IN THE MATTER OF THE ARBITRATION
BETWEEN

NATIONAL FOOTBALL LEAGUE	:
PLAYERS ASSOCIATION	:
	:
v.	:
	:
THE NATIONAL FOOTBALL LEAGUE	:
And 32 CLUB MEMBERS	:
	:

For National Football League Players Association:
Tom DePaso, Esquire
Heather M. McPhee, Esquire
Winston & Strawn, LLP
Jeffrey L. Kessler, Esquire
David Greenspan, Esquire
Jonathan Amoona, Esquire
John S. Tschirgi, Esquire

For National Football League:
Adolpho. A. Birch III, Esquire
Kevin Manara, Esquire
W. Buckley Briggs, Esquire
Brook Gardiner, Esquire
Akin, Gump, Strauss, Hauer & Feld, LLP
Daniel L. Nash, Esquire
Stacey Eisenstein, Esquire
James E. Tysse, Esquire

Jonathan B. Marks
Arbitrator -- Non-Injury Grievance Panel April 11, 2016

Opinion and Award

I. Background

On January 22, 2015, the National Football League Players Association ("NFLPA") filed a non-injury grievance ("Grievance") against the National Football League ("NFL") and all 32 NFL Clubs ("Clubs") pursuant to Article 43 of the August 4, 2011, Collective Bargaining Agreement ("CBA"). NFL Ex. 1.

On February 8, 2015, the NFL Management Council ("NFLMC" or "NFL") filed an answer on behalf of the NFL and all Clubs, denying the grievance in its entirety. NFL Ex. 2.

The undersigned was designated to arbitrate the matter.

On April 16, 2015, the NFLPA and the NFLMC filed pre-hearing briefs, along with exhibits and supporting authorities. A hearing was held on April 20, 2015, during which counsel for the NFLPA and the NFLMC presented oral arguments, but no witnesses were heard. Subsequent to the hearing, and pursuant to guidance I provided on April 20, 2015, the NFLPA and the NFLMC each submitted additional exhibits and designated witnesses to appear at a further hearing. A further hearing was held on June 11, 2015, at which testimony was received from Richard Berthelsen (former NFLPA General Counsel), Thomas DePaso (NFLPA General Counsel), Ira Fishman (NFLPA Managing Director and Chief Operating Officer), and Adolpho Birch (NFL Senior Vice-President of Labor Policy and Government Affairs).

On June 30, 2015, the NFLPA and the NFLMC filed post-hearing briefs. On July 14, 15, and 24, and August 6, 2015, the Parties provided exhibit submissions responding to further Arbitrator requests.

On August 3, 2015, I provided the Parties an update on my progress in preparing an Opinion and Award. I noted my view that settlement on some or all of the issues presented to me would be preferable to my issuing an Award. I commented that my "Opinion and Award will resolve the issues concerning the Personal Conduct Policy presented to me, at least some of which are not amenable to easy decision."

I expressed my agreement with views expressed in 1986 by Arbitrator Kasher in the arguably comparable circumstances of the *Rozelle Augmented Drug Policy Matter.*[1] I noted that, in issuing his Award, Arbitrator Kasher had stated that settlement "would have been preferable" since, for example, Mssrs. Upshaw and Donlan were "more knowledgeable regarding their constituents' respective needs," "better qualified to create a negotiated interface," and possessed "the authority to compromise principles in an effort to reach an agreement that will serve the best interests of the players, the League, the Association, and the integrity of the game." *Id.* at 68.

---

[1] The NFL cites this case as *Augmented Drug Program* (1986) (Kasher, Arb.). The NFLPA cites it as *Rozelle Augmented Drug Program* (1986) (Kasher, Arb.). I refer to the case hereafter as *Augmented Drug.*

On August 11, 2015, I was informed that the Parties had had discussions about resolving the Grievance. I agreed to the Parties' request that I hold my decision. I received a series of further requests asking that I hold my decision between August 2015 and February 25, 2016, with the last request asking that I hold my decision until March 31, 2016.

Absent settlement, I now offer my Opinion and Award.

II. Roadmap to Opinion and Award

In this Opinion and Award I proceed as follows:

- Section III outlines the issues presented and the relief sought by the NFLPA.
- Section IV presents a summary of the Parties' overview arguments.
- Section V deals with the threshold issue of ripeness.
- Subsequent sections present the Parties' issue-specific arguments and my analysis and decision on each of the currently contested issues:
    - Section VI: Leave with Pay
    - Section VII: Disciplinary Officer
    - Section VIII: Third-Party Advisers and Independent Appeal Experts.
    - Section IX: Counseling, Treatment, Therapy, Enhanced Supervision
- Section X summarizes my decisions.

III. Issues Presented and Relief Sought

As filed on January 22, 2015, the Grievance challenged ten specific aspects[2] of the NFL Personal Conduct Policy announced by Commissioner Goodell on December 10, 2014 ("New Policy"). The Grievance asked for:

- A declaration that "those specific aspects of the New Policy which are inconsistent with the CBA [are] invalid"; and
- An "order" that "the League . . . cease and desist from seeking to implement them in contravention of the CBA."

---

[2] The Grievance challenged the following aspects of the New Policy:

1. Placement of players on the Commissioner Exempt List.
2. The disciplinary officer.
3. The probationary period and pre-hearing conditions.
4. Disciplinary use of counseling, education, treatment, or therapy.
5. Banishment.
6. Community service.
7. Enhanced supervision.
8. Independent experts to recommend a decision on appeal.
9. Conclusive nature of a court's disposition and factual findings.
10. Involvement of third-party advisers in other parts of the discipline process.

NFL Ex. 1 at 2-8.

NFLPA Pre-Hearing Brief at 5 ("PAPreHB").

In its Pre-Hearing Brief, the NFLPA stated that "[i]n this Grievance, the NFLPA has challenged the New Policy itself because that Policy—*on its face*—conflicts with the CBA, the parties' custom and practice, and the 'law of the shop.'" *Id.* at 10.

During the course of these grievance proceedings, the NFLPA has narrowed its challenge, asking that the Arbitrator:

> [D]eclare invalid, and issue a cease and desist and compliance with the CBA order, against the following provisions of the New Policy:
>
> 1. The New Policy's "Leave with Pay" provision in its entirety, including its purported use of the Commissioner Exempt List (NFL Ex. 25 at 000113-14);
>
> 2. The New Policy's delegation of the Commissioner's exclusive authority "to make the initial decision on discipline" to a "disciplinary officer" (*id.* at 000114);
>
> 3. The New Policy's provision that "[d]iscipline may also include requirements to seek ongoing counseling, treatment, or therapy where appropriate as well as the imposition of enhanced supervision" (*id.* at 000115), leaving the League to instead apply the "Evaluation, Counseling and Treatment" provision of the 2007 Personal Conduct Policy (NFL Ex. 29 at 000128), to which the Union agreed and which the NFL applied in subsequent Personal Conduct Policies prior to the New Policy; and
>
> 4. The New Policy's provisions allowing for outside parties to participate in the confidential and collectively-bargained disciplinary and appeals processes; specifically, the provision allowing third-party advisors "to assist [the disciplinary officer] in evaluating a potential violation" of the New Policy, and the provision that the "Commissioner may name a panel that consists of independent experts to recommend a decision on the appeal" (NFL Ex. 25 at 000115, 000117).

NFLPA Post-Hearing Brief at 63 ("PAPost-HB"),

In addition, the NFLPA asks that the Arbitrator "issue an order, pursuant to Article 2, Section 4(b) of the CBA, to [direct the NFL to] cease and desist from implementing the amendment to Section 17.14(A) of the NFL Constitution and Bylaws[3] (NFLPA Ex. 14) on the ground that it violates and/or renders meaningless the provisions of the CBA that protect players from conduct detrimental action prior to a finding of guilt and the opportunity for a hearing." *Id.*

---

[3] Hereinafter, "CBL."

IV. The Parties' Arguments – Overview

In this Section I briefly state the overall perspective of each side with regard to this grievance. I provide details of the Parties' arguments on the specifically challenged elements of the New Policy later in this Opinion and Award.

A. The NFLPA's Position

The NFLPA's grievance "challenges specific aspects of the NFL Commissioner's new Personal Conduct Policy . . . which was unilaterally implemented by the League, without collective bargaining, and violates the CBA in several of its key features." (PAPre-HB at 1).

As the NFLPA sees the matter:

> The NFL announced the New Policy on December 10, 2014 as the League's response to months of intense media criticism aimed at the NFL's handling of a number of "conduct detrimental" cases, including, most notably, the Ray Rice incident. There is no dispute that the League's handling of such cases needs improvement—but the NFL must implement any changes in a manner consistent with the terms of the CBA *or* the NFL must collectively bargain with the Union to modify the CBA. The Commissioner may have broad authority to define what constitutes conduct detrimental to the League, but it is not unfettered authority; specifically, he cannot violate the terms of the CBA or players' rights. Thus, he was not at liberty to impose the New Policy at his whim, without regard to those CBA limitations. If the NFL believes that fixing its Personal Conduct Policy requires changes to the CBA, then its only recourse is to collectively bargain and reach agreement with the Union on any changes, which has not occurred.

Id. at 2.

The NFLPA emphasizes that its "grievance does *not* challenge the NFL's authority to unilaterally issue *a* New Policy so long as it is consistent with the parameters set forth in the CBA; it challenges only those aspects of *the* New Policy that are *inconsistent* with the CBA. If the NFL wishes to change the CBA, its only recourse is collective bargaining." *Id.* at 5 (emphasis in original).

According to the NFLPA, "[a]lthough the NFL has promulgated prior versions of the Personal Conduct Policy without the NFLPA's agreement, the New Policy marks a departure from past practice because it facially conflicts with the CBA in myriad respects. *None* of the challenged aspects of the New Policy appeared in its prior iterations, and *all* conflict with specific and unambiguous terms of the CBA." PAPost-HB at 1 (emphasis in original).

In the NFLPA's view, while the "Commissioner's conduct detrimental authority may be broad, . . . it is not unlimited. The 2011 Collective Bargaining Agreement ('CBA') — most significantly, Paragraph 15 of the Standard Form NFL Player Contract and Article 46 — expressly limits the Commissioner's conduct detrimental power as it applies to NFL players. Moreover, the CBA trumps all other NFL policies and documents, including the NFL Constitution and Bylaws, and may not be amended without written agreement of the NFLPA. *See* CBA, Art. 2, §§ 1, 4(a)." *Id.* at 1.

Indeed, according to the NFLPA, "[p]aragraph 15 of the NFL Player Contract, as incorporated in the CBA (*see id.*, Art. 4, § 1), is the collectively-bargained source of the Commissioner's authority to discipline NFL players for conduct detrimental; there is no other grant of player authority for the imposition of Commissioner discipline on players (which only the Union can grant on behalf of its membership)." PAPreHB at 5.

B. The NFL's Position

In the NFL's view:

> For years, the Commissioner of the NFL has had "complete authority" to discipline players for engaging in conduct detrimental to the League. Ex. 17 (NFL Constitution and Bylaws 2010), § 8.13. That authority, which has been incorporated into every collective bargaining agreement ("CBA") negotiated between the National Football League Management Council ("NFLMC") and the National Football League Players Association ("NFLPA"), has never been contested. Pursuant to this authority, over the past two decades, the Commissioner has promulgated numerous policies setting forth, among other things, the standard of conduct expected of players; provisions for evaluation, counseling and other treatment; the range of possible discipline; and conditions of reinstatement. Until the present grievance, neither these "personal conduct" policies nor their predecessor "violent crime" policies have ever been challenged by the Union.
>
> Now, after years of acceptance and even public support of the personal conduct policy, the Union has challenged the policy promulgated by the Commissioner in December 2014 as "inconsistent with, and in violation of, the CBA." . . . [T]here is simply no basis — in the plain language of the CBA or the parties' longstanding past practice — for the Union's assertions. The NFLPA's grievance should be denied in its entirety.
>
> First, the grievance entirely ignores the Commissioner's longstanding and unrestricted authority to impose discipline for conduct detrimental to the NFL. The CBA expressly recognizes that authority, and the parties' well-established past practice demonstrates that it includes the discretion to both adopt and *change* the League's conduct policies.
>
> Second, the NFLPA cannot possibly satisfy its burden to demonstrate that the Policy, on its face, violates any provision of the CBA. The NFLPA cites Paragraph 15 of the Player Contract and Article 46 of the CBA as a basis for its claims. But nothing in the plain language of either provision—or any other provision of the CBA — in any way limits or restricts the scope of discipline or the process by which it is imposed by the Commissioner when a player has engaged in conduct detrimental to the League.
>
> Finally, setting aside its complete lack of merit, the grievance is, at best, premature. Whether a specific application of the Policy *may* at some time in the future somehow violate a particular player's CBA rights is simply not before the Arbitrator. Granting the requested order barring the application of the Policy to all

> such future cases based on speculation and without a proper factual basis is not permitted under the CBA.

NFL Pre-Hearing Brief at 1-2 ("NFLPre-HB").

V. Threshold Issue: Ripeness

A. The NFL's Position

As a threshold matter, the NFL contends that I should dismiss this grievance as a premature request for an "advisory opinion," which it contends I am not authorized under the CBA to render. *Id.* at 23-24. According to the NFL:

> Article 43 permits grievances involving the interpretation of, application of, or compliance with provisions of the CBA and NFL Constitution, as long as they "pertain[] to the terms and conditions of employment of NFL players." *See* CBA Art. 43. But the NFLPA is not challenging the application of the Policy to any particular player; rather, it is simply challenging the announcement of the Policy, on the ground that the Commissioner's implementation of the Policy in the future might violate the CBA.

Id. at 24 (footnote omitted).

> [T]he NFLPA has inappropriately asked the arbitrator to decide how the Commissioner might apply the Policy in exercising his broad Article 46 discretion in the abstract, rather than asserting that the Commissioner has actually *applied* the policy "in a manner that violates the contractual rights" of a member of the bargaining unit "in a particular case." Because no player has claimed injury to date based on the Commissioner's actual application of the new Policy, this facial challenge to the Policy is premature and unripe for present adjudication.

Id. at 26 (emphasis in original; citations omitted).

B. The NFLPA's Position

The NFLPA contends that even if the judicial doctrine of "ripeness" were "binding on the Parties here," which it rejects, that doctrine "only operates to prevent 'advisory opinions' deciding 'abstract disagreements' between Parties." PAPost-HB at 59. According the NFLPA:

> There is nothing "abstract" about the New Policy or the conflicting CBA provisions. They are spelled out, in the record, and in effect. The NFLPA has presented evidence of the New Policy being applied now [and] a federal court has already held that "[t]here is no dispute that the Commissioner imposed Peterson's discipline under the New Policy". . . .
>
> Moreover, the Union is challenging facial CBA violations in the New Policy, which by definition do not require a case-by-case analysis. The CBA specifically provides that it trumps "any other document affecting terms and conditions of employment of

> NFL players." The New Policy is such a document and is before the Arbitrator. Nothing more is required for this grievance to be "ripe."

Id. at 59-60 (citations and footnote omitted).

C. Analysis

While the NFL cites several non-NFL authorities in support of its position, NFL Post-Hearing Brief at 23-25 ("NFLPost-HB"), it has not sought to rebut two NFL arbitral decisions relied on by the NFLPA that are directly on point, at the least with regard to my authority as a threshold matter to address the NFLPA's contentions.

As pointed out by the NFLPA, in the *Loyalty Clause Dispute* (2000) (Bloch, Arb.), which involved a grievance concerning "a clause in players' contracts that made their signing bonus contingent on not making public statements critical of the Club," PAPost-HB at 60, "[s]ince the clause had yet to be enforced against a player (which is not the case here), the League argued that the grievance was 'premature' and 'seeking an advisory opinion' based on 'speculative' arguments. Arbitrator Bloch disagreed, finding before him 'a current and real dispute' that was ripe for his review." *Id.* at 61 (citations omitted). As Arbitrator Bloch put the matter:

> The core and character of this dispute is whether the Club, by the sole act of bargaining (with the player) the here-disputed loyalty provision, has violated the CBA. That act itself, one concludes, is properly reviewable. Clearly, it is a dispute involving the interpretation of the Collective Bargaining Agreement. Article VIII. The question asked is whether the Club has bargained a conflicting provision, thereby expanding the existing CBA restrictions on maximum discipline. If it has done so, it is by means of an act – bargaining the loyalty clause/bonus forfeiture terms – that has already been accomplished and need not await imposition of any enforcement action. The bargained terms of the collective bargaining agreement take precedence in the event of a 'conflict.' The dispute in this case centers squarely on whether such a conflict exists. If the loyalty clause poses such a conflict, the conflict arises because of the clause's existence, not because of its enforcement. The case is ripe for resolution.

Loyalty Clause Dispute at 6-7.

