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**VIA ELECTRONIC MAIL**
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President Chaouki Abdallah
Office of the President
MSC05 3300
Scholes Hall Suite 144
1 University of New Mexico
Albuquerque, NM 87131

**Re: Petition to the Board of Regents**

Dear President Abdallah:

Pursuant to Regents' Policy Manual-Section 1.5, attached please find Robert Davie's Petition to the Board of Regents.

Sincerely,

GALLAGHER & KENNEDY, P.A.

By: Michael K. Kennedy

MKK:agm
Enclosures

**ROBERT DAVIE'S PETITION TO THE BOARD OF REGENTS APPEALING PRESIDENT ABDALLAH'S FEBRUARY 6, 2018 DECISION --AND— REQUEST FOR STAY OF PUBLICATION, IMPLEMENTATION AND ENFORCEMENT OF THAT DECISION PENDING RESOLUTION OF THIS APPEAL**

In accordance with Regents' Policy Manual-Section 1.5, Petitioner Robert Davie respectfully requests that President Abdallah's February 6, 2018 Decision ("Decision") be vacated. The bases for this appeal are as follows:

1. ***The President had no authority to modify, reverse or vacate OEO's January 22, 2018 Final Report in Case #I-2017-05-23 that: "The OEO found NO POLICY VIOLATION with regard to allegations Respondent created a hostile environment due to race in violation of UNM UAP Policy 2720***." Neither the Complainant nor Respondent requested review of OEO's Final Report. Upon receipt of "notice from the Office of the President no appeal has been filed in OEO Case #1-2017-05-23", the OEO file was closed effective January 30, 2018. Exhibits A and B. The President had no authority to modify, reverse or vacate the OEO Final Report where neither the Claimant nor Respondent appealed and the OEO file had been officially and finally closed.

2. ***There is no evidence of any failure to report Incident 1 by Petitioner in violation of UAP 2740, UAP 2720 or UAP 2730 ("UAP Policies").*** It is undisputed that the UNM Police Department ("UNMPD") was timely notified of Incident 1 and had already begun its investigation **before** Petitioner learned of Incident 1. Kaley Espindola and Paul Krebs had consistently advised Petitioner that in the event UNMPD had been apprised of a misconduct complaint, OEO would then be advised by UNMPD and further reporting was by Petitioner was unnecessary. The theory of mandatory reporting, of course, is to enable the appropriate authorities to respond to, investigate, and assess incidents of possible sexual violence or sexual misconduct as quickly as possible. In a case like this, in which Petitioner learned of the incident from UNMPD, the appropriate authorities by definition already were engaged in their investigative process; an additional report from Petitioner would not have advanced the purpose of the policy. Even more importantly, Petitioner's failure to report the matter (to authorities who already were aware of it) obviously could not have impeded the purposes of the policy. To sanction Petitioner for then failing to make his own distinct report of a matter that already was under investigation by appropriate authorities does not serve the theory of the policy. Innumerable University officials and employees have learned of Incident 1 since the UNMPD investigation commenced. Were the President, HR Director, Athletic Director and their assistants all obligated to report this incident when they learned about it, even though that may have been long after the investigation had commenced? Of course not. Petitioner did not violate the UAP Policies by failing to report Incident 1 when he learned about the incident from UNMPD after their investigation had begun.

Also worthy of note is the Decision's reference to a February 22 team meeting that the Decision intimates was inappropriate and may have jeopardized the UNMPD investigation. Prior to that meeting Petitioner contacted the Athletic Director and UNMPD Chief for specific instruction on what to share with the team. Petitioner advised the 100+ members of the team and

coaching staff of the ongoing investigation and proper procedures for how to respond: no retaliation, no contact with any affected party either in person or via social media and report any information to UNMPD—just as he had been instructed.

3. ***Petitioner did not "interfere" with the UNMPD investigation of Incident 1 in violation of UAP 2200.*** The Decision itself acknowledges that the investigating officer "declined to term your (Petitioner's) involvement as "interference" . . ." It was only after the Hogan Report was received by UNM that UNM Human Resources unilaterally and without notice to Petitioner, ignored the Hogan Report finding and conclusion that there was no "interference" by Petitioner. There was no finding in the three UNM investigations that Petitioner "interfered" in the UNMPD investigation of Incident 1. In authoring the Decision the UNM administration simply ignored the results of the three investigations, and without benefit of additional investigation simply imposed their preferred outcome in claiming that Petitioner did "interfere" with the Incident 1 investigation.

4. ***Posing questions to five African American coaches regarding whether they had ever heard Petitioner use the "n-word" or "blood diamond" was in no way intimidating, did not interfere with a University investigation, and did not violate any obligation of confidentiality.*** There is no evidence whatsoever that any of the five coaches felt in any way intimidated, nor does the Decision even attempt to explain how this alleged conduct interfered with a University investigation. When Petitioner immediately returned to OEO and reported this meeting, there was no suggestion whatsoever that any University policy had been violated. A follow-up letter from OEO thanked Petitioner for his cooperation and never made mention of any policy violation. As for any alleged breach of confidentiality of the OEO Claims Procedure, there is no indication that Petitioner even mentioned the OEO investigation when posing these questions. And there is certainly no violation of University Policy in communicating with fellow coaches to inquire as to whether anything had made them uncomfortable in their work place.

