

DOES THE AVAILABLE INFORMATION WARRANT ALLEGING A VIOLATION?

By: Chuck Smrt

The enforcement staff has the responsibility to allege violations against an institution if the staff believes that: (i) a violation occurred; and (ii) it is reasonable to conclude the NCAA Committee on Infractions will find that a violation occurred. Bylaw 32.7.6.2 indicates that a finding should be made by the Committee only if the information is credible, persuasive, and of a kind on which reasonably prudent persons rely upon in the conduct of serious affairs. The NCAA Enforcement Staff must believe that there is a reasonable expectation for a finding by the Committee prior to alleging a violation.

It is important for member institutions to understand the principles and practical considerations which influence the NCAA Enforcement Staff's decision as to whether to allege a violation. Overall, the staff has a responsibility to operate an efficient and effective enforcement process. Efficiency is important in order to process information in a timely fashion and effectiveness is important to penalize institutions and individuals who have been involved in violations. While alleging a violation without substantiation could be efficient, or possibly effective, the enforcement staff understands that the "jury" in this adjudication process (e.g., the Committee on Infractions), will remain the same for long periods of time. If the Committee believes that the enforcement staff routinely alleges violations that are without substantiation, a poor reputation develops.

As a result, the enforcement staff's standard for alleging a violation is high. Over 80 percent of all allegations made by the enforcement staff are deemed violations by the Committee (approximately 90 percent of the 80 percent is acknowledged by the university). While some may argue that such a high conviction rate is an indication of "rubber stamping" by the Committee, the true reason is that allegations are not made without substantial and credible information. By "setting the bar" very high, the enforcement staff pressures the institution to make the determination that a violation occurred based upon the available information. The law firm of Stier, Anderson and Malone addresses some of these pressures elsewhere in this newsletter.

Questions about the collected information routinely arise when deciding whether to allege a violation, such as: (i) what if it is a one vs. one situation with no corroboration of either party?; (ii) how many persons indicating it occurred cancel out "x" number of persons who said it did not happen?; and (iii) what if the enforcement staff's main witness changes stories, gets arrested for drug use, etc.? As with other regulating processes, no specific guidelines are detailed. Rather, the enforcement staff will look for a preponderance of the evidence and whether that information reaches the Bylaw 32.7.6.2 standard and a reasonable expectation of a finding.

Should the enforcement staff have a lower standard than the Committee? By "lowering the bar," it provides more flexibility for the Committee to make a finding if it believes the Bylaw 32.7.6.2 standard has been met. It also has been argued that the enforcement staff should forward institutional self-reports to the Committee regardless of the standard for a finding utilized by the institution. However, by forwarding allegations that do not meet the normal standards, the enforcement staff abdicates some of its responsibility to the Committee. Further, the Committee continually has affirmed that the enforcement staff has more than a "filtering" responsibility.

During my tenure as the major infractions case coordinator, I stressed to the enforcement staff that it had a significant responsibility to ensure that violations are alleged only when it was very probable that the Committee would make a finding. It is in the best interests of the NCAA enforcement process for the enforcement staff to set a very high standard before it will allege a violation.