Also pertinent is the NFLPA's reliance on the award of Arbitrator Kasher in *Augmented Drug*, a case with substantial and telling similarities to this one, in which, as pointed out by the NFLPA:

> [T]he mere implementation of a disputed policy by the League, before enforcement against individual players, was sufficient to make the Union's grievance ripe. This was not in dispute and, in fact, the Parties stipulated to the ripeness of the matter."

PAPost-HB at 61, fn 26, citing *Augmented Drug* at 20.

Accordingly, I find this grievance is not premature.

VI. Leave with Pay: The New Policy's Use of Paid Administrative Leave and Commissioner Exempt List

A. The New Policy's "Leave with Pay" Provision

The New Policy's "Leave with Pay" provision provides:

> **Leave with Pay –** You may be placed on paid administrative leave or on the Commissioner Exempt List under either of the following circumstances:
>
> > First, you are formally charged with a crime of violence, meaning that you are accused of having used physical force or a weapon to injure or threaten another person, of having engaged in a sexual assault by force or a sexual assault of a person who was incapable of giving consent, of having engaged in other conduct that poses a genuine danger to the safety or well-being of another person, or of having engaged in animal abuse. The formal charges may be in the form of an indictment by a grand jury, the filing of charges by a prosecutor, or an arraignment in a criminal court.
> >
> > Second, if an investigation leads the Commissioner to believe that you may have violated this Policy by committing any of the conduct identified above, he may act where the circumstances and evidence warrant doing so. This decision will not reflect a finding of guilt or innocence and will not be guided by the same legal standards and considerations that would apply in a criminal trial.
>
> In cases in which a violation relating to a crime of violence is suspected but further investigation is required, the Commissioner may determine to place a player or other employee on leave with pay on a limited and temporary basis to permit the league to conduct an investigation. Based on the results of this investigation, the player or employee may be returned to duty, be placed on leave with pay for a longer period, or be subject to discipline.
>
> A player who is placed on the Commissioner Exempt List may not practice or attend games, but with the club's permission he may be present at the club's facility on a reasonable basis for meetings, individual workouts, therapy and rehabilitation, and other permitted non-football activities. Non-player employees placed on paid administrative leave may be present only on such basis as is approved by the Commissioner or the league disciplinary officer and only under circumstances in which they are not performing their regular duties.
>
> Leave with pay will generally last until the league makes a disciplinary decision and any appeal from that discipline is fully resolved.

NFLPA Ex. 1 at 4-5.

B. The NFLPA's Position

According to the NFLPA, "the New Policy provides for the unprecedented use of the Commissioner Exempt List (the 'Exempt List') as a vehicle for interim discipline, whereby a

player *suspected* of conduct detrimental is involuntarily suspended with pay and barred from participating in practices and games *before* the Commissioner determines whether the player is guilty of conduct detrimental and *before* the player has an opportunity to have his CBA right to a hearing or to appeal any such disciplinary determination. *See* Ex. 1, New Policy at 4-5 (submitted herewith as Exhibit 1). This aspect of the New Policy is squarely at odds with the collectively-bargained form NFL Player Contract (*see* CBA, Art. 4, § 1)." PAPre-HB at 2 (emphasis in original).

Further:

> As plainly written, the Player Contract only permits the Commissioner to take action against a player for conduct detrimental by imposing (i) a "***fine***," "***suspen[sion]***," "and/or" "***terminat[ion]***" of the Player Contract, (ii) *after* the player has been found "***guilty*** of . . . conduct reasonably judged ***by the League Commissioner*** to be detrimental" to the League (not merely *suspected* of conduct detrimental), *and* (iii) "***only after*** *giving Player the opportunity for a hearing.*" *Id*. Thus, Paragraph 15 plainly limits both ***when*** the Commissioner can exercise his conduct detrimental authority and ***what specific actions*** the Commissioner may take.
>
> Paragraph 15 provides the Commissioner with no further conduct detrimental authority. He may only fine, suspend, and/or terminate a player's contract—no other remedial action is provided for—and may do so only *after* a finding of "guilt[]" and "*only after*" any appeal of such finding (*i.e.*, the "hearing"). The provision is exhaustive and serves as a plain limit on the Commissioner's conduct detrimental authority with respect to players under the CBA.

PAPost-HB at 6 (emphasis in original).

Although, in the NFLPA's view, "Paragraph 15 should thus be the beginning and end of the inquiry about when and how a player can be punished by the Commissioner for conduct detrimental . . . it is notable that the Commissioner's conduct detrimental authority with respect to players is similarly limited by the terms of Article 8.13(A) of the NFL Constitution and Bylaws. NFLPA Ex. 2, Const. & Bylaws, § 8.13(A) ('Whenever the Commissioner, ***after notice and hearing***, decides that . . . any player . . . has been or ***is guilty of conduct detrimental*** . . . then the Commissioner shall have complete authority to: (1) Suspend and/or fine . . . ; and/or (2) Cancel any contract . . . .')." PAPost-HB at 9 (certain citations and footnote omitted; emphasis in original).

In the NFLPA's view, "suspension[s] with pay" have serious adverse consequences for players:

> [U]nder the New Policy, any player who the Commissioner believes has *possibly* committed a conduct detrimental violation is subject to *involuntary* placement on the Exempt List — banning the player from games and even practice — indefinitely. This suspension with pay occurs *before* the Commissioner finds a player guilty of conduct detrimental, *before* the imposition of a specific penalty (to the extent a penalty is ever imposed), and *before* a player is afforded his rights of appeal under the Player Contract and Article 46.

> For example, a Commissioner investigation concluding that a player was *not* guilty of conduct detrimental would still result in that player having been barred from games and practices for an unlimited period of time. The same holds true for a Commissioner investigation that results in discipline which is then overturned on the player's Article 46 appeal. The fundamental problem is that such use of the Exempt List as part of the disciplinary process, prior to any determination of a conduct detrimental violation, is flatly prohibited by the CBA.

PAPreHB at 11.

In addition to its other arguments, the NFLPA contends that the Commissioner's use of the Exempt List as a vehicle for implementing his Leave with Pay procedure is invalid, since the amendment to the NFL's CBL that gave "the Commissioner such new Exempt List authority . . . cannot be applied to players without a collectively bargained modification of the CBA and agreement of the Union." *Id.* at 3.

C. The NFL's Position

The NFL rejects the NFLPA's "arguments challenging the Policy provision under which players may be placed on the 'Commissioner Exempt' list . . . based on its claim that such paid leave must be considered 'disciplinary' in nature." NFLPost-HB at 9, citing PAPre-HB at 10-18. In the NFL's view, "application of paid leave as contemplated by the Policy is not discipline. Rather, the Policy formalizes the practice that has existed for many years, previously unchallenged, under which the Commissioner has taken immediate action to address violent and other serious incidents of criminal behavior, on a temporary basis, during the pendency of a league investigation into whether discipline should be imposed in the first place." *Id.* at 10.

The NFL also disagrees with the NFLPA's contention that the Commissioner's promulgation of the Leave with Pay section of the New Policy is in conflict with Paragraph 15. In its view, "[g]iven that Paragraph 15, on its face, applies only *after* the Commissioner determines that a player has engaged in conduct detrimental, that provision cannot possibly limit the Commissioner's discretion in placing a player on paid leave pending a determination into whether he should be disciplined in the first place." NFLPre-HB at 18. Further, pointing out that Paragraph 15 "refers to an 'opportunity for a hearing' in connection with the Commissioner's power to 'suspend' players, 'fine' players, or terminate their contracts," the NFL asserts that placing a player on paid administrative leave or on the Exempt List isn't, contrary to the NFLPA's contention, "a suspension with pay." NFLPost-HB at 10. Thus, in the NFL's view, "[b]ecause a player on paid leave is not 'suspended' within the meaning of the CBA, paid leave does not even fall under paragraph 15's plain terms." *Id*. (footnote omitted).

In addition to its contention that paid leave isn't a "suspension," the NFL asserts that "paid leave also 'is not intended to be disciplinary.'" *Id.*, citing Tr. 381. "Rather," says the NFL, "consistent with his established authority, the Policy provides that the Commissioner may, depending on the circumstances, place players on paid leave 'on a limited and temporary basis to permit the league to conduct an investigation' into conduct detrimental matters. *Id.* at 10-11 (citation omitted). "Nor," says the NFL, "can the Policy's use of the Commissioner's Exempt list in connection with paid leave be considered disciplinary. . . . [T]hat list is merely a roster designation controlled (as its name suggests) '[o]nly [by] the Commissioner,' who

has always had sole 'authority to determine . . . whether a player's time on the Exemption list will be finite' or indefinite." *Id.* at 11 (citations omitted). In addition, "[a]lthough not itself disciplinary, the Commissioner's Exempt list has been 'routinely' used in connection with disciplinary actions, including both in transitioning suspended players to active status and in ensuring that they are paid while on leave (as in the cases of Peterson, Hardy, and Carruth). As the NFL has argued, and as a different NFL arbitrator confirmed, nothing in 'the Collective Bargaining Agreement' prevents the use of the list in connection with a disciplinary investigation. Ex. 80 (Peterson Grievance) at 6; *see* Ex. 81 (Peterson Tr.) at 9 (because Commissioner's Exempt status within Commissioner's sole discretion, 'nothing in the CBA . . . in any way entitles Mr. Peterson to demand that his status be changed' pending investigation)." *Id.* at 11-12 (citation omitted).

Finally, the NFL contends:

> The use of paid leave during the pendency of a disciplinary investigation is also fully consistent with established labor law precedent. Arbitrators "have consistently held that a suspension pending investigation is not disciplinary." In fact, placing a player on paid leave is considered not merely a *permissible* non-disciplinary action but generally "preferable." Paid leave allows "employers to engage in a cooling off period" prior to making a disciplinary decision in order to allow them to conduct a thorough investigation, *id.*, which is one of the Policy's purposes. This procedure also ensures that the player will continue to be paid pending a league or criminal investigation, and using the Commissioner's Exempt list specifically ensures that the club will not be forced to terminate his contract."

Id. at 12 (Citations and footnote omitted).

D. Analysis

The NFLPA challenges the New Policy's Leave with Pay provision in its entirety, including its use of the Commissioner Exempt List.

I address two related issues.

I consider in subsection "a" whether Commissioner Goodell had the authority unilaterally to set rules and procedures providing that under defined circumstances a player could be placed on "paid administrative leave." I then consider in subsection "b" whether the Commissioner could properly use the Exempt List to accomplish this objective.[4]

---

[4] The Leave with Pay provision of the New Policy initially states, presumably referring to all who are subject to the New Policy, including but not limited to players, that "[y]ou may be placed on administrative leave or on the Commissioner Exempt List. . . . " The immediately following paragraph deals with placing "a player or other employee on leave with pay on a limited and temporary basis," without referring the Commissioner Exempt List. The next paragraph discusses a "player who is placed on the Commissioner Exempt List" and "[n]on-player employees placed on paid administrative leave." The final paragraph discusses how long "[l]eave with pay will generally last" without reference either to paid administrative leave or the Commissioner Exempt List.

Continued on next page.

a. Is There a Limit on Commissioner Goodell's Authority Unilaterally to Implement the Leave With Pay Provision of the New Policy?

i. Analysis: Are the Commissioner's Leave with Pay Actions Within or Outside the Mandates of Paragraph 15 and Article 8.13(A)?

Paragraph 15 of the Player Contract provides that a player "acknowledges his awareness" that if he is "guilty of any . . . form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving Player the opportunity for a hearing at which he may be represented by counsel of his choice, to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract."

Article 8.13(A) of the NFL CBL is essentially to the same effect. It provides in part:

> (A) Whenever the Commissioner, after notice and hearing, decides that [a] player . . . has either violated the Constitution and Bylaws of the League or has been or is guilty of conduct detrimental to the welfare of the League or professional football, then the Commissioner shall have complete authority to:
>
> (1) Suspend and/or fine such person in an amount not in excess of five hundred thousand dollars ($500,000) . . . ; and/or
>
> (2) Cancel any contract or agreement of such person with the League or with any member thereof;
>
> . . . .

There are differences between Paragraph 15 and Article 8.13(A), but none are material to this grievance.[5] Thus, in my view, the question to be decided is whether the

---

Read as a whole, it appears that the Commissioner's intent was to implement the Leave with Pay portion of the New Policy by placing players on the Exempt List, with the additional status of being on paid administrative leave, with other employees only being in the paid administrative leave status, since (1) the Commissioner Exempt List only covers players and (2) there's nothing in Article 17.14(a), the CBL provision covering the Commissioner Exempt List, that specifies whether the player is to be paid or not (in contrast with, for example, Article 17.11, which provides that suspended players are not entitled to compensation).

Hence my conclusion, with regard to players, is that I need to evaluate both the Commissioner's authority, in the context of the New Policy, to put a player on paid administrative leave and the Commissioner's authority to put a player on the Commissioner Exempt List.

[5] Paragraph 15 goes beyond Article 8.13(A) in granting the player a right to be represented by counsel at the hearing.

Paragraph 15 also allows the Commissioner to fine Player in a "reasonable amount," rather than stating the "not in excess of . . . $500,000" limitation in 8.13(A), and thus may provide the Commissioner more leeway on a fine's amount, up or down, than 8.13(A). Since both Parties agree that, in the event of a conflict, Paragraph 15 controls over Article 8.13(A), the standard for

Continued on next page.

actions that the Commissioner's New Policy allows are within or outside the mandates of Paragraph 15 and Article 8.13(A).

The NFL contends that since "Paragraph 15, on its face, applies only *after* the Commissioner determines that a player has engaged in conduct detrimental, that provision cannot possibly limit the Commissioner's discretion in placing a player on paid leave pending a determination into whether he should be disciplined in the first place." NFLPre-HB at 18.

I agree with the NFL's view. There is no other sound reading of the language in both Paragraph 15 and Article 8.13(A). Both provisions deal explicitly with actions the Commissioner may take after finding a player (or, in the case of Article 8.13(A), others) "guilty" of "conduct detrimental." Neither can reasonably be read as speaking to what the Commissioner may or may not do prior to reaching that conclusion. Thus, except, possibly, for the "suspension"-related issue that I deal with in the immediately following section, the Leave with Pay provision of the New Policy is not controlled by either Paragraph 15 or Article 8.13(A).

ii. Analysis: Do the Commissioner's Leave with Pay "Actions" Involve a Suspension?

I conclude that the focus of Paragraph 15 and Article 8.13(A) is on the period after an initial conduct detrimental decision is made, not on whether the Commissioner can take action involving a player before that initial decision is made. But this is not alone sufficient to carry the day for the NFL. That's because the language of both Paragraph 15 and Article 8.13(A) also requires the conclusion that if, as the NFLPA argues, a "Leave with Pay" action of the Commissioner is a suspension, as that term is used in Paragraph 15 and Article 8.13(A), then the Commissioner must give the player notice and the opportunity for a hearing in which the player is represented by counsel, none of which is provided for in the New Policy.

On the other hand, if an action of the Commissioner under the "Leave with Pay" section isn't properly characterized as a suspension, as that term is used in paragraph 15 and Article 8.13(b), then it would follow neither Paragraph 15 nor Article 8.13(A) applies.

The NFLPA characterizes the New Policy's Leave with Pay provision as, for example, having "three paid suspension scenarios" (PAPost-HB at 41); as involving "pre-hearing suspensions" (*Id.* at 1), "suspension with pay" (*Id.*), "'pre-discipline discipline in the form of a suspension with pay" (PAPre-HB at 11); and as "the equivalent of a disciplinary suspension" (NFLPA Ex. 6, *Peterson* Art. 46 Hr'g Tr. 109:2-8 (Kessler)). It assumes that any action of the Commissioner that has the potential adverse impacts on a player that it

---

determining the validity of a fine is whether it's "reasonable," which, depending on the facts, could arguably be less than or more than the $500,000 limit in Article 8.13(A).

Paragraph 15's "suspend Player for period certain or indefinitely" language makes explicit what is implicit in 8.13's grant of authority to "suspend."

contends can result from a player's being put on leave with pay must be deemed to be a suspension.

The NFL argues that:

> [P]aragraph 15 specifically refers to an "opportunity for a hearing" in connection with the Commissioner's power to "suspend" players, "fine" players, or terminate their contracts. Player Contract ¶ 15.[6] But a "suspended player[]" is a defined term in the CBA; it means a player who is off a team's active roster *and* not "entitled to compensation." C&B § 17.11 ("[T]he Commissioner may suspend a player . . . During the period of suspension, *a player shall not be entitled to compensation* and shall be ineligible to play with any club."). Although the NFLPA attempts to characterize paid leave as a "suspension with pay," NFL Executive Adolpho Birch confirmed that there is no such thing under the parties' CBA. *See* Tr. 415 ("[Y]ou don't get paid on reserve suspended. . . . We don't suspend with pay."). Because a player on paid leave is not "suspended" within the meaning of the CBA, paid leave does not even fall under paragraph 15's plain terms.