5. ***The OE Final Report concluded that none of the Key Factual Findings of Civil Rights Matters ("Factual Findings"), separately or collectively constituted a violation of University policies.*** In that the OEO Final Report concluded that Petitioner had not committed any violations of University Policy, Petitioner elected not to appeal from the Final Report. The OEO file has been officially and finally closed. For the President to now resurrect findings from the closed OEO file, after it has been closed and the parties having elected not to appeal, offends every conceivable notion of fair and due process. The OEO file is chock-full of facts that are inconsistent with these unfounded Factual Findings and innumerable arguments regarding the fundamental unfairness of the OEO process that generated these Factual Findings. The President's opportunity to cite and rely in any way upon these Factual Findings expired with closure of the OEO file. Parties in a proceeding such as the OEO process are entitled to "finality" or "closure." That is one of the purposes of prescribing a time period within which the parties may appeal the findings in the OEO proceeding. To nevertheless then impose discipline after a party has exercised his or her right not to appeal undermines the integrity of the appeal process. In practical effect, such discipline actually punishes Petitioner for exercising a right that the appeal process affords—the right not to appeal. Also, even the language of the Decision concedes that the Factual Findings only "signify" additional violations and does not claim actual violations of University policy.

6. ***Petitioner has not violated Paragraph 7.g. or 8 of his Employment Contract***. The Decision references three separate, although at times overlapping in substance, investigations by OEO, a federal judge and the Hogan Firm. **It is absolutely undisputed that those three investigations, conducted over a nine month time frame, did not reveal a single finding or conclusion that Petitioner violated any University policy.** Scores of interviews, 50+ pages of investigative reports, University expenses approximating $100,000 for the investigators and hundreds upon hundreds of hours expended by University investigators and management personnel, produced the undisputed, unanimous conclusion that Petitioner had not violated any University policy. The only Policy violations alleged against Petitioner were exclusively created and penned by the University administration within the past week, after neither the Complainant nor Respondent appealed and the OEO file was officially and finally closed, and the Hogan Report was signed and delivered. Without explanation or benefit of any investigation of their own and without notice to or input from Petitioner, the University administration simply rejected certain undisputed conclusions in all three of the investigative reports and in the last week rendered their preferred brand new allegations, theories, findings and policy violations. Aside from the recent and wrongful emergence of alleged policy violations, the three investigations found no violation of any University policy and consequently no violation of Paragraphs 7.g. or 8 of Petitioner's Employment Contract.

7. ***There is no evidence that any NCAA representative or UNM Athletic Department representative has concluded that Petitioner has violated or exposed UNM to any NCAA claim that NCAA's Principle 2.2 has been violated.*** This claim too was born during the last week. Never before was Petitioner advised of University concerns about NCAA Principle 2.2 or afforded an opportunity to tout the football program's cultural and gender equality; protection of health and safety, such as having the only operational drug-testing program with the UNM athletic department; and examples of not just positive, but extraordinary relationships between student athlete and coach. Just as labeled, these are aspirational "principles" for NCAA member institutions, not policies defining sanctionable conduct for coaches at NCAA member institutions.

8. ***The proposed discipline deprives Petitioner of a significant property interest without any right to fair or due process.*** A public employee has a constitutionally protected property interest in the rights, privileges and benefits of his or her employment with the public employer. The public employer, in turn, as a governmental entity subject to the 14th amendment, may not deprive the employee of any of those rights or benefits without proper respect for the employee's right to fair and due process. Most Americans are familiar with the basic requirements of fair and due process: notice of the charges, and explanation of the employer's evidence, and an opportunity for the employee to present his or her side of the story. The proposed discipline in this case deprives Petitioner of a significant property interest. The proposed discipline also was imposed without a clear advance notice of the particular charges lodged against petitioner, and obviously was imposed before providing Petitioner any opportunity to respond to the charges and present his side of the story. Those failings render the proposed discipline constitutionally infirm.

9. ***The Decision's sanction is excessive***. The alleged policy violations manufactured by the University administration this week include technical reporting violations claiming an obligation to report an incident that is already be investigated by the proper authorities, as well as violations of aspirational, not mandatory, University and NCAA policies. Such alleged violations do not warrant the sanction imposed by the Decision, which is grossly excessive. Petitioner has been deprived of any opportunity to demonstrate that such proposed sanctions far exceeds previously leveled sanctions by the University for similar conduct and is unjust, unfair and constitutionally infirm.

The Decision specifically mentions the University prohibition against retaliation and Petitioner has refrained from any such conduct during the nine months of the three University investigations. It is Petitioner's expectation and University policy right that he will not be the target of retaliation by any member of the University community during or after pendency of this appeal.

Petitioner was summoned to the President's office at 4:00 Tuesday afternoon, February 6, 2018 and presented with the Decision. To preserve the status quo and prevent further damage to Petitioner's reputation and constitutionally protected interests, this appeal was prepared and submitted as quickly as possible. It is expected that additional, pertinent information will surface and Petitioner requests the right to supplement this appeal as may be necessary. Petitioner also requests the right to submit written briefs and present oral argument as contemplated by Regents' Policy Manual-Section 1.5. It is for these same reasons that Petitioner requests that any publication, implementation or enforcement of the Decision be stayed and remain confidential pending resolution of this appeal.

It is Petitioner's understanding that later today President Abdallah plans to publicly reveal the substance of the Decision. For the reasons set forth herein Petitioner respectfully requests that such action be stayed and postponed pending resolution of this appeal. Publication of the Decision during pendency of this appeal would cause grave and irreparable damage to Petitioner and his reputation.

**For these reasons Petitioner requests that the Decision be vacated. Petitioner further requests that publication (including today's planned public disclosure), implementation and enforcement of the Decision be stayed pending resolution of this appeal so as to avoid irreparable damage to Petitioner.**

Respectfully submitted,

Michael K. Kennedy
Gallagher & Kennedy, P.A.