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TERMINATION OF COLLEGE COACHING CONTRACTS: WHEN DOES ADEQUATE CAUSE TO TERMINATE EXIST AND WHO DETERMINES ITS EXISTENCE?

MARTIN J. GREENBERG*

I. INTRODUCTION: JIM O’BRIEN’S BACKGROUND

Jim O’Brien arrived on the campus of The Ohio State University (OSU) in the spring of 1997. O’Brien was hired as OSU’s head men’s basketball coach on April 12, 1997. He came to OSU with over twenty years of experience coaching basketball at the collegiate level. O’Brien’s college coaching career began in 1977 as an assistant at the University of Connecticut. After five years as an assistant at Connecticut, O’Brien got his first head coaching position at St. Bonaventure University. He coached at St. Bonaventure from 1982 to 1986 before moving on to Boston College, where he served as head coach from 1986 to 1997.

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Jay S. Smith, a third-year law student, who graduated from the University of Wisconsin-La Crosse and is a NSLI Sports Law Certificate candidate, has been instrumental in the drafting and research of this article. Without his contribution, his dedication to detail and extraordinary effort, this article would not have been possible.

This article is dedicated to the staff of Wisconsin State Fair Park, who over the last four years under my chairmanship, has taken a troubled state asset and turned it around into a profitable venture, has saved one of the best state fairs in the country from being bankrupted, and has given Wisconsin State Fair Park a new hope for the future.

1. Note that O’Brien’s records and the achievements of OSU listed in this section do not reflect changes that occurred when the NCAA erased all of OSU’s records from 1999-2002.
3. Id.
4. Id.
6. Id.
7. Id.
After eleven successful seasons at Boston College, OSU hired O'Brien. O'Brien quickly found success at OSU, leading the team to the Final Four in 1999. O'Brien also led the program to Big Ten regular season co-championships in 2000 and 2002 and the Big Ten Tournament Championship in 2002. Under O'Brien, OSU made a school record four consecutive National Collegiate Athletic Association (NCAA) tournament appearances from 1999 to 2002. Due to the success of his team, O'Brien also received several individual honors for his coaching. Following OSU’s Final Four run in 1999, O'Brien received numerous National Coach of the Year honors. He was also selected by the Big Ten media as the Big Ten Coach of the Year in 1999 and 2001.

In twenty-one seasons as a head coach, Jim O'Brien accumulated a 354-289 win-loss record. His record in six seasons at OSU was 119-72. O'Brien-coached teams have participated in the NCAA tournament on seven occasions and in the postseason NIT tournament five times.

II. EVENTS SURROUNDING JIM O'BRIEN'S TERMINATION

Despite O'Brien's success as the OSU men's basketball coach, OSU terminated O'Brien's employment on June 8, 2004. O'Brien's dismissal was the result of events that began in 1998. The series of events that led to O'Brien's firing began when Aleksandar Radojevic arrived on the campus of OSU for an unofficial recruiting visit on May 14, 1998. Radojevic, a 7'3" player from Yugoslavia, was twenty-one years old at the time. At the time of his visit, Radojevic was enrolled at Barton Community College in Kansas.
and played on the basketball team at Barton.22 Radojevic was planning to transfer to a four-year school, and OSU was one of many schools that was recruiting him.23

In early September of 1998, O'Brien made an official recruiting visit to Radojevic at Barton.24 While O'Brien was on the visit, Radojevic received word that his father had passed away in Yugoslavia.25 Radojevic was upset about his father's death and expressed to O'Brien his "concern for his mother who was living in a war-torn region of Yugoslavia."26 Radojevic also told O'Brien he regretted being unable to provide financial assistance to his mother.27 Radojevic felt he could not return to Yugoslavia to help his mother because he feared that he would be forced into military service.28

Within a few weeks of his visit to Barton, O'Brien learned that in 1996 Radojevic had signed a contract to play basketball for a professional team in Yugoslavia and had received compensation for his play.29 Based on this information, O'Brien determined that Radojevic was a professional basketball player, and therefore, was ineligible to play college basketball.30 Despite knowing this information, O'Brien and his staff continued to recruit Radojevic.31 On November 11, 1998, Radojevic signed a National Letter of Intent to play for OSU.32

On December 13, 1998, Radojevic went to OSU for an official visit.33 Around the time of the visit or shortly thereafter, O'Brien was asked to provide financial assistance to the Radojevic family.34 The request originated from a man named Spomenko Patrovic who lived in New York City.35 The details of the request and Patrovic's relationship to Radojevic are unclear; however, it appears that Patrovic was either Radojevic's relative or his legal guardian.36 Regardless of these details, in late December of 1998 or early

22. Id.
23. Id.
24. Id. ¶ 5.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id. ¶ 6.
30. Id.
31. Id. ¶ 7.
32. Id.
33. Id.
34. Id. ¶¶ 8-9.
35. Id. ¶ 9.
36. Id.
January of 1999 O’Brien took $6000 in cash from his desk, placed it in an envelope, and instructed an assistant coach to deliver the money to Patrovic. O’Brien was to forward the money on to the Radojevic family in Yugoslavia.

O’Brien characterized the money as a loan, but there was no written loan agreement or specified terms of repayment. O’Brien claimed that he believed the loan did not violate NCAA rules because Radojevic was already a professional basketball player and lending money to the family of a professional basketball player is not prohibited by NCAA rules. O’Brien also claimed that the Radojevic family’s situation was his motivation for the loan, not Aleksandar Radojevic’s potential as a basketball player.

In February of 1999, the NCAA informed OSU that Radojevic had signed a professional basketball contract in 1996. OSU immediately declared Radojevic ineligible and applied to the NCAA for Radojevic’s reinstatement as an amateur. The application was denied, and, on May 24, 1999, OSU’s appeal of the decision was denied. Radojevic never enrolled at OSU or played basketball for the university. In the summer of 1999, Radojevic entered the National Basketball Association (NBA) draft and was selected twelfth overall by the Toronto Raptors. On September 15, 1999, O’Brien signed an NCAA Certificate of Compliance. By signing the certificate, O’Brien certified that during the 1998-99 academic year he had reported any NCAA rules violations that he was aware of. While it is unclear if it was a violation of NCAA rules, O’Brien did not report giving the money to the Radojevic family.

The 1998-99 season was an extremely successful season for O’Brien and his basketball team. The team earned a share of the Big Ten Conference title and advanced to the Final Four in the NCAA tournament. Following the
season, O’Brien won several coaching honors. O’Brien was also rewarded by OSU for his successful season. OSU initiated discussions with O’Brien regarding a new contract. O’Brien and OSU reached an agreement, which took effect on September 12, 1999. The new contract was clearly more favorable to O’Brien than his original contract with the university. The new contract gave him an eight-year extension and significantly increased his compensation.

Radojevic and the events of 1998 and 1999 seemed to be in the past for O’Brien until the OSU spring football game on April 24, 2004. At the game, O’Brien pulled OSU Athletic Director Andy Geiger aside and told him about the money he had loaned to the Radojevic family. O’Brien explained to Geiger that the loan would likely be revealed to the public in a lawsuit involving a woman named Kathy Salyers. O’Brien told Geiger he wanted him to hear about the Radojevic loan from him personally. O’Brien also explained to Geiger that his motivation for providing the loan was purely to help a family in need.

In May of 2004, Geiger saw the deposition testimony from the Salyers lawsuit. Following the spring football game, Geiger and O’Brien did not

51. Id.
52. Id. ¶ 15.
53. Id. ¶ 17.
54. Id.
55. Id.
56. Id. ¶ 18.
57. Id.
58. The lawsuit was filed by Salyers against OSU alumni boosters, Dan and Kim Rostovic in August of 2003. Kathy Lynn Gray, Salyers: OSU Case Made Her an Outcast: NCAA Probe Hurt Her, too, Whistle-Blower Says, COLUMBUS DISPATCH, Mar. 27, 2006, at 01.A. Salyers claimed the Rostovics had failed to pay her $1000 a month for housing Savovic. Id.; Aaron Portzline & Kathy Lynn Gray, NCAA Outlines OSU’s Failures, COLUMBUS DISPATCH, May 17, 2005, at 01A. Salyers had provided numerous impermissible benefits to former OSU player Slobodan Savovic, including housing. Gray, supra note 58; Portzline & Gray, supra note 58. Salyers alleged that the Rostovics promised to reimburse her for all of the costs she incurred related to Savovic. Gray, supra note 58; Portzline & Gray, supra note 58. In her lawsuit, Salyers claimed she was owed $600,000. Gray, supra note 58; Portzline & Gray, supra note 58. Salyers and the Rostovics settled the lawsuit, but the terms of the settlement were not disclosed. Gray, supra note 58; Portzline & Gray, supra note 58. Savovic, also from Yugoslavia, and Salyers had contact with Radojevic during the recruiting process. Gray, supra note 58; Portzline & Gray, supra note 58. O’Brien feared the Radojevic loan would be revealed during the lawsuit. See Gray, supra note 58; Portzline & Gray, supra note 58. The violations involving Savovic were part of the NCAA investigation and the March 10, 2006 infractions report. Joe LaPointe, Buckeyes Remain Eligible for NCAA Tournament, N.Y. TIMES, Mar. 11, 2006, at D2.
60. Id.
61. Id. ¶ 20.
speak to each other again until the Big Ten basketball meeting in Chicago from May 18-20. However, on May 26, 2004, O'Brien, Geiger, and Julie Vanatta (OSU's legal counsel) had a brief meeting in Columbus, Ohio. At the meeting, O'Brien was informed that the loan had been reported to the NCAA and Geiger suggested O'Brien hire an attorney. The following day, O'Brien called Geiger and asked him if he was going to be fired. According to O'Brien, Geiger told him he was not going to be fired. O'Brien also offered to resign from his position. A few days later, O'Brien informed OSU that he had hired attorney James Zeszutec. On June 4, 2004, Zeszutec sent a letter informing OSU that he had been hired as O'Brien's attorney. OSU did not respond to the letter.

On the morning of June 8, 2004, O'Brien was summoned to a meeting at Geiger's office. At the meeting, Geiger gave O'Brien a letter notifying him of OSU's intent to terminate him as the head coach of the men's basketball team. The letter read:

As you know, you informed me on April 24, 2004, that you had paid approximately six thousand dollars ($6,000) to Alex Radojevic, a men's basketball prospective student-athlete. You admitted that you gave him this money sometime after Mr. Radojevic signed his National Letter of Intent to attend The Ohio State University (November 11, 1998), but before May 24, 1999, the date that Mr. Radojevic's request for reinstatement to the NCAA was denied by the NCAA's Subcommittee on Student-Athlete Reinstatement. Although you explained that you gave him the money to assist him with his family's dire financial situation in light of the Serbian war, that reason, however noble, does not excuse your action.

In our discussion on April 24, 2004, you admitted that you knew your
action was a violation of NCAA rules, and you are correct. In particular, it is a recruiting inducement in violation of NCAA Bylaw 13.2.1. Despite the fact that the University was no longer actively recruiting Mr. Radojevic after he signed his National Letter of Intent, he is considered a “prospect” according to NCAA rules until he officially registers and enrolls in a minimum full-time program of studies and attends classes for autumn quarter. Furthermore, for each of the past five years, you violated NCAA Bylaw 30.3.5 which, by your signature on the annual NCAA Certification of Compliance form, requires you to confirm that you have self-reported your knowledge of any NCAA violations. We have self-reported this matter and other allegations related to the program to the NCAA.

Section 4.1(d) of your employment agreement requires you to “know, recognize and comply” with all applicable rules and regulations of the NCAA and to “immediately report to the Director [of Athletics] and to the Department of Athletics Compliance Office” if you have “reasonable cause to believe that any person . . . has violated . . . such laws, policies, rules or regulations.” You have materially breached this important term of your contract.

Unfortunately, your admitted wrongdoings leave the University no choice. Pursuant to Section 5.1(a) of your employment agreement, we intend to terminate such agreement for cause, effective at 5:00 p.m. today, June 8, 2004. Rather than being terminated for cause, you may choose to terminate your employment agreement (including your Letter of Agreement regarding supplemental compensation for appearing on radio and television programs, and for summer basketball camps and miscellaneous bonuses and benefits) and resign from your position as head men’s basketball coach provided that you agree to continue to cooperate fully with the University and the NCAA in our investigation of issues related to the men’s basketball program. Under either scenario, the University has no obligation to provide compensation or benefits (other than the availability of continued health benefits) to you past the effective date of such termination or resignation.

If you choose to resign, you may sign the statement below and return this letter to me by 1:00 p.m. today. At 3:00 p.m. today, the University has scheduled a press conference to explain these matters as the University believes that it, and not another entity, should take the lead to inform the public of this unfortunate news. The University will announce your separation from the University at the press conference.
If you have not resigned in the manner set forth in this letter by 1:00 p.m. today, then the University will announce that it will terminate your employment agreement for cause and we will do so. If you have resigned in the manner set forth in this letter by 1:00 p.m. today, then the University will announce at its press conference that you have resigned and that the University has accepted your resignation.