NFLPost-HB at 10 (footnote omitted).

I don't agree with the NFL's statement that "a 'suspended player[]' is a defined term in the CBA."[7] That said, the NFL's argument that the CBA (and the CBL) consistently link suspension to a player's not being entitled to compensation deserves weight in determining how to label the actions authorized in the Leave with Pay portion of the New Policy.

I am also influenced by the findings of Arbitrator Kasher in *Scott v. Dallas Cowboys* (1990) (Kasher, Arb.). Arbitrator Kasher considered Mr. Scott's claim that he had been improperly placed on "Non-Football Injury" ("NFI") status and "suspended for thirty (30) days without pay by the Cowboys." *Id.* at 4, 2.

The Arbitrator faced the threshold question of whether the Club had the burden of proving it had just cause for how it dealt with Mr. Scott or whether Mr. Scott had to prove that the Club violated the Collective Bargaining Agreement based on his being placed on NFI status without pay. In the Arbitrator's view, he had to determine "whether Victor Scott was suspended and placed on the NFI list or whether he was only placed on the NFI list." *Id.* at 14.

Arbitrator Kasher's analysis of whether the Cowboys' placing Mr. Scott on NFI status without pay constituted a "suspension" is pertinent to whether the Leave with Pay provision of the New Policy (with its reference placing a player on "paid administrative leave or the Commissioner Exempt List") is appropriately characterized as a suspension as that term is used in Paragraph 15 or Article 8.13(A). While not binding precedent, since

---

[6] Article 8.13(A) is to the same effect.

[7] "Suspended player" is not capitalized, as is normal for defined terms; nor does it appear in CBA Article I, DEFINITIONS.

Scott v. Cowboys is not on all fours factually, Arbitrator Kasher's findings deserve significant weight.

Arbitrator Kasher stated that a "[s]uspension without pay is, in fact, a short term termination," in which "the employer ceases to control the activities the employee and the employee, for the period [of] his/her suspension, ceases to retain any of the standard Employee obligations." *Id.* at 15. Arbitrator Kasher found that the evidence before him didn't support a finding of "suspension" when:

- Mr. Scott "continued to be responsive to the Club directives";
- The "Club continued to fulfill its obligations as employer under the drug program terms providing rehabilitation and counseling services to the Grievant"; and
- There was "insufficient evidence in this record to establish that either the Club or the commissioner intended to 'discipline' Victor Scott or impose discipline upon Victor Scott through suspension." *Id.* at 15-16.

Arbitrator Kasher reached that conclusion even though he also found that "the result of being placed in NFI status caused Victor Scott to suffer a significant loss in compensation." He concluded that "that fact alone does not indicate that the Club or the Commissioner imposed a disciplinary suspension for the purpose of correcting Scott's discerned improper behavior." *Id.* at 16.

A lynchpin of the NFLPA's argument that Leave with Pay amounts to a suspension is its view of the serious impact it has on a player. The NFLPA contends, for example, that:

> [T]he CBA expressly limits any suspension to be imposed by the Commissioner to *after* guilt has been assessed and a hearing has been afforded to the player to contest the Commissioner's action. This is because, as discussed during the hearing, leave with pay for professional football players amounts to severe discipline as it bars them from practicing and playing in games, which shortens and threatens their already-brief careers, while also preventing them from earning performance incentives. Hr'g Tr. 35:3-37:17, 58:12-59:22 (Kessler); *id.* at 349:18-352:6, 381:22-383:7 (DePaso). . . . It is this unique attribute of professional football players that gives context to why Paragraph 15 limits the Commissioner's authority to take conduct detrimental action—*i.e.*, fine, suspend, and/or terminate—to a time *after* guilt has been found and the right of an appeal hearing has been provided.

PAPostHB at 25-26.

I agree with the NFLPA that there may be actual negative impacts on a player placed on leave with pay.[8] But placing a player on Leave with Pay, whether on paid administrative

---

[8] The NFL emphasizes its intent to mitigate any impact:

> The Union also argues that placement on the Commissioner's Exempt list under the Policy *could* conceivably result in harm to the player that equates to discipline. *See* Pre-Hearing Br. 16-18. But the unrebutted testimony and documentary evidence makes clear that the NFL has no intention of applying the Policy provisions regarding the Commissioner's

Continued on next page.

leave and/or on the Exempt List is, first, materially different from being suspended, as that term is used in the CBL and as it was viewed by Arbitrator Kasher in *Scott*. The player on Leave with Pay is paid and potentially continues to interact with the club in non-football activities. As stated in the New Policy with regard to the Exempt List, the player "may not

---

> Exempt list in such a manner. For example, the league has made clear that, where a particular player is ultimately exonerated, he "will not lose a credited season or any other benefits to which he would otherwise be entitled." Tr. 384-85. Similarly, the league also is "prepared to ensure both that players continue to participate in benefit programs during the period of paid leave, and to identify means that will minimize to the extent possible any NFL financial consequences to a player who is put on paid leave and ultimately found not to have violated the Personal Conduct Policy." *See* Ex. 23 at 2. Although the Union claims that there has been no final agreement reached on the specifics of the league's assurances, it can point to no example of *any* player suffering its alleged financial and other "disciplinary" consequences from the application of the Policy's paid leave provision. Its claims that such disciplinary consequences *may* result in the future is pure speculation. [FN: For instance, the NFLPA testified that placement on Commissioner's Exempt list could prevent a player from accruing a credited season. Tr. 355. But a player gains a "credited season" for retirement, severance, and other purposes by being active for just three games. *See* Bert Bell/Pete Rozelle Retirement Plan §§ 1.10, 1.17 (credited season means being on active roster for only "three or more" regular-season or post-season NFL Games).

NFLPost-HB at 13-14.

> The NFLPA takes issue with the NFL's mitigation arguments, noting, for example:
>
> > As Mr. DePaso testified at the hearing, time spent on the Exempt List impacts a player's ability to reach incentives based on playing-time, performance and other criteria. *Id*. at 350:7-24 (DePaso); *id*. at 350:25-351:21 (DePaso) (explaining how a player with a "split contract" will have a portion of his salary reduced for the period of time spent on the Exempt List). Coupled with the fact that, as even Mr. Birch concedes, there is no "finite limit" to how long a player can spend on the Exempt List (*id.* at 422:4-5 (Birch)), there can be little dispute that the use of the Exempt List in the New Policy constitutes a "significant change" to the terms and conditions of players' employment.
>
> > Furthermore, the League's purported and unspecified "intention" to mitigate these myriad consequences cannot alleviate the irreparable harm suffered by a player who is prohibited from practicing and/or playing with his team. *See id*. at 382:14-384:14 (Birch); *see also id*. at 508:4-509:9 (Birch) (discussing the purported "willingness to review" how the New Policy impacts players). In fact, the League has "indicated that they could not make the player 100% whole, they made it very clear, particularly with respect to incentives that the player might have lost as a result of being on the roster exempt list." *Id*. at 384:16-385:12 (DePaso). And with respect to games lost, as Mr. Birch testified, "[w]e can't go back in time and put the player back in the game." *Id*. at 510:8-20 (Birch); *see also id*. at 395:14-396:5 (DePaso). Moreover, if after a conduct detrimental finding a player is exonerated, the League has said it is "not willing to agree that they would treat him exactly as if he were not on the roster exempt list for those particular weeks. . . . So, it's not a wipe-the-slate-clean sort of approach . . . ." *Id*. at 384:5-14 (DePaso).

PAPostHB at 56-57.

> I reach my decision without resolving these disputes or assuming any successful mitigation.

practice or attend games, but with the club's permission he may be present at the club's facility on a reasonable basis for meetings, individual workouts, therapy and rehabilitation, and other permitted non-football activities." New Policy at 5.

Second, placing a player on Leave with Pay, as through being placed on the Exempt List, appears to have less actual impact on the player than his being placed in NFI status, which, under the facts of *Scott*, was found not to be a suspension. The career-related risks to the player from being on the Exempt List and in NFI status don't appear materially different (e.g., both are treated in the same way with regard to "accrued season game credit" and "credited seasons"),[9] but the Exempt List player is paid and the NFI player is not, a fundamental difference.

In deciding *Scott,* Arbitrator Kasher found that there was not sufficient record evidence to establish an intent to discipline. While I don't necessarily agree with Arbitrator Kasher that the subjective intent of the Commissioner should be pertinent to my decision about whether the Commissioner's placing a player on Leave with Pay pending his consideration of whether a player's action involved conduct detrimental, there's no basis in the record before me to conclude that the New Policy's Leave with Pay provisions involve a specific intent to discipline a player or to impose discipline through suspension.

As a result, I find that:

- At least on their face, the "Leave with Pay" provisions of the New Policy, including placement on the Exempt List, do not amount to a suspension as that term is used in Paragraph 15, Article 8.13(A), the CBA, and the CBL.
- Thus, neither Paragraph 15 nor Article 8.13(A) bar or limit the Commissioner's authority to promulgate the Leave with Pay portions of the New Policy.

This conclusion doesn't immediately lead to the additional conclusion that the Commissioner has the authority under the CBA and the CBL to take the actions provided for in the Leave with Pay Section. It only means that the mandates of Paragraph 15 and Article 8.13(A) don't preclude the Commissioner from placing a player on administrative leave without pay and on the Exempt List absent notice and a hearing with counsel, and that the NFLPA is incorrect in claiming that Paragraph 15 and Article 8.13(A) invalidate the Leave with Pay portions of the New Policy.

iii. Analysis: Putting Paragraph 15 and Article 8.13(A) to the Side, Does the Commissioner Have the Authority to Mandate the Leave with Pay Provisions of the New Policy?

The question remains whether the Commissioner has the authority to mandate the Leave with Pay portions of the New Policy.

In its opening brief, the NFLPA contended that it "is only through the CBA—pursuant to Paragraph 15 of the collectively-bargained form NFL Player Contract (CBA, App.

---

[9] CBA, Article 8.1(a)(i) and (ii), at 34 and Article 26.2 (i) and (ii).

A, ¶ 15)—that the NFLPA agreed the Commissioner would have the authority to discipline NFL players for 'conduct detrimental' to the League." PAPre-HB at 1.

In its post-hearing brief, although it resiled from its emphasis on "discipline," the NFLPA reemphasized the importance of Paragraph 15, contending that it "circumscribes the Commissioner's conduct detrimental 'right[s]'. . . . The Commissioner's only conduct detrimental rights are to—following a finding of guilt and the opportunity for a hearing—fine, suspend, and/or terminate a Player Contract." PAPost-HB at 19.

Given this limitation on his power, the NFLPA sees Commissioner Goodell's implementation of the Leave with Pay element of the New Policy as an

> impermissible end-run around the CBA . . . . analogous [to] *Rozelle*[,] where the League argued that "this case is particularly important because it concerns the disease and scourge of drug abuse." *Rozelle*, slip op. at 28. Despite this contention and the obvious importance of the issue, Arbitrator Kasher:
>
> > conclude[d] that when the Commissioner establishes policies or procedures, which have the effect of rules or regulations, [] those policies and procedures, which are impacted by the collective bargaining relationship, are not plenary in nature. ***Plenary authority is "absolute" or "unqualified" authority; that is not the scope of the Commissioner's authority under the terms of the collective bargaining agreement.***
>
> *Id*. at 62. There, the NFL's only solution was to return to the bargaining table with the NFLPA, not to unilaterally impose procedures and policies that violate the CBA. The same remains true today.

PAPost-HB at 28-29 (emphasis in original).

The NFL disagrees:

> Notwithstanding the Union's assertion that the only "source" of the Commissioner's authority in conduct detrimental matters is paragraph 15 of the NFL Player Contract, . . . the Commissioner's authority originates in, and is defined by, provisions in the C&B. Although the NFLPA suggested at the hearing that the C&B primarily concerns the relationship among the league and its clubs, it is firmly established that the C&B is "incorporated by reference in the collective bargaining agreement." *Augmented Drug Program*, at 61; *see, e.g.*, *Speight v. Los Angeles Rams*, at 9 (1988) (Kagel, Arb.) (player agreement incorporates C&B, which is binding on players). Players acknowledge in the NFL Player Contract that they are bound by club and league "rules and procedures," including the C&B. *See* Player Contract ¶ 14 ("Rules"); CBA Art. 1 ("'NFL Rules' means the Constitution and Bylaws, [etc.]"). Far from defining the Commissioner's authority, the CBA – including the player contract itself – "*acknowledges* [the player's] awareness" of the authority granted to the Commissioner in the C&B. Player Contract ¶ 15.
>
> Under the C&B, the Commissioner is authorized: to "interpret and from time to time establish policy and procedure" with respect to the "enforcement" of his conduct detrimental authority (C&B § 8.5); to impose discipline on players,

> including through suspensions, fines, and contract terminations (*id.* § 8.13(A)); to disapprove player contracts for conduct detrimental (*id.* §§ 8.14(A) & 15.4); to declare any player ineligible to play (*id.* § 17.12); to arbitrate any dispute involving player conduct detrimental matters (*id.* § 8.3(D)); and "in addition to his other powers . . . to bar and prohibit" any individual "from entry to any stadium or park used by the League or its member clubs or affiliates for the practice or exhibition of professional football" (§ 8.13(D)). The Commissioner is also generally empowered to "take or adopt appropriate legal action or such other steps or procedures as he deems necessary and proper in the best interests of" football with regard to integrity of the game matters. *See id.* § 8.6. [FN: Rule 8.6, titled simply "Detrimental Conduct," addresses the Commissioner's broad authority to define and address what constitutes "conduct detrimental . . . to the League, its member clubs[,] or employees." The language of this provision, which has been part of the CBA for over 45 years, *see* 1968 NFL and AFL Constitution, Article N-VIII at N-8.2, applies to the Commissioner's authority to act with regard both to those who are "not a member" of the League, as well as to players, *i.e.*, those "employed by, or connected with the League or any member thereof." C&B § 8.6; *see New Orleans Saints Pay-for-Performance* / "*Bounty," Decision on Recusal of Paul Tagliabue* ("*Bounty Recusal*"), at 1-2 (Nov. 5, 2012) (interpreting C&B § 8.6 to mean that the CBA vests in the Commissioner "the responsibility, authority and accountability for identifying" conduct detrimental by players).]

NFLPost-HB at 4-5 (emphasis in original).

Considering these and related arguments of the Parties as to the nature and scope of the Commissioner's authority to deal with issues relating to "conduct detrimental," I find that the Commissioner generally had the authority to promulgate the Leave with Pay provisions of the New Policy.[10] The best authority for that conclusion is, in fact, the *Augmented Drug* decision of Arbitrator Kasher, cited by both sides.

While not on all fours, there are substantial factual similarities between *Augmented Drug* and this matter. Further, there are strong parallels between the arguments put forward by each side in this Grievance and those they made in *Augmented Drug*.

Arbitrator Kasher's decision in *Augmented Drug* is not merely, to the extent applicable, binding precedent; it also provides an appropriate analytic framework for approaching and resolving the Parties' disagreements over the Leave with Pay section of the New Policy and their disagreements over other elements of the New Policy.

As stated by Arbitrator Kasher:

> In this Arbitrator's opinion, the case before us, in general terms, represents a classic dispute of contract interpretation, in which the question is whether certain retained management rights, in this case those exercised by a third party, the Commissioner of the League, are in conflict with and thus superseded by specific agreement rights.

---

[10] I say "generally" because there are issues relating to the applicability of Article 46 and to possible constraints on the use of the Exempt List that I deal with later in this Opinion and Award.

> Although counsel for the Parties each stated the issue somewhat differently, in semantic terms, the underlying question for this Arbitrator to determine is whether the Commissioner of the NFL, in the face of certain provisions of the collective bargaining agreement, properly exercised his authority, as that authority is contained in the relevant sections of the Constitution and By-Laws and the collective bargaining agreement, when, on July 7, 1986, he announced the institution of a far-reaching, comprehensive, augmented drug program.

Augmented Drug at 43-44. If language relating to the New Policy's announcement were substituted for that relating to the announcement of the augmented drug program, the just-quoted statements of Arbitrator Kasher would succinctly and accurately capture both the case before me – a classic dispute of labor/management contract interpretation – and the underlying question I have to determine, whether elements of the Commissioner's New Policy are in conflict with the CBA and CBL.

