

October 17, 2016

VIA EMAIL

Mr. Thomas C. Hosty
Director of Enforcement
National Collegiate Athletic Association
P.O. Box 6222
Indianapolis, IN 46206-6222

Re: The University of North Carolina at Chapel Hill – Case No. 00231

Dear Tom:

I am writing to you on behalf of the University of North Carolina at Chapel Hill (“University”), because there are several statements in the Enforcement Staff’s September 19, 2016, Written Reply (“Staff’s Reply”) that the University believes are inaccurate or incomplete. The statements at issue relate to the University’s jurisdictional contentions, so they will be discussed at the hearing on October 28, 2016. We want to advise you about our position on these statements prior to the procedural hearing so that the Enforcement Staff has the opportunity to correct the misstatements and omissions prior to the hearing. We believe these corrections will help to clarify for the hearing panel the important issues before them, and will ensure that the institution receives a fair hearing.

A. The Enforcement Staff’s Assertions Regarding the Proceedings in 2010-12

The Enforcement Staff has asserted that the 2010-12 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 has been one case that has been reopened.

As will be discussed in detail in Section B below, by September 2011, the key facts regarding the anomalous courses were known, and the Enforcement Staff correctly determined that those key facts did not violate the NCAA constitution or bylaws. As the University has provided new reports about the anomalous courses, the Enforcement Staff has assessed whether the new reports provided a basis to revisit the case – not whether a new or separate case should be commenced. After the University supplied the Martin Report to the Enforcement Staff, on February 12, 2013, the enforcement staff wrote an email to the Academic and Membership Affairs (“AMA”) staff asking for AMA’s 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. Since June 2, 2014, the Enforcement Staff and the University have consistently acknowledged that the current proceeding is a "reopening" of the proceedings that commenced in 2010. (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.)

B. The Enforcement Staff's Assertions Concerning Whether the Bylaws Require it to Provide Access to Case Materials Developed Prior to June 2, 2014

Working off the erroneous statement that the events that took place before June 2, 2014, were a "different," "separate," "prior," and "past" case, the Enforcement Staff asserts that it has "no legislative obligation" to provide the institution with access to materials developed prior to June 2, 2014. The Enforcement Staff contends that communications with AMA in February and March 2013 were made available to the University only "as a courtesy." (Staff's Reply, p. 11.) As noted above, there is no "different" or "separate" case. Most importantly, the relevant bylaw makes no such distinction. 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.) Although the Enforcement Staff may want to make arguments why it is not bound by its February 2013 characterization of the issues related to the anomalous courses that it considered and found did not violate any bylaw or by AMA's March 5, 2013, interpretation that the anomalous courses did not violate any bylaw, there is no basis to contend that those communications are not "pertinent" to the conduct charged in the ANOA. In this regard, the Enforcement Staff's initial email indicated that it had determined no violations had occurred in connection with the anomalous courses, and sought an opinion from AMA confirming that determination and that there were no additional issues that had been overlooked. The Enforcement Staff noted that among the issues that had been examined and determined were not violations included:

- 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" and although the "aberrant classes [were] comprised of a significant number of student-athletes in comparison to non-athletes," the evidence did not validate the existence of a "systematic effort within the African and American Studies department motivated by the desire to assist student-athletes maintaining their eligibility, either in how the courses were created, taught and/or how the grades [were] awarded." (See email from University's Response, Ex. Jur. 5.) That is precisely the alleged conduct that the Enforcement Staff is currently asserting the University failed to monitor and

control. The fact that in 2013 the Enforcement Staff had found and AMA had opined that the underlying conduct was not a violation could not be any more pertinent.

C. The Enforcement Staff's Assertions Concerning What Subjects Were Investigated in 2011 and the Enforcement Staff's Involvement in the Investigation

The Enforcement Staff asserts that, "At no point did the 2012 allegations involve AFRI/AFAM courses, athletics' use of those courses, Julius Nyang'oro's, former chair and professor in the AFRI/AFAM departments, behavior or Boxill's behavior." (Staff Reply, p. 9.) Nearly all of the investigation in August and September 2011 focused on the very issues (as well as the conduct of Deborah Crowder and other ASPSA employees in connection with the anomalous courses).¹

The August and September 2011 portion of the investigation included disclosure of the following information about the anomalous courses:

- Seven student-athletes were interviewed

- Among others, Beth Bridger confirmed

(Bridger,
8/29/11 Int. Trans., pp. 21-22, 24, 30-31, 33-35, 46-50, 59-60, 62-67, 78-79.)

¹ The Staff's Reply indicates that the interviews were conducted by telephone and led primarily by the University. Although the Enforcement Staff participated in some of the interviews by telephone, an individual from the Enforcement Staff was physically present for the interviews of Nyang'oro, Gore, Boxill and seven student-athletes. Further, that individual from the Enforcement Staff was the lead interviewer of the student-athletes and participated in the questioning of the other witnesses.

