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Re: Adrian Peterson Appeal

Gentlemen:

Adrian Peterson, a player with the Minnesota Vikings, was notified by a letter from Commissioner Roger Goodell dated November 18, 2014, that he was suspended without pay for at least the remainder of the 2014 season, fined an amount equal to six week's pay, inclusive of amounts forfeited during his suspension, and required to undertake counseling and rehabilitation efforts, among other things. The letter also stated that failure to adhere to those terms may lead to a lengthier suspension. That discipline was for violating the NFL Personal Conduct Policy ("Policy"). A timely appeal was filed on behalf of Mr. Peterson by the NFLPA, which appeal was heard on December 2, 2014 and December 4, 2014. This letter sets out the decision on that appeal.

Background Facts: The pertinent facts surrounding the incident which gave rise to the discipline challenged here are largely undisputed. At the appeal hearing no testimonial evidence about those facts was presented, but rather counsel for both parties relied on relevant correspondence and other documents to establish those facts. On September 11, 2014, Mr. Peterson was indicted by a grand jury in Montgomery County, Texas for reckless and negligent injury of a child. NFL Exhibit 2(D)(1). The indictment alleged that on May 18, 2014, Mr. Peterson repeatedly struck his four-year old son with a branch from a tree, inflicting multiple welts and lacerations on the child's legs, hands, buttocks and back, and bruises and abrasions on his scrotum. NFL Exhibit 3. The NFL learned of the indictment, which was widely publicized in national media, on or about September 11 when the indictment was handed down. A warrant for Mr. Peterson was issued and he was arrested the next day when he surrendered himself to authorities.

During the period between the incident in May and the indictment, the NFL Commissioner, in the wake of a highly publicized domestic violence incident involving another player, announced several changes to "reinforce and enhance" league policies on domestic violence and sexual assault. See NFL Exhibit 2(c). In addition to enhanced education and training for employees and expansive outreach and public awareness efforts, among other things,

the changes included enhanced discipline for violations of the Personal Conduct Policy that involve incidents of assault, battery, domestic violence and sexual assault. Such violations, the Policy announced, will be subject to a suspension without pay of six games for a first offense, with consideration for mitigating or aggravating circumstances.

The actions taken to reinforce and enhance the Personal Conduct Policy were announced on August 28; the indictment was announced two weeks later, after the first week of the 2014 season. Mr. Peterson was deactivated by the Vikings for the team's second game on September 14, then placed on Commissioner Exempt status pursuant to an agreement between his union and the league on September 18.

On November 4, 2014, Mr. Peterson, pursuant to a negotiated disposition of the charge against him, entered a plea of *Nolo Contendere*. The court accepted that plea and found that "there is substantial evidence to support the Defendant's guilt of the Class "A" offense, Reckless Assault, and that the offense was committed on May 18, 2014." NFL Exhibit 2(D) (3). On November 6 Adolpho Birch wrote to Mr. Peterson, through his agent, requesting information about the criminal matter and about his counseling while on the Reserve/Commissioner Exempt list, after receipt of which meetings would be scheduled with parties designated by the Commissioner to prepare findings and recommendations for his consideration. Mr. Birch's letter also said, "You also will be provided the opportunity to have a hearing, at which you may appear and present information regarding any potential discipline that may be considered." NFL Exhibit 1, p. 1. The letter closed with notice that "in the interim, your status on the Reserve/Commissioner Exempt list will remain unchanged." The NFLPA took exception to that position as contrary to the September 18 agreement that Mr. Peterson would go on the Reserve/Commissioner Exempt list, with full pay, "until after the pending charges are adjudicated." The union eventually filed an expedited grievance on the issue; the extension of the exempt status was upheld. NFL Exhibit 3(A).

On November 11 Commissioner Goodell, by letter from Adolpho Birch, noticed a hearing on November 14 to review the matter for possible disciplinary action. The letter stated that "we expect that a determination on appropriate discipline, if any, will be made promptly upon the conclusion of the proceeding." That same day the NFLPA, via letter from Heather McPhee, responded with a request for clarification on the proposed "hearing" so they could provide Mr. Peterson with clear guidance. That letter also confirmed that Mr. Birch had advised Ms. McPhee by telephone that the proposed meeting between Mr. Peterson and the Commissioner was not intended to be substantively different from prior meetings in which the player spoke with the Commissioner prior to possible imposition of discipline; put differently, Mr. Birch had advised that his use of the word "hearing" was not intended to convey anything