I deeply regret that we have come to this circumstance. After we have celebrated so much success together, this is very hard.\textsuperscript{74}

Later that morning, Zeszutec contacted Geiger’s office in an attempt to gain more time for O’Brien to consider his options.\textsuperscript{75} Geiger refused the request, and O’Brien’s termination was announced the same afternoon.\textsuperscript{76}

The allegations of misdeeds involving Radojevic and Savovic resulted in an NCAA investigation of OSU. The NCAA released its findings about OSU in an infractions report on March 10, 2006, twenty-one months after O’Brien’s termination.\textsuperscript{77} In the infractions report, the NCAA placed OSU on three years of probation and levied numerous sanctions against OSU for its violations.\textsuperscript{78} The sanctions included erasing all of the OSU basketball team’s records from 1999-2002.\textsuperscript{79} Erasing these records means OSU did not win any games from 1999-2002.\textsuperscript{80} OSU was also stripped of all its achievements during those years, including the 1999 Final Four run, Big Ten regular season co-championships in 2000 and 2002 and the Big Ten Tournament Championship in 2002.\textsuperscript{81} Erasing the records means that OSU’s and O’Brien’s records have been adjusted to reflect these changes.\textsuperscript{82}

OSU will also need to pay back approximately $800,000 of tournament revenue the school received from 1999-2002.\textsuperscript{83} Additional penalties include a public reprimand and a reduction in campus visits for recruits.\textsuperscript{84} However, OSU was not banned from future postseason play and was not cited for a “lack

\begin{footnotes}
\footnote{74. Letter from Andy Geiger, Dir. of Athletics, The Ohio State Univ., to James J. O’Brien, Head Men’s Basketball Coach, The Ohio State Univ. (June 8, 2004) (on file with author).}
\footnote{75. O’Brien, 2006-Ohio-1104, 2006 Ohio Misc. LEXIS 52, ¶ 27.}
\footnote{76. Id.}
\footnote{77. LaPointe, supra note 58.}
\footnote{78. Id.}
\footnote{80. Id.}
\footnote{81. Id.}
\footnote{82. Id.}
\footnote{83. LaPointe, supra note 58.}
\footnote{84. Id.}
\end{footnotes}
of institutional control.” The NCAA also did not take any scholarships away other than the two OSU had already voluntarily dropped.

III. TERMINATION PROVISIONS OF O’BRIEN’S CONTRACT

The basis of O’Brien’s lawsuit against OSU was that he believed there was not “cause,” as it was defined in his contract, for his termination. College basketball coaches’ contracts usually contain separate “termination for cause” and “termination without cause” provisions. Termination for cause provisions provide for circumstances under which the university may terminate the coach and in doing so, the university is relieved of its duty to further provide the coach with compensation and benefits due under the contract. Termination without cause provisions provide what the coach’s compensation will be if the university chooses to terminate the coach without having cause. Dismissal of a coach for any reason other than those laid out in the termination for cause provision will be a termination without cause.

Like most coaching contracts, O’Brien’s contract with OSU contained termination for cause and termination without cause provisions. Under O’Brien’s contract, OSU’s ability to terminate O’Brien for cause was limited to the occurrence of one or more of the following:

(a) a material breach of this agreement by Coach, which Coach fails to remedy to OSU’s reasonable satisfaction, within a reasonable time period, not to exceed thirty (30) days, after receipt of a written notice from Ohio [S]tate specifying the act(s), conduct or omission(s) constituting such breach;

(b) a violation by Coach (or a violation by a men’s basketball program staff member about which Coach knew or should have known and did not report to appropriate Ohio State personnel) of applicable law, policy, rule or regulation of the NCAA or the Big Ten Conference which leads to a “major” infraction investigation by the NCAA or the Big Ten Conference and which results in a finding by the NCAA or the Big Ten Conference of lack of institutional control over the men’s basketball program or which results in Ohio State being sanctioned by the NCAA or the Big Ten Conference in one or more of the following

85. Id.
86. Id.
88. EMPLOYMENT CONTRACT BETWEEN THE OHIO STATE UNIVERSITY AND JAMES O’BRIEN § 5.1-3 (July 1, 1999) [hereinafter O’BRIEN CONTRACT].
ways:
(i) a reduction in the number of scholarships permitted to be allocated;
(ii) a limitation on recruiting activities or reduction in the number of evaluation days;
(iii) a reduction in the number of expense-paid, official recruiting visits;
(iv) placement of the men’s basketball program or Ohio State on probation;
(v) being banned from NCAA post-season play for at least one season;
(vi) being banned from regional or national television coverage for at least one basketball season with a consequent loss by Ohio State of television revenues for at least one basketball season; or
(c) any criminal conduct by Coach that constitutes moral turpitude or any other improper conduct that, in Ohio State’s reasonable judgment, reflects adversely on Ohio State or its athletic programs. 89

OSU had cause to fire O’Brien only if one or more of these three occurrences were to arise. The three broad occurrences covered by the termination for cause provision were material breaches of contract in violation of NCAA or Big Ten rules, which resulted in a sanction, and amounted to conduct that constitutes moral turpitude or reflects adversely on OSU. College basketball coaches’ contracts often cover all three of these occurrences in a termination for cause provision because they represent the major concerns universities have about coaches’ conduct.

The termination for cause provision of O’Brien’s contract required OSU to give O’Brien written notice of its intention to terminate his employment and to specify the contractual provision upon which it was firing him. 90 The contract did not specify any required amount of notice. The contract also provided that if terminating for cause, OSU had no obligation to provide any further compensation to O’Brien as of the date of termination. 91

The termination without cause provision of O’Brien’s contract provided for substantial liquidated damages if OSU fired him without cause. He was to receive twelve months of his base salary ($175,000) and his normal benefits. 92

89. Id. § 5.1.
90. Id. § 5.1.1.
91. Id. § 5.1.2.
92. Id. §§ 5.2-3.
The twelve months of salary and benefits was subject to a "set-off" provision, whereby he would not be paid this compensation if he were employed in a similar position during the twelve months following his dismissal. However, O'Brien was under no duty to mitigate damages if his employment was terminated after June 30, 2003. Additionally, if OSU terminated O'Brien without cause, it owed him additional liquidated damages as compensation "for the loss of collateral business opportunities." This provision was to provide O'Brien the bulk of his liquidated damages if OSU fired him without cause. This provision stated that O'Brien would be paid "an amount equal to three and one-half (3.5) times the product of (y) the Coach's then current base salary . . . and (z) the number of years remaining under the term of this agreement." These additional damages were to be paid in one lump sum within thirty days of O'Brien's termination. O'Brien's attorneys calculated that he was owed $3,295,870 under this provision.

O'Brien's contract also contained a "Termination by Coach" provision. The "Termination by Coach" provision in O'Brien's contract read as follows:

If Coach terminates this agreement before the conclusion of the 2004-2005 basketball season, regardless of the number of extension years he has earned pursuant to Section 3.4 of this agreement, Ohio State will not be liable to pay Coach any compensation or damages of any kind. If Coach terminates this agreement after the conclusion of the 2004-2005 basketball season, regardless of the number of extension years he has earned pursuant to Section 3.4 of this agreement, Ohio State shall pay to Coach (on a monthly basis) Coach's monthly budgeted salary for the balance of the contract term or for two (2) years, whichever is lesser, and employee benefits paid by Ohio State to Ohio State's senior administrative and professional employees as determined by Ohio State's Board of Trustees, provided that Coach makes himself available for mutually agreed-upon special projects on behalf of Ohio State. Coach shall not unreasonably make himself unavailable. Ohio State's obligation to pay such amount to Coach shall cease if Coach accepts a comparable employment position (for example, media

93. Id. § 5.2(a).
94. Id. § 5.2(b).
95. Id. § 5.3.
96. Id. § 5.3(b).
97. Id. § 5.3.
99. O'BRIEN CONTRACT, supra note 88, § 5.4.
commentator, professional head basketball coach or NCAA Division I head basketball coach). 100

IV. PLEADINGS OF THE CASE

Following his termination in June of 2004, O’Brien filed a lawsuit against OSU alleging that OSU did not have cause to terminate him under Section 5.1 of his contract. 101 When OSU dismissed O’Brien, it asserted it had cause to fire him under Section 5.1(a) of the contract. 102 OSU contended it had cause under this provision because O’Brien had committed a “material breach” of his contract. 103 In its letter notifying O’Brien of his termination, OSU alleged that O’Brien had breached Section 4.1(d) of the employment agreement. 104 This provision required O’Brien to know and comply with the rules and regulations of OSU, the NCAA and the Big Ten Conference. 105 It also required O’Brien to report to the proper OSU authorities any violation that he had reasonable cause to believe had occurred. 106 OSU claimed O’Brien’s loan to the Radojevic family was a violation of NCAA bylaws, and therefore, by committing this violation, O’Brien had breached Section 4.1(d) of his contract. 107

O’Brien contended that OSU did not have cause to terminate him “for cause” under Section 5.1(a) because this section of the employment agreement does not apply to alleged or actual violations of NCAA bylaws. 108 O’Brien claimed that the alleged and actual NCAA violations are addressed in Section 5.1(b). 109 O’Brien asserted that Section 5.1(b) defines when a violation of NCAA Bylaws will constitute a material breach and therefore will justify a “for cause” termination. 110 O’Brien contended that his actions did not constitute a material breach under Section 5.1(b) because this section requires

100. Id.
103. Id.
104. Id.
106. Id.
109. Id. ¶¶ 33-34.
110. Id. ¶ 34.
that the alleged violation lead to an "investigation and which results in a finding by the NCAA . . . of lack of institutional control . . . or OSU being sanctioned by the NCAA."\textsuperscript{111} When OSU terminated O'Brien, the NCAA had not issued a finding of lack of institutional control against OSU, nor had it issued any sanctions against OSU.\textsuperscript{112} Because the standard for a material breach under Section 5.1(b) had not been met, O'Brien claimed OSU did not have cause to fire him under this section.\textsuperscript{113}

In addition to his claim that OSU did not have cause to terminate him, O'Brien also alleged in his complaint that OSU had violated the contract by not paying him the liquidated damages he was owed for being terminated without cause.\textsuperscript{114} In his complaint, O'Brien alleged that he was owed not less than $3,484,205 in liquidated damages under the contract.\textsuperscript{115} He was also seeking additional compensatory damages for OSU's breach of the contract for a total of $6,000,000.\textsuperscript{116}

OSU's main defense was to deny O'Brien allegations and contend that its actions were justified under the contract.\textsuperscript{117} OSU claimed it had "cause" for terminating O'Brien and that it did so properly under the employment agreement.\textsuperscript{118} OSU also asserted multiple other affirmative defenses. Its second defense was that O'Brien's claims were "barred by the doctrines of waiver, estoppel and laches."\textsuperscript{119} Another defense was that O'Brien's claims were barred by the doctrine of unclean hands.\textsuperscript{120} A fourth defense of OSU was that the claims were barred by O'Brien's own breaches of the contract.\textsuperscript{121} The final defense asserted by OSU was that the claims were "barred or reduced by [O'Brien's] failure to mitigate his alleged damages."\textsuperscript{122}

\begin{itemize}
\item \textsuperscript{111} Id. ¶ 35.
\item \textsuperscript{112} As was explained earlier in this article, the NCAA issued penalties against OSU March 10, 2006. The penalties included numerous sanctions, but did not include a finding of "lack of institutional control."
\item \textsuperscript{113} Pl.'s Compl. ¶ 36, O'Brien, 2006-Ohio-1104, 2006 Ohio Misc. LEXIS 52 (No. 2004-10230).
\item \textsuperscript{114} Id. ¶ 44-45.
\item \textsuperscript{115} Id. ¶ 46.
\item \textsuperscript{116} Id. ¶ 52.
\item \textsuperscript{117} Def.'s Answer, ¶ 5 O'Brien, 2006-Ohio-1104, 2006 Ohio Misc. LEXIS 52 (No. 2004-10230).
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Id. ¶ 54.
\item \textsuperscript{120} Id. ¶ 55.
\item \textsuperscript{121} Id. ¶ 56.
\item \textsuperscript{122} Id. ¶ 57.
\end{itemize}
Every college basketball coach’s contract will contain termination provisions similar to those in O’Brien’s contract. These provisions will usually define what circumstances give the university cause to terminate the coach. While the basic content of these provisions will vary little from contract to contract, no two provisions are exactly alike. The different language used in these provisions can cause a significant variation in their meaning.

The language of O’Brien’s contract was favorable to O’Brien. The agreement greatly restricted OSU’s ability to terminate O’Brien for cause. Comparing O’Brien’s contract to those of other Big Ten coaches, he enjoyed advantages that many of his counterparts did not. One example of a coach who had a less favorable termination for cause provision is University of Minnesota coach, Dan Monson. Monson’s contract states:

The University may terminate this Agreement, suspend payments required hereunder, or take other disciplinary action as it deems appropriate for just cause. “Just cause” as used in this Agreement shall include, but not be limited to, the following:

a. a major violation, as determined by the University, of a rule of a Governing Association by or involving Coach;

b. a major violation, as determined by the University, of a rule of a Governing Association by an assistant coach of the men’s intercollegiate basketball team, any University employee for whom Coach is administratively responsible, or representative of the University’s athletic interest which, in the judgment of the University, Coach knew or should have known about with reasonable diligence and oversight;

c. multiple secondary violations, as determined by the University, of the rules of a Governing Association in or related to the men’s intercollegiate basketball program;

d. a substantial failure to perform the duties required by Section 1.2 of this Agreement.\(^\text{123}\)

One way in which Monson’s contract is less favorable than O’Brien’s is that it does not limit cause to those occurrences listed in the contract. It says

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123. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF MINNESOTA AND DAN MONSON § 3.1 (July 24, 1999) [hereinafter MONSON CONTRACT].
cause includes, "but [is not] limited to, the following." O'Brien's contract stated that OSU's ability to terminate him for cause "shall be limited to the occurrence of one or more of the following." Monson's contract also has less favorable language regarding violations of NCAA or Big Ten rules. O'Brien's contract required a finding of lack of institutional control or OSU being sanctioned, whereas Monson's contract provides the university cause for "a major violation, as determined by the University." This gives the university more latitude and discretion in determining when a violation is adequate cause to terminate.