In Arbitrator Kasher's view, until Article XXXI of the 1982 collective bargaining agreement limited his power, "Commissioner Rozelle, since his appointment as Commissioner in 1960, had exercised plenary authority over misconduct by NFL players, including illegal drug use, where, in his opinion, such conduct might have a detrimental impact on the integrity of and/or public confidence in the game of professional football." *Id.* at 50. Arbitrator Kasher found that:

> [F]or many years, at least and until December 11, 1982, the policies and procedures for drug abuse education, drug abuse detection, drug abuse rehabilitation and after care, and penalties for the misuse of drugs were established and implemented exclusively by the Commissioner of the NFL. While players participated and cooperated with the League in educational and public service efforts, and although those players were affiliated with the NFLPA, it is clear that prior to December of 1982 there were no rights and obligations regarding education, testing and/or treatment of players involved in drugs which were established by bargaining agreement or understanding, and would thus arguably place restrictions upon the Commissioner's authority in this area. *Id.* at 55.

After setting out his understanding of key events during the 1982 negotiations leading up to the adoption of Article XXXI (*id.* at 56-60), Arbitrator Kasher considered the "alleged 'conflicts' between the Commissioner's authority and the collective bargaining agreement," reaching these conclusions about those conflicts (*id.* at 60-68):

> There can be no question that the Commissioner of the NFL has broad authority under the Constitution and By-Laws, which are incorporated by reference in the collective bargaining agreement, to establish policy and procedure and to take action which would protect the integrity of, and public confidence in the game of professional football. The Commissioner has the power, recognized by the collective bargaining agreement, to make rules and enforce them. *Id.* at 61.
>
> [W]e must conclude that when the Commissioner establishes policies and procedures, which have the effect of rules and regulations, that those policies and procedures, which are impacted by the collective bargaining relationship, are not plenary in nature. Plenary authority is not 'absolute' or "unqualified' authority; that

is not the scope of the Commissioner's authority under the terms of the collective bargaining agreement." *Id.* at 62.

This finding is not meant to imply that Commissioner Rozelle does not retain broad and special powers to deal with issues that involve the 'integrity of the game.' Section 11 of Article VII and Article VIII of the collective bargaining agreement bear strong witness to the fact that the Commissioner of the NFL has specifically retained far-reaching authority to address and resolve integrity of the game matters." *Id.*

The Commissioner's augmented drug program, issued in accordance with the Commissioner's authority which is derived from the general language of the Constitution and By-Laws and the collective bargaining agreement, is a 'document affecting terms and conditions of employment of NFL players', and where it conflicts with certain specific provisions of the collective bargaining agreement, it is superseded in those areas. *Id.* at 64.

[In the negotiations leading up to the 1982 collective bargaining agreement,] the Commissioner's disciplinary authority in matters involving drug misuse and abuse was left intact; however, certain other subject areas, such as drug testing and the evaluation of chemical dependency treatment facilities, were addressed by the collective bargaining agreement and represented limitations on the clubs' and/or the Commissioner's rights to change their agreements. *Id.* at 66.

[T]he Commissioner's rule-making authority was supplanted, in certain respects, by specific agreement language in Article XXXI, which established clear procedures concerning the chemical dependency program, testing and the confidentiality of medical report type of materials. As a necessary corollary, we find that the NFLPA, during the recent round of negotiations as well as in previous contracts, conceded certain authority to the Commissioner in terms of his continued right to establish policies and procedures and to address and resolve matters which impacted upon the integrity of, or public confidence in the game of professional football." *Id.* at 66-67.

Within that framework, Arbitrator Kasher viewed his task as deciding "which new procedures of Commissioner Roselle's augmented drug program conflict with the specific provisions of Article XXXI and which new procedures do not." *Id.* at 68. He said that he was "limited by the specific language of the collective bargaining agreement vis a vis the new procedures established by Commissioner Rozelle's drug program. We can only decide, where, and if, conflicts exist between these two documents, and then direct the parties as to which procedures of the Commissioner's drug program may be implemented without violating the collective bargaining agreement." *Id.* at 69.

He held that "part of Commissioner Rozelle's augmented drug program, which establishes unscheduled drug testing, is in conflict with specific provisions of Article XXXI and is therefore superseded by the agreement's language." *Id.* at 72. He otherwise rejected the NFLPA's contentions that other parts of the augmented drug program were in conflict with Article XXXI. Thus, for example, he found that the "Commissioner's specification of particular prohibited substances" was not in conflict with Article XXXI, including "the scope of the checking procedures established in Appendix D," which did not "limit urinalysis checks to particular chemical substances." As a result, he concluded that there was "no

violation of the collective bargaining agreement by the Commissioner's restatement of his general rights to impose discipline, which rights are established and recognized under Article VIII of the collective bargaining agreement." *Id.* at 75-76.

With this framework in mind, what is the import of *Augmented Drug* for our case?

At least with regard to the challenged Leave with Pay provisions of the New Policy, the answer is straightforward, since I've already found that Paragraph 15 and Article 8.13(A) don't apply to the Commissioner's Leave with Pay actions, whether placing a player on paid administrative leave or on the Exempt List. *Augmented Drug* supports the conclusion that, like Commissioner Rozelle's augmented drug policy and predecessor policies, the New Policy and predecessor personal conduct policies, were validly issued pursuant to the Commissioner's "broad" (*Augmented Drug* at 61), "far-reaching" (*Id.* at 62), and "plenary" (except where "it conflicts with certain specific provisions of the collective bargaining agreement" [*Id.* at 50, 62, 64]) authority "under the Constitution and By-Laws, which are incorporated by reference in the collective bargaining agreement, to establish policy and procedure and to take action which would protect the integrity of, and public confidence in the game of professional football." *Id.* at 61.

This conclusion doesn't end my consideration of the Leave with Pay provision of the New Policy, nor does it necessarily mean that there remains no substantive basis on which challenges to specific instances of implementation of the Leave with Pay provision can be made.

First, there is the question whether Article 46 applies to a Commissioner action pursuant to the Leave with Pay provisions of the New Policy. I deal with this issue in the section "iv," which immediately follows.

Second, there is the question whether, even accepting that the Commissioner's authority to place a player on the Exempt List isn't circumscribed by Paragraph 15 or Article 8.13(A), there are other CBA or CBL limitations on that authority beyond Article 46. I deal with this issue in section "v," *infra*.

Finally, I note here that, although it's not clear from Arbitrator Kasher's Opinion and Award whether, and if so, how, in *Augmented Drug*, the NFLPA raised the "question of the reasonableness, in whole or in part, of the augmented drug program"[11] (*id.* at 64), Arbitrator Kasher addressed the issue (*id.* at 63):

> Arbitrators of labor management disputes are regularly confronted with allegations that an employer's rules or regulations are contrary to the specific terms of a collective bargaining agreement and, therefore, should be vitiated. In such cases the challenging party frequently argues, in the alternative, that the rules are arbitrary

---

11

The NFL contended that the "Commissioner's 'integrity of the game' authority, insofar as it was exercised on July 7, 1986 by the announcement of an augmented drug program, . . . is only governed, in view of the Commissioner's wide latitude to control conduct which he determines would be detrimental to the image of the League, by the rule of reason." *Augmented Drug* at 61.

and unreasonable and therefore they should have no effect upon employees' terms and conditions of employment.

He found that, "with the possible exception of the NFL's intention to conduct two (2) unscheduled urinalysis tests during the regular season, that the Commissioner's augmented drug program appears to be reasonable on its face" (*id.)* and that "[a]fter consideration of the evidence, which supports a finding that the current drug program is subject to improvement in certain areas, . . . the Commissioner's augmented drug program is reasonable, per se, where it addresses these subject matters." *Id.* at 63-64.

In this case, in addition to mounting a frontal attack contending that the Leave with Pay provisions of the New Policy are invalid since in conflict with the CBA, the NFLPA has criticized specific aspects of the provisions, such as its allowing "players to be banned from playing or practicing for an indefinite period." But the NFLPA has not here formally challenged the reasonableness either of the New Policy or of the specific provisions of that policy that it has criticized in this proceeding. Hence, "reasonableness" is not an issue before me, and I express no opinion on it.

iv. Analysis: Does Article 46 Apply to a Commissioner Action Pursuant to the Leave with Pay Provisions of the New Policy?

My conclusions to this point don't support the additional conclusion that there are no limits on the Commissioner's authority with regard to Leave with Pay or on the implementation of the Leave with Pay provision of the New Policy. In challenging the Commissioner's conduct detrimental authority, the NFLPA relies not merely on Paragraph 15 but also on Article 46 of the CBA.

I here address the question whether Article 46 and its procedural requirements apply to Commissioner actions under the Leave with Pay provisions of the New Policy, including placing a player on paid administrative leave or on the Exempt List.

1. Pertinent Provisions of Article 46

Article 46.1(a) of the CBA sets procedures for handling certain disputes, including disputes over "a fine or suspension imposed upon a player for conduct on the playing field, including unnecessary roughness or unsportsmanlike conduct" and disputes over "action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football." These are to be "processed exclusively as follows: the Commissioner will promptly send written notice of his action to the player, with a copy to the NFLPA. Within three (3) business days following such written notification, the player affected thereby, or the NFLPA with the player's approval, may appeal in writing to the Commissioner." Article 46.2(a) and (b) provide that for appeals under Article 46.1(a):

- The Commissioner will either appoint a hearing officer after consultation with the Executive Director of the NFLPA or himself serve as the hearing officer;
- The player may be accompanied by counsel; and
- The NFLPA and the NFL may attend the hearing and present evidence.

Article 46.1(a) deals both with disputes involving a player's on-field conduct and disputes involving "conduct detrimental" by a player. Article 46's procedures must be followed with regard to "a fine or suspension imposed upon a player for conduct on the playing field" and an "action taken against a player by the Commissioner for conduct detrimental." Thus a distinction is drawn between specifically defined actions, involving fines or suspensions for a player's playing field conduct, and any Commissioner "conduct detrimental" action involving a player, presumably including but not necessarily limited to fines and suspensions. Particularly given the juxtaposition of the specific actions, "fine" and "suspension," for on-field conduct and the general "action" for conduct detrimental, the only reasonable reading of Article 46.1(a) is that it applies to any "action," not just fines and suspensions, taken "against a player by the Commissioner for conduct detrimental."

2. Does the Commissioner Take "Action Against a Player for Conduct Detrimental" When He Imposes Leave with Pay Under the New Policy?

I now consider whether an action by the Commissioner involving putting a player on paid administrative leave or on the Exempt List triggers the procedures of 46.1(a) and 46.2(a) & (b).

The Commissioner takes "action" when he places a player on paid administrative leave or on the Exempt List.

Article 46 is triggered if such an "action" is being "taken *against* the player" and if the "action" is "*for* conduct detrimental" (emphasis added).

I find that under the common meaning of the words, "against" and "for," the actions provided for in the Leave with Pay section in the New Policy are "against the player" and "for conduct detrimental." Common meanings of "against" include "in opposition to," "adverse to," "toward," and "upon."[12] Under any of those meanings, but particularly the latter two, I find that the word is applicable to actions of the Commissioner under the Leave with Pay provision. Equally, while the Leave with Pay provision is explicitly framed in terms of the Commissioner's actions preceding and pending his consideration whether a player is guilty of conduct detrimental and, if so, what remedial action to take, I find that since the reason "for" any Leave with Pay action relates to conduct that appears to fall within the rubric of conduct detrimental, the Commissioner's action falls within the ambit of "for conduct detrimental."

3. "Action" vs. "Discipline"

An additional question concerning whether Article 46's procedural rights are triggered by the Commissioner's placing a player on paid administrative leave or on the Exempt List relates to whether the Commissioner's "action" must be deemed to involve "discipline" in order for Article 46 to apply.

---

12 *E.g.*, http://dictionary.reference.com/browse/against.

The Parties have extensively briefed the question of what is and isn't "discipline," in the contexts of the Leave with Pay issue and of the other elements of the NFLPA's grievance.

While maintaining that the Commissioner would have the authority to impose paid administrative leave or the Exempt List under the New Policy under his broad disciplinary authority, the NFL's first line of argument is that "the proposed use of the list announced in the Policy is not disciplinary but, as the Union correctly acknowledges, is used 'prior to the imposition of discipline.' Ex. 1 (Grievance) at 4." NFLPre-HB at 17. Further, according to the NFL, it "is well settled that placing an employee on paid leave pending an investigation does not constitute discipline." *Id.* (citations omitted). In the NFL's view, the New Policy "formalizes the practice that has existed for many years, previously unchallenged, under which the Commissioner has taken immediate action to address violent and other serious incidents of criminal behavior, on a temporary basis, during the pendency of a league investigation into whether discipline should be imposed in the first place." NFLPost-HB at 10.

The NFLPA's position on the issue of whether what it calls "pre-hearing suspensions" under the New Policy, PAPost-HB at 1, is "discipline" has evolved during this grievance proceeding.

In its January 27, 2015, grievance, the NFLPA contended:

- "[T]he revised Personal Conduct Policy imposes a new form of player discipline prohibited by the CBA, by providing that the NFL may unilaterally place a player on the 'Commissioner Exempt List," and during that time the player is prohibited from practicing or participating in any games." NFL Ex. 1 at 2.
- The "NFL Constitution and Bylaws, which defines the use and scope of the Commissioner Exempt List, does not provide for the List to be used in such a disciplinary manner." *Id.* at 4.
- "There is no provision in the CBA or the Constitution and Bylaws for the Commissioner to use the Exempt List as a means of putting a player on paid suspension as a part of a disciplinary process." *Id.* [13]

---

[13] These views were consistent with the position the NFLPA staked out in December 2014 in the *Adrian Petersen* appeal before Mr. Henderson. In the *Petersen* matter, after the expiration of an agreement that Mr. Petersen would be placed on the Commissioner exempt list during the pendency of his criminal proceedings, Mr. Petersen and the NFLPA objected to the Commissioner's continuing placement of Mr. Petersen on the list. Mr. Kessler contended that placing Mr. Petersen on the exempt list over the objection of Mr. Petersen "was the equivalent of a disciplinary suspension because I can tell you that there is no basis in the NFL constitution for just putting somebody on the Commissioner's exempt list with no reason. So in effect, they were disciplining him . . . ."

Further, according to Mr. Kessler, "[t]he Commissioner's exempt list has never previously been used to put somebody on [the list] who is accused of criminal activity, to our knowledge. . . . The only time we have ever seen Commissioner exempt used, to our knowledge, was [when] it was used for players who were unavailable to play for some reason. That has not been traditionally the role of he Commissioner exempt list. It has also been used sometimes as a way of bringing back a player from drug suspensions that they can practice before they count against the roster, because he is not available under a suspension to play. But as far as we are concerned, it's never been used to prevent

Continued on next page.

In its Pre-Hearing Brief, the NFLPA expanded on its position that there "is no CBA provision for 'pre-discipline discipline' in the form of suspension with pay on the Exempt List" (PAPre-HB at 11). It asserted:

> [T]he New Policy provides for the unprecedented use of the Commissioner Exempt List (the "Exempt List") as a vehicle for interim discipline, whereby a player *suspected* of conduct detrimental is involuntarily suspended with pay and barred from participating in practices and games *before* the Commissioner determines whether the player is guilty of conduct detrimental and *before* the player has an opportunity to have his CBA right to a hearing or to appeal any such disciplinary determination. *See* Ex. 1, New Policy at 4-5 (submitted herewith as Exhibit 1). This aspect of the New Policy is squarely at odds with the collectively-bargained form NFL Player Contract (*see* CBA, Art. 4, § 1), which specifically enumerates—and expressly limits—the imposition of Commissioner discipline to a time *after* the player has been found "guilty" of conduct detrimental *and* "*only after* giving Player the opportunity for a hearing at which he may be represented by counsel of his choice . . . ." *Id.*, App. A, ¶ 15 (emphasis added). The collectively-bargained Player Contract thus prohibits such "pre-hearing discipline," and there is no past practice or precedent for this use of the Exempt List. This conclusion is underscored by the fact that the NFL had to vote to amend its Constitution and Bylaws to give the Commissioner such new Exempt List authority, an amendment which cannot be applied to players without a collectively bargained modification of the CBA and agreement of the Union.

Id. at 2-3 (emphasis in original).

Asked to deal in its Post-Hearing Brief with "whether and, if so, how I should draw a line distinguishing between (a) player-related actions of the Commissioner that should be labeled 'discipline' and (b) decisions of the Commissioner that require player action that should not be labeled 'discipline,'" the NFLPA argued as follows:

> The NFLPA submits that the NFL has trumpeted the "discipline" versus "non-discipline" debate as a straw man issue in this proceeding. Nowhere does Paragraph 15 provide that the limitations on the Commissioner's conduct detrimental authority apply only to "disciplinary" action. The word "discipline" does not appear in Paragraph 15. Rather, Paragraph 15 circumscribes the Commissioner's conduct detrimental "right[s]." CBA, App. A, ¶ 15 (if player "is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental . . . , the Commissioner ***will have the right***, but only after giving Player the opportunity for a hearing . . . ***to fine*** . . . , ***to suspend*** . . . ; ***and/or to terminate***"). Thus, the question of whether "counseling" or "paid leave" or anything else does or does not constitute discipline is irrelevant to applying the limitations of Paragraph 15. (The same is also true of the NFL Constitution and Bylaws, which limits the Commissioner's authority

---

the player from playing who was ready, willing, able to play and nothing stopped him and therefore, we think it should be treated as the equivalent of discipline." NFLPA Ex. 6, *Petersen* Art. 46 Hr'g Tr. 109:5-10; 136:14-16; 137:12-138:1(Kessler)

> in a similar manner with respect to players without mentioning the word "discipline." *See* NFLPA Ex. 2, Const. & Bylaws, § 8.13(A).) The Commissioner's only conduct detrimental rights are to—following a finding of guilt and the opportunity for a hearing—fine, suspend, and/or terminate a Player Contract.

