

October 19, 2016

VIA EMAIL

Mr. Joel McGormley
Managing Director of the Committees on Infractions
National Collegiate Athletic Association
P.O. Box 6222
Indianapolis, IN 46206-6222

Re: *University of North Carolina, Chapel Hill - Case No. 00231 (UNC)*

Dear Joel:

This is in regard to your October 17 and 18, 2016, letters to all parties in this case responding to UNC's October 14, 2016, letter to Chief Hearing Officer Greg Sankey requesting the Hearing Panel to supplement the record for the October 28 procedural and jurisdictional hearing, and its October 17, 2016, letter to Director of Enforcement Tom Hosty requesting corrections of the enforcement staff's September 19, 2016, Reply. Collectively, your letters indicated that Mr. Sankey reviewed the institution's request to supplement the record and that such request was denied, but he approved allowing the institution to provide up to a "10-page targeted and synthesized submission" to all parties by Wednesday, October 19, 2016. Further, you indicated that to the extent the Hosty letter includes new relevant information that is not redundant, the institution may succinctly address those claims in its supplemental filing.

In response to your modified approach, UNC submits below what it believes to be additional relevant information for the procedural and jurisdictional objections that it asserted in its August 1, 2016, Response to the NCAA enforcement staff's Amended Notice of Allegations ("ANOA"). The institution understands that the information submitted below will comply with the four limitations stated in your October 17 letter.

Core Academic Issues Beyond the Scope of the NCAA's Authority

The University (University Response, p. 11) and the enforcement staff agree (Staff Reply, p. 5) that the NCAA has no authority over academic structure, content, and process or over the way academic departments are managed. The University will rely on its prior submission for its position that, in light of the foregoing, the NCAA does not have the authority to assert that the University failed to monitor and lacked institutional control over one of its academic departments and its Academic Support Program for Student-Athletes ("ASPSA") for permitting student-athletes to use courses that were open to and used by the general student body.

turned in before July 21, 2009 (

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(Overstreet, 8/26/11 Int. Trans., pp. 14-15, 19, 21, 30; Lee, 8/26/11 Int. Trans., pp. 26-29, 43-44, 47-50, 52-53; Bridger, 8/29/11 Int. Trans., pp. 8-9, 16-21, 25-27.)

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(Lee, 8/26/11 Int. Trans., p. 44.)

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(Gore, 8/31/11 Int. Trans., 84-85.)

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(Mutima, 8/26/11 Int. Trans., pp. 26-33, 39-41.)
(Mutima, 8/26/11 Int. Trans., pp. 33-38.)

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¹ Kleisser's email message was included in the staff's September 19, 2016, Reply.

(Nyang'oro, 8/31/11 Int. Trans., pp. 55-56, 71-72, 86-96.)

pp. 36-38.)

(Id.,

30.)

(McMillan, 8/25/11 Int. Trans., pp. 24-27,

(Id., p. 13.)

Relevance of Issue 1: The enforcement staff has mischaracterized the nature and scope of its prior knowledge. There is no "new, relevant, material information" within the meaning of Bylaws 19.02.1 and 19.8.3 and, therefore, the prior proceedings cannot be reopened.

Issue 2: The enforcement staff's assertion that "AMA's March 5, 2012, interpretation is "wholly immaterial" and it "was long-obsolete, rendered irrelevant and supplanted by an entirely new set of facts." (Staff's Reply, p. 11 [emphasis supplied].) The enforcement staff further states the Cadwalader Report and subsequent efforts "provided a picture of institutional behaviors not detected before by any investigator." (Id. [emphasis supplied].)

Institution's Response Concerning Issue 2: The discussion in Issue 1 alone is sufficient to establish that the enforcement staff's statements are not accurate. However, in addition to the information provided to the enforcement staff in August and September 2011, the University continued to supply information to the enforcement staff. Prior to AMA's interpretation on March 5, 2013, the University had provided the enforcement staff with (a) the May 2, 2012, document entitled "Review of Courses in the Department of African and Afro-American Studies, College of Arts and Sciences" ("Hartlyn Andrews Report"), (b) the July 26, 2012, Report of the Subcommittee of the Faculty Executive Committee ("FEC Report"), and (c) the report issued by James Martin on December 19, 2012, and his addendum issued on January 24, 2013 (the "Martin Report" and the "Martin Addendum").