Former Indiana University coach, Mike Davis, who resigned following the 2005-06 season, is another coach who did not enjoy the advantages of a contract like O'Brien's. Davis's termination for cause provision stated:

The University shall have the right to end this Employment Agreement for just cause prior to its normal expiration on June 30, 2008. The term "just cause" shall include, in addition to and as examples of its normally understood meaning in employment contracts, any of the following:

1. deliberate and serious violations of the duties outlined in Section 2.01 of this Agreement or refusal or unwillingness to perform such duties in good faith and to the best of the Employee's abilities;

2. violations by the Employee of any of the other terms and conditions of this Agreement not remedied after thirty (30) days' written notice thereof to the Employee;

3. any conduct of the Employee in violation of any criminal statute of moral turpitude;

4. a serious or intentional violation of any rule, regulation, constitutional provision, bylaw or interpretation of the University, the Big Ten Conference or the NCAA by the Employee or a member of the men's basketball coaching staff or any other person under the Employee's supervision and direction, including student-athletes in the men's basketball program, which violation may, in the sole reasonable judgment of the University, reflect adversely upon the University or its athletic program, including any serious violation which may result in the University being placed on probation by the

124. Id.
125. O'BRIEN CONTRACT, supra note 88, § 5.1.
126. Compare MONSON CONTRACT, supra note 123, §3.1(a), with O'BRIEN CONTRACT, supra note 88, § 5.1(b).
Big Ten Conference or the NCAA;

5. conduct of the Employee seriously prejudicial to the best interests of the University or its athletics program or which violates the University’s stated mission;

6. prolonged absence from duty without the consent of the Employee’s supervisor; or

7. any cause adequate to sustain the termination of any other University employee of the Employee’s classification.

8. failure to obtain University’s permission (from the Director of Athletics) to enter into an agreement for Outside or Promotional Income.127

Davis’s contract provided Indiana with a much wider array of options to terminate Davis for cause than OSU had under its contract with O’Brien. For example, Davis’s contract states that cause “shall include, in addition to and as examples of its normally understood meaning in employment contracts.”128 This language, like the “includes, but [is not] limited to” language of Monson’s contract, did not limit cause to the events listed in the contract.129 Davis’s contract also gave the university cause to fire Davis for “violations” of the terms of the agreement.130 This is a significant difference from O’Brien’s contract, which required a “material breach” of the agreement by O’Brien.131 The term “material breach” requires a higher standard before the university has cause to terminate the coach.132

Recently, Indiana hired Kelvin Sampson to replace Mike Davis. Sampson’s contract is similar to Davis’s; however, it gives the university even more latitude in terminating Sampson for cause. The termination for cause provision of Sampson’s contract reads:

The term “just cause” shall include, in addition to and as examples of its normally understood meaning in employment contracts, any of the following:

1. Deliberate and serious violations of the duties outlined in Section

127. EMPLOYMENT CONTRACT BETWEEN INDIANA UNIVERSITY AND MIKE DAVIS § 6.02(B) (May 22, 2002) [hereinafter DAVIS CONTRACT].
128. Id.
129. Id.; MONSON CONTRACT, supra note 123.
130. DAVIS CONTRACT, supra note 127, § 6.02(B)(1).
131. O’BRIEN CONTRACT, supra note 88, § 5.1(a).
2.01 of this Agreement or refusal or unwillingness to perform such duties in good faith and to the best of the Employee’s abilities;

2. A material or significant violation by the Employee of any of the other terms and conditions of this Agreement not remedied after fourteen (14) days’ written notice thereof to the Employee;

3. Any conduct of the Employee in violation of any criminal statute (excluding minor traffic offenses) whether prosecuted or not, or any act of moral turpitude;

4. A significant, intentional, or repetitive violation of any law, rule, regulation, constitutional provision, bylaw or interpretation of the University, the Big Ten Conference or the NCAA, which violation may, in the sole judgment of the University, reflect adversely upon the University or its athletic program, including but not limited to any significant, intentional, or repetitive violation which may result in the University being placed on probation by the Big Ten Conference or the NCAA and including any violation which may have occurred during any prior employment of the Employee at another NCAA member institution and for which the NCAA could hold the Coach responsible;

5. A significant, intentional, or repetitive violation of any law, rule, regulation, constitutional provision, bylaw or interpretation of the University, the Big Ten Conference or the NCAA by a member of the intercollegiate men’s basketball coaching staff or any other person under the Employee’s supervision and direction, including student athletes in the program, which violation the Employee knew or should have known of and which violation may, in the sole judgment of the University, reflect adversely upon the University and its athletic program, including but not limited to any significant, intentional, or repetitive violation which may result in the University being placed on probation by the Big Ten Conference or the NCAA;

6. Conduct of the Employee seriously prejudicial to the best interests of the University or its athletics program or which violates the University’s stated mission;

7. Prolonged absence from duty without the consent of the Employee’s supervisor;

8. Any cause adequate to sustain the termination of any other University employee of the Employee’s classification;

9. Failure to obtain University’s permission (from the Director of
Athletics) to enter into an agreement for Outside or Promotional Income as set forth in Section 4.05.B.4;

10. Fraud or dishonesty of Employee in the performance of his duties or responsibilities under this Agreement;

11. Failure to maintain an environment in which the coaching staff complies with NCAA, Big Ten and University rules and regulations;

12. Failure to comply with Article VII of this Agreement regarding Unique Services; knowingly misleading the University about any matters related to the men’s basketball program, its assistant coaches or student athletes;

13. Failure or refusal to recognize and cooperate with the Athletic Director or other University officials;

14. Findings of the NCAA infractions committee referenced in Section 4.08 that demonstrate serious, intentional, or repetitive violations and that result in additional significant penalties or sanctions against the Employee beyond the University of Oklahoma’s self-imposed sanctions taken against the Employee, including any action of the NCAA that would materially impair the Employee’s ability to perform under this Agreement.\textsuperscript{133}

Sampson’s contract clearly provides Indiana significant protection if it has the desire to terminate Sampson for cause. The contract enumerates fourteen occurrences under which Indiana can terminate Sampson for cause.\textsuperscript{134} It also retains the “‘just cause’ shall include, in addition to and as examples of its normally understood meaning in employment contracts” language used in Davis’s contract.\textsuperscript{135} Indiana required a more inclusive termination for cause provision from Sampson because of NCAA violations that occurred while Sampson was at the University of Oklahoma.\textsuperscript{136} Indiana sought to protect

\textsuperscript{133} EMPLOYMENT CONTRACT BETWEEN INDIANA UNIVERSITY AND KELVIN SAMPSON § 6.02(B) (Apr. 20, 2006) [hereinafter SAMPSON CONTRACT].

\textsuperscript{134} Id.

\textsuperscript{135} DAVIS CONTRACT, supra note 127; EMPLOYMENT CONTRACT BETWEEN PURDUE UNIVERSITY AND GENE KEADY § 6.01(b) (July 1, 1994) [hereinafter KEADY CONTRACT]; SAMPSON CONTRACT, supra note 133.

\textsuperscript{136} In early 2006, the University of Oklahoma faced allegations of NCAA violations. Frank Litsky, Universities Punished For Coach’s Violations, N.Y. TIMES, May 26, 2006, at D2. Allegedly, Kelvin Sampson and his assistant coaches made 577 impermissible phone calls to recruits from 2000 through 2004. Id. In May 2006, the NCAA censured Oklahoma and placed the program on two years probation. Id. Sampson was also penalized for the violations. Id. He will be unable to make telephone calls to recruits and visit them off campus for one year. Despite the penalties, Sampson will keep his new job at Indiana. Id.
itself from the repercussions of Sampson’s violations at Oklahoma. Sampson’s situation at Oklahoma is the reason for many of the differences between Davis’s and Sampson’s contracts. However, the O’Brien situation probably had some impact on how Indiana negotiated and drafted Sampson’s contract.

Gene Keady, who was the long-time coach at Purdue University until retiring after the 2004-05 season, also had a contract that contained language very similar to the Davis and Sampson contracts.\(^\text{137}\) Keady also could be terminated for cause for a “violation” of the terms of the agreement instead of a “material breach.”\(^\text{138}\) Additionally, his contract, like Davis’s, did not limit cause to those events listed. In 2005, Matt Painter replaced Keady as the head coach at Purdue. The termination for cause provisions of Keady and Painter’s contracts are virtually identical.\(^\text{139}\) When hiring Painter, Purdue apparently did not feel it needed to obtain additional protection from what it had while Keady was the head coach. Painter’s contract states:

The University shall have the right to terminate this Agreement for just cause prior to its normal expiration on June 30, 2010. The term “just cause” shall include, in addition to and as examples of its normally understood meaning in employment contracts, any of the following:

(i) Deliberate and serious violations of the duties outlined in Section 3.02 of this Agreement or refusal or unwillingness to perform such duties in good faith and to the best of the Coach’s abilities;

(ii) Violations by the Coach of any of the other terms and conditions of this Agreement not remedied after seven (7) days written notice thereof to the Coach;

(iii) Situations in which the University and the Coach have agreed upon a reassignment from Head Coach of the University’s intercollegiate men’s basketball team to another position within the University, and the Coach does not thereafter accept and perform the reassignment of responsibilities in accordance with the provisions of Section 3.01 hereof;

(iv) Any conduct of the Coach in violation of any criminal statute of moral turpitude;

\(^{137}\) Keady Contract, supra note 135.
\(^{138}\) Id.
\(^{139}\) See id.; Employment Contract Between Purdue University and Matt Painter § 6.01 (July 1, 2005) [hereinafter Painter Contract].
(v) A significant or repetitive violation of any law, rule, regulation, constitutional provision, bylaw or interpretation of the University, the Big Ten Conference or the NCAA, which violation may, in the sole judgment of the University, reflect adversely upon the University or its athletic program, including but not limited to any significant or repetitive violation which may result in the University being placed on probation by the Big Ten Conference or the NCAA and including any violation which may have occurred during any prior employment of the Coach at another NCAA member institution and for which the NCAA could hold the Coach responsible;

(vi) A significant or repetitive violation of any law, rule, regulation, constitutional provision, bylaw or interpretation of the University, the Big Ten Conference or the NCAA by a member of the intercollegiate men’s basketball coaching staff or any other person under the Coach’s supervision and direction, including student athletes in the program, which violation may, in the sole judgment of the University, reflect adversely upon the University and its athletic program, including but not limited to any significant or repetitive violation which may result in the University being placed on probation by the Big Ten Conference or the NCAA;

(vii) Conduct of the Coach serious prejudicial to the best interests of the University or its athletic program or which violates the University’s mission;

(viii) Prolonged absence from duty without consent of the Coach’s reporting superior; or

(ix) Any cause adequate to sustain the termination of a tenured faculty member of the University.  

University of Wisconsin coach Bo Ryan has a contract that is similar to O’Brien’s; however, it is probably still less advantageous for the coach. Ryan’s contract states:

The term “just cause” shall include any of the following:

(a) A deliberate or serious violation, material in nature, of the duties set forth in Articles I. and IV. of the Agreement, or refusal or unwillingness to perform such duties in good faith and to the best of Coach’s abilities;

(b) A deliberate or serious violation, material in nature, of any of the

140. Painter Contract, supra note 139, § 6.01(b).
other terms and conditions of this Agreement not remedied after thirty (30) days written notice thereof to Coach. In the event a default under this section is not capable of being remedied within thirty (30) days, Coach shall be deemed to have remedied such default if he takes reasonable steps to remedy such default within thirty (30) days after written notice thereof;

(c) A specific written finding following investigation by the University’s Chancellor or Athletic Director and consultation with the Chair of the University’s Athletic Board or a criminal complaint, indictment or conviction resulting from any conduct by Coach which constitutes moral turpitude and which would tend to bring public disrespect, contempt or ridicule upon the University;

(d) A deliberate or serious major violation, material in nature, of any law, rule, regulation, constitutional provision or bylaw of University, the Big Ten Conference, or the NCAA, which major violation may, in the sole judgment of University, reflect adversely upon University or its athletic program, and which major violation which may in and of itself result in University being placed on probation by the Big Ten Conference of the NCAA;

(e) A deliberate or serious major violation, material in nature, of any law, rule, regulation, constitutional provision or bylaw of University, the Big Ten Conference, or the NCAA by a member of the coaching staff, or any other person under Coach’s supervision and direction, which major violation may, in the sole judgment of University, reflect adversely upon University or its athletic program, and which major violation which may in and of itself result in University being placed on probation by the Big Ten Conference or the NCAA, and which violation was the result of Coach’s failure to reasonably supervise the offending individual(s); or

(f) Prolonged absence from duty without University’s written consent.141

Ryan’s contract is similar to O’Brien’s in that it requires a material breach on the part of Ryan to be terminated for cause.142 Ryan’s contract also covers the same basic occurrences as O’Brien’s contract, with the exception that

141. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF WISCONSIN AND WILLIAM F. RYAN JR. § V(A)(1)(a)-(f) (July 1, 2003).
142. Id. § V(A)(1)(a).
Ryan’s lists prolonged absence as just cause. 143 Ryan’s contract is less advantageous because it states “[t]he term ‘just cause’ shall include any of the following.” 144 This language does not necessarily limit just cause to the occurrences enumerated in the contract. Ryan’s contract is also less advantageous than O’Brien’s because it gives the University more room to determine when a rule violation is serious enough to constitute just cause. 145

Overall, O’Brien’s contract had a more favorable termination for cause provision than most other Big Ten coaches. Michigan State Coach Tom Izzo is the one Big Ten coach who has a termination for cause provision that is more favorable than O’Brien’s. The full termination for cause provision of Izzo’s contract states:

The University may terminate this Agreement prior to expiration of its term at any time, without liability to the Coach or any other penalty, in the event that the Coach engages in criminal conduct involving moral turpitude or that the Coach materially breaches any of the terms of this Agreement. 146

This provision greatly restricts the university’s ability to terminate Izzo for cause. With the exception of Izzo, O’Brien probably had the best termination for cause provision in the Big Ten.

