Case No. 00527

IN THE

DIVISION I INFRACTIONS APPEALS COMMITTEE

OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

UNIVERSITY OF LOUISVILLE

On Appeal from
Committee on Infractions Decision No. 473

REPLY OF THE UNIVERSITY OF LOUISVILLE

October 31, 2017

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INTRODUCTION

The University agrees that "[t]he events in this ca[s]e are antithetical to everything that college athletics stands for." Committee on Infractions (COI) Resp. at 2. As the COI accurately explains, Andre McGee, a staff member on the men's basketball team, "orchestrated" a scheme of grotesque sexual misconduct, *id.*, in which he "ushered" prospects and student-athletes, many of them "minors," into rooms filled with strippers, *id.* at 6-7; "subjected" them without warning to striptease dances and offers of sex, *id.* at 8; and "pressured [them] to participate" in his repulsive activities. *Id.* at 9.

The question before the Infractions Appeals Committee (IAC) is not whether these actions were unacceptable, or whether the University should be penalized because of them. The University acknowledges that McGee's conduct was abhorrent, and that it warranted serious institutional penalties, most of which the University does not contest on appeal. Rather, the question before the IAC is whether the student-athletes and prospects who were unwillingly "subjected to" McGee's schemes should be deemed so tainted by McGee's misconduct that every competition in which they participated for the remainder of their collegiate careers should be vacated, and all of the revenues the University received from those games should be forfeited.

The answer is no. For decades, the COI has imposed vacation and financial penalties only where student-athletes were culpable for some misconduct or received benefits of substantial value in the context of NCAA rule violations. In this case, the COI disclaims any belief that the student-athletes are "to blame . . . for being drawn into" McGee's scheme. *Id.* at 15. And it does not dispute that the "benefits" these youngsters had foisted upon them—which "discomfort[ed]" and repulsed many of them—were worth far less than values previously relied on to justify vacation and financial penalties. *See id.* at 13-14. Indeed, the COI does not dispute that no prior case, ever, has imposed vacation because of the participation of student-athletes who did so little wrong, received so little benefit or advantage, and were almost certainly eligible for reinstatement without loss of competition. The COI simply argues that "[t]here is no requirement" that it consult "past cases" at all when imposing penalties. *Id.* at 12. That is emphatically not the way the infractions system works, and the IAC should not countenance the COI's refusal to abide by its own precedent in this manner.

The COI also failed to heed the IAC's repeated and explicit instruction that an institution's cooperative efforts "*must* be 'a significant factor and given substantial weight in determining penalties,'" and that the COI *must* "set forth in its analysis the evaluation and balancing of the factors which this committee has identified as relevant in setting penalties." University Submission at 44-45

(quoting *University of Memphis* (IAC 2010), at 15-16; *Florida State University* (IAC 2010) at 11). On appeal, the COI claims that it satisfied these standards by listing the University's extensive cooperative efforts in an "appendix," and citing one relevant precedent without making any attempt to apply it. COI Resp. at 20-21, 23-35. That cannot be right; the IAC's precedents require much more, both to ensure fairness to the institution and students involved, and to enable full review of the COI's decisions.

Finally, the COI erred by imposing vacation and financial penalties for the 2011-12 and 2012-13 men's basketball seasons. [redacted] None of those individuals received a sex act, obtained "benefits" of meaningful value, or engaged in culpable conduct. And the COI failed to make adequate findings of misconduct [redacted] The COI responds only by noting that it identified a "number" of violations, which it says implicitly included these individuals, and by offering a strained and atextual reading of the "limited immunity" bylaw. Neither of those arguments has merit.

At bottom, the penalty the COI imposed is simply unfair. It wipes away the collegiate careers of numerous student-athletes because they were unwillingly drawn into McGee's schemes; ignores the University's exemplary efforts to

investigate and redress McGee's misconduct; and imposes one of the most severe sanctions possible—the vacation of a Division I NCAA Men's Basketball Championship, two Final Four appearances, and multiple seasons of competition—because of the participation of a handful of student-athletes who did little wrong. Precedent does not support this approach. Neither does common sense or fundamental fairness. The COI's grossly excessive vacation and financial penalties should be reversed.