- Amy Kleissler's message to student-athletes indicating that Crowder would be retiring in one week and stating that "IF YOU WOULD PREFER THAT SHE READ AND GRADE YOUR PAPER RATHER THAN PROFESSOR NYANG'ORO" the paper needed to be 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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85.)

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

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26-33, 39-41.)

(Mutima, 8/26/11 Int. Trans., pp.

Trans., pp. 33-38.)

(Mutima, 8/26/11 Int.

² Kleisser's email message was included in the staff's September 19, 2016, Reply acknowledging that it had reviewed this information in 2011.

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

pp. 36-38.) (Id.,

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30.) (McMillan, 8/25/11 Int. Trans., pp. 24-27,
(Id., p. 13.)

Similarly, the Enforcement Staff's assertion that Jan Boxill's behavior was not previously at issue is inaccurate and should be corrected.

(Boxill, 9/1/11 Int. Trans., pp. 7-11, 18-21, 24-29, 33, 38-42, 47-48, 55-56, 58-59.)

D. The Enforcement Staff's Assertions Related to the "New" Information Revealed by the Cadwalader Report

The Enforcement Staff asserts 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].) The discussion in Section C alone is sufficient to establish that these statements are not accurate. However, in addition to the information provided to the Enforcement Staff in August and September 2011, as you are aware, the University continued supplying information to the Enforcement Staff both proactively and in response to requests made by the Enforcement Staff. Among the items disclosed by the University were the reports of the various investigations. These documents contain additional information that further demonstrates the inaccuracies of the above statements.

On May 2, 2012, Jonathan Hartlyn and William Andrews issued a document entitled "Review of Courses in the Department of African and Afro-American Studies, College of Arts and Sciences" ("Hartlyn Andrews Report"). The Hartlyn Andrews Report identified the time period that was

reviewed (Summer Session I, 2007 through Summer Session II, 2011), described the documents and records that were reviewed, and described the more than 20 individuals they interviewed. 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 University supplied a copy of the Hartlyn Andrews Report to the Enforcement Staff.

On July 26, 2012, the Report of the Subcommittee of the Faculty Executive Committee issued a report ("FEC Report".) This report identified the 31 individuals who were interviewed and what documents and records were reviewed (FEC Report, pp 2-5.) The report stated that the evidence indicated that ASPSA academic advisors 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.

On December 19, 2012, James Martin issued a report that he supplemented via an addendum issued on January 24, 2013 (the "Martin Report" and the "Martin Addendum"). 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.³ (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.) The University provided the Martin Report and the Martin Addendum to the Enforcement Staff on January 24, 2013.

In sum, 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.

E. The Enforcement Staff’s Assertions Concerning the Availability of Emails and the Institution’s Alleged Failure to Provide Pertinent Information

In the University’s Response, it was noted that under Bylaw 19.02.02 only “relevant, material information that could not have been reasonably obtained prior to the Committee on Infractions hearing” can be used to reopen a previously decided matter. The University asserted that no such new information exists regarding the anomalous courses or the Boxill allegations.

In the Staff’s Reply, it is asserted 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); and (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.). These statements are inaccurate and misleading both as to Boxill’s conduct and the anomalous courses. The materials identified and reviewed by Cadwalader could have been requested and reviewed by the Enforcement Staff at any time, including in 2011.

1. Anomalous Courses

As is apparent from the discussion in Sections B-D, 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.

³ 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.

2. Boxill's Conduct

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 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.

3. The "Vetting" of the Cadwalader Emails

Throughout this investigation, the University gave no indication at the beginning of the investigation that it had "thoroughly vetted" the 1.6 million emails collected by Cadwalader. It was not until September 2015 that the University, in consultation with the NCAA enforcement staff, reviewed the 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.

F. The Enforcement Staff's Assertion That the University Did Not Object to Allegation 1-r

The Enforcement Staff asserts that the University did not object to the inclusion of the email when the Enforcement Staff listed that email in the factual information chart. (Staff's Reply, p. 12.) This assertion is without any basis.

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 , 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. On pages 17-18 of my January 7, 2016, letter to you, I reiterated the above facts and the University's objections to the reliance on the [redacted] email. Further, I 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, I raised the University's objections to the use of the [redacted], email thread.