The most interesting contract to compare with O’Brien’s is that of the current OSU men’s basketball Coach Thad Matta. OSU hired Matta in 2004 to replace O’Brien. Matta’s contract contains a lengthy termination for cause provision, which reads:

Ohio State may terminate this agreement at any time for cause, which, for the purposes of this agreement, shall be limited to the occurrence of one or more of the following:

a. Neglect or inattention by Coach to the duties of head basketball coach or Coach’s refusal or unwillingness or inability to perform such duties in good faith after reasonably specific written notice has been given to Coach by the Director, and Coach has continued such neglect, inattention, refusal, unwillingness or inability during a subsequent reasonable period specified by Ohio State; or

b. A significant or repetitive or intentional violation (or if Ohio State has a reasonable basis for believing that a significant or repetitive or

143. Id. § V(A)(1)(f).
144. Id. § V(A)(1).
145. Id. § V(A)(1)(d)-(e).
146. EMPLOYMENT CONTRACT BETWEEN MICHIGAN STATE UNIVERSITY AND TOM IZZO § III(B)(1) (July 1, 2000).
intentional violation has occurred) by Coach (or any other person under Coach’s supervision and direction, including student-athletes) or any law, rule, regulation, constitutional provision, bylaw or interpretation of Ohio State, the Big Ten Conference or the NCAA; or

c. A material breach of this agreement by Coach after receipt of a written notice from Ohio State specifying the act(s), conduct, or omission(s) constituting such breach which breach cannot be or has not been cured within thirty (30) days after the date that a written notice by Ohio State identifying such breach is sent; or

d. Commission by Coach of a crime whether prosecuted or not (excluding minor traffic offenses) or violation by Coach of Ohio’s ethics laws; or

e. Fraud or dishonesty of Coach in the performance of his duties or responsibilities under this agreement; or

f. Fraud or dishonesty of Coach in the preparation, falsification, submission or alteration of documents or records of Ohio State, NCAA or the Big Ten conference, or documents or records required to be prepared or maintained by law, governing athletic rules or Ohio State rules and regulations, or other documents or records pertaining to any recruit or student-athlete, including without limitation, expense reports, transcripts, eligibility forms or compliance reports, or permitting, encouraging or condoning such fraudulent or dishonest acts by any other person, provided that Coach had actual knowledge of such fraudulent or dishonest acts or reasonably should have known about such fraudulent or dishonest acts; or

g. Failure by Coach to respond accurately and fully within a reasonable time to any reasonable request or inquiry relating to the performance of his duties hereunder or the performance of his duties during his prior employment at any other institution of higher learning propounded by Ohio State, NCAA, the Big Ten conference or other governing body having supervision over the athletic programs of Ohio State or such other institution of higher learning, or required by law, governing athletic rules or Ohio State rules and regulations; or

h. Failure by Coach to manage the Team in a manner that reflects the academic values of Ohio State as set forth in this agreement.

i. Counseling or instructing by Coach of any coach, student or other person to fail to respond accurately and fully within a reasonable time to any reasonable request or inquiry concerning a matter relevant to
Ohio State's athletic programs or other institution of higher learning which shall be propounded by Ohio State, NCAA, the Big Ten conference or other governing body having supervision over the athletic programs of Ohio State or such other institution of higher learning, or required by law, governing athletic rules or Ohio State rules and regulations; or

j. Soliciting, placing or accepting by Coach of a bet on any intercollegiate or professional athletic contest, or permitting, condoning or encouraging by Coach of any illegal gambling, bookmaking or illegal betting involving any intercollegiate or professional athletic contest whether through a bookmaker, a parlay card, a pool or any other method of organized gambling; or furnishing by Coach of information or data relating in any manner to basketball or any other sport to any individual known by Coach to be or whom he should reasonably know to be a gambler, better or bookmaker, or an agent of any such person, or the consorting or associating by Coach with such persons; or

k. Use or consumption by Coach of alcoholic beverages in such degree and for such appreciable period as to impair significantly or materially his ability to perform his duties hereunder; or failure by Coach to fully cooperate in the enforcement and implementation of any drug testing program established by Ohio State for student-athletes; or

l. Coach’s sale, use or possession, or Coach’s permitting, encouraging or condoning by a student-athlete, assistant coach or other athletic staff member of the sale, use or possession of any narcotics, drugs, controlled substances, steroids or other chemicals, the sale, use or possession of which by Coach or such student-athlete is prohibited by law or by governing athletic rules; or

m. Failure by Coach to report promptly to the Director any violations known to Coach of governing athletic rules or Ohio State rules and regulations by Coach, the assistant coaches, students or other persons under the direct control or supervision of Coach; or

n. Failure by Coach to obtain prior approval for outside activities as required by Section 4.5 of this agreement and by NCAA rules or to report accurately all sources and amounts of all income and benefits as required by NCAA rules and Section 4.5 of this agreement; or

o. Commission of or participation in by Coach of any act, situation, or occurrence which, in Ohio State’s reasonable judgment, brings Coach
into public disrepute, contempt, scandal or ridicule or failure by Coach to conform his personal conduct to conventional standards of good citizenship, with such conduct offending prevailing social mores and values and/or reflecting unfavorably upon Ohio State’s reputation and overall primary mission and objectives, including but not limited to, acts of dishonesty, misrepresentation, fraud or violence that may or may not rise to a level warranting criminal prosecution by the relevant authorities.\textsuperscript{147}

There is a clear difference between the termination for cause provisions of O’Brien and Matta’s contracts. Matta’s contract provides an extensive list of the occurrences that give OSU cause to terminate. In drafting Matta’s contract, OSU clearly was doing everything possible to avoid another problem like the O’Brien situation.

As was stated earlier in the article, the termination for cause provision of O’Brien’s contract dealt with the three broad occurrences, including a material contract breach, a violation of NCAA or Big Ten rules, which results in a sanction, and conduct that constitutes moral turpitude or reflects adversely on OSU. The termination for cause provision of Matta’s contract clearly covers far more occurrences than the three covered in O’Brien’s contract. Some of the notable occurrences covered by Matta’s contract and not covered by O’Brien’s are falsification of records (section f), gambling (section j), and alcohol/drug use (sections k and l).\textsuperscript{148} OSU likely included these sections in response to recent misdeeds by O’Brien and other coaches around the country, such as Rick Neuheisel and Bob Huggins. OSU also used broader language in Matta’s contract, which will allow OSU more discretion to terminate Matta for cause, if it becomes necessary. Overall, the termination for cause provision in Matta’s contract is far more favorable to OSU than the termination for cause provision in O’Brien’s contract.

VI. DECISION IN THE O’BRIEN CASE

In deciding O’Brien’s case, the court held that O’Brien breached Section 4.1(d) of his contract.\textsuperscript{149} The court found that O’Brien had reasonable cause to believe he had violated NCAA bylaws when he loaned the Radojevic family money.\textsuperscript{150} Section 4.1(d) required O’Brien to report any violations that he had

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\textbf{147.} & \textit{Employment Contract Between the Ohio State University and Thad Matta} § 5.1 (July 8, 2004). \\
\textbf{148.} & \textit{Id.} \\
\textbf{150.} & \textit{Id.}
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“reasonable cause to believe” had been committed.\textsuperscript{151} The court determined that O’Brien’s actions following the loan signified that he had reasonable cause to believe he had committed a violation.\textsuperscript{152} O’Brien contended that he knew Radojevic was ineligible to play college basketball, yet he continued to take steps toward securing Radojevic as a player. The court said O’Brien’s “words and conduct are not those of a person who was sure that Radojevic would never play college basketball.”\textsuperscript{153} Had Radojevic been eligible, O’Brien’s loan would have been a clear violation of NCAA rules. Therefore, O’Brien had reason to believe the loan might be a violation. The court stated that “[t]he circumstances surrounding plaintiff’s decision to make the loan combined with plaintiff’s subsequent words and conduct convince the court that plaintiff had reasonable cause to believe that he had committed an infraction.”\textsuperscript{154} The court held that O’Brien breached Section 4.1(d) of his employment agreement when he failed to report the loan.\textsuperscript{155}

Despite the court’s finding that he had breached his contract, the court held that OSU did not have proper cause to terminate O’Brien.\textsuperscript{156} The court determined that O’Brien’s breach was not material, and therefore, under the language of the contract, OSU did not have cause to fire O’Brien.\textsuperscript{157} Looking at its common law meaning, the court determined a material breach to be “a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract.”\textsuperscript{158} The court also looked at the Restatement of Contracts to identify five factors that should be considered when determining whether a breach is material.\textsuperscript{159}

The first factor the court reviewed was the extent to which O’Brien’s breach deprived OSU of the benefit it reasonably expected under the contract.\textsuperscript{160} OSU claimed the breach deprived it of the benefit of the contract in three ways: “subjecting defendant to NCAA sanctions; adversely affecting defendant’s reputation in the community; and breaching the trust between

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\item O’Brien Contract, supra note 88, § 4.1(d).
\item O’Brien, 2006-Ohio-1104, 2006 Ohio Misc. LEXIS 52, ¶ 85.
\item Id. ¶ 89.
\item Id. ¶ 85.
\item Id. ¶ 90.
\item Id. ¶ 169.
\item Id.
\item Id. ¶ 97.
\item Id. ¶¶ 99-104.
\item Id. ¶ 100.
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plaintiff and defendant’s athletic director.” The court found that the harm to OSU in these three areas was not as significant as OSU contended. The court said, “the evidence shows that the NCAA sanctions and the injury to defendant’s reputation that can be fairly attributed to the loan are relatively minor.” Regarding the loss of trust issue, the court held that it was not more than an implied term of the contract. Neither the contract nor the termination letter of June 8, 2004 referenced trust of the athletic director. The court determined that OSU would have included trust of the athletic director in the agreement if it were as important to the transaction as OSU claims. The court made this determination based on the amount of detail used in the agreement to discuss “other important aspects of the parties’ relationship.”

The second factor considered when determining whether the breach was material was the extent to which O’Brien could compensate OSU for his failure to perform. The court determined that O’Brien could have done little to compensate OSU because the injury to OSU was largely non-economic.

The third factor was the extent to which the breaching party would suffer forfeiture. The court found that O’Brien would suffer significant forfeiture if the breach were determined to be material. If the breach was material and OSU had cause to fire O’Brien, he would receive no further compensation from OSU, whereas, if the breach was not material and he was terminated without cause, he would be entitled to a significant amount in liquidated damages.

The fourth factor was O’Brien’s ability to cure his failure. The court determined that O’Brien could not cure the damage of the sanctions and the damage to OSU’s reputation. However, the court reasoned that O’Brien
could cure the breach of trust because he could repair his relationship with Geiger. The court found that “with time and effort, trust could have been restored.”

The final factor to consider was the extent to which O'Brien's actions failed to conform to standards of good faith. The court found that O'Brien's “failure to disclose the loan was not completely consistent with good faith and fair dealing.” However, the court did note that the loan was made for “humanitarian purposes.” The court also determined that OSU did not act in good faith when dealing with O'Brien after he admitted to making the loan.

After analyzing the five factors, the court determined that O'Brien's breach was not material; and thus, OSU did not have cause to terminate O'Brien. In addressing the loan to Radojevic, the court said, “that this single, isolated failure of performance was not so egregious as to frustrate the essential purpose of that contract and thus render future performance by defendant impossible.” The court held that because O'Brien's termination was without cause, OSU was contractually obligated to pay O'Brien in accordance with the termination without cause provisions of the contract.

The court also held that OSU breached the contract when it decided to terminate O'Brien without compensation.

On August 2, 2006, O'Brien was awarded just over $2.25 million in damages. The court arrived at this amount by looking at O'Brien's employment contract. The court determined that the liquidated damages prescribed in Sections 5.2 and 5.3 of O'Brien's contract are proportionate to O'Brien's actual damages. In determining that the liquidated damages were proportionate, the court also determined that the contract as a whole was not unreasonable. Addressing the reasonableness of the contract, the court stated:

175. Id. ¶ 145.
176. Id.
177. Id. ¶ 104.
178. Id. ¶ 147.
179. Id. ¶ 148.
180. Id. ¶ 150.
181. Id. ¶ 151.
182. Id. ¶ 169.
183. Id.
184. Id.
186. Id.
187. Id.
The contract is extremely favorable to plaintiff but it is not unreasonable. The parties in this case negotiated a contract virtually guaranteeing plaintiff that he could not be terminated for an NCAA infraction, without compensation, unless the NCAA had made a finding that plaintiff had committed a major infraction that resulted in either a finding of lack of institutional control or the imposition of serious sanctions. As was discussed extensively in the court’s February 15, 2006, liability decision, defendant’s right to terminate plaintiff for cause under Section 5.1(a) was limited to those instances where the breach was material. In other words, the terms of the contract made it very difficult for defendant to terminate plaintiff’s employment, without a financial consequence, upon learning that plaintiff had committed an NCAA infraction.\textsuperscript{188}

In arriving at $2.25 million in damages, the court first found that OSU owed O’Brien $236,551.60 in liquidated damages under Section 5.2 of the contract.\textsuperscript{189} This amount included O’Brien’s base salary for 2004 ($188,335), the value of his yearly employee benefits ($28,784) and the value of his use of a vehicle provided by OSU ($19,432.60).\textsuperscript{190} Secondly, the court determined that O’Brien was owed $2,017,067.85 in additional liquidated damages under Section 5.3 of the contract.\textsuperscript{191} The court arrived at this amount by multiplying the years remaining on the contract (3.06) by O’Brien’s base salary ($188,335).\textsuperscript{192} This calculation resulted in an amount of $576,305.10, which was then multiplied by 3.5 in accordance with Section 5.3.\textsuperscript{193} The resulting amount was added to the Section 5.2 liquidated damages, for a total damages award of $2,253,619.45.\textsuperscript{194}

The liquidated damages award was less than the $3,571,964.45 O’Brien believed he was entitled to.\textsuperscript{195} The amounts were different because the court opted to invalidate the final two years of the contract because they were extension options that had not been exercised at the time of the termination.\textsuperscript{196} The court also awarded O’Brien prejudgment interest.\textsuperscript{197} The amount of

\textsuperscript{188.} Id.
\textsuperscript{189.} Id.
\textsuperscript{190.} Id.
\textsuperscript{191.} Id.
\textsuperscript{192.} Id.
\textsuperscript{193.} Id.
\textsuperscript{194.} Id.
\textsuperscript{195.} Id.
\textsuperscript{196.} Id.
\textsuperscript{197.} Id.
prejudgment interest will be decided at a later hearing.\textsuperscript{198} In addition, to be decided at the later hearing is how much O'Brien must repay OSU for bonuses he received in 2000 and 2002.\textsuperscript{199} The court held that O'Brien must repay championship bonuses from those years because the NCAA stripped OSU of all basketball championships won during those seasons.\textsuperscript{200} The court found that "genuine issues of fact" exist regarding the amount of the bonuses; thus, the amount O'Brien must repay will be determined at a later hearing.\textsuperscript{201} Perhaps the O'Brien case will be complete following the next hearing; however, it appears that OSU might appeal the recent decision.\textsuperscript{202}

VII. LESSONS TO BE LEARNED

A. Termination for Just Cause – What is Just Cause?

Oftentimes a coach can be fired or terminated for causes that are not subject to dictionary definition, that require legal interpretation and that contain terms that no two lawyers or even a judge can ultimately agree upon the meaning of. These terms include: (1) conduct seriously prejudicial to the best interests of the university; (2) moral turpitude; (3) material breach; (4) serious or intentional violations of any rule or regulation; (5) gross negligence in performance; (6) perpetuation of willful fraud; (7) an immoral act; (8) habitual intoxication; and (9) dishonesty. If the terms are not subject to clear and simple, Webster-style definitions, they should not be in the coach's contract. Specific acts constituting just cause for termination need to be strictly defined, rather than couched in broad-based statements that are subject to interpretation. These phrases, if used, ought to be defined in terms of specific prohibited acts. The fact that the language used in coaches' just cause provisions is subject to definition and is factual in nature, is an even better reason that the ultimate fact finder, who determines whether just cause exists, should be an impartial hearing examiner.

