

BEFORE THE CBA APPEALS PANEL

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NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION,

Appellant,

In the Matter of New Orleans Saints
"Pay-for-Performance/Bounty" Program

-against-

OPINION

NATIONAL FOOTBALL LEAGUE

Appellee.

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This is an appeal by the National Football League Players Association ("NFLPA") from the decision of the System Arbitrator (Burbank, June 4, 2012) ("SA Opinion") dismissing the NFLPA's demand for arbitration of a dispute with the National Football League ("NFL") filed pursuant to the Collective Bargaining Agreement between the parties dated August 11, 2011 ("CBA").

The subject of the demand was the decision of the Commissioner of the NFL ("Commissioner") to impose discipline upon four current and former New Orleans Saints players (Scott Fujita, Anthony Hargrove, Will Smith and Jonathan Vilma) (the "Players") under Article 46, Section 1(a) of the CBA for "conduct detrimental to the integrity of, or public confidence in, the game of professional football" That conduct was alleged by the NFL and the Commissioner to be the Players' participation in a so-called "pay-for-performance/bounty program" wherein players and coaches put money into a pool to reward the players for legitimate plays (such as interceptions and fumble recoveries), as well as illegitimate plays that injured opposing players ('cart-offs' and 'knockouts'). In its demand for arbitration, the NFLPA contends that any discipline imposed for the alleged conduct was within the exclusive jurisdiction of the System Arbitrator ("SA") under Article 14 and 15 of the CBA and, therefore, that the players' discipline

should be vacated. After briefing and argument, the SA found that the specific conduct for which the players had been disciplined (with one reservation noted below) fell within the exclusive jurisdiction of the Commissioner under Article 46 and outside the scope of his exclusive jurisdiction under Articles 14 and 15. SA Opinion at 9.

On August 7, 2012, the NFLPA appealed the SA's ruling to this Panel. The appeal was thoroughly briefed by the NFLPA and the NFL, and the parties presented full oral arguments to the panel at a hearing in New York on August 30, 2012. On September 7, 2012, the Panel issued a summary decision finding that both the Commissioner and the SA each had exclusive jurisdiction over certain aspects of the alleged bounty program. Because we could not determine whether the Commissioner had imposed discipline, in part, on the basis of the Players' actions properly within the province of the SA, we vacated the Players' discipline and remanded the matter to the Commissioner for expeditious redetermination consistent with the Panel's decision. We now set forth a more detailed articulation of the reasoning underlying the summary decision.

BACKGROUND

In early 2010, NFL Security, an internal department of the NFL, investigated allegations that players for the New Orleans Saints had placed bounties on certain opposing players during the 2009 playoffs. See Report of NFL Security ("Report"), March 2, 2012 at p. 1. No action was taken at that time; however, the investigation was reopened in late 2011 based on new allegations that such a program existed from 2009 to 2011. *Id.* The reopened investigation ultimately resulted in the issuance of the Report which concluded that certain Saints' coaches and players developed and administered a "pay-for-performance/bounty" program whereby players received cash payments for legitimate plays such as turnovers, and "bounty" payments for plays resulting in injury to opposing players that were referred to as "cart-offs" and "knockouts." The Report concluded that payments made under the program—whether for legitimate or illegitimate plays—were "inconsistent with the Collective Bargaining

Agreement and well-accepted rules relating to player contracts.” *Id.* at 3. Earlier in the Report, NFL Security referred generally to provisions in the CBA prohibiting “Non-Contract Bonuses.” This presumably was a reference to Article 14 of the CBA which prohibits undisclosed compensation agreements or understandings between a club and its players and functions as a means of enforcing the salary cap provisions of the CBA. Importantly, the enforcement of Article 14 is within the exclusive jurisdiction of the SA. *See*, CBA, Article 14, Section 3 and Article 15 Section 1. The Report, however, did not limit its findings to the compensation aspects of the pay-for-performance/bounty program:

The payments here are particularly troubling because they involved not just payments for “performance,” but bounties directed generally against opposing players, including opposing quarterbacks. The bounty rule promotes two key elements of NFL football: competitive integrity and player safety [D]eliberately seeking to hurt an opposing player—let alone rewarding a player for inflicting injury—has no place in the NFL.