ARGUMENT

I. The COI Erred by Abandoning Its Longstanding Approach To Imposing Vacation And Financial Penalties.

The NCAA bylaws set a clear precondition for the imposition of vacation and financial penalties. These penalties "may" be imposed only if "a student-athlete competed while ineligible." Bylaw 19.9.7(g); *see* Bylaw 31.2.2.4. By linking the sanctions with the conduct of an individual student-athlete, the bylaws thus make clear that a student-athlete must have incurred some meaningful ineligibility—that is, he must have done something wrong or incurred some substantial benefit—to justify the harsh sanction of wiping away games in which he subsequently competed. University Submission at 23-25. For decades, the COI respected that straightforward principle: Before this case, it had *never* imposed vacation or financial penalties where the relevant student-athletes were not

culpable for misconduct, did not receive something of meaningful value, or could easily have obtained reinstatement. *Id.* at 25-30.

The COI unaccountably abandoned that approach here. It imposed sweeping vacation and financial penalties based on the participation of student-athletes who were unwillingly subjected to McGee's grotesque scheme of sexual misconduct. The COI all but concedes that this case does not satisfy the standard set by its precedent: It admits that it does not "in any way . . . blame" the student-athletes (many of them minors) for being "subjected to" McGee's activities, COI Resp. at 8, 15; does not dispute that the "benefits" they received were less substantial than any previously relied on to justify vacation, *id.* at 13-14; and offers no response to the fact that, when McGee's misconduct came to light, [redacted]. *See* University Submission at 30-38.

The COI nonetheless persists in defending the unprecedented and grossly disproportionate sanctions it imposed. But its arguments for doing so fly in the face of precedent, the bylaws, and basic fairness.

A. The COI Offers No Valid Basis For Abandoning Its Longstanding Approach.

The COI begins by offering two reasons why it believes it need not follow its longstanding approach to imposing vacation and financial penalties. Neither of them withstands scrutiny.

First, the COI claims that the standard the University describes is "inherently inconsistent," because the COI has sometimes issued vacation penalties "where the involved student-athletes were unaware of the violations." COI Resp. at 13-14. There is no inconsistency; the COI simply misunderstands the relevant standard. As the University has explained, the COI has previously issued vacation and financial penalties where student-athletes "did something wrong *or* received some unwarranted benefit." University Submission at 21 (emphasis added). Each of the cases the COI cites satisfied the second half of that standard, by issuing penalties where student-athletes received a substantial impermissible benefit—usually by engaging in intercollegiate competition despite failing to meet academic requirements. In *Grambling State University* (2017), dozens of student-athletes competed and received travel expenses despite failing to satisfy amateurism, progress-toward-degree, and academic requirements, thereby causing them to receive "impermissible benefits" and conferring "more than a minimal . . . competitive advantage." *Id.* at 3-5, 9-10. Similarly, in *Alcorn State University* (2016), the COI found that 28 student-athletes "competed and received travel expenses" without satisfying progress-toward degree and other academic requirements, likewise giving them a substantial competitive and material advantage. *Id.* at 5.

Second, the COI makes a broader argument that "[t]here is no requirement" that it consult "past cases" at all—indeed, that "compar[ing] past cases" with this one amounts to improper "second-guessing" of the COI's judgment. COI Resp. at 12. That is an astonishing and incorrect assertion. Less than two years ago, the IAC reminded the COI that while it is not "strictly bound to previous decisions" that were issued in "qualitatively different" circumstances, "this does not mean that prior decisions provide no restraint on or guidance to the [COI] and this committee." *Syracuse University* (IAC 2015), at 7. On the contrary, the COI must explain "how [it] weighed precedent" and offer "qualitative distinction[s] in the record" that warrant a "departure from prior precedent." *Id.* In *Syracuse* itself, the IAC found that the COI had "abused its discretion" by imposing a penalty that inexplicably departed from the approach of its prior cases. *Id.* The COI is similarly barred from "ignoring [its] prior decisions" here. *Id.*

B. The Student-Athletes "Subjected To" McGee's Schemes Were Not Culpable, Did Not Receive Anything Of Meaningful Value, And Would Undoubtedly Have Been Reinstated.

