

Symposium on Dispute Resolution in Sports

Resolution of Disputes in Intercollegiate Athletics

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Recommended Citation

Gary R. Roberts, *Resolution of Disputes in Intercollegiate Athletics*, 35 Val. U. L. Rev. 431 (2001).
Available at: <https://scholar.valpo.edu/vulr/vol35/iss2/5>

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RESOLUTION OF DISPUTES IN INTERCOLLEGIATE ATHLETICS

Gary R. Roberts*

When asked to make a presentation as part of a conference entitled "Arbitrating Sports Disputes," I assumed that the general subject was how various disputes in sports are resolved by neutral third party fact finders rather than by a public judicial system. When I was then told that my particular subject was the resolution of disputes in intercollegiate athletics, my initial reaction was that it would be one of the shortest expositions on record. Because the National Collegiate Athletic Association ("NCAA") has been largely insulated from outside legal constraints by the courts, it dictates - it does not submit - its internal conclusions to outside review by neutral third parties.

This initial reaction, however, paints a misleading picture. While the procedures used by the NCAA to interpret its rules and to resolve disagreements in their enforcement are a far cry from those required in public administrative or judicial proceedings, they nonetheless reflect an elaborate system of internal processes and committees that give more protections to involved parties than the general public realizes. Thus, what I propose to do in this presentation is first to describe the culture in which issues arise in intercollegiate athletics and then to outline the procedures and bodies set up by the NCAA to resolve those issues.

I. THE UNDERLYING LEGAL AND CULTURAL ENVIRONMENT

The intercollegiate sports "industry" is a peculiar animal. On the one hand, the statement of the NCAA's "Fundamental Policy" claims that:

The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear

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432 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 35

line of demarcation between intercollegiate athletics and professional sports.¹

On the other hand, multi-billion dollar television contracts create monetary incentive to colleges and universities that may create motives adverse to the NCAA Constitution. For example, television revenues from the NCAA Division I men's basketball tournament, known as "March Madness," and the NCAA Division I football "Bowl Championship Series" contribute millions each year to participating schools. The latter dispersed over \$13 million dollars in payouts to each team participating in 2000-01. Such monetary incentives and the frequent revelations of academic cheating and illiterate athletes suggest a very different reality. Intercollegiate athletics are big business for Division I schools and are important to even lower division schools' self-image and perceived ability to raise money and attract students.

Thus, with so much at stake for an institution and the individuals entrusted with its program every time a school's "revenue" teams take the court or field, there are enormous incentives for the coaches and schools to do as much as possible to gain a competitive advantage, even if that means breaking an NCAA rule. There can be little doubt that in this industry the incentives to cheat are great, the opportunities to cheat are numerous, the likelihood of getting caught is fairly small, and every institution is suspicious that its competitors are "getting away with something" and thereby gaining some competitive advantage. It is in this environment that the NCAA is charged with adopting and enforcing its complex set of rules designed to maintain its definition of "amateurism," to stay at least arguably within reach of its stated goal of being an integral part of the educational system, and to maintain a "level playing field" in which all teams have a reasonable opportunity to remain competitive within their range of competition. This obviously is no easy task.

Recognizing the difficulty of this mission, the courts have generally tended to give great legal deference to the NCAA's structure and procedures that adopt, interpret, apply, and enforce the rules that appear to promote amateurism and the role of athletics as a fundamental part of higher education. While some deride the folly of this deference and argue that it is a foolish or cynical genuflection to an inherently corrupt system,² legal deference exists nonetheless. For example, courts have

¹ 2000-01 NCAA DIV. I MANUAL, CONST. art. 1.3.1.

² See, e.g., *Banks v. NCAA*, 977 F.2d 1081, 1094 (7th Cir. 1992) (Flaum, J., dissenting in part).

consistently held that the antitrust laws do not apply to the "noncommercial" rules of the NCAA aimed at promoting amateurism and academic integrity.³ The Supreme Court has also expressly held that the NCAA is not required to provide constitutional due process protections to persons affected by its rules or procedures because NCAA rules and conduct do not involve state action.⁴ Furthermore, state efforts to regulate the NCAA in various ways have consistently been struck

³ See, e.g., *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984); *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992). In *Board of Regents*, the Supreme Court stated on several occasions - even though the issue was not presented, briefed, or argued - that the NCAA's rules that promoted amateurism or academic values were procompetitive. For example:

Moreover, the NCAA seeks to market a particular brand of football - college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice - not only the choices available to sports fans but also those available to athletes - and hence can be viewed as procompetitive.