B. Dirty Laundry

Most universities like to resolve their dirty laundry in house, rather than making it a public affair. This certainly is true in the world of college

\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Kevin Mayhood, $2.25 Million Verdict, Improper Loan to Recruit Doesn't Justify Firing of Former Coach, Judge Rules, COLUMBUS DISPATCH, Aug. 3, 2006, at 01.A.
coaching. In his book College Sports, Inc., Murray Sperber indicates that although a university may have cause to dismiss a coach, and even though that coach may cause an NCAA investigation and ensuing penalties, universities prefer to settle their differences with a breaching coach rather than fire him outright. This is the case, even though the university is absolved from its obligations if the coach violates NCAA rules.

The recent firing of Bob Huggins as the head basketball coach of the University of Cincinnati is an excellent example of a situation where the university probably had grounds for termination for cause, but both the coach and the university chose to negotiate a resolution under the “not for cause” provision. On August 23, 2005, University President Nancy Zimpher sent Huggins an ultimatum giving him twenty-four hours to decide whether he wanted to resign or be fired.

Zimpher’s concerns stemmed from certain incidents that Huggins, his coaching staff and his players had been involved in. These incidents include Huggins being arrested and later pleading no contest to DUI charges, which is a misdemeanor in Ohio as a first-time offense. Huggins was suspended for seventy-six days and the rollover provision in his contract was not exercised. Assistant coach Keith LeGree was also arrested for a DUI on March 23, 2005 and was later found not guilty of the charge. Player Roy Bright was arrested for carrying a concealed weapon on campus on May 10, 2005; Huggins later dismissed Bright from the team. Player Tyree Evans was charged with statutory rape on June 8, 2005. Also, in 1998, Cincinnati was charged with multiple NCAA violations in separate categories, including a lack of appropriate institutional control. Zimpher said that she would not apologize for setting high standards and that Huggins and the program did not

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204. Id. at 165.
205. Mark Schlabach, Cincinnati Orders Huggins to Resign Today or Be Fired, WASH. POST, Aug. 24, 2005, at E02.
206. Id.
209. Daughtery & Koch, supra note 206.
210. Id.
211. Id.
212. Id.
213. Id.
fit into the "goals of the university's sweeping academic plan."\textsuperscript{214}

On August 24, 2005, Huggins chose to resign and accepted a buyout from the University.\textsuperscript{215} The resignation and buyout were settled by the Eighth Amendment to Huggins's Employment Contract, dated September 1, 2005.\textsuperscript{216} The amendment provides that the University is obligated to pay Huggins $58,333.33 for each month remaining on his contract, which was to end on June 30, 2008, or a total of $1,983,333.22.\textsuperscript{217} Additionally, the University was required to pay Huggins $700,000, $70,000 of which had already been paid, for reimbursement of taxes incurred.\textsuperscript{218} The University had until September 15, 2005 to make the payment.\textsuperscript{219} The aforereferenced payments are guaranteed payments irrespective of whether Huggins fulfills additional employment obligations at the University or obtains other employment.\textsuperscript{220} The Eighth Amendment further acknowledges that Huggins’s employment contract was to be terminated without cause effective September 1, 2005.\textsuperscript{221}

What is of interest with respect to the Huggins resolution is whether the University of Cincinnati could have fired Huggins had he not resigned and accepted the buyout as contained in the Eighth Amendment to Employment Contract. Several contract clauses in Huggins’ Employment Contract are pertinent to this discussion.

Huggins’s original employment contract, dated July 13, 1995, was amended eight times, with the final amendment (Eighth Amendment to Employment Contract) dated September 1, 2005.\textsuperscript{222} Under Paragraph 4 of the employment contract entitled “Coach’s Duties,” Huggins promised and agreed as follows:

To recognize and comply with the laws, policies, rules, and regulations of and governing the University and its employees and the constitution, bylaws, interpretations, rules and regulations of the National Collegiate Athletic Association (hereinafter “NCAA”) as now constituted or as they may be amended during the term hereof.

\textsuperscript{214} Id.  
\textsuperscript{215} Huggins to Step Down with $3-Million Deal, L.A. TIMES, Aug. 25, 2005, at D2.  
\textsuperscript{216} Eighth Amendment to Employment Contract Between the University of Cincinnati and Robert E. Huggins (Sept. 1, 2005).  
\textsuperscript{217} Id. § 2(A)(1).  
\textsuperscript{218} Id. § 2(A)(2).  
\textsuperscript{219} Id.  
\textsuperscript{220} Id. § 2(A)(3).  
\textsuperscript{221} Id. § 3.  
\textsuperscript{222} Employment Contract Between the University of Cincinnati and Robert E. Huggins (July 13, 1995).
Coach shall also endeavor to ensure that all assistant coaches and any other employees for which Coach is administratively responsible comply with the aforesaid policies, rules, and regulations as well. In the event that the Coach becomes aware, or has reasonable cause to believe, that violations of such constitution, bylaws, interpretations, rules or regulations may have taken place, he shall report the same promptly to the Director and to the President simultaneously."  

Paragraph 5.1.2 of the employment contract deals with termination by the University without cause:

In the event of the death or termination of the employment of the Coach by the University without cause during the term hereof, the Coach (or his estate) shall receive, in lieu of the compensation and benefits provided for herein, monthly payments at the rate of Seven Hundred Thousand Dollars ($700,000.00) per year, from the date of such death or termination without cause through the expiration of the term of this Contract, June 30, 2005.

Paragraph 5.2 of the employment contract delineates what occurs if the University terminates the coach’s contract for cause:

The University may at any time upon written notice to Coach and in accordance with University policy and procedures terminate this Contract and his employment for “cause”, which shall include, without limitation, termination on any of the following grounds:

5.2.1 deliberate and major violation by Coach of any of his obligations under Section 4.1.3 heretofore of any departmental regulations contained in the Department of Athletics Policy and Procedure Manual as it now exists or may be reasonably amended relating to the conduct and administration of the basketball or athletic program, including, but not limited to, recruiting rules;

5.2.2 any conduct by Coach which constitutes moral turpitude, or which would be reasonably likely to damage the reputation of the University;

5.2.3 any material breach of the provisions of this Contract; or

5.2.4 Coach’s refusal to perform the duties reasonably required herein, or for any reason his unavailability to the University to perform fully
such duties.\textsuperscript{225}

Under Paragraph 5.2.2 of the Employment Contract, the University could have terminated Huggins for cause for “any conduct . . . which would be reasonably likely to damage the reputation of the University.”\textsuperscript{226} The combination of incidents that Huggins, his staff and players were involved in could have amounted to and resulted in conduct that “damages the University’s reputation.” The damage to reputation provision is such a catch-all phrase that it would follow that a coach being arrested and pleading no contest to a DUI, an assistant coach being charged with a DUI and multiple player run-ins with the law could have been considered such conduct under Paragraph 5.2.2 of the Employment Contract. If Zimpher had utilized this clause to terminate Huggins, then, under Paragraph 5.3, his salary and benefits would also have been terminated; instead, under the Eighth Amendment, the University will pay Huggins $58,333.33 per month until June 2008, which is the same amount Huggins would have received under the termination without cause provision of his contract.

Zimpher was very concerned with the university’s reputation, and a further acknowledgement of this situation would have negatively affected the university. Termination for cause proceedings usually hang out the dirty laundry of the university in the public, involve protracted and expensive litigation in which the university is not always successful and offend many loyal fans and alumni.

Compromise seems to be the modus operandi when a university is desirous of terminating its relationship with a coach, where potential termination for cause exists. The Huggins termination, as well as the many terminations that occur in the coaching industry annually, point out the fact that the back end of the contract, i.e. the termination provisions, may be as important as the financial terms of the contract.

While the modus operandi in college coaching terminations has been to settle in the backroom rather than the courtroom, the O’Brien case and the Rick Neuheisel case that preceded it may be setting a new precedent in the area of coaches’ disputes with universities. Aggrieved coaches, who believe that they were not terminated for just cause, now seem to be willing to let the dirty laundry hang out in a courtroom and to use the public forum as leverage against the university. The Neuheisel case against the University of Washington\textsuperscript{227} case is a good example of this.

\textsuperscript{225} Id. § 5.2.

\textsuperscript{226} Id. § 5.2.2.

\textsuperscript{227} See Seattle Times Staff, The UW/Neuheisel Saga, SEATTLE TIMES, Mar. 8, 2005, at A13.
The events that led to Washington’s early termination of Neuheisel’s contract began in 2002 when the then assistant athletic director, Dana Richardson, who oversees NCAA compliance, sent out a memo to the entire athletic department. The memo stated that it was permissible for athletic department employees to participate in pools for the NCAA men’s college basketball tournament as long as the pools were conducted outside of Washington’s athletic department and the other participants in the pools were not employed by the athletic department. This memo was based, in part, on outdated bylaws, which were employed by the NCAA on its website. The NCAA had failed to update the gambling bylaw as it appeared on the website with the new revision to the rule that includes the key provision of which Neuheisel was found to be in violation. This memo was in direct opposition to NCAA rules against gambling. Gambling on professional and collegiate athletics is specifically prohibited by Bylaw 10.3 of the NCAA rules, which provides that “staff members of the athletics department of a member institution . . . shall not knowingly . . . solicit or accept a bet on any intercollegiate competition for any item (e.g., cash, shirt, dinner) that has tangible value.” Relying on this memo and another memo that Richardson distributed in 2003 to the same effect, Neuheisel participated with friends and neighbors in March Madness auctions, which amounted to the same thing as a men’s college basketball tournament betting pool. Millions of Americans participate in NCAA basketball pools, and Neuheisel believed that his participation in the pools was in accordance with NCAA regulations until he attended the 2003 NCAA annual meeting in Seattle, Washington.

On June 4, 2003, Neuheisel was asked to attend an interview with NCAA investigators who were said to be investigating allegations of minor recruiting issues occurring at Washington that involved Neuheisel. In actuality, the NCAA investigators were interested in Neuheisel’s participation in the betting pools during the 2002 and 2003 men’s basketball tournaments. According

229. Id.
230. Id.
231. Id.
232. Id.
234. Condotta, supra note 227.
236. Id.
to NCAA bylaws, the NCAA enforcement staff is supposed to provide some sort of formal or informal notice of the inquiry and the allegations that are being investigated before the individual is questioned about the particular matter.\textsuperscript{237} Bylaw 32.3.7 specifically provides that when the NCAA requests an interview with an institutional employee regarding possible violations of NCAA regulations, the employee to be interviewed "shall be advised that the purpose of the interview is to determine whether the individual has knowledge of or has been involved directly or indirectly in any violation of NCAA legislation."\textsuperscript{238} There was no such notice in Neuheisel’s case; he was actually misled by the investigators because there were no recruiting violations that were to be discussed in the interview.\textsuperscript{239} The NCAA investigators essentially undertook an ambush interview, a practice directly in opposition to the NCAA bylaws, which require disclosure of the purpose of the interview. Neuheisel walked into the interview expecting to answer questions about possible recruiting violations and instead was bombarded with questions about his participation in neighborhood March Madness auctions in 2002 and 2003. Initially, Neuheisel, surprised by the questioning, denied any involvement in the pools, but later that same day he recanted his original denial of betting on the tournament and admitted to the investigators that he had taken part in the tournament pools.\textsuperscript{240}

Washington fired Neuheisel shortly after his interview with the NCAA investigators in June 2003, six months before the term of his original contract with the University was to end.\textsuperscript{241} In support of Washington’s decision to fire Neuheisel, Washington cited Neuheisel’s participation in two NCAA men’s basketball betting pools in 2002 and 2003, but relied most heavily on Neuheisel’s dishonesty about his participation in the pools when initially questioned by the NCAA investigators about his involvement in the pools.\textsuperscript{242} Washington stated that the fact that Neuheisel was not forthcoming with the NCAA investigators and gave false statements to the investigators was a sufficient reason for termination with cause under his contract.\textsuperscript{243} Paragraph 8 of Neuheisel’s contract states that the university shall have the right to

\begin{itemize}
  \item \textsuperscript{237} \textsc{NAT'L Collegiate Athletic Ass’n, 2006-07 NCAA Division I Manual art. 32.3.7.1 (2006-07)}
  \item \textsuperscript{238} \textit{Id.}
  \item \textsuperscript{240} \textit{Neuheisel Sues Washington Over Firing}, supra note 234.
  \item \textsuperscript{242} \textit{Id.}
  \item \textsuperscript{243} See \textit{id.}
\end{itemize}
terminate this agreement for just cause prior to its normal expiration. The term "just cause" shall include, in addition to and as examples of its normally understood meaning in employment contracts, any of the following:

  a. Violation by Employee of any of the material provisions of this Agreement not corrected by Employee within ten (10) days following receipt of notification of such violation from the University;

  b. Refusal or unwillingness by Employee to perform his duties hereunder in good faith or to the best of Employee's abilities;

  c. Any serious act of misconduct by Employee, including but not limited to, an act of dishonesty, theft or misappropriation of University property, moral turpitude, insubordination, or act injuring, abusing, or endangering others;

  d. A serious or intentional violation of any law, rule, regulation, constitutional provision, by-law, or interpretation of the University, the state of Washington, the PAC-10, or the NCAA, which violation may, in the sole discretion of the University, reflect adversely upon the University or its athletic program in a material way; or

  e. Any other conduct of Employee seriously and materially prejudicial to the best interests of the University or its athletic program.