The COI also cannot show that this case meets its longstanding standard for imposing vacation and financial penalties. None of the elements required by its longstanding approach—culpability, receipt of a meaningful benefit, or low likelihood of reinstatement—is present here.

1. The COI acknowledges that none of the student-athletes subjected to McGee's schemes was meaningfully culpable. The COI is quite clear on this point; it states that it does not "*in any way* . . . blame the student-athletes for being drawn into the striptease and prostitution that McGee arranged." COI Resp. at 15 (emphasis added). The COI further observes that the student-athletes were "ushered" into rooms without warning, *id.* at 7, "subjected to" and "pressured . . . to participate" in striptease dances and offers of prostitution, *id.* at 8-9, and made unwilling participants in a scheme that McGee "orchestrated," *id.* at 2. As in *University of Alabama, Tuscaloosa* (2009), these student-athletes were not "intentional wrongdoers," and so did not engage in misconduct sufficient to warrant vacation or a financial penalty. *Id.* at 8; *see also University of Nebraska, Lincoln* (2012), at 3-4 (declining to impose vacation on students who received improper benefit "inadvertent[ly]").[1]

2. Nor did the student-athletes receive "benefits" of sufficient value to justify these harsh penalties. The COI does not dispute that the *monetary* value of

[1] The COI nonetheless criticizes the student-athletes because it believes they "knew or should have known that their participation violated NCAA legislation." COI Resp. at 15. That assertion is highly questionable, particularly as to individuals drawn into McGee's scheme as prospects and before they obtained rules education. *See infra* pp. 16-17. In any event, this would not establish the student-athletes' culpability. If these youngsters were not "the impetus" for the events, were "subjected to" them without warning, and were not "to blame" for attending them—all of which the COI concedes—then it is impossible to comprehend how they can nonetheless be deemed at fault.

the benefits—on average, roughly $250 per student-athlete—was too low to warrant vacation or financial penalties under its precedents. The COI has previously imposed vacation penalties only for benefits whose monetary value is between $400 and $12,200. University Submission at 28-29; *see, e.g.*, *Lamar University* (2016), at 12 n.11 (stating that vacation is appropriate in cases involving "*similar* monetary values" (emphasis added)). As the COI concedes, that threshold was not met here. COI Resp. at 13.

Likewise, the *non*-monetary value of the "benefits" these individuals received does not justify vacation or a financial penalty. The COI has previously declined to issue such penalties where student-athletes *willingly* attended "strip clubs," *University of Miami* (2013), at 9, visited "topless bars," *University of Mississippi* (1994), at 6, or held on-campus "parties" featuring "strippers," *University of Alabama, Tuscaloosa* (2002), at 24-25 (finding the institution liable for seven other major violations involving a dozen different bylaws). If the "benefits" in those cases were not sufficient to order vacation, then the benefits *unwillingly* foisted on the prospects and student-athletes here—which "discomfort[ed]" and repulsed many of them, COI Op. at 8-9—cannot be sufficient, either.

The COI's only response is to assert that some of these prior cases "involved boosters, not an institutional staff member," and entailed fewer and less serious

violations. COI Resp. at 14. Even if true, that would be irrelevant. The fact that McGee "orchestrated" these events and forced them on "minors" without their consent, *id.*, makes the benefits they received *less* substantial, not more. And NCAA violations involving boosters providing cash or other benefits are not viewed as less significant; in many cases, they are considered much more severe.