- The Hartlyn Andrews Report found that: (a) from summer 2007 through summer 2009, there were nine courses (eight took place in the summer sessions) involving 59 students where it appeared no faculty supervised or graded the paper that was turned in ("aberrant courses"); (b) from summer 2007 through

summer 2009, there were 43 other courses (29 took place during the summer sessions) involving 599 students where Nyang'oro was listed as the instructor of record for a lecture course that did not meet, had limited to no instructional content, and were evaluated solely by a paper ("irregular courses"); (c) from fall 2009 through summer 2011, two additional courses involving 28 students were taught irregularly; (d) the African and African American Studies Department's ("Department") lack of policies and its lax practices made it very difficult to determine who, if anyone, taught independent study courses, and presented the opportunity for Crowder to create and encourage enrollment in the irregular and aberrant courses, and submit grades for those courses; and (e) Nyang'oro inadequately supervised Crowder and failed to properly oversee the Department's practices. (Hartlyn Andrews Report, pp. 3-6.)

- The FEC Report stated that the evidence indicated that ASPSA academic counselors were directing student-athletes into the aberrant and irregular courses that had been identified in the Hartlyn Andrews Report. (FEC Report, p. 6.) The FEC Report was provided to the Enforcement Staff.
- Martin, with the assistance of the Baker Tilly firm, reviewed all of the 172,580 course sections taught by the University to undergraduates from the fall of 1994 through the fall of 2012 (Martin Report, p. 3.) The Martin Report described in great detail what documents and records were collected, the 84 individuals who were interviewed, and how all of the information was analyzed. (*Id.*, pp. 4-5.) The report found that the anomalous courses dated back to at least 1997, identified 216 anomalous courses (116 of which were offered in the summers), and 4,194 enrollments in those courses. (*Id.*, pp. 8-9, 35-40, 50, 73.) It also noted that although Crowder's involvement could not be proven "definitively," there was a "dramatic reduction in academic anomalies" after her retirement. (*Id.*, pp. 9, 50.) The report also found another 150 courses for which the evidence was inclusive as to whether the courses were anomalous. (*Id.*, pp. 46-48.) The report noted that, among other things, Nyang'oro's absences from campus, his delegation of authority to Crowder, his lack of oversight to Crowder, the University's lack of monitoring of the Department, and the Department's lax practices concerning independent studies combined to create a situation that allowed Crowder to create a course with no instructor, register students, and assign coursework and grades. (*Id.*, pp. 52-57.)
- The Martin Addendum noted that 44.9 percent of the enrollments in the anomalous courses were student-athletes. (Martin Addendum, p. 5.) The addendum went on to explain that despite this seemingly high enrollment percentage, it was consistent with the clustering of student-athletes in non-anomalous courses both within the Department and in other parts of the University. In this regard, it was noted that student-athletes comprised 48.9 percent of the enrollments in "cleared" courses in the Department and between

44 and 47.7 percent of the "cleared" courses in seven other departments.² (*Id.*, pp. 3, 5-6.) The addendum explained that student-athletes' enrollments were not evenly distributed across all courses for a variety of reasons, just one of which was that only certain courses matched the student-athletes' available schedules taking into account workouts, practices and games. (*Id.*, p. 5.)

Relevance of Issue 2: In 2011, the enforcement staff knew all of the key details about the anomalous courses. From the sample of student-athletes selected for interviews, it was clear that the use of the anomalous courses by student-athletes was prevalent. Prior to AMA's March 5, 2013, interpretation and prior to the enforcement staff's September 26, 2013, email confirming that there were no NCAA violations to be pursued, the enforcement staff had evidence showing that the anomalous courses existed for 18 years, involved hundreds of courses, and impacted thousands of students nearly half of whom were student-athletes. The enforcement staff's assertion that the Cadwalader Report presented "an entirely new set of facts" and "provided a picture of institutional behaviors not detected before" are simply untrue. There is no "new, relevant, material information" within the meaning of Bylaws 19.02.1 and 19.8.3 and, therefore, the prior proceedings cannot be reopened.

Issue 3: In its Reply, the enforcement staff asserts that (1) the 1.6 million emails collected and reviewed by Cadwalader "were not available" (Staff's Reply, p. 1); (2) 2,000 emails and other documents that were produced during the 2014 investigation that were "not previously available" (*Id.*, p. 9); (3) the University "did not provide the enforcement staff with the entire body of pertinent information" in 2011 (*Id.*); (4) the University "failed to uncover" and "could not locate" the information it now claims was available (*Id.*, p. 10); (5) the enforcement staff "relied on its belief that the institution" had "thoroughly vetted the emails it had produced to Cadwalader" at the beginning of the 2014 investigation (*Id.*); and (6) the enforcement staff amended the NOA after reviewing 900 additional emails that the University provided in September 2015. (*Id.*, pp. 4,10.)