Bd. of Regents, 468 U.S. at 101-02.

It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.

Id. at 117.

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.

Id. at 120. The courts have applied §1 of the Sherman Act to hold that some NCAA rules are illegal agreements in restraint of trade. See, e.g., *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984)(involving NCAA restrictions on the number of times member schools' football teams could appear on television); *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998)(involving an NCAA rule limiting the salary of the last member of various coaching staffs, the so-called "restricted earnings coaches"). However, in these cases the courts first determined that the rules at issue were "commercial rules," not rules relating to amateurism or academic integrity.

⁴ *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

434 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 35

down by the courts as in infringement on interstate commerce in violation of the U.S. Constitution's dormant commerce clause.⁵

Many are critical of granting such deference because they argue that it protects a system that exploits many - often poor - minority athletes, corrupts the integrity of higher education, and overly commercializes what should be primarily an integral part of the learning process for college students. However, until courts accept that the current system of intercollegiate athletics in higher education is one that should not be preserved, deference to the NCAA will likely be continued. And the staff of the NCAA and the representatives of NCAA member institutions who volunteer their time and services to making the system operate will be put in the role of trying consistently to enforce the NCAA's complex rules as best they can within the objectives of those rules. To subject the decisions of these persons and internal bodies to regular judicial review under standards established for commercial businesses (antitrust and labor law), for government entities (due process and other constitutional requirements), and by states motivated to try to aid and to protect the good old State U. would undoubtedly make this task far more difficult than it already is and possibly impossible. This might well force radical alteration of the system itself. Whether such radical change would be good or bad is subject to disagreement that is beyond the scope of this presentation.

II. INTERPRETING AND APPLYING NCAA RULES AND BY-LAWS⁶

There are numerous occasions when a student-athlete ("S-A"), coach, or administrator at a NCAA member institution is uncertain about how NCAA constitutional or bylaw provisions ("rules") would apply in a given situation. These situations might arise after something has occurred and it is unclear whether a rule has been violated, or they might arise when someone wants to do something but is unsure whether or not it is permitted under the rules. In these instances, the member institution with which the S-A, coach, or administrator is affiliated may,

⁵ See, e.g., *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993), cert. denied, 511 U.S. 1033 (1994) (striking down a Nevada law requiring the NCAA to provide due process to coaches and institutions from Nevada who are charged by the enforcement staff with violations of NCAA rules).

⁶ Much of the information dealing with the standards and processes by which the NCAA interprets, applies, and enforces its by-laws and rules can be found on the NCAA's official website. See NCAA, at <http://www.ncaa.org> (last visited March 31, 2001).

through one of five designated people at the institution,⁷ request from the Membership Services Department of the NCAA, an interpretation of the constitution or bylaws as they might apply to a particular factual situation. If the language of the constitution, bylaws, or the legislative intent behind the language is clear with respect to the inquiry, or if an "official published interpretation" is dispositive, the Membership Services staff will notify the requestor of the answer. However, if there is some unresolved ambiguity, the staff will make what it believes is the proper interpretation and so notify the requestor.⁸

Once an institution has been notified of a staff interpretation, that interpretation becomes binding on the requesting institution. It does not at this point become an "official published interpretation" that is binding on any other institution. However, if the interpretation is likely to have significance beyond the specific institutional request, the staff will make the interpretation public and will be almost certain to give the same interpretation to another institution that might subsequently make a materially identical request. This is because it is generally accepted within the NCAA that the staff and all committees should treat similar situations or cases similarly - a self-imposed version of a system of *stare decisis* - although they do not consider themselves legally bound to follow precedent that is not officially published since some circumstance or cultural change might suggest a corresponding change in the way rules are interpreted or applied.