In any event, the COI's characterization of its precedents is not accurate. In *University of Miami* (2013), the COI found that multiple institutional staff members—including a "former equipment manager" and assistant football coaches—either personally escorted students to strip clubs or "knew of the booster's involvement with prospects." *Id.* at 11, 13. Yet the institution still was not subjected to a vacation penalty for their misconduct.

3. Finally, the COI errs in asserting that there is "no factual support" for the claim that the student-athletes would have been reinstated had McGee's misconduct been discovered earlier. COI Resp. at 15-16. As the University has repeatedly observed—and as the COI has persistently ignored—when McGee's violations came to light, [redacted]

It follows that other student-athletes who participated in less serious activities would have been reinstated without being withheld from competition, too. The COI cannot simply shut its eyes to this critical fact and then complain about the dearth of evidence.

The COI also suggests that reinstatement must already have "occur[red]" to justify declining to impose a vacation or financial penalty. COI Resp. at 16. Precedent forecloses that argument. In *University of Wisconsin-Madison* (2001), the COI declined to "vacate records due to ineligible participation" because "the benefits gained by the student-athletes were easily addressed through repayment for the cost of the benefits," and did not have "far-reaching and unrestorable consequences in terms of initial and continuing eligibility." *Id.* at 15; *see Georgia Institute of Technology* (IAC 2012), at 14 (vacating records only because there was "no guarantee that the student-athlete" at issue "would have been reinstated," and because it was "the decision of the institution" to allow him to compete while ineligible). This longstanding approach makes sense. The purpose of vacation and financial penalties is to claw back victories that were improper because one or more student-athletes participated when they should have been withheld from competition. If a student-athlete almost certainly could have obtained

reinstatement without loss of competition, then there is little justification for vacating games in which he competed.

Last, the COI is wrong that the Student-Athlete Reinstatement Guidelines recommend that the student-athletes involved in McGee's schemes be withheld from 10 percent of competitions. COI Resp. at 16. The threshold set by the Guidelines for loss of competition varies based on both the value of the benefit and the enrollment status of the student-athletes at the time of the violation. The large majority of individuals subjected to McGee's schemes were prospects at the time of the misconduct, and so were subject to Bylaw 13. *See* Div. I Student-Athlete Reinstatement Guidelines (May 2017), at 21. For those individuals, the Guidelines recommend reinstatement without loss of competition if the student-athletes received benefits worth $500 or less—a criterion met by every involved prospect here. *Id.* at 15-16. Moreover, these recommended sanctions are simply a "starting point," which are to be varied based on "the culpability of the . . . student-athlete" and his or her "responsibility for [the] violation." *Id.* at 16. Given that even the COI acknowledges that the student-athletes are not to "blame" for McGee's actions, the COI cannot credibly ask the IAC to assume that any of them would have received a penalty *greater* than the Guidelines recommend.

II. The COI's Attempts to Sidestep its Obligation to Weigh Mitigating Factors and Other Considerations Are Unavailing.

The COI also cannot defend a second set of errors that independently requires reversal of its vacation and financial penalties. As the University explained at length, IAC precedent requires the COI to "set forth in its analysis the evaluation and balancing of the factors which this committee has identified as relevant in setting penalties." University Submission at 44 (quoting *University of Memphis* (IAC 2010), at 15-16). The COI flouted that requirement several times over. It entirely ignored the University's extraordinary "cooperative efforts and corrective actions," factors that the IAC has held "*must* be 'a significant factor and given substantial weight in determining penalties.'" *Id.* at 45 (quoting *Florida State University* (IAC 2010), at 11 (emphasis added)). And it failed to make any predicate findings that could have justified the sweeping financial and vacation penalties it imposed, including the requisite considerations of scienter and proportionality. *Id.* at 50, 56-57.

