



MIKE HUNTER  
ATTORNEY GENERAL

June 26, 2020

Mr. Mark Emmert, President  
National Collegiate Athletic Association  
700 W. Washington Street  
PO Box 6222  
Indianapolis, IN 46206-6222

Dear President Emmert,

I am deeply troubled by the Public Infractions Decision issued by the NCAA Division I Committee on Infractions (COI) on June 5, 2020, laying out the severe punishments Oklahoma State University (OSU) will receive for the corrupt actions of its former associate head basketball coach. As the chief law enforcement officer for the State of Oklahoma, I routinely deal with issues of fairness and justice in punishment, and I am struggling to find those values represented in this decision. Although I believe that the corruption deserved accountability, I have a number of concerns about what appears to be unduly harsh treatment of a state university.

**First, the decision repeatedly mentions exculpatory facts for OSU, but then does not appear to take those facts into account when determining mitigation or the appropriate penalty.** For example, the Committee admits the associate head coach “acted independently and in his own self-interest” when he took cash bribes to steer an innocent and unaware OSU player to financial advisers, it admits the “lack of direct connection between the associate head coach’s employment duties and the purpose and source of the bribes,” it admits the bribes “were not intended to benefit the institution or the men’s basketball program,” it admits the bribery scheme was hatched before the coach even started working at OSU (with no connection to anyone at OSU), and it admits that one of the two underlying incidents involved the coach steering a *non*-OSU athlete and his mother to these advisers. None of those significant facts is mentioned in the “Mitigating Factors” section for OSU, nor are they mentioned in the “Core Penalties” section.<sup>1</sup> As the U.S. Supreme Court has stated, *mitigating factors* are an essential consideration when determining appropriate punishment, with “firm historical roots” in our American traditions. *Alleyne v. United States*, 570 U.S. 99, 117 (2013). And while this is not a legal

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<sup>1</sup> Indeed, the “Core Penalties” section gives almost no explanation for how each penalty was chosen.

proceeding, the Committee appears to have cast aside core principles of justice by failing to account for all the mitigating facts here. The last fact's omission is perhaps the most perplexing, for it seems OSU's harsh punishment is based at least in part on its coach's independent and unethical attempt to steer a player from *another* university to professional advisers—an act almost completely divorced from OSU. This leads to the next point.

**Second, imposing on Oklahoma State an equal “level” of culpability for its coach’s independent and self-centered conduct is illogical, given the facts of this case.** OSU understandably argued that these undisputed facts—namely, the independent and purely selfish actions of a single coach, as well as OSU’s total and immediate cooperation with the NCAA—should lead it to being held responsible at a lower level than the rogue coach himself. The COI rejected this commonsense view: “Although the [associate] head coach acted independently and in his own self-interest, institutions act through their employees and are responsible for their conduct at the same level.” OSU, the Committee argues, completely “owns the conduct” of the coach. But this is not how the employer/employee relationship is typically understood to work. Employers are not usually responsible for every wrong employees commit, and especially not at the same level of culpability. In Oklahoma tort law, for instance, “it is well settled that to impose liability on an employer for its employee’s intentional tort that ... the tortious act must have been committed while the employee was acting within the scope of employment.” *Jordan v. Cates*, 935 P.2d 289, 292 (Okla. 1997). And prosecutors generally treat favorably organizations that cooperate with investigators, recognizing that such entities are the ones best-positioned to probe corrupt acts of their own employees and assist in investigations, and they should be incentivized to help root out such corruption. *See* U.S. SENTENCING GUIDELINES, § 8C2.5(f) & (g).<sup>2</sup>

Here, again, the COI repeatedly admitted the coach’s actions were not within the scope of his employment. Similarly, the separate Interpretations Committee, in ruling for OSU and against the COI on an interpretive issue, wrote that the coach’s “payments were from sources with no affiliation with the institution and unrelated to the coach’s employment responsibilities with the institution.” As such, the Interpretations Committee held that “[s]uch payment would be considered outside athletically related income.” To be sure, the NCAA rules are not the same as Oklahoma or federal law, and vice versa. And OSU has not claimed it should go entirely unpunished. But it surely cannot be the case that the NCAA rules enshrine a strict liability standard that ignores considerations of justice and equity, wherein an entire university is imputed with the same level of responsibility as a single employee for the independent bad actions taken by that employee, no matter how divorced the actions were