If a Division I member institution is not satisfied with a staff interpretation, it may seek a review of the interpretation from the Subcommittee on Legislative Review/Interpretations.⁹ If the issue is not

⁷ These people typically are the president, the athletic director, the senior women's administrator, the faculty athletics representative, and one other administrator designated by the president (often either a senior administrative assistant to the president or the university's general counsel). The Membership Services staff will not provide interpretations of NCAA rules to anyone other than the designated representatives of a member institution.

⁸ The general process of interpreting NCAA rules is set out in 2000-01 NCAA Div. I MANUAL § 5.4.1.2 [hereinafter NCAA]. Each of the three NCAA Divisions has its own Manual, but each contains all provisions common to all of them plus those rules that apply only to the particular division. Most of the focus in this presentation will be to the procedures and structures in Division I, and citations to rules in this presentation will be to provisions in the Division I Manual.

⁹ Actually, section 5.4.1.2.2 says that the appeal may be to the Division I Academics/Eligibility/Compliance Cabinet, but in parentheses it also says "or a committee designated by [the cabinet]." *Id.* at § 5.4.1.2.2. The Subcommittee on Legislative Review/Interpretations is that designee. Similar procedures exist in Divisions II and III although the official names of the various bodies are different.

436 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 35

one of national significance and the staff has not made its interpretation public, the Subcommittee will make a decision and notify the requesting institution. If the issue is one of broader national significance and the staff has made its interpretation public, the Subcommittee will make a thorough review, render a decision, and then issue an "official published interpretation" that will have the force of internal NCAA "law" and be binding on the staff and all member institutions.

If any member institution is dissatisfied with the official published interpretation, its president, athletic director, or faculty athletics representative may submit a written appeal to the Division I Management Council. The Management Council will then establish the procedures for hearing the appeal and will issue its decision either affirming, modifying, or reversing the official published interpretation of the Subcommittee.¹⁰ The decision of the Management Council is final, and there is no further appeal from this decision other than seeking to amend the underlying legislation through the full legislative process.

This process of internal interpretation of the rules, along with the language of the rules themselves, establishes the internal "legal" framework within which all member institutions and their S-As, coaches, administrators, and institutional representatives must operate. The disputes that arise within the NCAA are shaped and will be decided within this legal framework.

III. THE ENFORCEMENT PROCESS

The vast majority of what the NCAA rules define as "secondary infractions" (minor breaches that do not give a violating institution any competitive or recruiting advantage)¹¹ are initially discovered by the institution itself, self-reported to the NCAA enforcement staff, and administratively resolved with minor penalties like reprimanding the offending coach or making anyone who received a small impermissible benefit repay it. There are dozens of such infractions committed by every Division I institution every year, but they have little impact on the system, attract virtually no public attention, and seldom instigate legal issues or controversy.

¹⁰ See *id.* at § 5.4.1.2.3.

¹¹ See *id.* at § 19.02.2.1 ("A secondary violation is a violation that is isolated or inadvertant in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit.").

However, the far more significant rules violations, the so-called "major infractions," often involve significant consequences for the offending institution, great public attention, and instigate substantial factual and legal disputes. In this arena, so much is often at stake that a cottage industry of lawyers can make a fine living doing nothing but representing member institutions in major infractions cases.

The process is commenced when the NCAA enforcement staff is made aware of a possible major rule violation. This awareness may come from many sources, including the institution itself, but more often it comes either from a "tip" from someone affiliated with another institution or from an athlete involved in the violation who had a falling out with the coach or school and in turn retaliates. Regardless of the source of the information, if the enforcement staff believes that there is sufficient suspicion to take the matter further, it will usually dispatch an investigator to talk to potential witnesses and seek any documentation that might shed light on the allegations. Alternatively, the staff may informally ask the target institution to investigate the situation and make a report of its own internal findings. Or, the staff may do both. Once the enforcement staff has made whatever inquiry it believes is appropriate, it will decide whether there is sufficient cause to issue a "letter of official inquiry" ("OLI") - the equivalent of a criminal indictment - to the target institution. If no OLI is issued, the matter is dropped, at least for the time being. If the OLI is issued, the process becomes much more formal and significant.