G. The Enforcement Staff's Assertions Regarding the Cadwalader Report

The Enforcement Staff contends that the University objects to the inclusion of the Cadwalader Report in this matter in an effort to omit damaging information. (Staff's Reply, p. 13.) This mischaracterizes both the University's position and its motivation. The University very clearly has objected only to the use of the portions of the Cadwalader Report that recite statements reportedly made by witnesses, such as Nyang'oro and Crowder, to the Cadwalader investigators in interviews that were not performed in a manner consistent with the requirements of NCAA Bylaws 19.5.4 through 19.5.8, as well as conclusions based on those statements. (University Response, pp. 22-23.)

On multiple occasions during the investigation, the Enforcement Staff expressly agreed with this approach. In one particular instance that took place, shortly after the release of the Cadwalader Report, the University asked if the Enforcement Staff intended to rely on Cadwalader's summary of its interviews of Nyang'oro and Crowder and conclusions drawn therefrom. The University indicated that if the Enforcement Staff was going to rely on those interviews, the University would want to conduct certain interviews with others to explore the content of those summaries. The Enforcement Staff assured the University that they were not going to rely on the interview statements for the reasons that the University articulated in its Response and the University, therefore, did not conduct certain interviews.

The University has not and does not object to the documents, emails, and statistical information included in or attached to the Cadwalader Report. Further, the University has never tried to omit or hide from damaging information. It has been extraordinarily open about the events that occurred. However, the University, as a member of a bylaw driven membership association, is abiding by and requesting that the Enforcement Staff adhere to the membership-promulgated rules setting forth evidentiary requirements that must be present in order to ensure the integrity of the enforcement process.

H. The Enforcement Staff's Assertions Concerning the Reason for the Issuance of an Amended Notice of Allegations

The Enforcement Staff states that after reviewing 900 additional emails that the University provided in September 2015, "the enforcement staff revised its allegations and issued an amended notice of allegations." (Staff's Reply, pp. 4, 10.) This statement is misleading in two respects.

First, the University in an abundance of caution to avoid any contention that it did not disclose any arguably pertinent information produced 900 emails in September and October 2015. Of those emails, 658 arguably related to what was Allegation 1(a) in the NOA. The other 242 related to Boxill communicating with student-athletes about the content of their academic work. The University's very 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 in 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. It did not add any emails that changed any of the key factors regarding the anomalous courses.

Second, the Enforcement Staff has omitted mentioning the second reason for the issuance of the ANOA – the removal of what was Allegation 1 in the NOA. As you know, the University and the Enforcement Staff engaged in extensive communications concerning the former Allegation 1, and, in particular, former Allegation 1(a). These communications included:

- My October 1, 2015, letter to Duncan;
- Naima Stevenson's October 23, 2015, letter to me;
- My November 9, 2015, letter to Stevenson;
- Your December 15, 2015, letter to me.
- My January 7, 2016, letter to you.

The University argued that the conduct asserted in former Allegation 1(a) [ASPSA advisors allegedly (1) requesting that courses be offered, (2) registering student-athletes, (3) obtaining assignments on behalf of student-athletes, (4) suggesting assignments, (5) turning in papers for student-athletes, and (6) recommending grades for student-athletes] was not violative of any bylaw, and the Enforcement Staff had known about this conduct in 2011 and correctly determined it was not a violation. The University asserted that the Enforcement Staff had known about more instances of the conduct than the staff had acknowledged, but that in any event, the frequency or volume of the conduct did not alter whether the conduct violated any bylaw. After considerable debate, the NCAA Enforcement Staff correctly omitted the former Allegation 1 from the ANOA.

The deletion of former Allegation 1(a) from the ANOA is important because the Enforcement Staff has relied on some of the same factors cited in the former Allegation 1(a) (registering student-athletes, obtaining assignments, turning in papers) in support of its current arguments without acknowledging that the ANOA withdrew any assertion that the ASPSA advisors violated any bylaw by engaging in this type of conduct. (Staff's Reply, p. 35.)

I. Conclusion

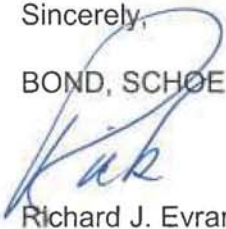
The University requests that the Enforcement Staff correct each of the inaccurate or incomplete statements that were made in the Staff's Reply and are described above. We ask that the corrections be provided directly to all individuals who received or were otherwise given access to the Staff's Reply. The University is making this request to help ensure that it has an opportunity to receive a fair and impartial hearing that is not influenced by inaccurate or misleading information that could prejudice the Committee on Infractions as it makes important decisions about the procedural issues related to this case. In the event that the Enforcement Staff does not correct the above items, the University will request that the Committee on Infractions supplement the record to include this letter.

Mr. Thomas C. Hosty
October 17, 2016
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Thank you and please let me know if you have any questions.

Sincerely,

BOND, SCHOENECK & KING, PLLC



Richard J. Evrard

RJE/mmh

cc: Ms. Lissa Broome
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