Institution's Response Concerning Issue 3: These statements are inaccurate and misleading as to Boxill's conduct, the anomalous courses and the institution's conduct during the joint investigation. The materials identified and reviewed by Cadwalader could have been requested and reviewed by the Enforcement Staff at any time, including in 2011.

- As is apparent from the discussion regarding Issues 1 and 2, it is the University's position that the enforcement staff has not identified any new information about the key elements concerning the anomalous courses. Rather, the new emails confirm the previously known key elements related to the anomalous courses.
- In the original investigation during 2010 and early 2011, it was learned that a former ASPSA tutor had provided impermissible academic assistance and that conduct was extensively investigated and resulted in a violation being found in

² Cleared courses were courses that had "red flags" that raised a possibility that they were anomalous but that Martin determined were not anomalous after investigation.

the March 12, 2012, Public Infractions Report. In addition in August and September 2011, the conduct of another ASPSA employee in connection with the provision of academic assistance was investigated thoroughly and ultimately the enforcement staff found there was no violation and accordingly no allegation was pursued. As part of the 2010-11 joint investigation, as it does in any case, the enforcement staff made decisions, in consultation with the University, regarding how much information needed to be reviewed to adequately investigate a matter. The fact that the Enforcement Staff made resource allocation decisions not to spend extensive time looking at huge numbers of emails and documents relating to every ASPSA employee does not mean the information was "not available" or that the University withheld or failed to uncover or locate any information. It does, however, mean that the Enforcement Staff should not be allowed to come back several years later to look for additional similar conduct during the same time period by other ASPSA employees.

- The University gave no indication at the beginning of the 2014 investigation that it had "thoroughly vetted" the 1.6 million emails collected by Cadwalader. The 2014 investigation started prior to the Cadwalader Report being issued. Cadwalader kept its investigation and the database it created highly confidential and only shared select information with the University and the NCAA pursuant to the May 28, 2014, communications protocol. Thus, as the enforcement staff is well aware, the initial parts of the 2014 investigation focused on the areas that Cadwalader suggested. Once the Cadwalader Report was issued, the large number of documents that were exhibits or supplementary materials to the report became available to the enforcement staff and the University. The enforcement staff knew the source of these documents and that they were not the product of a "thorough vetting" conducted by the institution. At no point thereafter did the enforcement staff request that the University perform its own search, and at no point prior to August 2015 did the University indicate it had performed such a search.
- Although the University produced 900 emails in September and October 2015, only 242 of those emails related to allegation 1 of the ANOA. The University's liberal approach to disclosure is demonstrated by the fact that the enforcement staff only found that 12 of those 242 emails raised alleged extra benefits related to Boxill that were added to the ANOA. Stated another way, the months of work expended reviewing the massive Cadwalader database simply increased the number of instances that Boxill allegedly provided an extra benefit from 6 to 18 without changing any of the key factors regarding the anomalous courses.

Relevance of Issue 3: There is no "new, relevant, material information" that was not previously available, so the prior decision not to allege violations concerning the anomalous courses and Boxill's conduct is final and cannot be reopened under Bylaws 19.02.1 and 19.8.3.

Issue 4: The enforcement staff has relied on the [redacted] email thread (Allegation 1-r) [redacted]. This email was available to and used by the enforcement staff in its 2011 investigation. In its Reply to the institution's Response to the Amended Notice of Allegations ("ANOA"), the enforcement staff indicates that the institution failed to object to its inclusion in the FI Chart and apparently contends that the University has somehow waived its finality contention regarding the [redacted], email thread.

Institution's Response Concerning Issue 4: It is undisputed that the [redacted], email (Exhibit JUR-1, [redacted] and Exhibit JUR-2, [redacted]); however, the 2011 NOA was not amended to include any allegation regarding the [redacted] email.

In discussions with the University prior to the issuance of the May 20, 2015, Notice of Allegations ("NOA"), the Enforcement Staff agreed and represented that none of the emails and documents that were made available to the Enforcement Staff in 2010-11 would be the subject of an allegation or would be used to support any allegations. When the NOA was released, the University contacted the Enforcement Staff about the [redacted], email being included in the NOA, and the Enforcement Staff stated that it was a mistake and it would be removed. Multiple times thereafter, the University asked that it be removed and the Enforcement Staff indicated it would do so. In correspondence to the enforcement staff in January 2016, five months before the issuance of the ANOA, the above facts were reiterated to the enforcement staff and the University's objections were again raised against the reliance on the [redacted], email (Evrard 1/7/16 Letter to Hosty, p. 17-18). Further, the institution had discussions with the Enforcement Staff on March 24, 2016, and April 21, 2016, regarding various objections the University had to the factual information chart. In those conversations, it was again raised that the University objected to the use of the [redacted], email thread.