Having so plainly failed to follow the IAC's instructions, the COI attempts to lower the bar. The COI claims that certain boilerplate language and an unadorned list of the University's self-imposed remedies contained in the decision's appendix somehow evidence full consideration of the relevant aggravating and mitigating factors. COI Resp. at 20-21. The COI also posits that the IAC can simply *assume* that the student-athletes victimized by McGee knew or

should have known that he had jeopardized their eligibility, contrary to all available evidence. *Id.* at 24. And the COI offers the IAC conclusory assurances that it fully considered the impact of its penalties on the University, *id.* at 20-21, 28, even though its decision betrays no hint of any such consideration. None of these arguments bears scrutiny. The COI did not justify the penalties it imposed, and its decision must be reversed for this separate and distinct reason.

A. The COI Cannot Justify Its Failure To Explicitly Consider And Balance Aggravating And Mitigating Factors By Pointing To The Decision's Appendix Or Its Treatment of McGee.

The University engaged in extraordinary efforts to assist the NCAA's investigation, detailed at length in its opening submission. University Submission at 46-49. The COI wrongly ignored those efforts. The COI does not claim that it actually "acknowledge[d] or discuss[ed] the nature or extent of the [University's] cooperation, nor specif[ied] what weight, if any, it was given," as the IAC's precedents require. *Id.* at 46 (citing decisions). Nor does the COI dispute that the IAC has reversed multiple prior penalties for precisely that failing. *Id.* Rather, the COI posits that it was sufficient to "clearly identify aggravating factors," COI Resp. at 20, and to "include[] Louisville's corrective actions as an appendix to the decision," *id.* at 21.

That is not nearly enough. The IAC has unambiguously explained that, when considering an institution's cooperative efforts, the COI must expressly

"analyze the role that these elements played, [and] the weight they carried, in fashioning . . . penalties." *Florida State University* (IAC 2010), at 10. The same is true when, as here, there is "a powerful self-imposed penalty which seriously affected the [athletics] program." *University of Oklahoma* (IAC 2008), at 7. And the IAC has repeatedly explained that the COI cannot satisfy this requirement by making "a conclusory assertion that such a factor was considered." *Howard University* (IAC 2002), at 31. But that is all that the COI did: Its entire defense is that it noted the University's cooperative efforts, without analysis or discussion, in an *appendix* to its decision. That was clear error.[2]

The COI compounds that error on appeal. The COI suggests that it implicitly considered and rejected the University's extraordinary cooperation by "expressly not[ing] that there were *no mitigating factors*." Resp. at 20 (emphasis in original). That is misleading—transparently so. The italicized language cited by the COI appears in its discussion of *McGee*, not the University. COI Op. at 22 (finding that "there are only aggravating and not mitigating factors *with regard to the conduct of the former operations director*" (emphasis added)). The COI made clear, in contrast, that it *was* aware that "mitigating factors" were present for the

[2] The COI claims that if "this Committee accepted Louisville's logic, the [COI] would have to argue in the negative why at least 14 aggravating factors and at least 8 mitigating factors did or did not apply." COI Resp. at 20. No. The University's argument is the COI was obligated to do what the IAC has prescribed—actually weigh the University's substantial cooperative efforts and self-imposed penalties. University Submission at 46-50.

University; it expressly stated that "the aggravating factors *outweigh* the mitigating factors" for the University. *Id.* (emphasis added). The COI just did not say what those mitigating factors were, or why the aggravators outweighed them. That blatant failure to explain the penalty decision, notwithstanding this committee's repeated and explicit instructions to the contrary, amply merits reversal on its own.

B. The COI Cannot Ask The IAC To Assume The Predicates For The Financial Penalties Imposed.

The COI also failed to satisfy multiple prerequisites the IAC has set for issuing financial penalties. As the University has explained, the COI never supported its conclusion that the involved student-athletes "should have known" they competed while ineligible. Moreover, the COI failed to apply the factors set out in *Purdue University* (IAC 2000) to determine whether and to what extent a financial penalty was appropriate. University Submission at 50-54. Nothing the COI says on appeal justifies those errors.