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<sup>2</sup> These principles, for example, have been essential in the modern success of enforcing the Foreign Corrupt Practices Act, where encouraging monitoring, compliance mechanisms, self-reporting, and cooperation of U.S. companies doing business abroad has proved key to effectively rooting out corruption. *See* Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary, 111th CONG. 15-16 (2010); *see also* Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Succession Liability and Its Consequences*, 7 N.Y.U. J. L. & BUS. 247, 254-80 (2010).

from the employee's duties or self-serving the employee's behavior, and no matter how much the university cooperated with the subsequent investigation. That makes no sense.

In addition, there is zero indication in the COI decision that OSU knew of, approved, or could even have reasonably discovered the coach's corrupt, secretive, and independent actions. Punishment is meant to ensure organizations have the incentive to "do the right thing" and do not benefit from the corrupt acts of their employees, but here the COI does not point to anything more OSU could have done or any benefit OSU unjustly received. Harshly punishing universities that cooperate or self-report in circumstances like this could easily incentivize universities to fight investigators tooth and nail rather than cooperate.

Any number of hypotheticals would demonstrate how the COI's position is unfair and counterproductive. Say, for example, that the coach had secretly taken bribes to intentionally undermine OSU's operations from within to help a rival school. The COI's logic here would necessarily still lead to holding OSU at the same level of culpability for the coach's actions, even though he was acting in a manner utterly hostile to the school's interests. OSU would still "own the conduct," even if that conduct was intended to hurt the school on behalf of one of its competitors. The school would be doubly harmed: first by corrupt coach and second by the NCAA for being the victim of corruption. The reality of what happened here isn't all that different. OSU's coach took bribes on his own, actively undermined OSU's operations by doing so, and did so partially in relation to a student-athlete *at another school*. And yet, OSU is apparently on the hook for the same level of punishment as the corrupt coach, with none of these facts apparently considered mitigation for the harsh chosen punishments.

***Third, the harsh penalties here punish the players more than anyone, even while the decision itself admits the players did nothing wrong.*** The decision makes it abundantly clear that neither the OSU players nor the staff knowingly did anything wrong. Even the single player who met with financial advisers was "unaware" of the coach's scheme and thought he was meeting the coach to watch game film. And both he and a video coordinator who was inadvertently involved immediately reported the incidents when encouraged to do so. Nowhere does the decision indicate that any players or staff (or other coaches, for that matter) should have done more but didn't. Nevertheless, it is the OSU players that will suffer the brunt of the COI's harshest punishments—the scholarship losses and the postseason ban. Unlike coaches or administrators, college basketball players only have a limited chance to participate in postseason activities—the pinnacle of the sport—and those have now been significantly reduced, both by COVID-19 and this punishment. A postseason ban is not the infamous "death penalty," but it isn't that far off, either.

I find other aspects of the decision troubling as well. The introduction, for instance, contains at least some indication that OSU is being punished for the misconduct of other corruption around the country, and that it is being punished more harshly *ex post facto*. Indeed, Footnote 2 explicitly states that in August 2018—a year *after* OSU fired its coach—the NCAA decided to "deter rule-breaking with harsher penalties," and the OSU punishment has been widely assessed among commentators and analysts as far harsher than expected or deserved based on existing precedent and the facts of this

case. Also worrisome is that some aspects of the decision appear to have been copy-and-pasted from other decisions: Page 18, for example, refers to OSU's former coach as the "head track coach."

In the end, as an Oklahoma State graduate and a father of two former D-1 athletes, I make no claim to be a purely disinterested party on these issues. But that only gives me, like the NCAA, a fierce desire to see any corruption rooted out at my alma mater, especially when it involves an authority figure taking advantage of students and their families. What concerns me deeply, though, is the level of punishment meted out despite OSU's full cooperation and without sufficient explanation, punishment that will invariably and negatively affect the school's innocent student-athletes as much as, if not more than, the leaders and authority figures of the institution.

Sincerely,

A handwritten signature in black ink that reads "Mike Hunter". The signature is written in a cursive, slightly slanted style.

Mike Hunter

OKLAHOMA ATTORNEY GENERAL

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