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## NFL 'Personal Conduct' Ruling Has Silver Lining For Players

By **Zachary Zagger**

Law360, New York (April 12, 2016, 11:25 PM ET) -- In the latest high-profile dispute over NFL Commissioner Roger Goodell's handling of player discipline, an arbitrator has affirmed the commissioner's authority to place players charged with a crime on paid leave, but experts say the arbitrator's finding that Goodell is still bound by the collective bargaining agreement is a silver lining for players.

While the league and the National Football League Players Association await a decision from the Second Circuit in the NFL's Deflategate appeal, arbitrator Jonathan Marks **issued a decision Monday** in an ongoing dispute between the parties over the player personal conduct policy handed down by the commissioner in December 2014.

The players union had filed a grievance challenging several portions of the policy, saying it contradicted the collective bargaining agreement. In particular, it challenged whether the commissioner can place players on the so-called Commissioner's Exempt List — paid administrative leave — for committing violent crimes, and also whether the commissioner can appoint a disciplinary officer to hand out punishments.

Players decried the Exempt List as amounting to a suspension without a finding of guilt. And even though the leave is with pay, they said, there are drawbacks to a player's career: Placement on the list bars a player from practicing with the team and can also impact performance milestones that determine incentives.

The arbitrator's decision was a powerful affirmation of the commissioner's power under the CBA to discipline players for conduct he considers detrimental to the league, but experts say it may not be all that bad for the players as the arbitrator found the commissioner is still bound by the procedural protections included in the CBA.

"There is no question that this arbitration ruling handed decisive and important predisposition powers to Roger Goodell and the NFL," said attorney Daniel Wallach of Becker & Poliakoff PA. "But on the other hand there were some silver linings for the players."

The arbitrator made determinations on some key challenges to the new personal conduct policy. First, he upheld the Exempt List, finding it did not constitute "discipline" and did not contradict the CBA. But in doing so, he found that the commissioner must still follow the notice and hearing procedures of Article 46 of the CBA — the provision that empowers the commissioner to punish conduct he considers detrimental to the league. That finding gives players the ability to challenge being placed on the list.

Second, the arbitrator found that the commissioner could appoint officers to aid in the player disciplinary process — and encouraged him to do so — but said the ultimate power

to make initial disciplinary determinations is with the commissioner, and that power cannot be delegated. The arbitrator further approved the use of third-party experts.

NFL general counsel Jeff Pash characterized the decision as a win for the league, saying in a memorandum to the teams that "decision recognizes and confirms the broad authority that the commissioner has to define and impose discipline for conduct detrimental."

Sports attorney Joseph Hanna of Goldberg Segalla agreed with that assessment: "Frankly [the arbitrator] further strengthened Commissioner Goodell's power and further increased his power to put [players] on the disciplinary list."

But some experts said the finding that the commissioner must now give a player placed on the list an opportunity for a hearing could be significant.

"Players did receive something, which is the ability to be placed on that list," Wallach said. "They are now entitled to the same types of protections and avenues to appeal for those who are suspended without pay."

Now, the NFLPA must decide whether to challenge the decision, but if it does, it may face a roadblock to federal court review. According to Article 43 of the CBA, arbitration decisions on grievances with how the CBA is interpreted are meant to be the "full, final and complete disposition of the grievance."

"Look, if they wanted to appeal it they will do it.," said Keith Carroll, the chair of the sports law group at Mintz Levin Cohn Ferris Glovsky & Popeo PC. "It is a question of whether there is something they want to push from a negotiating standpoint."

But at bottom, Carroll said, the case is just the latest battle in the ongoing struggle between the NFLPA and the NFL to determine what exactly the CBA provides.

"At the end of the day, the commissioner has retained his authority, and there is no question he has the authority to discipline players under the personal conduct policy, but he still must be bound by the procedural protections in the CBA," he said.

--Editing by Mark Lebetkin and Patricia K. Cole.

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