Washington based its termination on Paragraph 8(c), which lists as one of the acts that can constitute just cause for termination as "an act of dishonesty."

Neuheisel also had a due process provision in his contract. Just cause sufficient to satisfy the provisions of this paragraph shall initially be determined by the Director. Upon such determination, the Director shall have the authority to order the paid suspension of Employee from his duties pending termination of this Agreement, provided that notice of any such termination shall be delivered to Employee in writing, detailing the reasons for the termination and setting forth a reasonable time within which the Employee may respond. Employee may respond to the Director's notice of termination in writing or in person. The Director will consider Employee's response and issue a written decision. If Employee is


245. Id.

246. Id.
dissatisfied with the Director’s decision, Employee shall have the
procedural right, upon written request, to a review and an informal
hearing by the Special Assistant to the President relating to any such
termination ordered by the Director. Any such hearing shall be
governed by applicable University rules and state law and shall be
held within a reasonable time after the Director’s decision. The
Special Assistant to the President will review the matter and gather
additional information as appropriate. After review, the Special
Assistant to the President will notify Employee and the Director of
the decision and the final disposition of the issue. This right to a hearing
by the Special Assistant to the President shall be in lieu of any right to
review that may be provided for in the Personnel Program.247

The contract further provided that in the event Neuheisel was terminated
for cause in accordance with the provisions of Paragraph 8, all obligations of
Washington to make further payments or provide other consideration would
cease.248 Under no circumstances would Washington have been liable to
Neuheisel for the loss of any collateral opportunities or other benefits,
perquisites or income from any source.249

On or about August 21, 2003, Neuheisel commenced a lawsuit in the
Superior Court of Washington for King County against Washington and the
NCAA.250 Neuheisel claimed that Washington breached his contract by
terminating his contract for just cause, failing to give him a fair and impartial
hearing, and failing to pay all monies due under and pursuant to his
contract.251 Neuheisel claimed that the NCAA defamed him, put him in a
false light and tortiously interfered with his contract by encouraging
Washington to terminate him.252 In addition, he claimed that the NCAA
unlawfully interfered with prospective employment or advantage and further
conspired against Neuheisel.253

Neuheisel’s twenty-one month legal battle ended on March 7, 2005 when
a settlement of the case was announced by Superior Court Judge Michael
Spearman after five weeks of testimony, just as jurors were about to hear

247. Id.
248. Id.
249. Id.
250. See Bob Condotta, Neuheisel Sues UW, NCAA: Fired Coach Claims Conspiracy, Says
251. Id.
252. Id.
253. Id.
The settlement was for Neuheisel to receive a cash payment of $2.5 million from the NCAA and $500,000 from Washington. Additionally, the university agreed not to seek repayment of a $1.5 million loan. Neuheisel's lawyers put the settlement amount at $4.7 million, indicating that the settlement included $200,000 in forgiven loan interest.

C. Due Process

O'Brien's victory over OSU was significant because coaches have rarely been successful challenging their terminations in a court of law. O'Brien's situation was one that is common among college coaches. College coaching is a volatile industry where coaches are hired to be fired on a regular basis. Universities will try to terminate coaches for just cause whenever possible; however, terminated coaches, like O'Brien, will not always agree that just cause exists. Disagreement over the existence of just cause tends to raise numerous questions. The first question is who initially determines if an occurrence qualifies as just cause for termination purposes. This question is easy to answer in most situations because the university athletic director will usually make this initial determination.

If an athletic director decides to terminate a coach for just cause, other important questions thereafter come into play. The first of which is, what happens if the coach disagrees? Secondly, what type of due process rights does the coach have? Included within the question of due process are numerous issues. What method(s) of challenging the athletic director's decision is available to the coach? What appellate rights, beyond the original challenge, does the coach have? Who will be making the ultimate decision? These questions are all very important because the form of due process in place will often determine the coach's fate. Procedural and substantive due process rights, such as written notice, a statement of the factual basis for termination, a right to a hearing, an objective and impartial hearing, a procedure governed by rules and regulations, discovery, right to counsel, right to cross examine witnesses, right to provide a defense, and privacy, are very important to the coach.

A coach's due process rights will depend on the coach's employment contract or university grievance rules. Much like termination for cause provisions, there is significant variation among due process provisions.

255. Id.
256. Id.
257. Id.
However, due process contract provisions can generally be grouped into five categories.

The first category provides the coach with the same due process rights as other university employees. Typically, these provisions do not enumerate the exact procedural and substantive rights of the coach in detail. The provision often refers to a separate document, such as a university policy or a collective bargaining agreement, which explains in detail the due process rights. The rights available will vary based on the university; however, they usually give the coach a chance to challenge the termination and a right to one appeal. The following are examples of this category of due process provision.

**University of Connecticut – Randy Edsall (Football)**

In the event the Coach is disciplined or removed for just cause, the procedures shall be those currently contained in Article 13 of the Collective Bargaining Agreement between the University of Connecticut and the University of Connecticut Chapter, American Association of University Professors (July 1, 2002 – June 30, 2007), which is incorporated herein. In the event that there is a new Collective Bargaining Agreement, any provisions pertaining to discipline or termination of bargaining unit members not in a tenure track shall apply.258

**University of Missouri – Gary Pinkel (Football)**

The Head Football Coach shall have the procedural right to a review and hearing relating to any such determination. Any such hearing shall be governed by normal University grievance procedures provided for employees of the Head Football Coach’s classification, as now or hereafter amended, unless other procedures are agreed upon by the parties.259

The exact due process rights of Randy Edsall are found in the Collective Bargaining Agreement between the University of Connecticut and the University of Connecticut Chapter of the American Association of University Professors. According to the collective bargaining agreement, the following procedures apply:

1. The staff member shall receive in writing a statement of the reasons for the action being recommended.

258. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF CONNECTICUT AND RANDY EDSALL § 10.1 (July 1, 2004) [hereinafter EDSALL CONTRACT].

259. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF MISSOURI AND GARY PINKEL § 5 (Nov. 20, 2003) [hereinafter PINKEL CONTRACT].
2. Within seven (7) calendar days of receiving the written statement (B.1), the staff member may request a hearing before his/her Dean or Director or designee with an AAUP representative present, should the staff member so desire. This hearing shall be held within seven (7) calendar days of the employee’s request.

3. Within seven (7) calendar days of receiving the recommendation in B.2 above, the staff member shall have the right to appeal to the Chancellor or his/her designee. At such appellate hearing, the staff member shall have the right to be represented by the AAUP.

4. The decision of the Chancellor or designee may be appealed to arbitration on the merits under Article 10 of this agreement. Warnings, reprimands, and other less severe discipline shall be grievable through steps B.2 and B.3 above but shall not be grievable to arbitration.260

Gary Pinkel’s due process rights can be found in the University of Missouri Human Resources Policy Manual.261 The manual provides Pinkel the following procedural rights:

Should an employee or the employee’s representative feel, after oral discussion with the immediate supervisor, that employee’s rights under University policy have been violated, the employee may originate a grievance within ten (10) days of the date the alleged grievable act occurred by presenting the facts in writing to the proper supervisor, department head, or designated representative of the University with a copy to the Campus Grievance Representative. The decision of such official shall be made in writing to the employee within ten (10) days after receipt of grievance. For an alleged act of prohibited discrimination, an employee has a 180-day filing period.

Should the employee decide the reply is unsatisfactory, the employee or the employee’s representative shall, within five (5) days, submit an appeal to the Campus Grievance Representative. The Campus Grievance Representative or designate shall respond in writing to the grievance within five (5) days from the date of the review. If the grievance is resolved, no further action will be necessary.

If the grievance is not satisfactorily resolved, the employee or the


employee's representative may appeal within five (5) days after receipt of response to the University Grievance Representative for the purpose of reviewing the grievance. The decision of the University Grievance Representative or designate shall be made in writing to the employee and/or employee's representative within five (5) days after the date of the review.

Should the employee decide that the reply of the University Grievance Representative or designate is unsatisfactory, the matter may be appealed within five (5) days of receipt of the response through the University Grievance Representative to a grievance committee which shall be established: the employee or employee's representative may designate one (1) member; the University through its Grievance Representative, with the approval of the Chancellor of the campus, shall appoint one (1) member; and the selection of the third member shall be made by these two (2) members. If mutually agreeable, the two (2) designated members may select the third member from a list recommended by either and approved by both. Otherwise, selection will be made from a list of committee members supplied by the Federal Mediation and Conciliation Service and maintained by UM Human Resources. The selection will be made by reducing the list in alternate turns. The toss of a coin shall determine the elimination sequence.

A decision of the grievance committee may be reached upon the concurrence of any two (2) of the three (3) members. A hearing will be scheduled as soon as feasible after selection of the third committee member. The grievance committee shall keep a complete record of the hearing before it, including any exhibits or papers submitted to it in connection with the hearing and a complete record of any testimony taken. Upon the rendering of its decision, the complete record shall be filed in the Office of the President of the University and shall be available to the employee, employee's representative and the University Grievance Representative. Any cost of the third party on the committee and cost of transcript (if requested) shall be paid equally by the employee and the University.

In the event the decision of the grievance committee is unsatisfactory to either the employee or the University Grievance Representative, either may, within five (5) days after receipt of the decision of the grievance committee, file a written notice of appeal to the Board of Curators by delivering such notice of appeal to the President of the University. Upon the receipt of the notice of appeal, the President of
the University shall cause the record of the hearing before the grievance committee to be filed with the Board of Curators of the University, who shall review such record. The decision of the Board of Curators, upon such review, will be final.\textsuperscript{262}

One other coach who is given the due process rights of other university employees is University of North Carolina football coach, John Bunting. Bunting’s contract provides him with all the employment rights found in the Employment Policies for Instructional and Research EPA Non-Faculty Employees of The University of North Carolina at Chapel Hill. This policy provides the following due process rights:

1. If, within ten days after the employee receives the notice of intent to discharge referred to in Section III.D., above, the employee makes no written request for either specification of reasons or a hearing, he or she may be discharged without recourse to any further institutional procedure by a written letter of discharge from the Chancellor or his or her delegate.

2. If, within ten days after he or she receives the notice referred to in Section III.D., above, the employee makes written request, by registered mail, return receipt requested, for a specification of reasons, the Chancellor or his or her delegate shall supply such specification in writing by registered mail, return receipt requested, within ten days after receiving the request. If the employee makes no written request for a hearing within ten days after he or she receives the specification, the employee may be discharged without recourse to any further institutional procedure by a written letter of discharge from the Chancellor or his or her delegate.

3. If the employee makes a timely written request for a hearing, a hearing shall be accorded before the EPA Non Faculty Grievance Committee. The hearing shall be on the written specification of reasons for the intended discharge. The hearing committee shall accord the employee twenty days from the time it receives his or her written request for a hearing to prepare his or her defense. The Committee may, upon the employee’s written request and for good cause, extend this time by written notice to the employee.

4. The hearing shall be closed to the public unless the employee and the Committee agree that it may be open. The employee shall have the right to counsel, to present the testimony of witnesses and other

\textsuperscript{262} Id.
evidence, to confront and cross-examine adverse witnesses, and to examine all documents and other adverse demonstrative evidence. A written transcript of all proceedings shall be kept; upon request, a copy thereof shall be furnished to the employee at the University’s expense.

5. The Chancellor, or his or her delegate or counsel, may participate in the hearing to present evidence, cross-examine witnesses, and make argument.

6. In reaching decisions on which its written recommendations to the Chancellor shall be based, the Committee shall consider only the evidence presented at the hearing and such written and oral arguments as the Committee, in its discretion, may allow. The Committee shall make its written recommendations to the Chancellor within ten days after its hearing concludes.

7. With respect to any grievance, if the Chancellor concurs in a recommendation of the Committee that is favorable to the employee, his or her decision shall be final. If the Chancellor either declines to accept a Committee recommendation that is favorable to the employee or concurs in a Committee recommendation that is unfavorable to the employee, the employee may appeal the Chancellor’s decision to the Board of Trustees. This appeal shall be transmitted through the Chancellor and be addressed to the Chairman of the Board. Notice of appeal shall be filed within ten days after the employee receives the Chancellor’s decision. The appeal to the Board of Trustees shall be decided by the Board of Trustees. However, the Board may delegate the duty of conducting a hearing to a standing or ad hoc committee of at least three members. The Board of Trustees, or its committee, shall consider the appeal on the record, but it may, in its discretion, hear such other evidence as it deems necessary. In all cases, review shall be limited to the question of whether the Chancellor committed clear and material error in reaching his or her decision. The Board of Trustees’ decision shall be made within 120 calendar days after the Chancellor has received the employee’s request for an appeal to the Trustees. This decision shall be final except that the employee may, within ten days after receiving the Trustees’ decision, file a written petition for review with the Board of Governors if he or she alleges that one or more specified provisions of The Code of The University of North Carolina have been violated. All such petitions to the Board of Governors shall
be transmitted through the President.\textsuperscript{263}

A second category of due process provision allows the coach the right to challenge the athletic director’s initial termination decision in front of the university president or chancellor. This type of provision is disadvantageous for the coach because the university president or chancellor is most likely to side with the athletic director who is a fellow administrator. Additionally, determining there is just cause for a termination saves the university money because normally when a coach is terminated the university is absolved of providing any further compensation and/or collateral benefits. The following provisions are examples of this second category.