First, the COI argues that it had no obligation to actually support its conclusion that the involved student-athletes competed while culpable, because it is "common sense" that nobody "could believe that prostitution and stripteases were permissible under the rules." COI Resp. at 24. But this is a straw man. The question is not whether the student-athletes might have reasonably suspected that NCAA rules had been broken; the question is whether those minor recruits and students had reason to believe that *their own eligibility* had been compromised by

McGee's actions. University Submission at 52. The COI agrees that multiple students were "pressured" by McGee, and that they all were "subjected to" his conduct, COI Resp. at 8-9. It is hardly "common sense" that the victims of those depredations would consider themselves to be permanently tarred, especially when many of them explicitly declined to participate. *See* University Submission at 51-53.[3]

Moreover, the COI does not dispute that in cases like *University of Memphis* (IAC 2010), the involved student-athletes had received actual notice that they might be ineligible. COI Resp. at 26. The COI's only response is to assert, with no support, that notice is "[un]necessary here because of the very nature of the acts that resulted in ineligibility." *Id.* But that makes no sense. Not only is it unreasonable to expect minor prospects to be familiar enough with NCAA bylaws to anticipate that being unwillingly "subjected to" strippers makes them ineligible, but even *well-informed* student-athletes may have been surprised by that result, given that the COI declined to vacate records for similar conduct in *University of Miami* (2013), *University of Mississippi* (1994), and *University of Alabama, Tuscaloosa* (2002). The COI thus failed to make the finding required by Bylaw 31.2.2.4 to justify financial penalties.

[3] Furthermore, the COI never found—and the enforcement staff never alleged—that the prospective and current student-athletes were aware of any money being given to the women in exchange for sex.

Second, the COI also failed to properly apply the *Purdue* factors to evaluate the proposed financial penalties. *Purdue* provides that the COI should consider, among other things, "the nature of the violations, the contributions by the ineligible student-athlete toward the success of the team, and the manner in which the university has investigated and corrected the circumstances giving rise to the violations." University Submission at 53-54 (quoting *Purdue University* (IAC 2000), at 14). The COI claims to have provided all of this consideration. But its only support is that its decision "cited" *Purdue* and its bare assertion that it "was well aware of Louisville's actions and memorialized them in the decision." COI Resp. at 24 (citing Appendix). As the University explained, that is simply not sufficient. *See* University Submission 54-55.

C. The COI Wrongfully Imposed Severe Penalties, Including Vacation of a National Championship, Without Considering Whether They Were Proportional To The Violations.

Last, the COI erred by imposing sweeping penalties on the University without any consideration of their "proportionality" to the institution's wrongdoing and the effects on "innocent student-athletes." University Submission at 55-57 (citing *University of Texas at El Paso* (IAC 1998), at 23 and *University of California, Los Angeles* (IAC 1997), at 11).

The COI asserts on appeal that these "penalties are . . . consistent with the bylaws and past cases," COI Resp. at 21, but it is no overstatement to say that the

penalties were unprecedented in magnitude. Among the 123 games that the COI ordered to be vacated was the 2013 Division I NCAA Men's Basketball Championship—the first Division I men's basketball title ever so vacated—as well as two Final Four appearances. University Submission at 56-57. And the COI ordered that the University forfeit *all* of the revenues it received from the conference for games in which supposedly ineligible student-athletes competed. *Id.* at 54-55. The COI's decision simply contains no discussion of the significant impact of either of these penalties. It is always incumbent upon the COI to ensure that the "totality of the penalties imposed" is not excessive, *id.* at 55 (quoting *University of Central Florida* (IAC 2013), at 13), but particularly so when the penalty has such a significant effect. It did not do so here.

The COI resists this straightforward conclusion by stating, in conclusory fashion, that "[t]he panel fully understood the penalties it prescribed and the severity of them." COI Resp. at 21. But that is pure *ipse dixit*. If the COI had in fact considered whether it would be proportional to, among other things, vacate a Division I Men's Basketball Championship for the very first time, the COI's decision would reflect some consideration of those crucial factors. Instead, the decision is silent. That is another reason to reverse.

