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VIA ELECTRONIC MAIL AND OVERNIGHT DELIVERY

The Honorable Barbara S. Jones
Zuckerman Spaeder LLP
1185 Avenue of the Americas
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New York, NY 10036

Re: Ray Rice Appeal Hearing

Dear Judge Jones:

As you requested, and in response to the submission of the NFLPA dated October 8, 2014, the NFL hereby provides the legal authority regarding the standard of review and burdens of proof that govern Mr. Rice's appeal of the suspension imposed by Commissioner Goodell.

This case involves discipline imposed pursuant to Article 46 of the NFL Collective Bargaining Agreement ("CBA"), which, for many years, has afforded the NFL Commissioner broad discretion to discipline NFL players for "conduct detrimental to the League." This authority derives from the NFL Constitution and Bylaws, which are incorporated into the CBA, and which expressly "authorize" the Commissioner to "take or adopt appropriate legal action or such other steps or procedures as he deems necessary and proper in the best interests of either the League or professional football, whenever [any player] is guilty of any conduct detrimental either to the League, its member clubs or employees, or to professional football." Constitution and Bylaws of the National Football League Rule 8.6. This includes the "complete authority" to discipline a player for conduct detrimental to the League, *id.* at Rule 8.13(A), including by imposing fines, suspending players for definite periods "or indefinitely," and/or terminating a Player's Contract, NFL CBA, App. A, ¶ 15; *see also* Art. 46, Sec. 1(a) (authorizing the Commissioner to discipline players for "conduct detrimental to the integrity of, or public confidence in, the game of professional football").

Article 46 provides players with the right to appeal the Commissioner's discipline directly to the Commissioner. Unlike other grievance procedures set forth in the CBA that provide for discovery and impose specific limitations on discipline, Article 46 provides an appeal process that is both expedited and limited in scope. Thus, the Commissioner is authorized to review his own decisions, and the appeal process functions much like a petition for

reconsideration in a judicial setting. It makes no difference whether the Commissioner elects to decide the appeal himself or appoints a designee to serve as a hearing officer in his place, as was done here. In either case, the standard of review is exceedingly narrow, and the Commissioner's discipline should not be overturned unless it can be shown that he acted arbitrarily or otherwise abused his discretion.

Indeed, although the NFLPA asserts that this proceeding should be controlled by arbitral concepts such as "industrial due process," "just cause," and "double discipline," those concepts are absent from the plain terms of Article 46 and cannot override the Commissioner's authority to impose discipline when he determines that a player has engaged in conduct detrimental to the League. Rather, challenges to Commissioner discipline must be reviewed in accordance within established procedures in Article 46, which were specifically negotiated by the NFLPA and the NFL. *See Sacramento Cty. Super. Ct*., 131 Lab. Arb. Rep. (BNA) 497, 498 (2013) (Pool, Arb.) ("Labor arbitration is a matter of contract, a unique contract . . . . The role of the arbitrator is to interpret the labor contract consistent with the parties' intent."). For this reason, the NFLPA's reliance on arbitration decisions from other sports leagues, applying different negotiated procedures and interpreting different CBA provisions, is misplaced. *See, e.g.*, *Williams v. Nat'l Football League*, No. 12-cv-00650 (CMA) (MJW), 2012 WL 2366636, at *6 (D. Colo. June 21, 2012) (rejecting argument in an appeal of a suspension under the NFL steroid policy that the hearing officer had to follow the procedures and decisions of a Major League Baseball arbitrator, "declin[ing] to construe 'major sports leagues' as one 'industry'" and observing that "MLB and [the NFL] are governed by different [CBAs]"), *aff'd*, 495 F. App'x 894 (10th Cir. 2012).

Even if these industrial due process principles did apply in these proceedings, there is no basis to overturn the discipline imposed here. The double discipline or double jeopardy doctrine does not apply where an employer alters discipline based on evidence discovered after the initial discipline, particularly where, as here, that evidence is contrary to the accounts given by the employee. Nor does double jeopardy bar the imposition of additional discipline based on information that was not readily available at the time the initial discipline was imposed. Similarly, the principle of disparate treatment cannot serve as a basis for overturning discipline absent a showing that the discipline imposed deviated from penalties imposed on other employees whose misconduct was virtually identical in all material respects. Mr. Rice bears the burden to demonstrate such double discipline and disparate treatment defenses and, as the evidence at the hearing will show, he cannot meet that burden here.