NFLPA Post-HB at 18-19 (emphasis in original).

> In a pregnant footnote, the NFLPA said the following:
>
> While the NFLPA has at times in this proceeding used "discipline" as a shorthand for all of the Commissioner's actions related to conduct detrimental matters, the Union certainly did not intend to imply that the "discipline" versus "non-discipline" distinction is of any consequence to this grievance.

Id. at 18, fn. 8.

I find there is no definitive, black-and-white answer to whether the Commissioner's putting a player on paid administrative leave or the Exempt List should be deemed discipline.

The term "discipline" is nowhere defined in the CBA or the CBL.

I do note that Article 46 is headed "Commissioner Discipline"; Article 46, Section 1, is headed "League Discipline." Were these headings to be given dispositive weight, it would follow that for the procedural provisions of Article 46 to apply, the "dispute" arising from an "action taken against a player by the Commissioner for conduct detrimental" would have to involve some form of discipline. However, the CBA's "Article 70, GOVERNING LAW AND PRINCIPLES, *Section 4.* Headings" states: "The headings in this Agreement are solely for the convenience of the parties, and shall not be deemed part of, or considered in construing, this Agreement." Thus, I cannot consider the headings in construing the language of Article 46 that follows.

The word, "discipline," is not used in the text of Article 46, and there is nothing in the Article's text that requires the conclusion that "an action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of football" must be deemed "disciplinary" in order for the procedural requirements of Article 46 to be triggered. As I have concluded above, the applicability of Article 46's procedural requirements is triggered by the existence of a dispute over an **action** taken by the Commissioner **against** a player **for** conduct detrimental. Since I've found that putting a player on leave with pay or on the Exempt List is such an action, the question whether the action does or doesn't amount to "discipline" need not be decided, at least in this context.

4. Leave with Pay and Article 46 -- Conclusion

For better or worse, my analysis has come full circle. I have found no basis for concluding that the Commissioner lacks power to implement the Leave with Pay provisions of the New Policy or that the general procedural requirements (notice, hearing, right to counsel) inherent in Paragraph 15 and Article 8.13(A) apply (as, for example, because placing a player on Leave with Pay must be deemed a suspension). However, I have found that the specific procedural mandates of Article 46 do apply.

Thus, I find that if the Commissioner decides to place a player on paid administrative leave or the Exempt List pursuant to the Leave with Pay provisions of the New Policy:

- The Commissioner must promptly send written notice of his action to the player, with a copy to the NFLPA;
- The player, or the NFLPA with the player's approval, may within three days following written notification appeal in writing to the Commissioner.
- Either the Commissioner or his designee, appointed after consultation with the Executive Director of the NFLPA, will serve as hearing officer.
- At the hearing, the player may be accompanied by counsel and both the NFLPA and the NFL may be present and present evidence.

It's noteworthy that the subject matter of such a hearing will be different than the subject matter of an Article 46 hearing conducted after the Commissioner has reached an decision that a player is actually guilty of conduct detrimental and decided on what the remedial action to take.

I do not decide here whether the Commissioner is obligated to stay actually placing a player on Leave with Pay pending the Article 46 hearing.[14]

---

[14]

I have noted earlier the NFL's contention that a "practice that has existed for many years, previously unchallenged, under which the Commissioner has taken immediate action to address violent and other serious incidents of criminal behavior, on a temporary basis, during the pendency of a league investigation into whether discipline should be imposed in the first place." NFLPost-HB at 10.

I also note that the issue of the Commissioner's obligation to stay implementation of a Personal Conduct Policy disciplinary decision was explicitly dealt with in earlier Personal Conduct Policies. Thus, after their being no mention of a "stay" in the August 28, 1997, and October 1998 Violent Crime Policies (NFL Exs. 3 & 4), the Personal Conduct Policies of May 25, 2000, and May 1, 2000 (NFL Exs. 6 & 7) provided, under "Appeal Rights," that:

> Any person disciplined under this policy shall have a right of appeal, including a hearing, before the Commissioner or his designee. Except for the enforcement of discipline, no other requirements set forth in the policy will be stayed pending the completion of the appeal.

The "Appeal Rights" provision of the Personal Conduct Policy of April 2007 (NFL Ex. 8) provided that:

> Any person disciplined under this policy shall have a right of appeal, including a hearing, before the Commissioner or his designee. Except for the enforcement of a suspension, no other requirements set forth in the policy will be stayed pending the completion of the appeal.

The Personal Conduct Policy of April 2007, which was supported by the NFLPA, added a new and detailed "Discipline Section," but eliminated the "Appeal Rights" section of the three prior Policies and didn't address, one way or the other, whether there should be a stay of a Commissioner decision pending appeal.

Continued on next page.

b. Can the Commissioner Use the Exempt List to Implement the Leave with Pay Provision of the New Policy?

The NFLPA contends that the New Policy's Leave with Pay provisions relating to the Exempt List should be invalidated, and that I should "issue an order, pursuant to Article 2, Section 4(b) of the CBA, [directing the NFL] to cease and desist from implementing the amendment to Article 17.14(A) of the NFL Constitution and Bylaws (NFLPA Ex. 14) on the ground that it violates and/or renders meaningless the provisions of the CBA that protect players from conduct detrimental action prior to a finding of guilt and the opportunity for a hearing." PAPost-HB at 63.

The NFLPA actually has two arguments. Its first is reflected in the just-stated relief request – that the amendment to the Exemption List is inconsistent with CBA provisions protecting "players from conduct detrimental action prior to a finding of guilt and the opportunity for a hearing." This is the same argument the NFLPA makes with regard to the entire New Policy's Leave with Pay provision. I've determined that the Commissioner has the general authority to implement the Leave with Pay provision and that authority isn't in conflict with Paragraph 15 or Article 8.13(A), so this argument also fails to the extent it is specifically directed at the Exempt List issue.

The question that remains is whether the Commissioner's use of the Exempt List, as "confirmed" (according to the NFL) in the amendment at issue, is invalid because the adoption of the amendment violated Article 2.4(a) of the CBA, which provides that "if any proposed change in the NFL Constitution and Bylaws could significantly affect the terms and conditions of employment of NFL players, then the NFL will give the NFLPA notice of and negotiate the proposed change in good faith."

Under the heading, "Listing of Players," Article 17.14(A) of the CBL provides that "[a]ll players must be listed by the club on one of the following lists: Active List[,] Reserve List[, and] Exemption List," then describes the Exemption List:

> The Exemption List is a special player status available to clubs only in unusual circumstances. The List includes those players who have been declared by the Commissioner to be temporarily exempt from counting within the Active List limit. Any request for an Exemption must be sent to the Commissioner by NFLNet, e-mail, facsimile or other similar means of communication, and must include complete facts and reasons to support such request. Only the Commissioner has the authority to place a player on the Exemption List; clubs have no such authority. Except as provided in paragraph (1) of this subsection (A), no exemption, regardless of circumstances, is automatic. The Commissioner also has the authority to determine in advance whether a player's time on the Exemption List will be finite or will

---

Further evidence about how these stay-related changes came about would likely be pertinent in any later proceeding in which the issue of the Commissioner's stay-related obligations was directly raised. Looking solely at the evolution of the text of the Policies, a future decision-maker might find significant the evolution from no mention of a stay, to the provision of a stay relating to "the enforcement of discipline," then to a narrower stay provision relating only to the "enforcement of a suspension," and finally to no mention of a stay.

> continue until the Commissioner deems the exemption should be lifted and the player returned to the Active List. . . .

On December 16, 2014, membership of the NFL passed Resolution G-2, which provided:

> This is to confirm that the Commissioner may make use of the Exempt List in aid of his jurisdiction to address conduct detrimental, specifically violations of the Personal Conduct Policy that are under investigation. If a player is formally charged with a crime of violence or other conduct that poses a genuine danger to the safety or well-being of another person, or if a player is suspected on the basis of credible evidence of having committed such a crime but further investigation is required, then in such unusual circumstances, the Commissioner may place a player on the Exempt List until the matter is resolved under the Personal Conduct Policy.

NFL Ex. 26.

Articles 2.1 and 2.4(a) of the Collective Bargaining Agreement provide that:

> The provisions of this Agreement supersede any conflicting provisions in the Settlement Agreement, NFL Player Contract, the NFL Constitution and Bylaws, the NFL Rules, or any other document affecting terms and conditions of employment of NFL players, and all players, Clubs, the NFLPA, the NFL, and the Management Council will be bound hereby. For the avoidance of doubt, the NFL shall be considered a signatory to this Agreement.
>
> This Agreement represents the complete understanding of the parties on all subjects covered herein, and there will be no change in the terms and conditions of this Agreement without mutual consent. Except as otherwise provided in Article 47, Section 6, on Union Security, the NFLPA and the NFL waive all rights to bargain with one another concerning any subject covered or not covered in this Agreement for the duration of this Agreement, including the provisions of the NFL Constitution and Bylaws; provided, however, that if any proposed change in the NFL Constitution and Bylaws could significantly affect the terms and conditions of employment of NFL players, then the NFL will give the NFLPA notice of and negotiate the proposed change in good faith.

The NFLPA contends that the "League's amendment to the Constitution and Bylaws allowing the Commissioner to use the Exempt List to place players on so-called paid leave—thereby banning them from practice and games—before any finding of conduct detrimental guilt, and notice and a hearing, clearly qualifies as a significant change in the terms and conditions of players' employment." PAPost-HB at 55.

The CBL is incorporated into the CBA and binds players as well as others associated with the NFL, so long as the CBL provisions at issue are not in conflict with the CBA. I have found that the Commissioner has the authority to place a player on paid administrative leave in circumstances enumerated in the New Policy, although his authority is constrained by the rights of a player who disputes being placed on leave with pay to appeal, and to a hearing in which he is represented by counsel. The remaining question is whether, pursuant

to his authority, the Commissioner could make use of the Exempt List as a vehicle for implementing his paid administrative leave decision.

That question must be resolved by considering the language of the CBL. Although Article 17.14(A), the applicable CBL provision, is not a model of draftsmanship, I find the provision mandates the following:

- The Exemption List is a "special player status" including "those players who have been declared by the Commissioner to be temporarily exempt from counting within the Active List limit."
- "Only the Commissioner has the authority to place a player on the Exemption List; clubs have no such authority."
- With one exception not applicable here, "no exemption, regardless of circumstances, is automatic."
- Under "unusual circumstances" (which are not defined), a club may request an Exemption from the Commissioner by sending a communication by specified means that includes "complete facts and reasons to support such a request."
- In deciding whether to grant the Exemption, the Commissioner "has the authority to determine in advance" whether "a player's time on the Exemption List will be finite or will continue until the Commissioner deems the exemption should be lifted and the player returned to the Active List."

Resolution G-2 purported "to confirm that the Commissioner may make use of the Exempt List in aid of his jurisdiction to address conduct detrimental, specifically violations of the Personal Conduct Policy that are under investigation." It said that under the defined circumstances set out in the New Policy, which it concluded were "unusual circumstances, the Commissioner may place a player on the Exempt List until the matter is resolved under the Personal Conduct Policy."

Resolution G-2 differs from CBL Article 17.14(A) in that it authorizes the Commissioner to take unilateral action to place a player on the Exempt List, whereas Article 17.14(A)'s pre-Resolution-G-2 provisions provided that the Exemption List was "available to clubs only in unusual circumstances" and contemplated that "[a]ny request for Exemption" would be sent by a club to the Commissioner, along with complete facts and reasons to support such request.

Thus, while it's clear from Article 17.14(A) that the Commissioner (and only the Commissioner) has constitutional authority to make the decision about whether a Player should be placed on the Exemption List, there is nothing in Article 17.14(A) that allows the Commissioner to act unilaterally to invoke the Exemption List; on the contrary, Article 17.14(A) is explicit in stating that the Exemption status is "available to clubs only in unusual circumstances" and in providing that the Exemption process is to be initiated by a club's sending a request to the Commissioner.

In these circumstances, where Exemption List procedures have been specified in detail in the Constitution, I find that it was necessary for the NFL to amend the Constitution if, in addition to the previously enumerated procedures mandating club initiation of Exemption List proceedings, it wanted to allow the Commissioner to act on his own, without a Club request, to use the Exemption List. Thus, I don't think it was accurate for Resolution G-2 to say that it was "confirm[ing]" the Commissioner's power, rather than granting him

new authority in the context of providing for an additional procedure for placing a player on the Exemption List.

It is in this context that I address whether, in passing Resolution G-2 without giving the NFLPA notice and an opportunity to "negotiate the proposed change in good faith," the NFL violated Article 2.4(a) of the CBA.[15] Article 2.4(a) was violated if the change embodied in the resolution "could significantly affect the terms and conditions of employment of NFL players."

I have already found that the Commissioner has the authority to put a player on paid administrative leave under the general circumstances defined in the New Policy, and that such authority isn't limited by the CBA or CBL, except for Article 46, which mandates that if the Commissioner takes such action he must give a player who disputes the action notice and an opportunity for a hearing. I've also found that in light of the specific procedural mandates of the CBL, as it existed prior to Resolution G-2, the Commissioner did not have the authority unilaterally to use the Exemption List as a vehicle for implementing his Leave with Pay decision. Resolution G-2 gave him that authority.

Viewed in this context, I find that this CBL change did not "significantly affect the terms and conditions of employment of NFL players." Absent Resolution G-2, the Commissioner had the authority to implement a Player Conduct Policy that generally allowed him to place a player on paid administrative leave (without reference to the Exemption List), subject to the provisions of Article 46. Had the Commissioner implemented such a policy, he could also have provided as a part of that policy that he found that placing a player on paid administrative leave involved "unusual circumstances" as that term is used in Article 17.14(A), and that he would act immediately to place any such player on the Exemption List if the player's club made application following the procedures of Article 17.14(a). Given that I find that the Commissioner and a club could have, in a two-step process, caused a player put on paid administrative leave by the Commissioner also and immediately to be put on the Exempt List, I do not believe the constitutional amendment granting the Commissioner the authority to accomplish this in one step can reasonably be held to be a "**significant** change in the terms and conditions of players' employment" (emphasis added).

VII. Disciplinary Officer

A. Applicable Provisions of the New Policy

The New Policy provides:

> Initial decisions regarding discipline will be made by a disciplinary officer, a member of the league office staff who will be a highly-qualified individual with a

---

15 I agree with the NFLPA that "[t]he League's willingness to discuss this with the Union came only ***after*** the amendment had already been passed and went into effect. Hr'g Tr. 490:18-491:3 (Birch) (testifying that the NFL never offered to negotiate the proposed change with the Union before the owners adopted it); *id.* at 380:7-25 (DePaso)." PAPost-HB at 58 (emphasis in original).

criminal justice background. The disciplinary officer will follow the process outlined below and will make the initial decision on discipline pursuant to a delegation of the Commissioner's authority, subject to any appeal.

. . . .

Employees who are subject to discipline will be given notice of the potential violation for which discipline may be imposed. The employee will be furnished with the records and other reports that the disciplinary officer has relied on in addressing the matter, including records from law enforcement and a copy of any investigatory report and any documents relied upon by a league investigator in generating the report. The employee will be permitted to submit information in writing to rebut or otherwise respond to the report. In addition, the employee will have the opportunity to meet with the investigator and disciplinary officer in advance of discipline being imposed. In cases where there has been a criminal disposition, the underlying disposition may not be challenged in a disciplinary hearing and the court's judgment and factual findings shall be conclusive and binding, and only the level of discipline will be at issue. Once the record is complete, the disciplinary officer will issue a written decision setting forth the reasons for as well as the amount and nature of the discipline to be imposed.[16]

B. The NFLPA's Position

Absent collective bargaining and agreement by the NFLPA, the NFLPA contends that the NFL can't, as it has tried to do in the New Policy, take "the Commissioner's exclusive authority to determine and impose conduct detrimental discipline on players and put it in the hands of a newly-created and non-collectively bargained 'disciplinary officer.'" PAPre-HB at 3. That's because "the CBA grants the Commissioner – and no one else – the authority to impose conduct detrimental discipline on players." *Id.*

In the NFLPA's view:

[The] argument begins and ends with the unambiguous language of both Paragraph 15 and Article 46. The former expressly provides that "the Commissioner" — not anyone else — "will have the right" to impose a fine and/or suspension and/or to terminate the Player Contract upon finding a player "guilty" of conduct detrimental, and "only after" the player is afforded his right to notice and a hearing. CBA, App. A,

---

16

The New Policy also provides:

Conduct Committee – To ensure that this policy remains current and consistent with best practices and evolving legal and social standards, the Commissioner has named a Conduct Committee. This committee will be made up of NFL owners, who will review this policy at least annually and recommend any appropriate changes in the policy, including investigatory practices, disciplinary levels or procedures, or service components. The committee will receive regular reports from the disciplinary officer, and may seek advice from current and former players, as well as a broad and diverse group of outside experts regarding best practices in academic, business, and public sector settings, and will review developments in similar workplace policies in other settings.