III. At A Minimum, The Vacation And Financial Penalties For The 2011-12 And 2012-13 Seasons Should Be Reversed.

Finally, the COI cannot defend the imposition of vacation and financial penalties [redacted] None of them is alleged to have accepted a sex act, and all received "benefits" in an amount that almost certainly would have warranted reinstatement without loss of competition. Even if these student-athletes *could* have been deemed ineligible for their misconduct, the penalty the COI imposed—vacation of the Division I Men's Basketball Championship, two Final Four appearances, and two full seasons of competition—would remain grossly disproportionate.[4] University Submission at 64. But the COI largely failed to make findings necessary to impose these penalties in the first place.

[redacted]. As the University has explained, the COI did not make a finding resolving the disputed question of whether [redacted]

[4] The COI suggests that the actions of these individuals are irrelevant because McGee's violations "occurred in the context of *all* the acts of prostitution and stripteases—not in isolation." COI Resp. 17. But the COI had the authority to impose vacation and financial penalties for the games in which *these* student-athletes competed only if it found that the student-athletes competed while meaningfully ineligible. It is therefore both necessary and appropriate to analyze their violations individually.

of the dances McGee organized. Plainly, then, it could not impose a penalty based [redacted] University Submission at 58.

The COI resists this argument on the ground that it is an improper attempt to "backdoor" a challenge to the COI's factual findings. COI Resp. at 17. But the University is not contesting the accuracy of the COI's "finding[s]" or asserting that they "do not constitute a violation" of NCAA rules. Bylaw 19.10.1.2. Rather, it is observing that the COI did not make *any* findings necessary to support a portion of the "penalty" it imposed, which impacts 55 regular season and 10 NCAA victories. *See id.* 19.10.1.1. It is entirely appropriate for the University to raise such an argument through a challenge to the penalty itself. *See University of Memphis* (IAC 2010), at 12-13 (indicating that where the institution did not "request[]" that "any direct action be taken to or regarding" a finding, but rather sought "to argue that any penalties based on that finding were inappropriate," a challenge to the finding was unnecessary).

The COI further claims that it *did* find that "the act related to [redacted] occurred." COI Resp. at 17. The reader, however, will search the COI's decision in vain for any reference [redacted] conduct or the parties' dispute regarding that conduct. The COI suggests that it *sub silentio* resolved this dispute by providing a "number" of violations that, if carefully cross-referenced against the parties' submissions, "make[s] clear" that the COI sided with the enforcement staff's

version of events. *Id.* The COI cannot resolve important questions of fact this way, especially when the outcome affects an NCAA national championship and the remainder of a student's collegiate career. As the IAC has made clear, "when the [COI] has found . . . a matter of fact" on which a penalty rests, it must "state the matter explicitly" and "identify the record evidence on which it bases that conclusion." *University of Memphis* (IAC 2010), at 16; *see University of Mississippi* (IAC 1995), at 9 (similar). The COI did nothing of the kind

In any event, even if the COI had made a finding as to received would have been worth only $100. University Submission at 59. That amount "generally does not trigger ineligibility" at all, *Coastal Carolina University* (2008), at 6, and if it does, it is low enough that an individual may obtain reinstatement without any loss of competition, Div. I Student-Athlete Reinstatement Guidelines at 21; Bylaws at p. x. The COI's only response is to assert received "some value." COI Resp. at 17. But "some value" is not enough; absent meaningful culpability—which, again, the COI concedes was not present here, *see id.* at 15—the value must be "similar" to the range previously found to warrant vacation, and $100 does not suffice. *Lamar University* (2016), at 12 n.11.[5]

[5] That is particularly so given alleged participation consisted of attending a dance for several minutes before leaving. *See* University Submission at 10-11 & n.2.