I. The Standard Of Review In Article 46 Appeal Hearings Is Extremely Narrow

A. Article 46 Provides The Commissioner With Sole Discretion To Impose Discipline For Conduct Detrimental

It is firmly established that the CBA provides the Commissioner with "exclusive and broad authority" to determine whether a particular player's conduct has been detrimental to the League and to determine the appropriate level of discipline. *New Orleans Saints Pay-for-Performance / "Bounty,"* Final Decision on Appeal of Paul Tagliabue, at 4 (Dec. 11, 2012). Article 46 in no way limits the Commissioner's authority. Unlike other grievance/arbitration procedures in the CBA, Article 46 provides the player with a limited right to appeal to the Commissioner or his designated "Hearing Officer." Thus, on appeal, the Hearing Officer does not review the Commissioner's "findings and conclusions *de novo*." *Id*. Rather, the only task is to review the Commissioner's judgment and determine whether he erred in exercising his discretion. *See* Art. 46 Appeal Decision of Harold Henderson, at 3 (Aug. 29, 2008) (standard on appeal is abuse of discretion); Art. 46 Appeal Decision of Harold Henderson, at 3 (Sept. 21, 2010) (the Commissioner has "considerable discretion").

As one designated hearing officer has held, "[i]t has not been the practice of this Hearing Officer to substitute my judgment for that of the Commissioner . . . [the Commissioner's decision on review] should be respected absent new material information about which he was unaware." Art. 46 Appeal Decision of Harold Henderson, at 3 (Aug. 31, 2010); *see also* Art. 46 Appeal Decision at 4 (Sept. 2010) ("No new facts were revealed that would have dictated a different result in the discipline initially imposed."). Moreover, although the NFLPA places significant emphasis on the Bounty case, Commissioner Tagliabue in fact emphasized the highly deferential standard of review in Article 46 proceedings. *See Bounty* Final Decision on Appeal at 4.[1]

B. Standards Of "Industrial Due Process" Cannot Override The Commissioner's Discretion To Impose Appropriate Discipline

Ignoring the plain language of Article 46, the Union argues that the Commissioner's authority should be circumscribed by general principles of "fundamental fairness" and

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[1] While Commissioner Tagliabue ultimately overturned the discipline imposed in the Bounty case, he specifically held that the "case should not be considered a precedent" but rather was necessary for "the sake of the best interests of all involved in professional football" "[g]iven the three years of investigation, discipline and intense acrimony surrounding the" unique circumstances underlying the case. *Bounty* Final Decision on Appeal at 3.

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"industrial due process," which are "inherent legal requirement[s] of *all* arbitration proceedings involving the imposition or review of employee discipline." (NFLPA Brief, at 1-2.) But arbitrators have routinely found that, "where a collective bargaining agreement exists but contains no express limitation on the employer's right to discharge and discipline employees, an employer may discharge for any reason it chooses." ELKOURI & ELKOURI, HOW ARBITRATION WORKS 15-3-15-4 (Kenneth May ed., 7th ed. 2012). Thus, principles of "industrial due process" can be imposed only where, unlike here, the parties have agreed to a just cause standard on the employer's right to discipline. *See Chauffeurs, Teamsters & Helpers Local Union No. 878 v. Coca-Cola Bottling Co*., 613 F.2d 716, 719, 721 (8th Cir. 1980) (recognizing that "notions of 'industrial due process'" apply to "'just cause' discharge cases"); *Armstrong World Indus., Inc.*, 121 Lab. Arb. Rep. (BNA) 996, 1000 (2005) (Keyl, Arb.) (recognizing that "just cause" is "a term of art" implicating a "number of substantive and procedural elements"); *see also* ELKOURI at 15-44 (noting that "arbitrators have included certain basic due process rights within the concept of *just cause*") (emphasis added).