different from the usual process. Mr. Birch replied via email on Wednesday evening, November 12 with the information requested. Ms. McPhee replied the next morning, on Thursday, November 13, that the next day “won’t work for timing” but that the following Tuesday “would probably work.” The same day Mr. Birch sent a letter to Ms. McPhee stating that the league was unwilling to postpone the meeting beyond that week, noting that no reason had been given as to why Mr. Peterson could not appear and participate on Friday, November 14. Nonetheless, he offered to move the meeting to Saturday, the next day, and/or arrange for participation by conference call or video conference. That offer was unsatisfactory to the NFLPA, which set out the terms under which it would find a mutually convenient time to meet early the next week. The proposed meeting did not take place on November 14, and on November 18 Commissioner Goodell issued his discipline letter to Mr. Peterson, which gave rise to this appeal. See correspondence at NFL Exhibit 1.

Argument: At the appeal hearing, counsel for Mr. Peterson advanced several arguments supporting his position that the discipline must be overturned because of the league’s asserted failure to proceed in accordance with the CBA and applicable law, thus denying Mr. Peterson rights and protections to which he is assertedly entitled. At the outset of the appeal hearing his counsel articulated the basis for his appeal: “Mr. Henderson, the appeal we are presenting is not about the underlying conduct. We are accepting for purposes of this appeal that the conduct at issue is conduct detrimental...What we are challenging here is what we believe to be the improper process, procedures and form of discipline that has been imposed...The standard for review of discipline is agreed to be fair and consistent.” Transcript pp. 20-21. Player’s counsel stated he is comfortable with that standard because it means “when the league’s conduct is not fair or consistent, then it should be overturned by the arbitrator.” Transcript pp. 20-21. Thus that is the standard I will apply here.

Retroactive Application of Policy: The player contends that the Commissioner improperly seeks to apply the modified Personal Conduct Policy to conduct which occurred prior to adoption and announcement of those changes. The Commissioner’s discipline letter of November 18 refers specifically to the modifications to the Policy announced on August 28. On that basis, Mr. Peterson infers that the “new” modified policy has been applied rather than the prior version, and that doing so establishes a new standard of conduct and imposes a new level of discipline about which the player was not given timely notice, and therefore is not fair and consistent. Transcript p. 21. As framed by the player’s counsel, “what we have here is the pure legal issue as to whether it is permissible, whether it is fair and consistent for the league to retroactively apply the new policy to the May conduct that took place beforehand.” Transcript p. 22.

I have carefully read (a) the Player Conduct Policy effective June 1, 2014 (Players Exhibit 29) which is identical to the previous version for 2013 (Players Exhibit 12) and published and distributed to players before the start of each season and (b) Commissioner Goodell's letter to NFL owners dated August 28, 2014 and the attached "Memorandum to All NFL Personnel". That careful reading leaves me convinced that the August communications do not constitute a change of the June 1, 2014 policy, but rather reinforce that policy with initiatives to explain and enhance it. With regard to discipline, the Memorandum speaks of certain violations which will be subject to "enhanced discipline," of six weeks suspension without pay for a first offense, absent mitigating or aggravating circumstances; a second offense will result in banishment from the league. The policy itself, which has not been rescinded or reissued, provides in pertinent part as follows:

Discipline may take the form of fines, suspension, or banishment from the League and may include a probationary period and conditions that must be satisfied prior to or following reinstatement. The specifics of the disciplinary response will be based on the nature of the incident, the actual or threatened risk to the participant and others, any prior or additional misconduct (whether or not criminal charges were filed), and other relevant factors.

2014 Personal Conduct Policy, NFL Exhibit Players 2(B), Exhibit 29(B).

The Commissioner has broad discretion to impose appropriate discipline for violations of the Personal Conduct Policy, and his recent pronouncements simply reflect his current thinking on domestic violence and other incidents involving physical force. As I said in a previous arbitration decision under this policy:

The Commissioner has considerable discretion in assessing discipline. If he should determine that the current level of discipline imposed for certain types of conduct has not been effective in deterring such conduct, it is within his authority to increase discipline in such cases. He is not forever bound to historical precedent. It appears that domestic violence is an area where discipline has been increased, and a suspension for a first offense is now the norm rather than the exception. He should not be handcuffed by prior cases.

Appeal Decision dated September 21, 2010, Players Exhibit 103, p. 3.