An institution receiving an OLI is in trouble. I have asked various former members of the NCAA enforcement staff and the Infractions Committee if there has ever been an institution that received an OLI that was subsequently exonerated entirely. The response I have always received leads me to the conclusion that, while it is theoretically possible for an institution to escape receipt of an OLI with complete exoneration, no one can remember it ever happening. And, if it has, it would be a freak occurrence. The reality is that any institution receiving an OLI will be found guilty of some violation. Thus, representing an institution under official inquiry takes on a very different slant than representing a criminal defendant in a public court. The ultimate goal for the institution is to convince the Infractions Committee to impose the least possible penalty that is reasonable for whatever violations it ultimately finds.

Once an institution has completed the internal investigation required by the OLI and has submitted its report, the institution will be scheduled

438 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 35

for a hearing before the Committee on Infractions. Each NCAA Division has its own Committee. Of course, the cases receiving the most attention arise in Division I, whose Committee was chaired in 2000 by George Washington University Law School professor (and former dean) Jack Friedenthal.¹²

At a Committee on Infractions hearing, the institution is entitled to representation by legal counsel, as is any affected coach and S-A. The staff makes its presentation to support its OLI and then each "defendant" is allowed to argue its case. No witnesses are allowed except the parties representing the institutions and directly affected coaches and S-As. Testimony of third parties is given to the Committee only through reports and accompanying written statements. Cross-examination of witnesses is not allowed. Rules of evidence are not followed and whatever the Committee allows will be heard. In short, the proceeding is quite informal by judicial standards.¹³

Another way in which the proceeding is unlike a normal judicial case is that the Committee is not limited to finding violations that are alleged in the OLI. If during the course of the hearing, the Committee finds evidence of violations not listed in the OLI, it may rule that such violations have been committed without the institution having investigated or prepared to rebut such alleged violations. This offers yet another reason why institutions should not aggressively seek to use all possible objections and tactics to avoid any penalties: there can be a huge price to pay if the Committee becomes angered by overaggressive posturing or believes that the institution exudes arrogance.

After the hearing, the Committee on Infractions issues its written findings and penalties. At this point the institution can either accept the decision and penalties of the Committee on Infractions or it may appeal to the Infractions Appeals Committee, which in Division I is currently chaired by Conference USA Commissioner Michael Slive. In recent years, this committee has been surprisingly independent and assertive in reversing some Committee on Infractions' findings and penalties. This has undoubtedly had a significant influence on the Committee on Infractions, whose unfettered discretion is now subject to meaningful oversight and reversal in appropriate cases.

¹² Friedenthal also happens to be the special master appointed under the NFL-NFLPA collective bargaining agreement to resolve disputes relating to free agency and the salary cap.

¹³ See generally *id.* at §§ 19, 32.

The Infractions Appeals Committee's decision is final and unappealable to any further body.

IV. THE INITIAL ELIGIBILITY DETERMINATION PROCESS

There has been substantial publicity and controversy in recent years focused on the initial eligibility standards embedded in NCAA rules that have been adopted and refined by the NCAA since the late 1980s - so-called Propositions 48, 42, and 16. These rules create a complex sliding scale of dual minimum requirements for incoming freshman S-As in Divisions I and II comprised of standardized test scores (either the SAT or ACT) and high school grade point average in at least 13 defined "core courses."¹⁴ Prospective S-As fall into one of three categories: (1) qualifiers - those who meet the standards and are fully qualified to receive aid and participate as freshmen;¹⁵ (2) partial qualifiers - those who are not qualifiers but meet a reduced sliding scale of requirements and can receive athletic financial aid and practice during their freshman year but cannot participate in intercollegiate contests;¹⁶ and (3) nonqualifiers - those who fail to meet the requirements for either qualifier or partial qualifier status and may not receive athletics-related financial aid, practice, or participate in competitions during their freshman year.¹⁷

The initial job of determining whether a prospective S-A meets the initial eligibility requirements lies with the Initial Eligibility Clearinghouse, a body established in conjunction with the Educational Testing Service, which produces, administers, and grades the SAT examinations. Every prospective S-A who wishes to receive athletic-related financial aid, practice, or participate in contests during their freshman year must apply to the Clearinghouse for a status determination and clearance.