The COI also erred by imposing vacation and financial penalties for games in which . *First*, the committee did not make any finding as to participated in a striptease dance organized by McGee, another heavily disputed factual question. University Submission at 59-60. the COI therefore could not issue any penalties based on that alleged conduct. And the COI's claim that it implicitly resolved this difficult factual dispute merely by listing a number of violations, COI Resp. at 17, is no more convincing for

Second, the "benefits" event were worth only $125. Although the parties disputed whether should be valued at $175, the COI has made clear—in both its decision and again in its appellate submission—that it did not resolve that dispute. *See* COI Resp. at 17. Thus, "benefits" well below the value previously found sufficient to justify vacation, and near the bottom end of the range for which individuals may obtain reinstatement without loss of competition. University Submission at 60-61. That paltry benefit plainly cannot support the vacation of two seasons of wins and a national championship.

Finally, the COI has no cogent response to the fact that it limited immunity for his testimony, and therefore could not

"declare[] [him] ineligible for intercollegiate competition based on information [he] reported to the enforcement staff." Bylaw 19.3.7(d).[6]

The COI's principal argument is that limited immunity only shields an individual from "personal student-athlete eligibility consequences," but does not affect the appropriateness of vacation and financial penalties for the institution. COI Resp. at 17-18. That is clearly wrong. The bylaws state that the COI may impose vacation and financial penalties only if a student-athlete "competed while ineligible." Bylaw 19.9.7(g); *see* Bylaw 31.2.2.4. Accordingly, if a student-athlete is not "declared ineligible for intercollegiate competition," as the limited immunity bylaw provides, Bylaw 19.3.7(d), then the COI cannot impose vacation and financial penalties for his participation. In this context, the institutional penalty flows from the "eligibility" of the individual; one cannot be separated from the other.

Indeed, the COI recognized as much in its decision The COI ordered the *institutional* penalty of vacation only "from the time [student-athletes] became ineligible through the time they were reinstated as eligible for competition . . . *through a grant of limited immunity*." COI Op. at 26 (emphasis added). The COI

[6] Pursuant to the COI's grant of immunity, [redacted] what he had witnessed of McGee's scheme, including that he was present at a striptease dance during which he was offered—but refused—a sex act. University Submission at 8-9.

explicitly recognized, in other words, that a "grant of limited immunity" relieves the institution of any penalty for an individual's participation.

The only genuine dispute, then, is *when* that immunity goes into effect: Does it apply to all conduct [redacted] reported to the enforcement staff, or is it limited to conduct that took place *after* the grant of limited immunity? And the text of the rule provides a clear answer: It grants immunity for all conduct a student-athlete "reported to the enforcement staff," regardless of when the conduct occurred. Bylaw 19.3.7(d). The COI offers no reason for denying these words their straightforward meaning. It cites *Southern Methodist University* (IAC 2016), but that case merely rejected SMU's argument that it "was not provided adequate notice" of the consequences of a grant of limited immunity. *Id.* at 4; *see* COI Resp. at 19 (recognizing as much). The institution did not dispute, and this committee accordingly had no occasion to consider, when a grant of limited immunity goes into effect. *University of California, Berkeley* (1997), is even further afield. That case was decided before the current limited immunity bylaw was enacted, *see* Div. I Proposal PP-2011-2, and it contains no finding that the student-athlete provided relevant or truthful information, or that such information served as the basis for the vacation of the team's records.

Finally, the COI is wrong [redacted] the immunity he was promised would disserve the bylaw's purpose. *See* COI Resp. at 19-20. Few sanctions could

be more devastating to an individual student-athlete than the vacation of every game in which he competed. It is common sense that student-athletes would be reluctant to come forward and reveal misconduct if such a severe penalty—for both the individual himself and his teammates—was the inevitable consequence. The bylaw should not be read to lead to that counterproductive and atextual result.

[redacted] could not serve as the basis for a vacation or financial penalty. The COI's penalties should accordingly be reversed at least as to the 2011-12 and 2012-13 seasons.

CONCLUSION

For the foregoing reasons and those set forth in the University's principal submission, the vacation and financial penalties should be reversed, at a minimum with respect to the 2011-12 and 2012-13 men's basketball seasons.