In the recent Ray Rice decision Judge Jones, the designated hearing officer, recognized that "If this were a matter where the first discipline imposed was an indefinite suspension, an

arbitrator would be hard pressed to find that the Commissioner had abused his discretion.” Players Exhibit 119, p. 15. That case differs from this one in that it turned on a second, later discipline more severe than the first. In this case there was only one decision by the Commissioner on the player’s discipline. The discipline challenged here is “the first discipline imposed.”

I need not make a finding on whether we are looking at a single policy or two, or which one was applied, because the result is the same in either instance. Under the June 1, 2014 Policy, the Commissioner may use his discretion to decide appropriate discipline, based on the nature of the conduct involved, or to require clinical evaluation, education, counseling or other treatment deemed appropriate by health professionals. See NFL Exhibit 2(B). The August 28 letter to owners explained that “consistent with our Personal Conduct Policy, our own response to domestic violence or sexual assault incidents by NFL personnel will include new elements of evaluation, treatment and family support, as well as enhanced discipline.” NFL Exhibit 2(C), p. 3 and Player Exhibit 3. The November 18 discipline fits either or both, and one need not pick one or the other to conclude it was entirely “fair and consistent.” While the discipline assessed is indeed greater than in most prior cases, this is arguably one of the most egregious cases of domestic violence in this Commissioner’s tenure – the severe beating of a four year old child, with a tree branch, striking him repeatedly about the body and inflicting injuries visible days later. Given his admission that he similarly beat his other children, and that he had beaten this child on a prior occasion, as well as public statements that he did not intend to stop disciplining his children in this way, consulting with a variety of professionals and citizens interested in child abuse about the appropriate steps to ensure this behavior is not repeated seems both reasonable and proper. While this particular offense is rare among NFL employees, the discipline imposed here is consistent with that in the most egregious violations of the Policy. There is no comparing this brutal incident to the typical violence against another adult. Therefore, I find no basis to conclude, as the player’s counsel has argued, that the discipline imposed is either unfair or inconsistent.

Notice: It was alleged that because the conduct giving rise to the discipline took place months before the “new” policy was implemented, Mr. Peterson was not given required notice of the changed discipline and therefore he cannot be subject to the “new” level of discipline.

There is no evidence in this record that Mr. Peterson knew, at the time he engaged in the misconduct, what level of discipline had been imposed on prior cases of domestic violence under the Policy. Moreover, there is no indication that he ever relied in any way on the level of discipline that would be imposed for conduct such as his. His counsel never suggested that Mr.

Peterson might not have inflicted those injuries on his young son if he had known he could be suspended six weeks rather than two. This is not the case of a fine for missing the last few minutes of a Thursday practice. See Player Exhibit 82. The other cases cited for the proposition that failure to give notice of changes to the Policy regarding discipline constitutes lack of basic fairness are distinguishable, and I conclude there is no such unfairness here.

Retaliation: The player's counsel argued that the discipline imposed on Mr. Peterson was elevated in retaliation for his failure to attend a pre-discipline conference with the Commissioner. The NFLPA sought clarification of the November 6 letter from Mr. Birch (Players Ex. 5). The requested clarification focused on the letter's reference to meetings with "appropriate experts and other parties designated by the Commissioner to prepare findings and recommendations for his consideration," and also to a second "hearing" with the Commissioner. The first meeting mentioned, with experts and other selectees, is characterized by counsel for Mr. Peterson as a "new policy requirement with no agreed upon procedures by the union... two different events, the second one was what he was entitled to under the CBA. The first one was something different." Transcript pp 46-47. He argued that the discipline here was an attempt to punish this player for refusing to agree to provisions in a policy that was never collectively bargained and never understood. Transcript p. 51.

Counsel for Mr. Peterson is wrong about both proposed meetings. First, counsel misconstrues paragraph 15 of the Player Contract (CBA Appendix A) as giving a player an absolute right to a hearing before the Commissioner in addition to the one provided in Article 46. There is no such *right* to a pre-discipline hearing; that is an opportunity the Commissioner made available through the Personal Conduct Policy to allow the player an opportunity to make his perspective, and any additional facts he may have available, known to the Commissioner prior to determination of a violation and a decision about the appropriate level of discipline. Paragraph 15 simply reflects the Article 46 right to an appeal hearing after the decision but prior to imposition of a fine, suspension or termination; it does not create a right to a separate hearing prior to the Article 46 hearing. The Personal Conduct Policy is not part of the CBA, and I am aware of nothing which limits whom the Commissioner may invite to a pre-determination meeting with the player, nor of any basis to insist Mr. Peterson would meet with only the Commissioner and internal lawyers. This record contains no evidence of a different prior practice reflecting such a limitation.