Any prospective S-A who wishes either to appeal a decision of the Clearinghouse or to seek a waiver from one of the requirements may do so by petitioning the Initial Eligibility Waivers Committee of the Division I Academics/Eligibility/Compliance Cabinet ("AEC Cabinet").¹⁸ There are numerous bases for seeking an appeal or waiver,

¹⁴ See generally NCAA, *supra* note 8, at § 14.3.

¹⁵ See *id.* at § 14.3.1.

¹⁶ See *id.* at § 14.3.2.1.

¹⁷ See *id.* at § 14.3.2.2.

¹⁸ In Division II, the S-A may appeal a decision of the Clearinghouse or seek a waiver from one of the requirements from the Academic Requirements Subcommittee on Initial

440 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 35

although they usually arise in one of a few situations. Thus, the Division I Committee has established five separate subcommittees to handle petitions depending on the basis for the appeal: (1) the Core Course Evaluation subcommittee, which reviews whether a course that the Clearinghouse has not counted should be considered a "core course"; (2) the Transcript Change subcommittee, which determines whether a proposed modification in a prospective S-A's high school transcript is legitimate and should be allowed; (3) the Foreign Student subcommittee, which evaluates whether a nontraditional high school record in a foreign country is equivalent to the established standard for U.S. students; (4) the Home School subcommittee, which evaluates whether a nontraditional high school record for a home schooled student is equivalent to the established standard in regular high schools; and (5) the Disability Services subcommittee, which determines whether a prospective S-A's failure to meet the standards was due to a documented learning or physical disability and that granting a waiver would constitute a reasonable accommodation of that disability.¹⁹

A petition for an appeal or waiver of an initial eligibility determination must be made by the member institution in which the prospective S-A intends to enroll. The only exception is if the petition is based on a claimed disability, in which case the prospective S-A may file the petition. The procedures for processing petitions filed by prospective S-As seeking accommodations for documented disabilities and the standards under which those petitions shall be reviewed are governed by a complex agreement entered into between the NCAA and the Department of Justice in 1998, after the Department claimed that the NCAA's rules, standards, and procedures for dealing with disabled students appeared to violate the Americans With Disabilities Act.

An initial eligibility petition must be submitted entirely in writing. There is no hearing at which oral presentations can be made. The appropriate subcommittee will consider the petition through whatever means it chooses: an in-person meeting, a conference telephone call, or a series of faxes. The subcommittee deliberations may involve only the members of the subcommittee and relevant NCAA national office staff members. Neither representatives of the petitioning member institution nor the affected prospective S-As are involved in the deliberations.

Eligibility Waivers. Because there are no initial eligibility requirements for incoming freshman S-As in Division III, there is no need for such a process or appeals body in that Division.

¹⁹ In Division II, the full subcommittee hears all types of appeals or waiver requests.

Once the subcommittee has made a decision on the petition, the NCAA national office staff will notify all appropriate parties of the decision. Petitions for reconsideration are not entertained unless the petitioning institution can present new information not included in the original petition that has been recently discovered. The decision of the appropriate subcommittee may then be appealed to the Division I AEC Cabinet,²⁰ although such appeals are unlikely to be granted absent some extraordinary circumstance.

V. THE REINSTATEMENT PROCESS

Several circumstances might give rise to a S-A being rendered ineligible for competition. Examples of rule violations triggering ineligibility include: (1) breaches of ethical conduct rules (gambling, lying, or failing to cooperate during an investigation), (2) receipt of something of value from a representative of the S-A's institution, a professional team, or an agent, based on the S-A's athletic ability, (3) entering into a contract for future services with a professional team or for future representation services with an agent, (4) improper conduct by the institution or the S-A during the S-A's recruitment by the institution, (5) improper receipt of financial aid, (6) failure to meet continuing academic eligibility requirements (failure to remain a full-time student or failure to make satisfactory progress toward a degree), or (7) failing a drug test for prohibited substances. When an institution discovers that something has occurred to make a S-A ineligible, it must immediately declare the S-A ineligible and thereafter not allow the S-A to participate in competition.²¹

A. Procedures in Non-Drug Cases

In all cases, except a S-A's failing a drug test, an institution that wishes to have the S-A reinstated must investigate the circumstances related to the case and submit a report of those circumstances and a petition for reinstatement to the NCAA Student-Athlete Reinstatement staff.²² The staff will then either grant the petition, grant the petition

²⁰ In Division II, the decision may be appealed to the Management Council.