> ¶ 15. Article 46, meanwhile, details the "exclusive" procedures for processing and appealing conduct detrimental discipline imposed on players by the Commissioner, and expressly confers on the Commissioner the authority to delegate his disciplinary authority for *on-the-field conduct* (as opposed to conduct detrimental) and to hear conduct detrimental *appeals*. *Id.*, Art. 46, § 1(a)-(c). Nowhere do these "exclusive" procedures provide for the delegation of the Commissioner's sole authority to impose initial conduct detrimental discipline.

PAPost-HB at 42.

Further, according to the NFLPA, this "conclusion is underscored by the fact that the CBA expressly authorizes the Commissioner to delegate his authority to hear player *appeals* of conduct detrimental discipline to a Hearing Officer but contains no corresponding authorization for the Commissioner to delegate to anyone his exclusive role to *impose* such player discipline in the first instance." PAPre-HB at 4 (emphasis in original).

Although the NFLPA contends that there's no need to refer to extrinsic evidence, it notes that "[t]he League—including the Commissioner himself—has repeatedly stated that the Commissioner is the only person with authority to make conduct detrimental determinations with respect to players under the CBA." *Id.* at 20.

The NFLPA disputes the NFL's contentions that "the Commissioner has previously had members of his staff participate in the imposition of discipline without objections from the NFLPA," PAPre-HB at 24, and that Mr. Birch "has been independently deciding certain conduct detrimental cases for years." PAPost-HB at 43. It asserts that "prior to the New Policy, it was always the Commissioner—and only the Commissioner—who imposed the conduct detrimental discipline, whether or not he received advice from senior staff before doing so or had such NFL staff send the discipline letters that conveyed the Commissioner's discipline determination to the player," PAPre-HB at 24. According to the NFLPA, "both Mr. Berthelsen and Mr. DePaso testified to their unequivocal understanding that only the Commissioner actually rendered individual conduct detrimental disciplinary decisions against players prior to the New Policy." PAPost-HB at 44.

The NFLPA also argues that a further reason for concluding that the Commissioner must himself actually make the initial discipline determination is grounded in the jurisprudence that has developed over the years with regard to the standard of review on appeal from an initial conduct detrimental decision. As the NFLPA has put it, "the NFL has, time and again, emphatically articulated its unwavering position that the Commissioner is the *only* person with authority to make conduct detrimental determinations with respect to players under the CBA and has argued that his 'unique[]' role as Commissioner is the reason why conduct detrimental disciplinary determinations are entitled to deference. . . . This entire argument for 'deference' to the Commissioner's conduct detrimental determinations makes no sense—either in hindsight or looking forward—if anyone else were making those determinations in the first instance." PAPost-HB at 44-45 (citation omitted). Further, "[i]f the Commissioner's conduct detrimental authority could be delegated to someone else, the entire rationale for deference *to the Commissioner's* decision-making, and the whole body of precedent the NFL relies upon in Article 46 proceedings, would collapse." *Id.* at 47 (emphasis in original).

C. The NFL's Position

The NFL counters by contending that "the Commissioner's delegation of authority for initial disciplinary decisions . . . [has] been part of the Policy and its application for years without any claim of a supposed CBA violation." NFLPost-HB at 7. According to the NFL, "the Commissioner has delegated his authority to impose discipline to other league employees with the full knowledge and acquiescence of the NFLPA for years." NFLPre-HB at 22.

The NFL rejects the NFLPA's reliance on what it calls:

> [O]ut-of-context statements recognizing the Commissioner's "sole authority" in conduct detrimental matters, including that "only the Commissioner[] will make the determination of conduct detrimental." *E.g.*, *New Orleans Saints Pay-for-Performance / "Bounty,"* Decision on Recusal of Paul Tagliabue, (November 5, 2012) at 3. Those correct statements are drawn from contexts in which the Union had argued that someone *other than the Commissioner or his chosen designee* should resolve conduct-detrimental disputes (like a non-injury grievance arbitrator or simply a different individual), when in fact Article 46 "reflects conscious decisions by the parties to vest unqualified discretion in the Commissioner" in such cases. *Id.* at 5-6. These statements in no way suggest that the Commissioner lacks the power, in the exercise of his "sole authority" and "unqualified discretion" under Article 46, to delegate certain disciplinary functions to League employees."

NFLPre-HB at 22, fn. 4.

According to the NFL, "because no CBA provision affirmatively prohibits the Commissioner from delegating some aspects of his 'far-reaching' disciplinary authority, *Augmented Drug Program*, at 62, the Policy's delegation provisions are valid and consistent with the CBA. Indeed, given the sheer number of conduct detrimental cases, *see* Tr. 499-500, it would be unrealistic for the NFL Commissioner to personally investigate, negotiate, and determine discipline in every case without some delegation of authority. Nothing in the CBA can be read as conflicting with or restricting his right to delegate as contemplated in the Policy." NFLPost-HB at 26 (footnote omitted).

Further, the NFL claims:

> [T]his form of delegation is identical to the NFL's open practice under prior policies. Mr. Birch has been making initial disciplinary decisions "without consulting the Commissioner" in "a significant majority" of cases for years. Tr. 437; *see id.* ("It's probably the exception rather than the rule that I would need to consult with [the Commissioner] on a particular matter."). The record reflects literally scores of examples of discipline letters sent by Mr. Birch and others, all issued "under the authority of the Commissioner," but without any indication of the Commissioner's *personal* involvement. *See, e.g.*, Exs. 34, 54, 59, 63, 68, 72-73, 85-148). Although the Commissioner will "discuss the approach to things" and set forth his "viewpoint, his understanding, his perspective on the nature of different types of offenses," Mr. Birch has long made decisions about player discipline "at the granular level." Tr. 437-38. Mr. Birch also testified that the new role of the disciplinary officer was intended to be "sort of exactly what I was doing . . . it's the same process." Tr. 444-45.

> Because the form of delegation under the Policy is the same as the longstanding and unchallenged delegation practices under the old policy, there is no basis to declare the Policy invalid or to enjoin it. *See Augmented Drug Program*, at 72 (upholding Commissioner's unilateral retention of League Drug Advisor because there was "no prohibition in the collective bargaining agreement upon the League retaining additional personnel").

Id. at 23-24.

D. Analysis

I start with the applicable contract language.

Read separately and together, neither Paragraph 15 nor Article 8.13(A) definitively speak to the question of how an initial, pre-notice and pre-hearing determination about whether a player has been guilty of conduct detrimental must occur. They both speak to the Commissioner's deciding, "after notice and hearing" that a player is guilty of conduct detrimental. Neither Paragraph 15 or Article 8.13(A) can be read as explicitly foreclosing the involvement of someone other than the Commissioner in the initial process of evaluating whether a player's actions amount to conduct detrimental. Article 8.13(A) mandates only that the Commissioner, "after notice and hearing, decides . . ." and then states the Commissioner's "complete authority" to suspend the player, fine him (to a limit) or cancel his contract. Paragraph 15 mandates only that the Commissioner has "the right, but only after giving the Player the opportunity for a hearing at which he may be represented by counsel of his choice," to suspend the player (for a period or indefinitely), fine him (to a reasonable amount) or terminate his contact, all after the Commissioner "reasonably judge[s]" the player to be "guilty" of conduct detrimental.

The same cannot be said of Articles 46.1(a) and 46.2(a). Article 46.1(a) mandates that the Commissioner's conduct detrimental actions against a player will be "processed exclusively" by the Commissioner's "promptly sending written notice of his action" to a player, who then has three business days to appeal in writing to the Commissioner. Article 46.2(a) then mandates that for Article 46.1(a) appeals, the Commissioner must either, after consultation with the Executive Director of the NFLPA, "appoint one or more designees to serve as hearing officers" or decide that he himself will "serve as the hearing officer" in the appeal.

Under Article 46.1(a)'s *exclusive process* mandate, which requires the Commissioner to "promptly send written notice of *his action* to the player" (emphases added), it is the Commissioner who must determine in the first instance, prior to notice and the later hearing, what action he intends to take against the player for conduct detrimental.

Based on this language, I find that the Article 46.1(a) "action" that is embodied in the notice to a player and that will be at issue in the Article 46.2(a) appeal (heard either by a hearing officer or the Commissioner himself) must be an "action" of the Commissioner.

While my analysis need go no further than this finding about what Article 46.1(a) unambiguously says, I note my conclusion, more generally, that there is no basis either in the contractual documents or the past practices of the Parties to conclude that the Commissioner may completely delegate to a disciplinary officer or anyone else the ultimate

pre-notice, conduct-detrimental-related decision-making authority contemplated by the CBA's mandate that the notice to a player embody "his [-- the Commissioner's --] action."

I give some weight to the NFLPA's *inclusio unius est exclusio alterius* argument that "the clear expression of the Commissioner's ability to delegate in certain specified circumstances forecloses the injection of delegation language elsewhere in the CBA — much less elsewhere in *the very same provision* — where it does not exist." The NFL has a colorable counter-argument in its contention that merely because Article 46 permits the Commissioner to delegate in certain areas doesn't necessarily mean that it should be read as a restriction of his authority to delegate in other areas. Hence, the NFLPA's argument, while somewhat more persuasive than the NFL's counter-point, is far from dispositive.

I find inconclusive the Parties' conflicting evidence about past disciplinary practices, as, for example, with regard to the respective roles of the Commissioner and Mr. Birch and with regard to what officials of the NFLPA knew or inferred about whether the Commissioner was or was not actually involved in at least some way in every conduct detrimental action and notification.

I find persuasive the NFLPA's contention that a different view of whether the initial "action" leading to a conduct detrimental notice to a player must be that of the Commissioner, rather than his designee, would upend years of Article 46 jurisprudence and NFL advocacy in such proceedings that a hearing officer other than the Commissioner must give deference to the Commissioner's initial decision-making.

I don't find other NFL arguments persuasive.

The NFL has contended that the Commissioner is "*not* delegating his exclusive right to define conduct detrimental discipline through the Policy." NFLPost-HB at 23 (emphasis in original). I assume this is meant to mean that the Commissioner retains overall authority, subject only to any CBA or CBL limitations, to define the general parameters of conduct detrimental discipline – what discipline may be imposed, the nature of aggravating factors, and the like. The problem is that the Commissioner's retaining overall authority to set disciplinary standards isn't relevant to the question whether the CBA mandates or does not mandate the Commissioner's direct involvement in initial conduct detrimental decisions in individual cases.

The NFL asserts that the Commissioner is not "delegating his role in initial discipline altogether" since the "Policy specifically retains the Commissioner's authority to 'consult[]' with independent advisors 'in evaluating a potential violation' of the Policy." *Id.* The New Policy's actual language is: "To assist in evaluating a potential violation, expert and independent advisors may be consulted by the disciplinary officer, the Commissioner, and others as needed."

It's not clear from the New Policy itself when the Commissioner or "others" might do this. The policy gives the Commissioner no role in initial decisions, unqualifiedly putting that responsibility on the disciplinary officer, who, under the just-quoted language, may consult with expert and independent advisors. Absent inferring some other role for the Commissioner in the process, which would be questionable in light of a player's right to fair

notice as to how the conduct detrimental process will work,[17] the best reading of the Policy's giving the Commissioner the right to consult with "expert and independent advisors" seems to be that it would apply in the circumstance where the Commissioner, under Article 46.2(a), exercises his right to hear an appeal. Thus, this provision doesn't deal with the issue of whether the Commissioner is delegating initial decision authority.

The NFL says that the Commissioner is "not delegating his 'ultimate authority to make disciplinary determinations' in cases in which he disagrees with the disciplinary officer." *Id.* This presumably refers to the Commissioner's ability to decide to conduct the appeal hearing himself, since there is no other provision in the New Policy detailing how the Commissioner might intervene in the event of a disagreement. In addition, the NFL says that the Commissioner is "delegating to an NFL executive only part of his conduct detrimental authority — namely, the '[i]nitial decisions regarding discipline' of specific players." *Id.*

Neither of these arguments is persuasive. The New Policy explicitly and unqualifiedly provides that "[i]nitial decisions regarding discipline will be made by a disciplinary officer," who will "make the initial decision on discipline pursuant to a delegation of the Commissioner's authority, subject to any appeal" and "issue a written decision setting forth the reasons for as well as the amount and nature of the discipline to be imposed." I have found that under Article 46.1(a), the Commissioner is not allowed completely to delegate his obligation to make the initial decisions regarding discipline of specific players and that any conduct detrimental notice to a player under Article 46.1(a) must reflect the Commissioner's action, rather that of someone else.

My finding that the Commissioner must himself take the conduct detrimental "action" that forms the basis of the notice to a player and defines the subject matter that the player may, if he chooses, appeal, means that I find invalid as contrary to the CBA the provisions of the New Policy relating to the disciplinary officer as they are now written.

That does not mean that the Commissioner may not appoint and make extensive use of a disciplinary officer in the conduct detrimental process. I suggest, without now deciding, that, since there appear to be no other conflicts with provisions of the CBA and since such actions would otherwise be consistent with the Commissioner's general authority, the Commissioner has broad discretion to delegate conduct-detrimental-related tasks and responsibilities to staff members, including a staff member who may be designated as "disciplinary officer," including all tasks set out in the first paragraph of page 6 of the New Policy, up to but not including the disciplinary officer's himself issuing "a written decision setting forth the reasons for as well as the amount and nature of the discipline to be imposed." Again, I suggest without deciding that an acceptable process might be one that provided for a disciplinary officer's compiling a "record," then preparing a written "recommendation," setting forth for the Commissioner's personal review, evaluation, and formal approval "the reasons for as well as the amount and nature of the discipline to be imposed," so long as the Commissioner himself, after personal review and evaluation, then issued the written decision or it was otherwise clear that the Commissioner had himself signed off on it.

---

17 *See e.g.*, cases collected at PAPre-HB at 7-8.

In *Augmented Drug,* Arbitrator Kasher:

- Rejected the NFLPA's blanket challenge to Commissioner Rozelle's authority to retain Dr. Tennant "as coordinator of the new program and as the League's Drug Advisor," *id.* at 72;
- Noted "there is no prohibition in the collective bargaining agreement upon the League retaining additional personnel to improve the educational elements of the existing drug program," *id.;*
- Found that "some of the proposed responsibilities for Dr. Tennant overlap the responsibilities established by agreement [in Article XXXI] for the Hazelden Foundation," *id.;* and
- Found that "many of the responsibilities assigned to Dr. Tennant do not conflict with the specific language of Article XXXI." *Id. at 73.*

He then stated:

> Rather than attempting to delineate specific responsibilities which Dr. Tennant may properly fulfill within the interface of the augmented drug program and Article XXXI, we will direct the parties to address the details of Dr. Tennant's role. In the event they are unsuccessful, we will retain jurisdiction in this matter.

Id.

I follow Arbitrator Kasher with regard to the disciplinary officer issue. If, in light of my holding that the portions of the New Policy dealing with the role of the disciplinary officer cannot stand as written, the NFL desires to redraft them to allow for a modified disciplinary officer role, I direct the parties to address the details of that role.

In the event they are unsuccessful in agreeing on terms of a revised policy, I will retain jurisdiction in the matter to provide further guidance, as did Arbitrator Kasher.[18]

VIII. Involvement of Other Advisors

A. The NFLPA's Position

In addition to challenging the Commissioner's decision to delegate to the disciplinary officer the authority to make the initial conduct detrimental decision, the NFLPA challenges two other elements of the New Policy that, as the NFLPA puts it, allow "for outside parties to participate in the confidential and collectively bargained disciplinary and appeals processes." PAPost-HB at 2. The following provisions of the New Policy are challenged:

- "To assist in evaluating a potential violation, expert and independent advisors may

---

[18] For later actions by Arbitrator Kasher, see *Clarification of An Arbitration Opinion and Award* (January 18, 1987) (Kasher).

be consulted by the disciplinary officer, the Commissioner, and others as needed.[19] Such advisors may include former players and others with appropriate backgrounds and experience in law enforcement, academia, judicial and public service, mental health, and persons with other specialized subject matter expertise." New Policy at page 5.