The linchpin to the NFLPA's claim of retaliation is Troy Vincent, whose testimony was described as "essential to a fair hearing" and "strong evidence of retaliation." Transcript p. 117; see Transcript pp. 36-43. Based on transcripts of two telephone conversations with Mr. Vincent which Mr. Peterson recorded without his knowledge, it was argued that Mr. Vincent said that

Mr. Peterson was not subject to the “new” policy (Transcript p. 37); that Mr. Vincent had made it very clear he was having discussions with Commissioner Goodell and the league about those issues (Transcript p. 37); that a two-game suspension would be imposed if he came to the November 14 meeting (Transcript pp. 38-39); and that Mr. Vincent was talking with Commissioner Goodell, Jeff Pash, and Adolpho Birch about potentially coming back with a two-game suspension. Transcript pp. 39-40. Thus, the player’s counsel argued that when Mr. Peterson refused to come to the meeting he was disciplined in retaliation. Mr. Peterson’s counsel said “we believe that what Mr. Vincent said is, had you come to this extrajudicial *ultra vires* proceeding... that you will get two games and you will get the old policy.” Transcript p. 117.

Mr. Vincent testified on December 4. The gist of his testimony was that, while he had no responsibility for administering or interpreting the Policy, he had been included in large meetings of people at the league office about domestic violence issues in which the Peterson case was discussed. Because he felt Mr. Peterson “needed some help,” they met once at Mr. Peterson’s home and talked twice by telephone. He did not inform anyone in the league office of those conversations. Transcript p. 157. In fact he had promised not to divulge the discussions except as approved by Mr. Peterson. In his discussions with the large group, which on one occasion included the Commissioner, Jeff Pash and Adolpho Birch, no one told him what he should convey to Mr. Peterson. Transcript pp. 162, 215. No one at the league, in meetings or otherwise, told him they wanted him to persuade Mr. Peterson to come to the November 14 hearing with consultants and others. Transcript 165. All of this testimony is undisputed.

Mr. Vincent further testified that the notion of a two game suspension as discipline originated with Mr. Peterson. Transcript p. 167. Mr. Vincent testified that he never promised a two-game suspension or that the old policy would control, but rather encouraged Mr. Peterson to “go through the process and all things will be considered.” Transcript pp. 171-173 and 178-180. He said “I didn’t promise Adrian anything. Never promised. Adrian needed to show up. Talk. All things were on the table. All things were to be considered.” Transcript p. 84.

Although Mr. Vincent obviously has little experience with, and an inexact knowledge of, the policy and its discipline provisions, he appeared to testify with candor and honesty, even in the face of intense examination. I find no reason to doubt the veracity of his testimony, and in fact no evidence was offered to contradict or challenge any of his testimony. Further, his testimony was consistent with the voice recordings of his two telephone conversations with Mr. Peterson and the transcripts of these recordings, Players Exhibits 25, 26, 27 and 28. I conclude that he was not dispatched with a message for Mr. Peterson but rather intervened on his own in an effort to help Mr. Peterson put this issue behind him and get back to his life, his family and

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football. I do not find sufficient evidence to support the conclusion that the discipline imposed on Mr. Peterson was retaliatory.

Conclusion: The facts in this appeal are uncontested. The player entered a plea which effectively admitted guilt to a criminal charge of child abuse, after inflicting serious injuries to his four-year old son in the course of administering discipline. No direct evidence of the beating was entered in the record here, but numerous court documents, investigative reports, photographs and news reports, all accepted into evidence without objection, make it clear that Mr. Peterson's conduct was egregious and aggravated as those terms are used in the Policy, and merits substantial discipline. His public comments do not reflect remorse or appreciation for the seriousness of his actions and their impact on his family, community, fans and the NFL, although at the close of the hearing he said he has learned from his mistake, he regrets that it happened and it will never happen again. I reject the argument that placement in Commissioner Exempt status is discipline. I conclude that the player has not demonstrated that the process and procedures surrounding his discipline were not fair and consistent; he was afforded all the protections and rights to which he is entitled, and I find no basis to vacate or reduce the discipline.

The grievance hereby is denied and the discipline is affirmed.

Sincerely

Harold Henderson

cc: Commissioner Goodell