²¹ See NCAA, *supra* note 8, § 14.11.1.

²² Unlike the enforcement staff, the Reinstatement staff does not conduct investigations. Once conduct causing a S-A's ineligibility becomes known, the S-A's institution is responsible for declaring him ineligible and then conducting the appropriate investigation. If a S-A has become ineligible but the institution does not declare him so or withhold him from competition, the institution will have committed an infraction. At this point, the case will be turned over to the enforcement staff for investigation and possibly initiating an Official Letter of Inquiry leading to an infractions proceeding.

442 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 35

with conditions (make the S-A repay a benefit improperly received or sit out some number of competitions), or deny the petition either with respect to the S-A's eligibility at the petitioning institution or at any institution.²³

If the petition is denied or the institution or S-A is unwilling to meet the staff's preconditions for reinstatement, a Division I institution may appeal the staff's decision to the Athlete Reinstatement Committee of the AEC Cabinet in all cases, except those dealing with satisfactory academic progress toward a degree or full-time enrollment, for which a waiver is required that the staff is not allowed to grant.²⁴ The S-A is not allowed to file the petition: only the member institution may do so. The matter is submitted entirely in writing. The Committee may allow an oral hearing to be held, but such hearing can only be conducted by conference telephone call. Procedures for such hearings are entirely informal and will be entirely within the discretion of the Committee. Unlike initial eligibility matters, this committee may not engage in communications with the NCAA staff, except to request specific documentation, without including representatives of the institution. No *ex parte* communications are allowed.

The decision of the Committee is communicated to the petitioning institution. A petition for a rehearing will not be entertained unless new information has been discovered. The decision of the Committee is final. There are no further appeals allowed.

Cases involving the failure of a S-A to meet rules requiring satisfactory progress toward a degree or that the S-A be a registered full-time student will be appealed by a Division I institution to the Committee on Satisfactory Progress Waivers of the AEC Cabinet.²⁵

²³ As a general principle in cases involving the receipt of extra benefits, the staff's goal before permitting reinstatement is to put the S-A in the same position she would have been in had the violation not occurred.

²⁴ The institution may appeal the staff's decision in Divisions II or III to the Committee on Student-Athlete Reinstatement of the Division II or III Management Council.

²⁵ The appeal will be made in Division II to the Academic Requirements Committee's Subcommittee on Satisfactory Progress Waivers and in Division III to the Division III Management Council Subcommittee on Academic Issues. While most eligibility issues for already enrolled S-As involving academic issues are heard by this Committee acting on petitions for a waiver, the Reinstatement Committee does retain authority over some categories of cases involving waiver petitions on academic matters. Examples include: (1) violations of the 5 year/10 semester rule (2000-01 NCAA DIV. I MANUAL, §§ 14.2, 30.6.1), (2) waivers required when a S-A's academic program has been discontinued (*id.* at § 14.5.3.4), (3) hardship waivers for S-A's injured early in a season of competition who are

Again, a S-A is not permitted to file the waiver petition. Only the institution may seek the waiver. The matter is submitted entirely in writing. No oral hearing will be held. No *ex parte* communications are permitted. The decision of the Committee is final and may not be further appealed.