Article 46 contains no such "just cause" provision, meaning that concepts such as double jeopardy and disparate treatment should not serve as a basis to limit the Commissioner's authority. *See Coca-Cola Bottling*, 613 F.2d at 791-721 (explaining that courts should not "inject[] due process considerations into unambiguous grants of disciplinary authority" in reviewing arbitration decisions). To the contrary, as Commissioner Tagliabue noted in the Bounty proceedings, "the Commissioner has always had *sole discretion*" to discipline players for conduct detrimental. *New Orleans Saints Pay-for-Performance / "Bounty,"* Decision on Recusal of Paul Tagliabue, at 1-2 (Nov. 5, 2012) (emphasis added).

In *Los Angeles Dodgers, Inc.*, 58 Lab. Arb. Rep. (BNA) 489, 491 (1972) (Jones, Jr., Arb.), for example, the employer terminated a security guard who worked at a baseball stadium. The collective bargaining agreement did not contain a just cause provision limiting the employer's authority to discharge security officers. The arbitrator refused to read a just cause provision into the contract, holding that "[t]he most reasonable conclusion is that the bargainers here intended to reserve to the Employer that measure of control over discipline, including discharge, that makes unwarranted the implication of a just-cause limitation on managerial discretions in disciplinary matters. That being so, *the Arbitrator has no contractual power to assess the propriety of Grievant's termination in terms of just, good or proper cause*." *Id.* (emphasis added); *see also Bounty* Final Decision on Appeal at 4 ["[i]f the parties had intended such a review, they would have written it into the CBA").

Here, the absence of a just cause provision in Article 46 is of particular significance given that the parties expressly bargained to include a "just cause" standard elsewhere in the CBA. In particular, the NFL and the Union specifically included a just cause standard in defining the rights of NFL Clubs to impose discipline on players. Thus, Article 42 ("Club Discipline") provides the NFLPA the "express[]" right "to challenge the imposition of [Club] discipline . . . based upon the absence of just cause and/or any other allowable bases for opposing discipline." Art. 42, Sec. 3(a). This same language is conspicuously absent from Article 46. As a result, the cases cited by the NFLPA, including those involving Club discipline such as *Terrell Owens* (Bloch, Arb.) (2005), are inapposite. Unlike those cases, the CBA here is neither "vague" nor "silent" as to the application of a just cause standard. (NFLPA Brief at 11 (quoting *J & J Maint., Inc.*, 121 Lab. Arb. Rep. (BNA) 847, 854-55 (2005) (Henderson, Arb.)).) Instead, the parties specifically bargained to include a just cause standard with respect to *Club*-imposed discipline, but imposed no such standard as a limit to the Commissioner's authority. *Compare Binswanger Glass Co.*, 92 Lab. Arb. Rep. (BNA) 1153, 1155 (1989) (Nicholas, Arb.) (cited at NFLPA Brief at 11) (analyzing grievant's termination under "just cause" standard where CBA contained no specific "just cause" language); *Sterling Chems., Inc.*, 93 Lab. Arb. Rep. (BNA) 953, 957 (1989) (Taylor, Arb.) (cited at NFLPA Brief at 11 n.7) (implying "just cause" provision where parties' agreement contained no mention of a "just cause" standard).