- "The Commissioner may name a panel that consists of independent experts to recommend a decision on the appeal." *Id.* at page 7.

The NFLPA asserts that "the New Policy facially conflicts with the CBA by providing for NFL outsiders — unspecified 'advisors' — to participate in the initial determination of player discipline, as well as for non-collectively bargained 'independent experts' to 'recommend . . . decision[s] on appeal.' Ex. 1, New Policy at 5-7. The CBA does not permit the Commissioner to appoint such outsiders to participate in the confidential disciplinary process, as confirmed by the parties' long-standing custom and practice in processing the Commissioner's discipline of players pursuant to Article 46 of the CBA." PAPre-HB at 4.

The NFLPA explains:

> [T]he CBA does not sanction the appointment of "advisors" or consultants to aid the newly and impermissibly created disciplinary officer in making conduct detrimental determinations; nor does it authorize the Commissioner to appoint outsiders to "recommend" decisions on appeal—and for good reason. Disciplinary matters under the CBA often involve highly confidential and sensitive information about players and their families; as the NFLPA will establish at the hearing, this is precisely why the parties have never permitted the presence of any outsiders to participate in the confidential conduct detrimental disciplinary process.
>
> Indeed, as demonstrated above, when the parties intended to provide for the delegation of authority or a role for someone other than the Commissioner in the conduct detrimental disciplinary process, they did so expressly in the language of Article 46, which provides the "exclusive" process for imposing and appealing such discipline. *See* Point II, *supra*. The absence of any provision in Article 46 (or anywhere else in the CBA) for outside "advisors" to aid a "disciplinary officer" in making conduct detrimental determinations is thus dispositive—those jobs are exclusively the Commissioner's. *Id*.
>
> Likewise, Article 46 and the rest of the CBA do not provide for outside "experts" to be appointed to make recommendations in the appeals process. To the contrary, the CBA expressly authorizes the Commissioner to delegate his authority to serve as *Hearing Officer* (after consultation on the appointment of the Hearing

---

19 In defining its request for relief in its post-hearing brief, the NFLPA focused its opposition to the use of advisors solely on their role vis a vis the disciplinary officer, challenging "the provision allowing third-party 'advisors' 'to assist [the disciplinary officer] in evaluating a potential violation' of the New Policy." PAPost-HB at 63. It's not clear whether this means that the NFLPA has no objection to the Policy's provision's allowing the "Commissioner" and "others" to consult advisors to "assist in evaluating a potential violation." For purposes of my analysis here, I assume that the NFLPA objects to the use of advisors generally, whether consulted by the disciplinary officer, the Commissioner or others.

Officer with the Union), but provides no additional right of the Commissioner to also appoint "outside experts" to make recommendations for the disposition of an Article 46 appeal. *See* CBA, Art. 46, § 2(a) ("For appeals under Section 1(a) above, the Commissioner shall, after consultation with the Executive Director of the NFLPA, appoint one or more designees to serve as hearing officers."). This aspect of the New Policy is the equivalent of the NFL suddenly declaring that it has the unilateral right to appoint "outside experts" to make recommendations of relief in a non-injury grievance proceeding such as this one, when the CBA provides for no such thing. In providing for such outside participation in the disciplinary process of players, without CBA authorization, the New Policy violates the CBA and these aspects of the New Policy should be declared invalid.

PAPre-HB at 25-26.

B. The NFL's Position

The NFL counters:

[T]he NFLPA's claim that the Commissioner is restricted from consulting with "third party 'advisors'" or "experts" in determining whether a player has violated the Policy and in hearing appeals under Article 46, ignores that, for many years, the Policy has expressly given the Commissioner the right to consult with "medical, law enforcement, and other relevant professionals," Ex. 8 (2007 Policy) at 3. According to the Union, consultation with such advisors and experts is impermissible because "[t]here is no CBA provision for the participation of such outsiders to the CBA in the disciplinary process." Ex. 1 (Grievance) at 7-8. But the absence of a provision expressly authorizing the Commissioner to consult with outside advisors does not establish a violation of the CBA. *See City of Troy*, 1998 Lab. Arb. Supp. (BNA) 103851, slip op. at 8 (1998) (Knott, Arb.).

NFLPre-HB at 23.

The NFL also contends:

Although the NFLPA claims that the Policy's reference to the possible use of "consulting experts and independent advisors" conflicts with the CBA (Pre-Hearing Br. 25-26), Mr. Birch testified without contradiction that these provisions are simply "a codification of the method that [the NFL] ha[d] been using" in the past. Tr. 454-55. For example, Mr. Birch testified that the Commissioner has consulted with groups such as the Humane Society in relation to Michael Vick's discipline, and Mothers Against Drunk Driving in relation to Dante Stallworth's discipline, in order "to help [the League] either fashion what needs to happen or to give perspective on the nature of the conduct or nature of the sanction we made." Tr. 454-56; *id.* at 455 (Policy "spells out that continuing fact, that we will utilize those types of people, those types of experts when it's appropriate"). Mr. Birch further testified that the NFLPA was aware of these uses of third-party advisors and never objected. *Id.* at 457.

The NFLPA did not contradict Mr. Birch's testimony, or otherwise elicit any contrary testimony suggesting that this sort of consultation was either objectionable

> or that it "conflicts with certain specific provisions of the collective bargaining agreement[.]" *Augmented Drug Program*, at 64. Thus, the NFL's unchallenged evidence demonstrates that there is no basis to find that the aspect of the Policy permitting the Commissioner to consult with outside personnel or advisors violates the CBA—particularly when there is no dispute that he may freely consult with NFL personnel. *See* NFLPA Br. at 24 (no objection when the Commissioner has "had members of his staff participate in the imposition of discipline" or "received advice from senior staff" before imposing discipline).

NFLPost-HB at 27-28.

C. Analysis

To decide whether the Commissioner exceeded his authority I need look no further than Arbitrator Kasher's decision in *Augmented Drug* with regard to Dr. Tennant. In that case, the NFLPA had argued that:

> [T]he program announced by Commissioner Rozelle installs Dr. Tennant to oversee the operation of Article XXXI, as purportedly amended by the League. In the NFLPA's opinion, this provision eviscerates the parties' designation of Hazelden to perform this function and the NFLPA's right to participate in the joint selection of Hazelden's successor. The NFLPA contends that the ongoing educational function to be performed by Hazelden or its jointly-selected successor under the agreement would be deleted by the League if Dr. Tennant is substituted for Hazelden or a jointly-selected successor to Hazelden. The NFLPA further points out that rather than having a pre-season and reasonable cause urinalysis performed at the direction of the club physician, the Commissioner's program requires that such tests are now to be performed by SmithKline and the results provided to Dr. Tennant, both of whom are strangers to the agreement and to the doctor-patient relationship which concededly exists between the players and their club physicians.

Id. at 23.

In dealing with this issue, Arbitrator Kasher held as follows:

> The augmented drug program also provides for the retention of Dr. Forest S. Tennant, Jr. as coordinator of the new program and as the League's Drug Advisor. Part of Dr. Tennant's proposed responsibilities would involve an oversight function of the procedures used for testing for chemical dependency, as well as his coordinating drug education for players, management, trainers, doctors and coaches. Obviously, some of the proposed responsibilities for Dr. Tennant overlap the responsibilities established by agreement for the Hazelden Foundation. On the other hand, there is no prohibition in the collective bargaining agreement upon the League retaining additional personnel to improve the educational elements of the existing drug program. In fact, the record reflects that the clubs, with NFLPA knowledge and tacit encouragement, have gone beyond the Hazelden Foundation in seeking higher quality educational materials for League personnel. The record does not reflect that the Commissioner's augmented drug program will or intends to replace the Hazelden Foundation. Therefore Section 6 of Article XXXI would not be violated, since the Commissioner's program does not negate the NFLPA's and the

> NFLMC's right to agree to jointly designate a successor to Hazelden. We find that many of the responsibilities assigned to Dr. Tennant do not conflict with the specific language of Article XXXI.

Id. at 72-73.[20]

I deal first with the New Policy's authorization of the use of "expert and independent advisors," such as "former players and others with appropriate backgrounds and experience in law enforcement, academia, judicial and public service, mental health, and persons with other specialized subject matter expertise," to "assist in evaluating a potential violation."

Although it generally contends that "the CBA does not sanction the appointment of 'advisors' or consultants to aid . . . in making conduct detrimental determinations," PAPre-HB at 25, the only specific provision of the CBA the NFLPA relies on is Article 46, which, it says, "provides the 'exclusive' process for imposing and appealing such discipline." *Id.* at 25-26.

In the NFLPA's view, "[t]he absence of any provision in Article 46 (or anywhere else in the CBA) for outside 'advisors' to aid a 'disciplinary officer' in making conduct detrimental determinations is thus dispositive — those jobs are exclusively the Commissioner's." *Id*. at 26.

These arguments cannot hold up in the face of Arbitrator Kasher's decision relating to Dr. Tennant in *Augmented Drug.* In *Augmented Drug,* Article XXXI of the then-applicable CBA defined detailed responsibilities for the Hazelden Foundation. In our case, Article 46 defines the roles of the Commissioner and, in some circumstances, a designated hearing officer. As with regard to Article XXXI and the remainder of the then-applicable CBA, where there was no "prohibition. . . upon the League retaining additional personnel to improve the educational elements of the existing drug program," there is no prohibition in either Article 46 or the rest of the current CBA to the League's retaining additional personnel to improve the disciplinary process.[21]

I hasten to add that this statement will be true so long as the retention and role of such personnel does not otherwise conflict with the mandates of Article 46, such as if the use of "expert and independent advisors" were to be implemented in such a way as to "replace" the role of the Commissioner in the process or to "negate" any NFLPA right set out in Article 46, such as the right to appeal, with a player's permission, an initial decision and

---

[20] As noted earlier, Arbitrator Kasher dealt with the fact that there might be overlap between Dr. Tennant's role as defined in the augmented drug policy and the roles assigned to others by the controlling provisions of Article XXXI by directing "the parties to address the details of Dr. Tennant's role" and retaining jurisdiction to deal with any disputes. *Id.*

[21] Although I don't base my decision on facts related to the Parties' prior practices, I believe my decision is supported by the record evidence cited by the NFL concerning the Commissioner's prior consultations with outside groups in the context of considering conduct detrimental actions.

the NFLPA's "right to attend all hearings provided for in this Article and to present, by testimony or otherwise, any evidence relevant to the hearing."[22]

Because there is no indication on the face of the New Policy's provisions that the use of "expert and independent advisors" to "assist in evaluating a potential violation" would run afoul of these restrictions, I reject the NFLPA's challenge to them.

The same logic holds with regard to the New Policy's provision that the Commissioner "may name a panel that consists of independent experts to recommend a decision on the appeal." As long as this panel is constituted merely to recommend a decision, rather than to make the decision, I find no bar in Article 46 or the CBA that would prevent such a panel's being appointed (just as I found no bar to the Commissioner's use of a disciplinary officer as part of the initial decision-making process, so long as the Commissioner himself retains and exercises the final decision-making authority).

As I understand the NFLPA's position, it does not contend that it has a CBA-based right to a hearing or otherwise to be consulted during the initial conduct detrimental decision-making process,[23] prior to the time the Commissioner has reached an initial

---

22

In this regard, I note Mr. Pash's letter of March 17, 2015, to Mr. DePaso, in which he states that "the review panel," which I take to mean those who, under the New Policy, may assist in evaluating a potential violation, will "consist of experts in particular fields who will be consulted as appropriate when the Commissioner and others would benefit from their views. At least some of the people who serve in this capacity will likely differ from time to time depending on the particular issue presented. We do not expect the experts to make any decisions on discipline; instead, they will provide advice in selected cases. We would be pleased to have the NFLPA select a representative to be available to participate." NFL Ex. 27 at 2.

23

In its Post-Hearing Brief, the NFLPA summarized interactions on the meaning of "hearing":

> At the hearing in this matter, Mr. Kessler mistakenly stated that the Paragraph 15 "hearing" must occur before a finding of conduct detrimental. In fact, both parties agree that "[t]he hearing that is described in [P]aragraph 15, where it says 'hearing,' that is the [appeal] hearing that takes place pursuant to Article 46. It's one and the same." Hr'g Tr. 337:10-338:22 (DePaso). Mr. Birch similarly testified that "it is by far not the norm that we would have a meeting in advance of discipline involving the Commissioner," thus confirming that the hearing required by Paragraph 15 is the appeal hearing detailed in Article 46. *Id*. at 448:4-23 (Birch).
>
> > Footnote: *See also* NFLPA Ex. 6, *Peterson* Art. 46 Hr'g Tr. 122:6-10 (Nash) ("[P]aragraph 15 of the Player Contract, says that, 'The player has a right to a hearing.' That's the right to a hearing; that's in Article 46. That's the hearing we are having right now."). Separate from this hearing requirement, informal "pre-hearing" meetings developed as a matter of practice because it was "unfair for our players to not have the ability to at least meet with the Commissioner to give his side of the story about what had happened, before he would decide to issue that initial letter." Hr'g Tr. 339:2-13 (DePaso). But these meetings are not the "hearing" described in Paragraph 15.]
>
> PAPost-HB at 39-40.

decision and notified the player of that decision, triggering the player's right to appeal. Thus, I suggest, without deciding, that the Commissioner's or the disciplinary officer's consulting with "expert and independent advisors" without involvement of the player or the NFLPA before reaching an initial conduct detrimental decision would seem to raise no CBA-related issues.

That said, there is the potential of a conflict between the possible role of "an independent expert panel" in the appeal process[24] and the "right" of the NFLPA "to attend all [appeal] hearings provided for in this Article and to present, by testimony or otherwise, any evidence relevant to the [appeal] hearing."

I note, without deciding, that any *ex parte* consultations between the "independent expert panel" and the appeal hearing officer, whether the Commissioner or his designee, would seem to be in tension with reasonable inferences about participation in events potentially material to the hearing officer's decision that can be drawn from the right of the NFLPA to attend the hearing and present evidence.

While I find the Commissioner's authority extends to appointing such a panel, I suggest that the New Policy, which will need to be amended as a result of other aspects of my decision, might appropriately be amended to make clear the process by which any expert panel would, post-appointment, be informed of each side's views of the applicable facts and law and interact with the Parties and the hearing officer.

Again, to be consistent with a player's right to fair notice as to how the conduct detrimental process will work, it seems to me that embodying relevant procedures in the New Policy would be preferable to the Parties' relying on letter communications, such as that from Mr. Pash to Mr. DePaso of March 17, 2015.[25]

---

[24] While my initial assumption in reading the applicable language of the New Policy was that the intent was for "expert and independent advisors" to "assist in evaluating a potential violation" as a part of the initial decision process, I note that it isn't explicit in the New Policy's provision (although "evaluating a potential violation" seems better read as not comprehending the appeal process). To the extent that there is any intent to involve "expert and independent advisors" other than the independent panel in the appeal process, my comments relating to the potential conflict noted in text would also apply.

[25] In that letter, NFL Ex. 27 at 2, Mr. Pash stated, helpfully, that:

> [T]he appeal panel will consist of qualified individuals with legal, law enforcement, and judicial backgrounds and will advise the Commissioner or his designee when a player appeals from a disciplinary decision. We do not anticipate a panel being convened in every case since many disciplinary matters are quite straightforward and do not present issues that would warrant additional expert consideration. When an appeal panel is convened, we would expect that the panel would review the disciplinary record, any memoranda filed by the parties to the appeal, and would participate in any appeal hearing.

IX. Counseling, Treatment and Therapy

A. Background

The New Policy describes "discipline" as follows:

> Depending on the nature of the violation and the record of the employee, discipline may be a **fine**, a **suspension for a fixed or an indefinite period of time**, a requirement of **community service**, a combination of the three, or **banishment** from the league. Discipline may also include requirements to seek ongoing **counseling, treatment, or therapy** where appropriate as well as the imposition of **enhanced supervision**. It may also include a **probationary period and conditions** that must be met for reinstatement and to remain eligible to participate in the league. Repeat offenders will be subject to enhanced and/or expedited discipline, including **banishment** from the league.