Report at 3-4.¹ Without further reference to Article 14 or the prohibition on undisclosed compensation agreements contained therein, the Report concludes that “[t]he players who contributed funds and targeted players on opposing teams are guilty of conduct detrimental.” This last phrase, of course, is a shorthand reference to Article 46 of the CBA which establishes procedures for the exercise of the Commissioner’s exclusive jurisdiction over disciplinary “action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football”

On March 12, 2012, the Commissioner issued a Memorandum of Decision (“Memo”) pursuant to which he imposed a fine on the Saints and suspended the head coach, general manager, defensive coordinator and assistant head coach for varying periods. In justifying the discipline meted out, the

¹ While the Report refers to a “bounty rule,” there is no explicit definition of the rule in the record before us. We note that the Commissioner’s Memorandum of Decision imposing discipline on the Saints and its staff quotes a memorandum sent to the clubs before the 2011 season which stated, in relevant part, that “[n]o bonuses or awards may be offered or paid for on-field misconduct (for example, personal fouls to or injuries inflicted on opposing players.)” *Id.* at 5.

Commissioner stated “I am guided by a number of policies and principles. The first is the longstanding rule against non-contract bonuses set forth in the Constitution and By Laws.” Memo at 4-5. He also referenced a memo sent to all clubs before the 2011 season advising the clubs not to pay bonuses to players for on-field misconduct. *See, fn. 1, supra.*

On May 2, 2012, the Commissioner imposed suspensions of varying length on the four Players for their role in the pay-for-performance/bounty program that “included improper cash rewards for legitimate plays . . . and improper cash rewards for injury to opposing players” *See, Letters from Roger Goodell to Scott Fujita, Will Smith, Jonathan Vilma and Anthony Hargrove, dated May 2, 2012.* The Commissioner explicitly invoked his authority under Article 46 of the CBA as well as parallel provisions contained in the players’ NFL contracts. Each suspension was tied to that individual’s “particular involvement” in the program such as pledging a significant amount of money (Fujita), establishing and funding the program (Smith and Vilma), offering a bounty on particular players (Vilma), and, more generally, participating in the program (Hargrove). *Id.*

On May 3, 2012, the NFLPA initiated two CBA arbitrations, the present matter before the SA and a second proceeding before the Non-Injury Grievance Arbitrator. The central issue before Non-Injury Grievance Arbitrator Shyam Das was whether the NFL’s release of claims against the NFLPA or its members for conduct prior to the execution of the CBA on August 4, 2011 was broad enough to limit the Commissioner’s power to impose discipline under Article 46 for a player’s misconduct that occurred before the execution date. *See CBA Article 3, Section 3. Arbitrator Das held that the release language could not be read so broadly. See Arbitrator’s Opinion and Award (Das), dated June 8, 2012 at 13-15.*

The appeal process established by Article 46, Section 2 entails a review of the Commissioner’s discipline by a Hearing Officer, and provides that the Commissioner himself can be the Hearing Officer. This unusual procedure requires the Commissioner, if designated as the Hearing Officer, to assume the mantle of an arbitrator in order to review his own decision to issue “conduct detrimental” discipline to a

player or players. Accordingly, on June 18, 2012 the Commissioner held a hearing on the appeal of his original imposition of discipline on the Players. On July 3, 2013, the Commissioner, unsurprisingly, issued his decision denying the appeals. See Letter from Roger Goodell to Messrs. Vilma, Smith, Hargrove and Fujita dated July 3, 2012. On July 5, 2012 the NFLPA and Messrs. Fujita, Hargrove and Smith filed an action in the U.S. District Court for the Eastern District of Louisiana seeking to vacate the Commissioner's July 3 decision. Mr. Vilma had previously filed a similar action and both actions have now been consolidated. Plaintiffs' motion for a preliminary injunction and defendant's cross motion for summary judgment are pending.

THE DECISION BELOW

In the proceedings below, the NFLPA sought to invoke the exclusive jurisdiction of the SA under Article 15 of the CBA to enforce the terms of Article 14. Article 14 is captioned "Enforcement of the Salary Cap and Rookie Compensation Pool." Article 14, Section 1 prohibits a club from entering into any undisclosed agreement or understanding with any players involving consideration of any kind to be paid to the player. It can be seen that such undisclosed agreements could undermine the salary cap provisions of the CBA.

If the SA finds a violation of Article 14, Section 1, he may require disgorgement and impose a fine of up to \$500,000 on a player. Art. 14, Section 6(a)). These are the sole sanctions that may be imposed on players for violating Article 14, Section 1. Other than the power to void any offending player's contract, the Commissioner has no power under Article 14 to impose any penalties on players, much less the suspensions imposed in the present case.