The absence of a just cause provision also establishes that the employee, not the employer, bears the burden to prove that the discipline should be overturned. *See, e.g.*, *Logan-Hocking [Ohio] Local Sch. Dist. Bd. of Educ.*, 122 Lab. Arb. Rep. (BNA) 550, 557-58 (2006) (Sellman, Arb.) ("Since the express language of the contract does not require the Employer to demonstrate just cause for its actions, then it is incumbent upon the aggrieved party (the Grievant) to demonstrate that the Employer did not have a legally sufficient reason for imposing discipline.") (multiple supporting citations omitted); *Westvaco*, 92 Lab. Arb. Rep. (BNA) 1289, 1291 (1989) (Nolan, Arb.) (employer was not required to prove that it had just cause to fire the grievant where CBA contained no just cause provision); *Latrobe Steel Co.*, 38 Lab. Arb. Rep. (BNA) 729, 734 (1962) (Wood, Arb.) (holding that the union had the burden of proof where the CBA delegated the power of discipline and discharge solely to the employer). In fact, hearing officers in Article 46 proceedings routinely place the burden on the player – not the League – to demonstrate why the Commissioner's disciplinary decision should be modified. *See* Art. 46 Appeal Decision at 3 (Aug. 2008) (burden on player to present at hearing "new facts or information material to [the Commissioner's] decision"); Art. 46 Appeal Decision at 3 (Aug. 2010) (burden on player to demonstrate "new facts which would require modification of [the Commissioner's] decision, or of any patent unfairness in the discipline imposed"); Art. 46

Appeal Decision at 4 (Sept. 2010) (player did not provide a "sufficient basis to overturn the discipline").

Accordingly, and contrary to the Union's contentions, the "just cause" standard and its corresponding supplemental protections do not alter the narrow standard of review negotiated by the parties applicable in this appeal.

II. Double Jeopardy Does Not Bar An Increase In Discipline Based On Information Revealing That The Infraction Was More Serious Than Originally Known

A. Industrial Double Jeopardy Is A Flexible Standard That Applies Narrowly In Article 46 Proceedings

To the extent double jeopardy can be applied in the context of an Article 46 proceeding, it must be done with appropriate regard to the Commissioner's discretion to determine when and to what degree a player has engaged in conduct detrimental to the League. The doctrine of "industrial double jeopardy" refers to the general proposition that "[o]nce discipline for a given offense is imposed and accepted, it cannot thereafter be increased, nor may another punishment be imposed." ELKOURI at 15-60. It is a defense that the employee bears the burden of establishing. *Veolia ES Solid Waste Midwest LLC*, 13-2 Lab. Arb. Awards (CCH) ¶ 5887, at 12 (2013) (Goldstein, Arb.). In the workplace setting, the double jeopardy principle derives from the labor contract, not the Constitution nor any federal statute. *Zayas v. Bacardi Corp.*, 524 F.3d 65, 68 (1st Cir. 2008). It is therefore "weaker and narrower than its constitutional counterpart." *Id.* at 69. Moreover, double jeopardy is a flexible standard that depends on each case's "special facts and circumstances," not an "automatic" defense. *Bd. of Educ. of Flint*, 1991 Lab. Arb. Supp. 102338, at 3 (1991) (Daniel, Arb.). In any case, when "an employer learns facts of great significance that were not known at the time of the original disciplinary action it may, then, make appropriate adjustments so that the punishment . . . does fit the crime." *Id.*

Here, the relevant labor contract does not impose a "just cause" standard or otherwise import principles of industrial due process intended to limit the scope of the Commissioner's disciplinary authority. Rather, the contract commits discipline for conduct detrimental to public confidence in the game of professional football to the discretion of the Commissioner, Art. 46(a), whose decisions as to the level of discipline are afforded great deference and are subject to review only for abuse of discretion, *see Bounty* Final Decision on Appeal at 4.

B. When Initial Discipline Was Based In Part On The Employee's Misleading Version Of Events, An Employer Is Permitted To Alter The Discipline Based On Newly Discovered Information

Consistent with the principle that "industrial double jeopardy" is a flexible standard turning on basic fairness, an employee may not secure lesser discipline by providing a false or misleading version of events and then object if the employer later learns the truth and increases the penalty commensurately. Arbitrators have thus routinely concluded that double jeopardy does not apply where it would "reward [an employee] for providing the Employer with [a] false statement during the investigation." *Veolia ES Solid Waste Midwest LLC* at 14 (rejecting double jeopardy defense where employer recalled employee from suspension in reliance on employee's statement that he had not backed up his truck and caused damage but later terminated employee because investigation proved that statement untrue).