**University of South Carolina – Steve Spurrier (Football)**

Any termination for cause must be preceded by a pre-termination meeting held for such purpose by the President of the University after not less than five (5) days prior written notice to Coach, which notice shall include a statement of the charges against Coach. The meeting shall consist of an explanation of the University’s cause for termination and an opportunity for Coach to present his side of the story. Present at the meeting shall be the President, Athletics Director, University General Counsel and/or other persons deemed appropriate by the President. Coach shall be permitted to have an attorney present to represent him if he so desires. The decision of the President following the meeting shall be the final University decision.\textsuperscript{264}

**Florida State University – Bobby Bowden (Football)**

Coach shall have the right, upon written request, for an opportunity for review and hearing before the President of the University relative to any termination of this Agreement for Cause. This right shall be Coach’s exclusive opportunity for review and hearing relative to any termination of this Agreement for Cause and Coach hereby waives his right to any other hearing provided in the Florida Administrative Procedures Act, Chapter 120, Florida Statutes, as amended, and in Chapters 6C and 6C2, Florida Administrative Code. The determination of the President in such case shall constitute final agency action.\textsuperscript{265}

\textsuperscript{263. EMPLOYMENT POLICIES FOR INSTRUCTIONAL AND RESEARCH EPA NON-FACULTY EMPLOYEES OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL art. IV(E)(1-6)-(F) (last revised July 1, 1999), available at http://www.unc.edu/policies/employmentpolicy.html#IV.}

\textsuperscript{264. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF SOUTH CAROLINA AND STEVE SPURRIER § 12.01(b). (Nov. 23, 2004).}

\textsuperscript{265. EMPLOYMENT CONTRACT BETWEEN FLORIDA STATE UNIVERSITY AND BOBBY BOWDEN § V(A)(ii)(c) (Nov. 12, 2003).}
Indiana University – Kelvin Sampson (Basketball)

The Employee shall have the procedural right, upon written request, to a review relating to any such suspension ordered by the Director of Athletics pending termination. Such written request shall be sent to the President of the University. The President may consider this request or may appoint one or more delegates to consider the request. The President or his delegate will provide an opportunity to the Employee to discuss and respond to the reasons set forth as the basis for the suspension pending termination. If after such opportunity, the President or his delegate/delegates determine that the recommendation of the Director of Athletics is proper, the Employee will be notified in writing of the decision by the President and the termination will take effect on the date specified in the President’s notification. The President’s decision will be final.266

University of California, Los Angeles – Ben Howland (Basketball)

In the event of a Termination for Cause, Coach and his counsel shall be entitled to an opportunity to appear before and/or submit written materials to the Chancellor or his/her designate in order to test whether Coach was removed from his position in a manner consistent with the terms of this 2003 HC Agreement. Such an appearance may take place either before Coach is removed from his position or after he is so removed. Coach’s request to exercise this right must be made in writing to the Chancellor. Coach understands and agrees that the exigencies of operating an NCAA Division I men’s basketball program require that matters involving the termination of Coach for cause be handled expeditiously to avoid the perception of confusion within and damage to the program. Coach agrees, therefore, that he shall have 10 (ten) calendar days from the date on which he receives notice that he is to be terminated for cause or from the date on which he is terminated, whichever occurs first, in which to request an appearance before and/or to submit written materials to the Chancellor or his/her designate. Such an appearance shall occur within 5 (five) calendar days after Coach’s request to so appear is timely received. The Chancellor or his/her designate shall review the matter and respond to Coach in writing within 3 (three) calendar days. The parties understand and agree that this process represents an administrative remedy.267

266. SAMPSON CONTRACT, supra note 133, § 6.02(c).

267. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF CALIFORNIA, LOS ANGELES AND
Texas Tech University – Mike Leach (Football)

"Cause" sufficient to satisfy the provisions of this Contract shall be determined by the President of the University at a pre-termination meeting held for such purpose after ten (10) days' prior written notice to Coach, which notice shall include a statement of charges against Coach. This meeting shall consist of an explanation of the University's cause for termination and an opportunity for Coach to present his side of the story. Present at the meeting shall be the President, Athletics Director, University General Counsel and/or other persons deemed appropriate by the President, Coach and Coach's attorney (if Coach so chooses). The decision of the President following such meeting shall be final.268

A third category of due process provisions is similar to the process of the second category. These provisions give the coach the same right to a hearing in front of the university president; however, the coach first has an opportunity to appeal to the athletic director. The coach will first appeal to the athletic director, and then, if the coach is not satisfied with this decision, he or she can appeal to the president. This third category provides the coach little, if any, additional protection. Usually the athletic director makes the initial decision to terminate the coach for cause. The athletic director is highly unlikely to overturn his or her own decision when the coach appeals. The provisions that follow are examples of this category of due process provisions.

University of Washington – Lorenzo Romar (Basketball)

Just cause sufficient to satisfy the provisions of this paragraph, shall initially be determined by the Director. Upon such determination, the Director shall have the authority to order the paid suspension of Employee from his duties pending termination of this Agreement, provided that notice of any such termination shall be delivered to Employee in writing, detailing the reasons for the termination and setting forth a reasonable time within which the Employee may respond. Employee may respond to the Director's notice of termination in writing or in person. The Director will consider Employee's response and issue a written decision. If Employee is dissatisfied with the Director's decision, Employee shall have the procedural right, upon written request, to a review and an informal hearing by the Special Assistant to the President relating to any such

BEN HOWLAND § 7(d) (Dec. 18, 2003).

termination ordered by the Director. Any such hearing shall be governed by state law and shall be held within a reasonable time after the Director’s decision. The Special Assistant to the President will review the matter and gather additional information as appropriate. After review, the Special Assistant to the President will notify Employee and the Director of the decision and the final disposition of the issue. This right to a hearing by the Special Assistant to the President shall be in lieu of any right to review that may be provided for in the Personnel Program.269

Iowa State University – Dan McCarney (Football)

Once the Director of Intercollegiate Athletics has determined termination is warranted, the Director shall have the administrative authority to order suspension of McCarney from his duties and salary pending termination of this Agreement, provided that notice of any such suspension pending termination shall be delivered to McCarney in writing, at least three days prior to the effective date of the suspension, detailing the reasons for such suspension and setting forth a reasonable time within which McCarney may respond. Within the three-day period, McCarney shall have the right to an informal meeting with the Director of Intercollegiate Athletics, or the Director’s designee, to discuss the basis for suspension and termination. McCarney shall have the procedural right to make a written request for a review and hearing relating to any such suspension and termination order by the Director. The request must be made to the President. The request shall state the grounds for seeking review. Review and hearing will be before the President or the President’s designee. If a designee conducts the review and hearing, the designee shall make a recommendation to the President, who shall make the final decision, subject to any review required by law or rule. If McCarney fails to request such review and hearing within five working days after the effective date of the suspension pending termination, this Agreement shall be terminated for the causes cited in such notice.270

Washington State University – Richard Bennett (Basketball)

“Just cause” sufficient to satisfy the provisions of Section 4.2 hereof

269. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF WASHINGTON AND LORENZO ROMAR § 8(e) (Apr. 1, 2002) [hereinafter ROMAR CONTRACT].

270. EMPLOYMENT CONTRACT BETWEEN IOWA STATE UNIVERSITY AND DAN MCCARNEY § V(2) (Jan. 18, 2003).
shall initially be determined in good faith by the Athletic Director of the University. The Athletic Director shall give the Employee written notice of the provisions of the Agreement alleged to have been violated, together with a statement of the factual basis for those allegations. The Employee will have fifteen (15) calendar days within which to respond to the Athletic Director, in writing, with reasons he should not be terminated. The Athletic Director, after considering any response provided by the Employee, will issue a decision regarding termination for cause. If a summary suspension has been issued in accordance with paragraph 4.3.1, the Athletic Director must issue a decision regarding termination within five (5) calendar days of receipt of the Employee’s response. If a summary suspension has not been ordered, the Athletic Director shall issue a decision regarding termination within ten (10) calendar days of receipt of the Employee’s response.

Employee’s right to receive any payment under this Agreement, including all portions of Section 3, shall cease the day following the issuance of the decision to terminate for cause.

The Employee may appeal the Athletic Director’s decision to terminate for cause to the University President or his designee. Such appeal must be made in writing within fifteen (15) calendar days notice of the Athletic Director’s determination, and must contain a statement of the reasons that the Employee requests the President to set aside the decision to terminate for cause. The Employee must provide a copy of the appeal to the Athletic Director at the time it is delivered to the Office of the President. The Athletic Director may, within seven (7) calendar days of receipt of the notice of appeal, provide an additional written statement supporting his decision to the President, and shall provide the President with 1) the written notice of termination sent to the Employee; 2) the Employee’s written response, if any, and 3) the written decision of termination. The President, within a reasonable time of receiving the notice of appeal and the documents from the Athletic Director, shall enter a decision regarding termination for cause. This shall be the final decision of the University.271

A fourth category of due process provisions provides the coach the opportunity to appeal an adverse determination to arbitration. This is a better

form of due process for the coach because it takes the appeal outside of the university. At arbitration, the coach has a better opportunity to have an unbiased hearing. Arbitration also provides for a more finalized decision. While arbitration decisions can be appealed to the courts for specific statutory reasons, courts will rarely overturn the decision. The following are examples of due process clauses providing for arbitration.

University of Iowa – Steve Alford (Basketball)

Coach may challenge University’s termination of Coach for cause before a panel of arbitrators. With respect to alleged violations of subsections (a), (b), (e) and (f), the issue(s) for determination shall be whether the violation occurred, with the University bearing the burden of proof by a preponderance of the evidence.

With respect to alleged violations of subsections (c) and (d), the issue(s) for determination shall be whether the University can demonstrate by clear and convincing evidence it had reasonable grounds to believe it would be subject to the specified sanctions from the NCAA or Big Ten Conference.

The arbitration panel shall consist of three members, one person selected by the University, one by Coach, and a third person agreed upon by the nominees of the parties. In the event the parties are unable to agree upon a third arbitrator within 14 days, the parties shall request a list of 10 arbitrators from the American Arbitration Association selected for their experience in resolving similar disputes. The parties will select an arbitrator from the list by the “strikedown” method, with Coach having the first and last strike. The University will bear all costs of the arbitration, except those relating to the nominee of Coach and counsel, if any, for Coach. . . .

The decision of the panel shall be final and binding upon the parties.272

Purdue University – Matt Painter (Basketball)

The Coach shall be subject to and have the benefit of all University grievance procedures which are or which may later become available to persons holding Administrative/Professional Staff appointments at the West Lafayette Campus of the University. After the complete exhaustion of such administrative remedies, the parties agree that all

disputes between them arising out of this Agreement or concerning the scope, interpretation or applicability of any provision of this Agreement shall be resolved by submission of such dispute to arbitration according to the rules of the American Arbitration Association. The arbitrator shall be a member of the National Academy of Arbitrators and only one arbitrator shall be required. The decision of the arbitrator shall be final and binding on both the Coach and the University.\textsuperscript{273}

Georgia Institute of Technology – Chan Gailey (Football)

Should COACH disagree with “good cause” termination, COACH may, within ten (10) days of such termination, give written notice of this objection to such termination. In that event, the ASSOCIATION shall, within a reasonable time, not to exceed twenty (20) days, request a list of seven arbitrators from the American Arbitration Association who are available for employment as herein provided. Selection of an arbitrator shall be made by each party ranking each of such arbitrators on the list with a number from one (1) to seven (7): one for the favorite, two for the second, and so on. The two rankings will be added and the arbitrator with the lowest cumulative number shall be the arbitrator to hear the case. In the event this method of selection results in a tie, each party will alternately remove one arbitrator from the fill list until only one arbitrator remains on the list. The arbitrator whose name remains on the list shall be the arbitrator who hears the case. COACH will have the first turn to remove an arbitrator from the list.

After the selection of an arbitrator, the issue of “good cause” termination shall be submitted to arbitration for a non-binding decision which shall be rendered within twenty (20) working days following the close of the proceedings conducted by the arbitrator. The proceedings conducted by the arbitrator shall be under such terms and conditions as the arbitrator determines, consistent with the procedures of the American Arbitration Association, and the arbitrator’s decision shall be submitted to both parties within twenty (20) days of the close of evidence and briefs which, within the discretion of the arbitrator, are allowed.\textsuperscript{274}

The fifth and final category of due process provisions is a miscellaneous

\textsuperscript{273} Painter Contract, supra note 139, § 7.01.

\textsuperscript{274} Employment Contract Between the Georgia Institute of Technology and Chan Gailey art. VIII, § 1 (Dec. 29, 2001).
category that includes the provisions that do not fit into one of the four
categories already discussed. These provisions are different because they
utilize an unusual form of hearing or provide for a sequence of due process
rights not commonly found in coaches’ contracts. The following are examples
of these provisions.