Relevance of Issue 4: There is no "new, relevant, material information" concerning the [redacted], email thread, so the prior decision not to allege a violation is final and cannot be reopened under Bylaws 19.02.1 and 19.8.3.

Finality, Fairness in Procedures, and Fundamental Fairness

Issue 5: The enforcement staff has asserted that the 2010-13 proceedings were "a different case," a "separate matter," a "prior case," and a "past case." (Staff's Reply, pp. 9, 11.) These characterizations are inaccurate and inconsistent with the enforcement staff's prior position that this is one case that has been reopened.

Institution's Response Concerning Issue 5: This was not a different case than what was investigated in 2010-11, decided in 2012, and revisited in 2013. One of the most important pieces of evidence to support that point is the enforcement staff's request to the Academic and Membership Affairs Staff (AMA) concerning "...review of a matter that the Enforcement Staff had been working on regarding UNC-Chapel Hill. (University Response, Ex. Jur-5 [emphasis supplied].) In response to the Enforcement Staff's email, the AMA staff noted that "enforcement is asking us to review the UNC case and determine if there are additional issues." (Id.) On

September 26, 2013, the Enforcement Staff confirmed to the University that despite the additional reports and other materials that had been supplied, the Enforcement Staff did not "believe that any modification of the infractions case that was completed on March 12, 2012, is necessary." (University Response, Ex. Jur-6.) Most importantly, in the Enforcement Staff's June 2, 2014, Notice of Inquiry, it decided to "revisit the matter" to determine if additional details had become available that would alter the prior conclusions that there were no violations relating to the anomalous courses. Further, in their subsequent communications, both the enforcement staff and the University referred to the instant proceedings as "reopening" the matter from 2010-13. (See, e.g., Evrard 11/9/15 Letter to Stevenson, pp. 3, 4, 5; Hosty 12/16/15 Letter to Evrard, p. 2; Evrard 1/7/16 Letter to Hosty, p. 1.)

Relevance of Issue 5: The Enforcement Staff is using information in its allegations that has already been investigated and determined not to support allegations of violations.

Issue 6: Bylaw 19.5.9 and fundamental fairness considerations require that all "pertinent" information be disclosed and be considered part of the record of a case. The enforcement staff has asserted that the AMA's March 5, 2013, email message was not required to be provided to the institution apparently because it was not "pertinent."

Institution's Response Concerning Issue 6: The Enforcement Staff contends that communications with AMA in February and March 2013 were made available to the University only "as a courtesy." NCAA Bylaw 19.5.9 plainly provides "for all cases to be considered by the Committee on Infractions, the enforcement staff shall make available to the institution . . . other factual information pertinent to the case." (Emphasis supplied.) There is no basis to contend that those communications are not "pertinent" to the conduct charged in the ANOA. In the message to AMA, the enforcement staff stated that "no violations had occurred in connection with the anomalous courses." The Enforcement Staff noted that among the issues that had been examined and determined not to be violations were:

- Whether academic fraud occurred due to the professor of record not grading papers for some seminar-type courses (even though the institution is allowing students to retain the credit awarded).
- Whether SAs were provided any extra benefits from the way the courses were created or administered.
- Whether the higher enrollment of SAs in the aberrant courses than SAs in the student body is indicative of any violations.

AMA opined there were "no additional issues..."

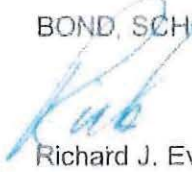
Relevance of Issue 6: AMA had already reviewed these topics. Subsequently, the enforcement staff told the institution that the investigation into these matters was closed. It is fundamentally unfair for the enforcement staff to use the same information to make allegations at a later time.

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The University recognizes that it has provided informational points that appear to sometimes overlap with the substantive facts of the allegations. This overlap is unavoidable. With great care we have attempted to limit the redundancy of the facts of the case to emphasize the procedural and jurisdictional elements. Thank you for your consideration.

Sincerely,

BOND, SCHOENECK & KING, PLLC



Richard J. Evrard

RJE/gm

cc: Ms. Jan Boxill (c/o Randall Roden)
Ms. Lissa Broome
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