B. Procedures in Drug Cases

The NCAA has adopted an extensive set of rules, policies, and procedures for testing athletes for banned substances and for providing an avenue for appeal. These are set forth on the NCAA's website, especially on the page entitled "2000-01 NCAA Drug-Testing Program Protocol."²⁶

To summarize the appellate process, every drug test sample is divided into an "A" and a "B" sample that are identified and tested solely by a random number assigned to the S-A. If the "A" sample tests negative, the test is complete. However, if the "A" sample tests positive for any banned substance, the laboratory will notify and mail a written report of the test results to the independent National Center for Drug Free Sport ("the Center").²⁷ The Center will then break the number code to identify the individual S-A who has tested positive. Next, the Center will immediately contact the CEO and the athletic director at the S-A's institution. The institution will notify the S-A. After notification, the Center will schedule a time for testing the "B" sample at the laboratory. The S-A or a representative of the S-A is allowed to be present at the opening and testing of the "B" sample. The results of the test on the "B" sample are deemed conclusive and final and are reported immediately to the Center, the institution, and the S-A, who is simultaneously notified of the right to appeal.

seeking to regain that full season of eligibility and who attend institutions unaffiliated with a conference (*id.* at § 14.2.4), (4) satisfactory progress waivers for S-As who attend institutions unaffiliated with a conference (*id.* at § 14.4.3.6a-b), and (5) a season of competition waiver (*id.* at § 14.2.5).

²⁶ To access information regarding the NCAA's drug-testing program, see NCAA, *Drug-Testing Program 2000*, available at http://www.ncaa.org/sports_sciences/drugtesting/ (last visited Jan. 12, 2001). To access information regarding the program's protocol, see NCAA, *Drug-Testing Program Protocol 2000-01*, available at http://www.ncaa.org/sports_sciences/drugtesting/program_protocol.html (last visited Jan. 12, 2001).

²⁷ For a list of all banned substances, see NCAA, *NCAA Banned-Drug Classes 2000-01*, available at http://www.ncaa.org/sports_sciences/drugtesting/banned_list.html (last visited Jan. 14, 2001).

444 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 35

Only the institution may file an appeal of the positive test, but it is required to do so if requested by the S-A. The appeal is filed with the NCAA's staff liaison to the Committee on Competitive Safeguards and Medical Aspects of Sports, which is authorized to hear the appeal. This committee has established and delegated all authority to handle drug-related cases to its Drug-Education and Drug-Testing Subcommittee.²⁸ At least three of the eight voting members of this subcommittee are randomly assigned to hear and decide each case.²⁹

An appeal must be heard by a panel of the Subcommittee before the S-A's next scheduled competition unless both the institution and the NCAA agree otherwise. The hearing on the appeal will be conducted by conference telephone call. The S-A is required to participate and may have others (legal counsel) also participate on her behalf. Members of the NCAA staff and NCAA legal counsel are also normally involved in the conference call, but cannot vote on the disposition of the appeal. Technical experts selected by the Committee to serve as consultants and relevant personnel from the testing laboratory usually participate in the hearing call. The S-A and the institution are allowed to have witnesses participate by "testifying" on the S-A's behalf, although such witnesses are not under oath or subject to charges of perjury for giving false testimony. The S-A is referred to throughout the hearing by number, and the identity of the S-A or her institution is never disclosed to the voting members of the Subcommittee.³⁰

The S-A and her athletic director must be provided copies of the test report for both the "A" and "B" samples before the hearing. Once the hearing is concluded, everyone is taken off the call except for the voting Subcommittee members and the NCAA counsel who then deliberate and make a decision. The Subcommittee is only allowed to grant the appeal, in which case the S-A's eligibility is immediately restored, or deny the appeal, in which case the automatic one-year suspension from competition stands. The Subcommittee does not have the authority to

²⁸ To examine the makeup and procedures of the subcommittee, see NCAA, *Information Regarding NCAA Appeals Process*, available at http://www.ncaa.org/sports_sciences/drugtesting/appeal_facts.html (last visited Jan. 12, 2001).

²⁹ The chair of the Committee on Competitive Safeguards and Medical Aspects of Sports may also serve on a panel that hears an appeal. A member of the subcommittee will not be assigned to hear a case involving an institution from the athletic conference of her institution.

³⁰ If a Subcommittee member recognizes a voice so that the member can identify the S-A or the institution involved, she will generally recuse herself from further participation although there is no requirement to do so.

reduce or modify the automatic one-year suspension. No formal written opinion is prepared, but the NCAA keeps a digest of decided appeals to which member institutions have access when bringing an appeal.

