure to do so Should Not be a Factor

The following case precedents show that a student-athlete's self-disclosure of violations does not "reward" student-athletes who DO come forward and disclose violations by reducing sanctions. Similarly, there are no increased penalties for not "immediately" disclosing a violation:

- Case 32993: A student-athlete receives a variety of benefits from a booster during both pre and post enrollment that are valued at over \$7000. The student-athlete was specifically informed of the booster's identity and that it was impermissible to receive special housing benefits. The student-athlete knowingly continued to receive extra

¹ This case was decided under the 2007 standard in which a \$300 benefit received a 20% withholding condition. Under today's standard, a \$300 benefit would receive a 10% withholding condition. [See Exhibit 4]

benefits primarily during 2005-06 while enrolled at the institution. SA comes forward and discloses the knowing violation in 2008. The student-athlete received a "sit one-charge one" penalty which is consistent with its guidelines. The student-athlete did not receive any relief from the withholding condition for coming forward and disclosing the intentional violation.

- Case 32510: Student-athlete accepts \$110 in cash and benefits from an agent and comes forward after receiving rules education from his institution. The student-athlete did not receive any relief from the standard 10% withholding for receiving benefits from an agent.

It is clear that coming forward should not be a factor in deciding upon a withholding condition. The staff's consideration of that factor in assessing a 40% withholding condition in this case is not supported by precedent.

2. NCAA Policies and Case Precedent do not Support Bowl Game Participation as a Factor for Increasing the Withholding Condition

The staff indicates that due to "unique circumstances within this case, application of the withholding condition was suspended to allow participation in the 2011 Sugar Bowl." While the institution is appreciative of receiving this suspension, the policies and procedures do not associate the suspension with additional withholding penalties. As noted below (emphasis added), there is no provision for a "trade off" of additional withholding penalties in exchange for being granted the ability to play in the bowl game.

NCAA Reinstatement Policies and Procedures – Pg. 8:

16. The student-athlete reinstatement lead administrator in consultation with the division-specific chair has the ability to suspend a reinstatement condition in very limited circumstances if the next contest is the NCAA championship. The general practice is that student-athletes are withheld from the next contests even if the next contests are part of the NCAA championship and that policy remains in place. Suspension of a withholding condition is to be used in very limited circumstances where the student-athlete is innocently involved, no competitive advantage was gained and withholding from the championship does not seem appropriate. Further, the suspension can only be used if the student-athlete has eligibility remaining the following academic year.

Furthermore, to apply the suspension, the NCAA necessarily determined that the student-athletes must be "innocently involved." The fact that the NCAA permitted the student-athletes to play in the bowl game because they were "innocently involved" is evidence of the athletes' lower level of culpability. The staff's decision to increase their withholding condition to 40% indicates a higher degree of culpability which is not consistent with the invocation of the policies and procedures above. Therefore, using the suspension to allow participation in the bowl game as a "trade off" for increasing the withholding condition to 40% is not provided for in the policies and procedures and is contrary to the determination that the student-athletes were innocently involved.

3. In addition to Case Precedent, SAR Guidelines do not Permit Increasing the Withholding Condition for Failure to Come Forward with Information (See Excerpts in Exhibit 5).

As set forth below, SAR Guidelines provide direction when considering withholding conditions.

Violations Involving Student-Athlete Culpability or Responsibility. The committee noted that in situations where the student-athlete clearly has responsibility for the violation and knowingly commits a violation of NCAA regulations, a significant withholding condition should be imposed. Further, relief should be provided in those instances where it is determined that the student-athlete had limited responsibility for the violation. (*May 2007*)

However, those guidelines do not allow for the addition of penalties when the student-athlete fails to disclose the violation after he/she becomes aware that a violation has occurred. Therefore, it is inappropriate for the staff to rely on failure to "come forward with information" as a factor in determining a 40% withholding condition.

In addition, the guidelines recommend that a "significant withholding condition" should be imposed where the student-athlete has a high degree of culpability or responsibility, which is defined below as both a responsibility for the violation AND knowingly committing a violation of NCAA regulations. In this case, the student-athletes did not knowingly violate regulations. Since both elements are not present, an additional withholding condition to reach 40% is not supported by the facts.