University of Oklahoma – Bob Stoops (Football)

Prior to suspension without pay or termination for cause, or within 30
days after suspension with pay, the President, or his designated
representative, shall provide Coach with a written notice of the
proposed action and a reasonable opportunity to defend. The notice of
proposed action shall state specific grounds and particular facts upon
which the proposed action is based, including any written reports or
documents supporting the proposed action. A reasonable opportunity
to defend shall mean that the Coach shall have a right to meet with the
President, or his designated representative, to respond to the proposed
action. At the meeting, Coach shall be given the opportunity to
present information to refute the existence of legitimate reasons for
the proposed action. To invoke the meeting process, Coach shall
deliver a written request for a meeting to the Director no later than
seven (7) days following receipt of the notice of proposed action.
Upon receipt of Coach’s request, the Director shall schedule the
meeting to be held prior to the effective date of the proposed action.
Following the meeting, the proposed action, supporting information,
and the Coach’s response and refuting information, if any, shall be
carefully reviewed by the President, or his designated representative,
to decide whether there is a sufficient basis for suspension without pay
or termination. After the review, the President, or his designated
representative, shall render a written decision. If the decision is that
Coach is to be suspended without pay or terminated, the decision shall
include: (1) the reason(s) for suspension without pay or termination,
(2) the facts found and the conclusions drawn from the meeting, and
(3) the effective date of the suspension without pay or termination.
Coach may appeal a written decision for suspension without pay or
termination by filing a written appeal with the Assistant Vice
President for Human Resources within ten (10) working days from the
date of receipt of the written decision. The rules and procedures set
forth in Classified Staff Dispute Resolution Procedure, Policy # 406.0
shall govern the appeal process, except that there shall be no Staff
Dispute Resolution Committee and, in addition to other enumerated
powers, the Hearing Officer shall assume the duties of the Staff
Dispute Resolution Committee and shall make all necessary finding
and recommendations. For the purposes of this Contract, the rules and procedures applicable to the appeal process are merely borrowed from the Classified Staff Human Resources Policy Manual. Nothing herein shall be construed as classifying Coach, or making Coach a Classified Staff employee, or conveying to Coach any rights or benefits that are provided to Classified Staff employees as a result of classification.275

University of Kansas – Bill Self (Basketball)
Upon receipt of a written request for a hearing, the Chancellor shall appoint a three-person hearing board, composed of two individuals from the Board of the University of Kansas Athletic Corporation (“KUAC”) and one other University or KUAC employee, to consider the matter and hear reasons for and against the contemplated action. Self shall have the right to appear before the hearing board, with a representative if he desires, to comment on the reasons given for the contemplated action and present reasons against it. The hearing board shall not be bound by formal or technical rules of evidence. The hearing board shall send written findings of fact and recommendations on the matter to the Chancellor or the Chancellor’s designee. The Chancellor or designee may seek counsel from the KUAC Board. The Chancellor shall consider and decide the matter and shall notify, in writing, Self, the Director of Intercollegiate Athletics, and the hearing board of the Chancellor’s decision, which shall be final.276

University of Nebraska – Bill Callahan (Football)
(a) If the employment of an athletic staff member is terminated for cause under this departmental policy, the athletic staff member upon written request delivered to the Athletic Director shall have the right to a post-termination hearing within reasonable time after termination of his or her employment.

(b) The post-termination hearing will be conducted by a panel of three academic-administrative employees of the University selected by the Chancellor. Such hearing will be reported by a qualified court reporter, and a transcript of such hearing shall be prepared, all at the expense of the University. The athletic staff member shall at his or her option have the right to have a personal attorney present at such hearing, to call witnesses on his or her behalf, and to cross-examine

275. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF OKLAHOMA AND BOB STOOPS § 17 (Jan. 1, 2002).
276. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF KANSAS AND BILL SELF § I(c) (Apr. 21, 2003).
witnesses. The formal rules of evidence applicable in the courts of the State of Nebraska shall not be applicable in any such hearing, however, the hearing panel shall only give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. The hearing panel may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

(c) After the conclusion of the hearing, the hearing panel shall promptly make a written recommendation for decision of the case to the Chancellor and provide a copy of such written recommendation to the athletic staff member. As soon thereafter as possible, the Chancellor, or his or her designated representative, shall inform the athletic staff member of the decision of the Chancellor relating to termination of the athletic staff member's employment. The decision of the Chancellor shall be final and there may be no further administrative appeal of such decision within the University of Nebraska.

Northwestern University – Randy Walker (Football)

Prior to any contemplated suspension or termination of Employee, University shall be required to provide Employee with written Notice of contemplated suspension or termination of employment and a statement of the reasons and factual basis and support therefor. Employee, from the date of receipt of said written Notice, shall have five (5) calendar days from receipt thereof to deliver a written Request for a hearing on the contemplated action. Written Request shall be delivered to the office of the Chancellor or President of the University. If no written request is received by the Chancellor or President as provided herein, a contemplated suspension termination shall become final five (5) calendar days following the Employee’s receipt of said Notice. Upon receipt of a written Request for hearing, the Chancellor or President shall appoint a three (3) person Hearing Panel composed of the Chief Judge of the County in which the main office of the University is located, the President of the local Bar Association who in turn shall select a third arbitrator to consider the matter and hear reasons for and against the contemplated suspension or termination. The Employee shall have the right to appear before the Hearing Panel with a representative, if he desires, including legal representation, to

277. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF NEBRASKA AND BILL CALLAHAN § 7(a)-(c) (July 9, 2004).
comment on the reasons given for the contemplated action and to present evidence. The Hearing Panel shall not be bound by formal or technical rules of evidence but shall be governed by the arbitration rules of the American Arbitration Association. The decision of the Hearing Panel shall be final and conclusive as to the employment status of the Employee. Employee shall be afforded any and all necessary due process including the right to hire counsel, call witnesses, conduct discovery, examine documentation and cross examine witnesses so that Employee is given a fair and unbiased hearing as to his employment status. The cost of arbitration shall be borne by the University.\textsuperscript{278}

When looking at the various categories of due process provisions, it becomes clear that the questions posed in the beginning of this section can have many different answers. When discussing the due process rights of coaches, other issues are important. First, there is the issue of the relationship between the coach’s contract and regular university due process procedures. Do regular university due process procedures trump those provided for in the contract, or vice versa? Many contracts answer this question specifically. For example, Lorenzo Romar’s (University of Washington) contract states that “[t]his right to a hearing by the Special Assistant to the President shall be in lieu of any right to review that may be provided for in the Personnel Program.”\textsuperscript{279} With other contracts, this question is not an issue because the contract gives the coach the same procedural rights as other university employees. Randy Edsall’s (University of Connecticut) contract is an example of this.\textsuperscript{280} His contract provides him with the due process procedures “currently contained in Article 13 of the Collective Bargaining Agreement between the University of Connecticut and the University of Connecticut Chapter, American Association of University Professors.”\textsuperscript{281}

When the coach’s contract does not discuss regular university due process procedures, there is the potential for a conflict. University counsels seem to agree that they will try to avoid this inconsistency from occurring. However, there is not a clear consensus about what happens if this conflict does occur. One general counsel office at a major Division I university states, “we would do our best to comply with both procedures in the termination.”\textsuperscript{282} Another

\begin{itemize}
\item \textsuperscript{278} Martin J. Greenberg, College Coaching Contracts Revisited: A Practical Perspective, 12 \textit{MARQ. SPORTS L.J.} 127, 218-19 (2001).
\item \textsuperscript{279} ROMAR CONTRACT, supra note 268, § 8(e).
\item \textsuperscript{280} See EDSALL CONTRACT, supra note 257, § 10.1.
\item \textsuperscript{281} Id.
\item \textsuperscript{282} E-mail from Anonymous University General Counsel Office to Jay S. Smith, Law Student,
general counsel office from the same conference has a slightly different opinion. It believes “that the terms and process of the coach’s contract would likely be the ones used.”283 This second general counsel office reasoned that “[t]he parties bargained for a specific process, even though a more general one existed. It would not be logical to bargain for a process and then go outside the contract to use a different process.”284 The differing opinions provided by these universities are interesting because there is no authority specifying what procedures should be followed, and it is unclear how courts would resolve this situation if it arises.

The constitutional right to due process is another issue that can arise when considering due process for college coaches. First, there is the question of whether coaches have a constitutional right to due process when terminated. Secondly, if they are entitled to due process, are the rights they receive constitutionally adequate?

College coaches at public universities are public employees and as public employees, they all have a right to pre-removal due process. In Board of Regents v. Roth,285 the Supreme Court established that public employees are entitled to pre-removal due process.286 The Court said, “staff members dismissed during the terms of their contracts, have interests in [their] continued employment that are safeguarded by due process.”287 The basic requirements of due process are “notice and an opportunity to respond.”288 More specifically, the Court in Cleveland Board of Education v. Loudermill289 stated that the “public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.”290 It is standard for coaches’ contracts to provide them these basic due process rights. All of the due process provisions quoted earlier provide for these basic rights.

The issue of constitutionally required due process appears to be of limited importance in college coaches’ contracts because it appears that most, if not all coaches, are afforded the required due process. Public university coaches under contract are entitled to constitutional due process protections; however,


283. E-mail from Anonymous University General Counsel Office to Jay S. Smith, Law Student, Marq. Univ. Law School (July 26, 2006, 13:23 CST) (on file with author).

284. Id.


286. See id.

287. Id. at 577.


289. Id.

290. Id.
the due process rights their contracts provide are normally adequate.

Private universities are usually not required to satisfy constitutional due process requirements when terminating a coach or any other employee. Generally, private universities are not government actors, and thus, they need not follow constitutional requirements. However, private universities do receive some level of public funding, and individuals have attempted to argue in court that this qualifies private universities as government actors. This argument has occasionally prevailed in court, but courts have traditionally been reluctant to accept this position. For example, in *Madon v. Long Island University C.W. Post Center*, the court held that a tenured professor at a private university was not entitled to constitutional procedural due process when he was terminated. In finding that public funding was not enough to qualify the university as a state actor, the court said, "mere allegations of State financial or other support, without more, are insufficient to convert an otherwise independent entity into a 'joint venturer' with the State." Based on this position, coaches at private universities are probably not constitutionally entitled to procedural due process. However, coaches at private universities probably have due process rights in their contracts that go beyond what is constitutionally required.

Considering the issues surrounding due process for college coaches, it is interesting to note the due process provision in O'Brien's contract. O'Brien's contract states that "[i]n the event Ohio State terminates this agreement for cause, Coach shall have such procedural rights and remedies, if any, as are generally afforded and given to Ohio State administrative and professional employees." This due process provision provided O'Brien the rights of other university administrative and professional employees, which are found in The Ohio State University Employee Policy Manual. The policy manual provides for the following procedure.

B. Upon receipt of a request for suspension or termination, the Office of Human Resources, Consulting Services, will schedule a pre-corrective action meeting and notify the staff member and the supervisor of the date, time, and location. During the meeting, the supervisor should be prepared to discuss the reasons and the basis for requesting corrective action. The staff member will have an opportunity to explain and present evidence as to why action should not be taken.

292. See id.
293. Id. at 249.
294. O'BRIEN CONTRACT, supra note 88, § 5.6.
C. After the pre-corrective action meeting, the Office of Human Resources, Consulting Services, will recommend appropriate action and notify the college/department and staff member of the appointing authority decision. The appointing authority will issue decisions within 40 calendar days of the request for corrective action unless considerable investigation is necessary.

D. CCS staff may appeal the following corrective actions to the State Personnel Board of Review:

1. Terminations except during the initial probationary period and for conviction of a felony.
2. Demotions except during the promotional probationary period.
3. Suspensions greater than three days.\textsuperscript{295}

Based on the record in the O'Brien case, it is unclear if any of these procedures were followed. Regardless of whether the procedures were followed, they clearly did not prevent the dispute between O'Brien and OSU from resulting in litigation.

VIII. CONCLUSIONS

A. Turnover

In the world of college coaching, coaches are hired to be fired. Their useful work lives for a particular college are often short term. They live in a volatile work environment where turnover, job movement and body relocation is the norm rather than the exception.

B. Employment Contracts

Employment contracts in college coaching, unlike unionized professional sports, are not standardized. No two forms are the same. The level of sophistication by drafters varies. Oftentimes when the coach is ready to sign the contract, he suffers from job elation; that is, if the salary or package numbers are acceptable, the contract is executed without advice of counsel. Coaches’ contracts are often created in a frenzy with “invent-the-wheel” language. The negotiation of coaches’ contracts, especially termination provisions, is a legal specialty that deserves the advice and counsel of an attorney who understands the nuances and intricacies of termination clauses.

C. Compensation Upon Termination

Whether a coach is terminated for causes enumerated in the contract or for no cause other than the coach’s failure to win or garner alumni support, the back end of the contract that deals with the financial consequences of

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termination may be as important or more important than the package or contract salary number.

D. Termination for Cause

Termination for cause provisions usually are drafted to favor the university.

E. Interpretation

Oftentimes a coach can be fired or terminated for causes that are not subject to dictionary definition and require legal interpretation, wherein no two lawyers or even a judge can ultimately agree on the meaning of the terms. These terms include: 1) conduct seriously prejudicial to the best interests of the University; 2) moral turpitude; 3) serious or intentional violations of any rule or regulation; 4) gross negligence in performance; 5) perpetration of willful fraud; and 6) complicity in an immoral act.

If words are not subject to clear and simple, Webster-style definitions, they should not be in the contract. Those types of words are used as weapons to fire or terminate a coach or make the coach resign in order to retain his honor, which ultimately affects the bottom line. If the contract is going to have words that are subject to interpretation, then the ultimate finder of fact must be an impartial party who does not have a vested interest in termination.

F. Due Process

If we are to continue to use words that are subject to interpretation in termination provisions for a coach's contract, the coach should then be entitled to a fair process to determine whether cause for termination exists. Procedural and substantive rights, such as written notice of the factual basis or reasons for termination, a right to a hearing before an objective and impartial panel, the right to discovery and cross examination, and the right to be provided with the protection of counsel, are basic rights that give the coach a more level playing field when the ultimate determination is made.

G. Dirty Laundry

For many years, dirty laundry was aired in the backroom rather than the courtroom. There now seems to be a trend where coaches are not afraid to have their principles adjudicated and to let the court determine whether they were justly terminated. Termination for cause proceedings usually hang out the dirty laundry of the university in the public, involve protracted and
expensive litigation, often offend many loyal fans and alumni and can shed a negative light on the university, whether it was right or wrong in its termination decision.

H. System of Termination

Maybe the system of termination needs a further look. Rather than characterizing termination for cause or not for cause, termination for any reason should be subject to agreed upon liquidated damages and subject to mitigation. In that instance, although the coach may be terminated at any time, at least the coach has the assurances that the agreed upon financial aspects of the contract will be fulfilled. However, the financial assurances will be subject to the coach’s obligation to continue to find other employment to mitigate the agreed upon liquidated damages for termination.