Banned substance use is a "strict liability" offense - to a point. Few grounds for granting an appeal are allowed if it is established that the positive test accurately reflected the presence of a banned substance in the S-A's body. Two grounds upon which appeals have been granted are that the S-A unknowingly took a banned substance for legitimate therapeutic purposes based on the medical advice of her doctor or the athletic department's medical staff and that the S-A ingested a product that was not properly labelled to indicate the presence of a banned substance. The hurdle for an S-A to clear is a high one. The S-A has the responsibility to consult with appropriate medical and athletic department personnel before taking any substance that might risk a violation of the drug protocol, such as drugs, nutritional supplements, or other substances that a reasonable person should suspect might contain a banned substance.

The Subcommittee will promptly notify the institution of its decision. The institution is then responsible for notifying the S-A. If the appeal is denied, the S-A must be immediately declared ineligible, the one-year suspension is automatically imposed, and the normal NCAA eligibility rules and procedures apply.

Once declared ineligible and suspended for a mandatory one-year period, the S-A must be retested before she can regain eligibility. Before eligibility can be restored, the S-A's institution must request retesting from the Center, which will be conducted at the institution's expense. The institution may then petition for the S-A's reinstatement through the normal reinstatement procedures outlined above in Part V.A, but the Athlete Reinstatement Committee cannot act on the petition until it receives the results of the retesting from the Center. As noted above, there is no further appeal from a decision of the Athlete Reinstatement Committee.

VI. ALL OTHER APPEALS OR WAIVERS

Any application of an NCAA bylaw, rule, or any staff decision relating to a bylaw or rule, that is not specifically assigned to another NCAA cabinet or committee, may be appealed by a member institution or conference to the Administrative Review Subcommittee of the

446 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 35

Management Council of the appropriate division.³¹ The petition is submitted entirely in writing, although a member of the Subcommittee may ask for a hearing by telephone conference call. Deliberations may be entirely by correspondence, in person, or by telephone conference call meetings. *Ex parte* communications are not allowed, even with the NCAA staff, except to ask for documentation. Once a decision is rendered by the Subcommittee, rehearings are entertained only if new information has been discovered. The decision of the Subcommittee is final and may not be further appealed.

VII. OVERVIEW AND CONCLUSION

The process by which the NCAA makes decisions and resolves disputes over those decisions is unlike procedures that most Americans are familiar with in other settings. There are no truly neutral third parties who resolve disagreements between member institutions or S-As and the NCAA staff. Rather, one internally established person or committee decides whether to support, modify, or reverse a decision of another internally established staff person or body. The procedures used by such appellate committees are either set by internal NCAA rules or, most often, by the committee itself. There is no requirement that the committee adopt procedures that conform to anything close to the due process required of public officials and bodies under the laws and constitutions of the U.S. or the individual states. Furthermore, the factual findings and conclusions of these bodies are given great deference and will rarely, if ever, be overturned by the courts.

While the numerous internal appellate committees within the NCAA undoubtedly carry out their duties and make decisions in good faith in virtually all cases, the complex and confusing nature of the rules they interpret and apply, and the confidential and often mysterious ways in which they operate, often give rise to public suspicions of bias, unfairness, and arbitrariness. Furthermore, because the members who serve on these committees always come from within the athletic programs of the NCAA member institutions, they necessarily come with a mindset that assumes the legitimacy of the existing system and are incapable of bringing a truly fresh perspective to bear on cases that often raise troubling issues about that system.

³¹ See 2000-01 NCAA DIV. I MANUAL § 5.4.1.4 (discussing the process by which an institution may appeal a decision of an NCAA committee or the NCAA staff regarding an application of NCAA legislation to a particular situation).

One can appreciate the difficulty of the job the NCAA staff and its internal committees have in trying to enforce complex rules for which there are often great incentives to cheat, and having to do so without the benefit of public authority (no subpoena power or ability to obtain search warrants). This task would be made even more difficult, and perhaps downright messy, if internal decisions were ultimately appealable to truly neutral outside "judges" or arbitrators who were not tied to the NCAA or any of its member institutions. However, in the long run, the image, integrity and mission of the NCAA might well be better served if such neutral outside dispute resolution mechanisms were utilized.