New Policy at 6 (emphasis added).[26]

In its January 21, 2015, Grievance, the NFLPA challenged all the bolded elements of possible discipline except for the imposition of a fine or suspension, based on the contention that "Paragraph 15 of the NFL Player Contract does not authorize the NFL to discipline players for conduct detrimental beyond fines, suspensions or contract termination . . . ." NFLEx.1 at 6. As a result the NFLPA contended that:

> [T]he Policy includes "**community service**" as a potential penalty, which has never been used as a form of discipline in the NFL and is not authorized by the CBA. *Id.* at 6-7(emphasis added).
>
> [T]he Policy contains an entirely new conduct detrimental penalty, never agreed to by the NFLPA, of "**banishment**" from the NFL. . . . The NFL Player Contract contemplates suspension for a "period certain or indefinitely" but does not authorize a lifetime ban. NFL Player Contract 15. *Id.* at 6 (emphasis added).
>
> Although Article 46 of the CBA and the NFL Player Contract state that the Commissioner may fine, suspend or terminate a player's contract for conduct

---

[26] In the context of addressing "what happens when a violation of this policy is suspected," the New Policy also states the following (New Policy at 3):

> **Evaluation, Counseling, and Services –** Anyone arrested or charged with conduct that would violate this policy will be offered a formal clinical evaluation, the cost of which will be paid by the league, and appropriate follow-up education, counseling, or treatment programs. In cases reviewed for possible disciplinary action, the employee's decision to make beneficial use of these clinical services will be considered a positive factor in determining eventual discipline if a violation is found. These evaluations will be available at designated facilities around the country on a confidential basis. The employee may select the particular provider at the designated facility.

> detrimental to the League, there is no provision authorizing the Commissioner to dictate the terms of **counseling** or **treatment** that a player may (or may not) choose to undergo as part of any disciplinary process or otherwise. *See generally* CBA, Art. 46; NFL Player Contract 15. The Policy's disciplinary requirement that a player submit himself to counseling, education, treatment or **therapy** at an NFL-designated facility, as opposed to complying with court-imposed counseling, is contrary to the custom and practice of the Parties and prohibited by the CBA. *Id.* (emphasis added).
>
> [T]he Policy provides that "[d]iscipline may also include . . . the imposition of **enhanced supervision**," which similarly has never been a permissible penalty for conduct detrimental under the CBA. . . . Again, Paragraph 15 of the NFL Player Contract is clear that the only authorized penalties for conduct detrimental are fines, suspension or contract termination. *Id.* at 7 (emphasis added).
>
> Imposing discipline by regulating player behavior through a "**probationary**" **period** or by imposing pre-hearing "**conditions**" on player conduct would vitiate the negotiated CBA limits on permitted discipline for conduct detrimental. *Id.* at 6 (emphasis added).
>
> In its Pre-Hearing Brief, the NFLPA stated it did not
>
> [a]t present . . . intend to pursue . . . the New Policy's (i) provision for banishment of players, (ii) requirement of community service. . . . This is because these aspects of the New Policy have either been withdrawn or the League has clarified the provisions in a manner satisfactory to the NFLPA. The NFLPA has sought to confirm its understanding of these provisions of the New Policy with the NFL, but as of the time of this filing, the Union has not received a substantive response. The NFLPA reserves its rights to continue to grieve these aspects of the New Policy if the NFL does not confirm what the Union understands to be the NFL's interpretation of and position on these aspects of the New Policy.

PAPre-HB at 5 fn. 2 (citations omitted).

In its Post-Hearing Brief, the NFLPA reaffirmed that it was not pursuing the challenges to "community service" and "banishment," and confirmed that, as had been stated during the Hearing, it was also not challenging the Policy's provision for the "imposition of 'probationary periods.'" PAPost-HB at 30, citing Hr'g Tr. 109:4-11; 110:20-111:10 (Kessler); *id.* at 31.

The NFLPA explained that it was not challenging the Policy's provisions relating to "banishment of players" and "probationary periods" because it "previously agreed" to their inclusion in the 2007 Personal Conduct Policy[27] and because Mr. Pash, the NFL's General

---

[27] There is nothing in the record to explain why the NFLPA chose in its initial grievance to assert that banishment had "never [been] agreed to by the NFLPA," but decided in its post-hearing brief to say that it had "previously agreed" to banishment in the 2007 Policy. The same can be said about the NFLPA's changed approach to "probationary periods."

Counsel, had stated that "such forms of discipline have the same meaning under the New Policy." *Id*. at 30.

Although noting "it could choose to grieve it," NFLPA stated that it did "not presently object to the New Policy's community service requirement." This was because "clarifications" from the NFL that "the NFL 'view[s] community service as a possible means for a player to reduce the suspension or fine that would otherwise be imposed on him' make[] clear that 'community service' is not 'discipline' under the New Policy. NFL Ex. 27 at 000122. To the contrary, 'community service' is a 'means for a player to reduce' discipline and Mr. Pash clearly stated that the NFL 'do[es] not view community service as additional discipline.'" PAPostHB at 31.

B. The NFLPA's Current Position and the Parties' Key Arguments

a. The NFLPA's Current Position.

The NFLPA's position, as I now understand it, is as follows:

- The Commissioner's sole source of "conduct detrimental" authority for players stems from Paragraph 15 (reinforced by Article 8.13(a)).
- Those provisions forbid the Commissioner from taking any "conduct detrimental" action against a player other than fining, suspending or terminating him, absent agreement by the NFLPA to some other disciplinary action.
- The NFLPA agrees, with qualifications, to the New Policy's use of banishment, community service, a probationary period and is not now grieving these elements.
- However, the NFLPA believes that "requiring a player to submit to counseling, treatment, therapy and enhanced supervision as part of the disciplinary system—as the New Policy expressly does—is discipline by its own terms," and thus beyond the Commissioner's authority absent NFLPA agreement. PAPost-HB at 19-20.
- The NFLPA would agree to the Commissioner's being able, in the context of a revised Personal Conduct Policy, to require a player to submit to counseling, treatment, therapy or enhanced supervision as an element of the Commissioner's exercise of his conduct detrimental authority, as long as it was clear that the Commissioner's requiring such actions involved some combination of being "designed with the express and sole purpose of *helping* players, *not* disciplining them" (*id.* at 20); "designed to provide assistance" (*id.*); "not considered discipline" (*id.* and fn. 9); not "additional discipline" (PAPre-HB at 31) and/or "a possible means to reduce the suspension or fine that would otherwise be imposed" (PAPost-HB at 31).
- The NFLPA suggests that right way to solve this problem would be for me to mandate a return to the "Evaluation, Counseling and Treatment" provision of the 2007 Personal Conduct Policy,[28] which read as follows:

28

Specifically, the NFLPA asked that I bar the NFL from enforcing the "New Policy's provision that '[d]iscipline may also include requirements to seek ongoing counseling, treatment, or therapy where appropriate as well as the imposition of enhanced supervision' (*id.* at 000115), leaving the League to instead apply the 'Evaluation, Counseling and Treatment' provision of the 2007 Personal

Continued on next page.

> Apart from any disciplinary action, any person arrested, charged or otherwise appearing to have engaged in conduct prohibited under this policy will be required to undergo a formal clinical evaluation. Based on the results of that evaluation, the person may be encouraged or required to participate in an education program, counseling or other treatment deemed appropriate by health professionals. The evaluation and any resulting counseling or treatment are designed to provide assistance and are not considered discipline; however, the failure to comply with this portion of the Policy shall itself constitute a separate and independent basis for discipline

b. The Parties' Positions

The NFLPA's position depends on its contention that the language of Paragraph 15, which it views as restricting the Commissioner's remedial options to fines, definite or indefinite suspension and termination, is all inclusive, not exemplary: "The Commissioner's clearly enumerated conduct detrimental authority in Paragraph 15 may not be treated as being merely exemplary; additional, unstated conduct detrimental rights may *not* be read into the contract." PAPost-HB at 6. In its view, the contract interpretation principle of "the inclusion of one is the exclusion of the other . . . . applies with particular force here where the sophisticated parties omitted clear and common contract language indicating the list was intended to merely be exemplary—such as the use of words like 'including' or 'for example' in reference to the Commissioner's 'right[s]' to impose conduct detrimental discipline under Paragraph 15." *Id.* at 6-7.

Paragraph 15, in the NFLPA's view, stands in sharp contrast to the fact that "the CBA is replete with different contractual provisions in which the parties purposefully employed exemplary language to make clear that a particular list was not intended to be exhaustive." *Id.* at 8, citing to CBA, Art. 4.8(b), 15.2(c), 21.8(f), 42.6, and 46.1(d). In the NFLPA's view, these "CBA provisions establish that if the parties had intended to make Paragraph 15 just an illustrative list of the Commissioner's conduct detrimental rights with respect to players, they knew how to expressly so provide. The parties' decision not to do so compels the conclusion that Paragraph 15's terms serve as an exhaustive description of the Commissioner's conduct detrimental authority vis-à-vis players—the Commissioner has no additional rights." *Id.* at 8-9.

The NFL disagrees, contending that "nothing in the plain language" of Paragraph 15 or Article 46 "-- or any other provision of the CBA -- in any way limits or restricts the scope of discipline or the process by which it is imposed by the Commissioner when a player has engaged in conduct detrimental to the League." NFLPre-HB at 2. Further, according to the NFL, the NFLPA

> never, until this grievance, claimed that the CBA – including paragraph 15 of the NFL Player Contract – should be read as a "limit[ation]" or a "prohibit[ion]" on the Commissioner's disciplinary authority. Pre-Hearing Br. 2-3. In fact, as explained more fully below, several of the challenged Policy provisions, such as the use of

---

Conduct Policy (NFL Ex. 29 at 000128), to which the Union agreed and which the NFL applied in subsequent Personal Conduct Policies prior to the New Policy. . . ." PAPost-HB at 63.

> counseling and probation, have been included in numerous prior versions of the Policy dating back to 1997, see NFL Exs. 3 (counseling), 8 (probation and enhanced supervision), and have been applied to players in dozens of past cases, see, e.g., NFL Exs. 30-31, 38-71, 74.

NFLPost-HB at 6-7.

> From the NFL's perspective,
>
> > Paragraph 15 "acknowledges" the Commissioner's broad authority to impose discipline for conduct detrimental; it nowhere purports to define or limit the Commissioner's authority . . . . Nothing in Paragraph 15 bars the Commissioner from imposing measures beyond fines, suspensions and contract terminations as the Union alleges. If the parties wished to impose such a limitation, surely they would have done so in Article 46 ("Commissioner Discipline"), not as part of a provision in the Player Contract discussing the Player's "awareness" of the Commissioner's authority.

NFLPre-HB at 12-13.

> According to the NFL:
>
> > Viewing the CBA as a whole makes clear that the Commissioner's authority is in no way restricted to fines, suspensions, or contract termination.
> >
> > For example, unlike Paragraph 15, which "acknowledges" the player's "awareness" that he may be disciplined by the Commissioner for engaging in conduct detrimental to the League, Article 42 sets forth the "maximum discipline" schedule that clubs may impose on players for various conduct and infractions. Under this schedule, clubs (as opposed to the Commissioner) can impose a "maximum fine of an amount equal to one week's salary and/or suspension without pay for a period not to exceed four (4) weeks" where a player has engaged in conduct detrimental to the club. Art. 42, § 1(a)(xv). No such "maximum" appears in Paragraph 15, Article 46 or any other provision of the CBA. Had the parties intended to limit the Commissioner's authority, "they would have included the same language" utilized in Article 42 that specifically limits clubs' disciplinary authority. . . .
> >
> > Moreover, construing Paragraph 15 as limiting the Commissioner's authority would impermissibly nullify the far broader authority granted by Rule 8.6 of the Constitution and Bylaws, which permits the Commissioner to "take or adopt appropriate legal action or such other steps or procedures as he deems necessary and proper" in relation to detrimental conduct. . . .
> >
> > In any event, as detailed below, both the previous iterations of the Policy and the "custom and practice" under the CBA have long embraced the types of discipline that the NFLPA has now (for the first time) decided to grieve. The NFLPA's acquiescence in longstanding past practice both belies their newfound interpretation of Paragraph 15, and also constitutes a waiver of their right to press their objections now.

NFLPreHB at 13-14 (footnote and citations omitted).

C. Analysis

Although arguably grounded in a legitimate conflict over the extent of the Commissioner's powers in light of the CBA, the Parties' dispute over whether the Commissioner has authority to require, in the context of conduct detrimental proceedings, a player to "submit to counseling, treatment, therapy and enhanced supervision" has nevertheless seemed to me to be a tempest in a teapot. This is because, at bottom, the dispute flows from the NFL's changes in wording from the 2007 policy's language, quoted above, that requiring clinical evaluation, counseling and treatment is "[a]part from" and "not considered discipline," to the New Policy's statement that "[d]iscipline may also include requirements to seek ongoing counseling, treatment, or therapy where appropriate as well as the imposition of enhanced supervision."

In oral argument during the first hearing day, Mr. Nash, for the NFL, said, "to focus on 'counseling, treatment, therapy and enhanced supervision,' these have been in the policy and have been applied for a very long time." Tr. 194. Mr. Kessler, for the NFLPA, interjected, "Just to help . . . we are not challenging the way it was done before . . . . We are challenging the movement to discipline." *Id*. Mr. Nash commented that the move to discipline was "not material," since "[i]t's a description without a distinction." *Id.* at 195. I asked, "If it's a description without a distinction, why can't you solve the problem by modifying the description?" I suggested to Mr. Nash: "If it is a description without a distinction, and if they are saying [they are comfortable with the other way], and it doesn't matter to you, there is a solution to that part of the problem. Just take that under advisement." *Id.*

I thought then, and still think, that, because the NFL takes the position that "the distinction [the NFLPA] make[s] in terms of discipline is meaningless," Tr. 202 (Mr. Nash), these elements of the NFLPA's grievance were and are simply solvable in the same way that the "community service" issue has been solved.

All that's needed are modest language changes in the New Policy to state that counseling, treatment, therapy and enhanced supervision are not deemed to be elements of additional discipline on par with fines, suspension or termination, but rather have been and will be employed (and may be required) in the context of conduct detrimental proceedings to help and assist players deal with the issues that give rise to the proceedings and/or, assuming satisfactory participation in the counseling, treatment, therapy or enhanced supervision, to substitute for or mitigate the fine, suspension or termination that might otherwise be imposed.

Despite these views, I have, in fact, proceeded to consider and reach tentative decisions on the following issues:

- Whether the NFLPA's textual arguments concerning Paragraph 15 and Article 8.13(a) support a conclusion that the Commissioner lacks the power under those provisions to require counseling, treatment, therapy or enhanced supervision.

- Whether the NFL is correct in its contention that "construing Paragraph 15 as limiting the Commissioner's authority would impermissibly nullify the far broader authority granted by Rule 8.6 of the Constitution and Bylaws."

- Whether the NFL is correct that longstanding past practice trumps the NFLPA's interpretation of Paragraph 15 and/or constitutes a waiver.

- Whether some or all of the challenged remedies of counseling, treatment, therapy and enhanced supervision fall within the Commissioner's undisputed authority to fine, suspend or terminate.

However, since I conclude that the Parties' dispute over the counseling, treatment, therapy and enhanced supervision elements of the New Policy can and should be resolved by language changes based on the NFLPA's agreement that the Commissioner may require counseling, treatment, therapy and enhanced supervision as long as they aren't labeled discipline and the NFL's view that applying such a label isn't material, I see no reason formally to opine on issues the resolution of which isn't essential to resolving the Parties' dispute.

Since I don't think it appropriate to accept the NFLPA's invitation to resolve this issue by mandating a return to the "Evaluation, Counseling and Treatment" provision of the 2007 Personal Conduct Policy, I direct the Parties to meet and confer with regard to making appropriate changes to the language of the New Policy consistent with their respective views set out just above.

To deal with the possibility that the Parties are unsuccessful in agreeing on new language relating to the counseling, treatment, therapy and enhanced supervision elements of the New Policy, I will retain jurisdiction.

Since I will then be hesitant to impose language on the Parties, I note that my inclination at that point will be to decide the Parties' dispute based on answering the substantive questions set out above.

X. Conclusion

Based on my consideration of the evidence and arguments presented by the Parties, I find, in summary,[29] as follows:

- This grievance is properly before me for decision.

- The New Policy's provisions relating to Leave with Pay and the Exempt List are, on their face, valid exercises of the Commissioner's authority.

- When the Commissioner decides to place a player on paid administrative leave or the Exempt List pursuant to the Leave with Pay provisions of the New Policy, he must comply with the procedural requirements of Article 46.

[29] My actual holdings are embodied in the earlier text of this Opinion and Award.

- As now written, the provisions of the New Policy relating to the disciplinary officer violate the CBA. I retain jurisdiction in the event the Parties are unsuccessful in agreeing to the terms of a revised policy.

- The New Policy's provisions relating to expert and independent advisors and the panel of independent experts are, on their face, valid exercises of the Commissioner's authority, although further issues may arise depending on how these provisions are implemented in practice.

- The Parties' dispute over the counseling, treatment, therapy and enhanced supervision elements of the New Policy can and should be resolved by language changes to the New Policy. I retain jurisdiction in the event the Parties are unsuccessful in agreeing to the terms of a revised policy.

SO ORDERED:

_____

Non-Injury Grievance Arbitrator

April 11, 2016