According to the NFLPA, the pay-for-performance/bounty program fit squarely within Article 14 as evidenced by Commissioner's discipline letters and the Report on which the letters were based. See, e.g., Report at 1 ("The NFL has long had in place rules prohibiting 'Non-Contract Bonuses.' Such provisions violate both the NFL Constitution and By-Laws and the Collective Bargaining Agreement.") At

a minimum, the NFLPA argued, the Commissioner's actions were predominantly and inextricably based on the alleged 'pay for performance' system. Letter of Jeffrey J. Kessler, dated May 25, 2012, at p. 2. Since violations of Article 14 are within the exclusive jurisdiction of the SA, the NFLPA argued that the Commissioner had no jurisdiction to suspend the four players under Article 46 for conduct detrimental to the integrity of the game. In its view the Commissioner improperly re-labeled an undisclosed compensation agreement as "conduct detrimental" in order to expand his Article 46 jurisdiction and sidestep the limitations of Article 14. *Id.*

The SA did not accept the NFLPA'S reading of the CBA and concluded that neither the "pay for performance" nor the "bounty" aspect of the Saints' program "fit comfortably within the ambit of Article 14." SA Opinion at 6. While acknowledging that some of the conduct might fall within Article 14, he found it unnecessary to reach that issue because "the conduct for which the Commissioner imposed discipline on the Players is not covered by Article 14, Section 1 and thus . . . the System Arbitrator lacks jurisdiction." *Id.* at 7. In the SA's view, Article 14 reached only the *receipt* of undisclosed payments by the players (or their undisclosed agreement to receive payments), while *contributions* to the program (or the agreement to make such contributions) were outside the Article's scope. Reviewing the record before him, the SA decided (with one possible exception)² that the Commissioner disciplined the players only for contributing (or agreeing to contribute) funds to the program, and that receipt of (or agreement to receive) payments from the pool did not play a part in the Commissioner's decision to suspend the players. Accordingly, the SA found that the Commissioner had jurisdiction and he did not. *Id.* at 8-9.

² The SA retained jurisdiction as to Mr. Hargrove because he concluded that the Commissioner's discipline letter to Hargrove did not make clear whether receipt of payments from the pool played any part in the Commissioner's decision. If that proved to be the case, the NFLPA was given leave to return to seek relief from the SA, (presumably because, under the SA's analysis, he would then have jurisdiction under Article 14.) The Commissioner subsequently wrote a supplemental letter to Mr. Hargrove stating that Hargrove's discipline was based on his obstruction of the NFL's investigation and his participation in the program by "pledging and contributing money to the pool . . . [and] was not attributable to any agreement on your part to accept payments from the pool" Letter of Roger Goodell to Anthony Hargrove, dated June 8, 2012.

DISCUSSION

This appeal concerns a dispute as to the scope of the exclusive jurisdiction of the SA under Article 14, on the one hand, and the exclusive process for Commissioner discipline under Article 46, on the other. Both the NFLPA and the NFL recognize that the SA and Commissioner possess exclusive jurisdiction in their respective spheres, but disagree as to the scope of that jurisdiction as applied to the Players' participation in the pay-for-performance/bounty program. The NFLPA is particularly concerned that an overly-broad reading of Article 46 would literally permit the Commissioner to expand his disciplinary powers to any player conduct through the simple expedient of labeling conduct as "detrimental," even where the conduct is otherwise subject to the exclusive jurisdiction of a neutral arbitrator under a different provision of the CBA.

The Commissioner's powers are broad under the CBA but they are not unlimited. While Article 46 does not define or limit the phrase "conduct detrimental to the integrity of . . . the game of professional football," the NFL Player Contract lists specific conduct that all parties agree would be detrimental to the sport (throwing games, betting on games, associating with gamblers, using or providing performance-enhancing drugs), and further prohibits "any other form of conduct reasonably judged by the . . . Commissioner to be detrimental . . ." See CBA, Appendix A at 261. This catch-all must be read in the context of specific types of conduct identified, and were the Commissioner to act unreasonably in applying Article 46, his decision would presumably be subject to review in the appropriate forum. In the present case, however, the NFLPA does not contend that it would be unreasonable for the Commissioner to conclude that, standing alone, an agreement among players and a club to injure opposing players would be conduct detrimental and subject to his exclusive jurisdiction. Transcript of hearing, August 30, 2012, at 157-163. But that is not this case, the NFLPA contends, because the Saints' program, taken as a whole, constitutes an agreement to pay undisclosed compensation; indeed, it is referred to as the *pay-for-performance/bounty* program, and this falls

within the exclusive jurisdiction of the SA. Thus, since the pay-for-performance program is within the SA's exclusive jurisdiction, it cannot be within the Commissioner's Article 46 jurisdiction. *Id.*