INSTITUTIONAL CORRECTIVE ACTIONS: The institution has taken the following corrective actions:

- Continue strengthening educational sessions on impermissible benefits, including the participation of student-athletes who have undergone the reinstatement process to underscore the "lessons learned."
- Enhance separate meetings for freshmen and incoming student-athletes to focus and increase attentiveness on compliance issues.
- Conduct additional sessions on the permissible alternatives and campus resources available to student-athletes with financial need situations.
- Required the student-athletes involved with this appeal to do additional outreach and community service as a corrective measure (which began at the bowl game), but also as an educational measure to assist the community youth in making good decisions in life.

SUMMARY/CONCLUSION:

The institution respectfully requests that the committee consider the following factors that support providing relief from the staff's 40% withholding condition.

- Consistency with existing precedents and SAR guidelines. The 40% withholding condition for the student-athletes' failure to come forward with information is excessive and contrary to SAR measures applied in previous cases. Based on SAR guidelines that identify a 30% withholding condition, the institution believes precedents and SAR guidelines do not support using failure "to come forward" as a factor to increase withholding. Further, this case does not involve benefits from an agent, or representative of the institution's athletics interest for which a higher degree of review and penalties are inherent.
- Bowl Game Participation. The policies and procedures do not provide for a "trade off" of bowl game participation in exchange for an additional 10% withholding. To determine otherwise, would ignore the student-athlete lower level of culpability.
- Financial issues. Individual financial pressures led each to seek additional cash resources. While the staff's decision indicates the student-athletes had numerous opportunities to ask compliance or staff regarding family circumstances and permissibility of selling items, given their status as underclassmen, inexperience with available institutional alternatives, and awkwardness with seeking assistance for private personal financial matters, it is reasonable to believe why they would not have known of the possibility or felt comfortable going to institutional staff for financial alternatives.
- Role of institution in violation. The staff's decision includes rationale that educational sessions on extra benefits/preferential treatment should have raised awareness. Again, the violations occurred, with one exception, during the freshmen and sophomore years and consideration should be given to the student-athlete's familiarity with NCAA legislation at that level. As noted previously, the institution provided general rules education regarding extra benefits, but did not provide specific, targeted rules education related to the inability to sell bowl gifts and other institutionally issued items to the student-athletes during the time period when the violations occurred. Only after the violations occur did the institution begin more targeted, specific educational sessions specifically listing the types of participation awards that could not be sold and requiring written declarations of student-athletes. [The targeted rules education and declarations were begun in November, 2009 in response to Nike's commencement of its "Rivalry Uniforms" – new uniforms only used in the OSU-Michigan game in late November, 2009 and then given to the University / players.] Staff rationale also reference a student-athlete's year in school as an additional factor in determining withholding penalties. (See Case 31309). Here, with the exception of one, the student-athletes were freshmen and sophomores.

In conclusion, the institution believes that case precedent does not support the 40% withholding condition based upon factors of failure to "come forward and disclose information" and based upon the fact that the student-athletes were allowed to participate in the bowl game. The committee should grant this request from both a procedural standpoint and a reasonable person standard.

On a more personal note, these student-athletes realize now what they did was impermissible and each has grown from this experience in not only a desire to prevent this from happening to other student-athletes but also to spare others the consequences of their actions playing out in the media. It is also important to note that they have all made numerous public apologies concerning their violations, beginning with a nationally-televised press conference. They have clearly and publically acknowledged their wrongdoings on many occasions. In addition, they have all performed additional community service, the first of which

began at the bowl game, just days after the public announcement of their violations. Furthermore, in some cases, the student-athletes chose to bypass potential professional careers, remain in school and complete their degrees when the option to enter the draft and avoid NCAA sanctions would have been more convenient.

Thank you for your consideration of the institution's request to reduce the 40% withholding condition. The institution has worked with and appreciates the NCAA staff's assistance with preparing this appeal in the spirit of collaborative efforts to resolve reinstatement and enforcement issues. We look forward to presenting our case and hearing your decision at your earliest convenience.