Where an employee's statements do not give the full picture of the infraction, but instead provide an inaccurate portrayal of events that suggest some lesser culpability, double jeopardy poses no bar to the employer's subsequent adjustment of the penalty to match the true culpability. *See, e.g.*, *Southwest Elec. Co*., 28 Lab. Arb. Info. Sys. 1041, 1042 (2000) (O'Grady, Arb.) (rejecting double jeopardy defense to a second, longer suspension based on destruction of company property where employee was initially suspended for only three days based on employee's false statement that destruction was a mistake and employer later learned employee had deliberately destroyed the property); *Charter Twp. of Chesterfield*, 10-2 Lab. Arb. Awards (CCH) ¶ 5079, at 13-14 (Jan. 12, 2010) (McDonald, Arb.) (upholding termination following suspension for the same conduct where employee's statements prior to imposition of the suspension had concealed that he intentionally, rather than negligently, made an arrest for kidnapping without probable cause).

Therefore, although an employer may not necessarily increase the penalty for an offense when "all [the employer] had to do was to ask [the employee]" about the true facts because the employee "couldn't or wouldn't lie about it," *Gulf States Paper Corp*., 91-2 Lab. Arb. Awards (CCH) ¶ 8346, at 6 (1991) (Welch, Arb.), that principle has no bearing where the employer *did* ask the employee about the infraction, but the employee misled the employer, and his recounting did not reflect the true seriousness of the incident.

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C. Double Jeopardy Poses No Bar To The Imposition Of Increased Discipline Based On Information That Was Not Readily Available At The Time Of The Initial Decision

Beyond circumstances where the employee's misleading account is responsible for the mismatch between the initial discipline imposed and the true sequence of events, it well-established, even in cases cited by the NFLPA, that a penalty can be increased based on the discovery of any "new additional facts that were not *readily available* to an employer at the time of the original punishment." *Nat'l Basketball Players Ass'n (Latrell Sprewell)*, 548 PLI/Pat 429, Opinion and Award at *525 (Mar. 4, 1998) (Feerick, Arb.) (emphasis added). "In such situations, the employer then has a right to elevate the level of discipline to fit the true facts as subsequently uncovered." *City of Indianapolis*, 86-2 Lab. Arb. Awards (CCH) ¶ 8469, at 6 (1986) (Strasshofer, Arb.); *see also Misco Precision Casting Co.*, 40 Lab. Arb. Rep. (BNA) 87, 90 (1962) (Dworkin, Arb.) (penalty may be increased with "newly discovered facts suggesting that the misconduct was in fact more severe than originally believed"). In sum, "the critical element of a double jeopardy defense is that . . . an Employer is in full possession of all facts when it takes an initial action." *Veolia ES Solid Waste Midwest LLC* at 14; *see also Int'l Harvester Co.*, 13 Lab. Arb. Rep. (BNA) 610, 614 (1949) (Wirtz, Arb.) (finding no double jeopardy violation from terminations following suspensions where employer learned that the terminated employees were the ringleaders only after the suspensions had been given, because "the fact that the Company had already meted out lesser disciplinary action on the basis of an incomplete knowledge of the facts is no defense").

Accordingly, to succeed in making a double jeopardy defense, an employee has to prove either that (a) an employer was in full possession of all relevant facts prior to instituting the initial discipline, and there are no "new facts [that] add anything of substance" to what was known, or (b) those new facts were readily available at the time the initial disposition was imposed. *See Bd. of Educ. of Flint* at 3-4 (finding no double jeopardy violation where employee was terminated after first being suspended, when employer learned after initial discipline that an employee's conduct was criminal, because employer could consider the "criminal status of the grievant as a substantial factor," among others, when deciding on his continued employment as a school bus driver).