The SA found this reasoning flawed in that "the same nucleus of operative facts may give rise to conduct that violates both Article 14, Section 1 and the prohibition against conduct detrimental [under Article 46]." We agree, although it may be more precise to state, at least in the present case, that the Saints' program encompassed *both* conduct that violates the Article 14 prohibition on undisclosed compensation agreements, and other conduct—agreements to injure— that may reasonably be judged to be 'conduct detrimental' in violation of Article 46. That is, we are not dealing with a situation where the *same* conduct is alleged to be subject to both Article 14 and Article 46; rather we are dealing with different terms of the Saints' program that run afoul of different articles of the CBA, and, therefore, are subject to the jurisdiction of different decision-makers. As we noted in our summary ruling, "[t]his is not concurrent jurisdiction, as different facts establish the jurisdiction of each: an agreement to injure in one case (whether disclosed or undisclosed, whether for consideration or not); and an agreement to receive (and possibly fund) payments from the pool in the other (whether for licit or illicit behavior). See Summary Decision at 3.

In reaching this conclusion, we do not adopt that portion of the SA's opinion that concludes that no aspects of the Saints' program in question "fit comfortably within the ambit of Article 14." SA Opinion at 6. To the contrary, that part of the program that provided for undisclosed payments to players, whether for legitimate or illegitimate plays, falls within the explicit terms of Article 14 and lies within the SA's exclusive jurisdiction. Nor do we agree with the SA's conclusion that he might have had jurisdiction over the receipt of compensation from the pool by the Players, but no jurisdiction over their contributions to the pool from which all player payments were made. *Id.* (citing *Reape v. New York News, Inc.*, 504 N.Y.S.2d 469, 470 (App. Div. 1986)). This is too fine a distinction, where, as here, any player who agreed to contribute was simultaneously eligible to receive. It is true that line drawing

inevitably brings an arbitrary aspect to any analysis, but we suggest that the distinction we draw between agreeing to injure other players and the agreement to participate in an undisclosed compensation arrangement properly reflects the intent of the parties as established by the language of Articles 14 and 46.

Concluding, as we do, that the Commissioner had exclusive jurisdiction over any agreement to injure does not end the inquiry. The NFLPA also contends that the Commissioner was “clearly punishing the players in this case, at least in substantial part, for their alleged participation in the pay-for-performance program,” not for behavior—such as an agreement to injure—that could fall within Article 46. (NFLPA Reply Br. at 14). This is so, the NFLPA contends, because (a) the Report, Memo and disciplinary letters so state, and (b) any attempt to injure players would constitute “unsportsmanlike” conduct under the CBA which is explicitly excluded from the commissioner’s Article 46 disciplinary powers over “conduct detrimental.” *Id.* at 15.

It is far from clear whether or to what extent the Commissioner subjected the Players to discipline for participation in the undisclosed compensation aspects of the program, as opposed to the agreements to seek to injure other players. This is not surprising since the precise boundaries of the exclusive jurisdiction of the SA and the Commissioner under Article 14 and 46 have not previously been defined. For this reason we deemed it appropriate to vacate the Players’ discipline and remand the matter to the Commissioner for redetermination in a manner consistent with the Panel’s interpretation of the proper scope of his authority. *See Summary Decision* at 4. In exercising that authority, we point out that the NFLPA’s argument that the players’ alleged behavior would at best be “unsportsmanlike” conduct—and for that reason outside the scope of the Commissioner’s authority—is not well founded. It is true that Article 46 of the CBA delegates disciplinary authority for “unsportsmanlike conduct on the playing field” not to the Commissioner (whose conduct detrimental authority is set forth in Section 1(a)), but rather in the first instance to a person designated by the Commissioner after consultation with the

Executive Director of the NFLPA, and then to a jointly selected hearing officer for appeal. See Article 46, Sections 1(b) and 2(a). But an individual player's conduct on the field is not directly implicated in the present case; rather it is the Players' participation in a program that sought to injure opposing players that subjects them to the Commissioner's exclusive Rule 46 jurisdiction, whether or not any actual unsportsmanlike conduct actually occurred on the field. Provided that the Commissioner does not impose discipline in whole or in part for the undisclosed compensation aspects of that program, the decision whether to issue "conduct detrimental" discipline and the selection of the appropriate sanctions falls squarely within his exclusive jurisdiction.

Dated: October 4, 2012



Richard J. Holwell
On Behalf of the Unanimous Panel