Moreover, information is not considered "readily available" where, as will be shown here, the employer has made unsuccessful efforts to obtain it. *Cf. Vancouver Police Officers Guild*, 05-2 Lab. Arb. Awards (CCH) ¶ 3187, at 11 (2005) (Landau, Arb.) (concluding that an investigation was sufficient even under the more stringent "just cause" standard where an

employer "made a good faith effort to locate and interview" the victim of an assault, but was unable to do so). That goes far beyond the insufficient investigations in the cases cited by the NFLPA, all of which involved the employer's failure to allow the employee to give his version of events. *See, e.g.*, *Gulf States Paper Corp* at 6 ("If the Asst. Supt. needed and wanted to know if [the employee] had run any bad rolls . . . , all he had to do was to ask him."); *Bd. of Educ. of Flint* at 4 (supervisor "did not interview the [employee] nor did he check with the victim" after being informed "the matter had been resolved"); *Shaefer's Ambulance Serv., Inc.*, 104 Lab. Arb. Rep. (BNA) 481, 486 (1995) (Calhoun, Arb.) ("[P]rior to the arbitration hearing, the grievant was never allowed to tell his side of the story.").

Further, it is well established that an employer has both a lessened opportunity and responsibility to conduct an independent investigation in criminal matters because of the potential that an employer's investigation could interfere with an ongoing law enforcement matter. *See City of Margate*, 08-1 Lab. Arb. Awards (CCH) ¶ 4159, at 8, 15 (2007) (Sergent, Arb.) (upholding indefinite suspension and finding employer conducted a reasonable investigation even though it was aware of, but did not seek access to witness statements where employees were charged with criminal sexual assault because "the dictates of criminal investigation procedures require that the City avoid any interference with the police, the State Attorney's Office, or the constitutional rights of the grievants"); *[Redacted]*, 2004 AAA LEXIS 1199, at *10 (2004) (Bloodsworth, Arb.) (finding school district acted properly in suspending employee charged with sexual assault without conducting an investigation because "[a]ny independent investigation conducted by the School Committee could have interfered with the police investigation"). Thus, in determining what information was "readily available" to the NFL, allowances must be made for the fact that Mr. Rice faced (and continues to face, until pretrial diversion is completed) criminal charges for his conduct, and that the relevant evidence was part of a law enforcement inquiry.

III. "Disparate Treatment" Requires A Showing That Discipline Is Inconsistent With Discipline Imposed On Employees Who Have Engaged In Virtually Identical Conduct

The NFL does not dispute that, as a general matter, an employer must discipline employees in a consistent manner unless a "reasonable basis exists for variations in the assessment of punishment (such as different degrees of fault, or mitigating or aggravating circumstances affecting some but not all of the employees)." ELKOURI at 15-76. As with principles of double jeopardy, however, claims of disparate treatment must be viewed in light of the fact that Article 46 does not contain a "just cause" standard, but instead vests the

Commissioner with sound discretion to determine the appropriate discipline based upon the particular facts of the case at hand. In particular, Article 46 precedent establishes that "[t]he 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." Art. 46 Appeal Decision at 3 (Sept. 2010); *Bounty* Final Decision on Appeal at 4 ("Equally important, the matters that can affect such integrity and public confidence evolve and change over time depending on both developments within and external to the League, and the parties to the CBAs have agreed not to operate with a static or frozen definition of conduct detrimental.").

Indeed, although the CBA's provisions regarding *Club*-imposed discipline explicitly require that "[d]iscipline will be imposed uniformly within a Club on all players for the same offense . . . ," Art. 42, Sec. 3, Article 46 contains no such limitation. Thus, it must be presumed that the parties did not intend to require such an exacting standard in the context of Article 46 proceedings. *See* ELKOURI at 9-39 (under the principle of *expressio unius est exclusion alterius* – "the expression of one thing is the exclusion of another" – when the parties include specific language in one provision of the CBA but omit the language in a similar provision, it is presumed that the parties intended to omit this language). In the absence of any such requirement in Article 46, substantial deference must be given to the Commissioner's weighing of the evidence, findings of fact, and determinations as to the degree in which conduct is viewed as detrimental to the League. In one Commissioner discipline appeal, for instance, the hearing officer rejected the Union's disparate treatment claim, noting that, while other players involved in incidents "seemingly similar in nature" received different discipline, "each case is unique," and the role of the hearing officer is not "to substitute [his] judgment for that of the Commissioner." Art. 46 Appeal Decision at 2-3 (Aug. 2010).

To the extent principles of disparate treatment do apply, the union bears the burden of proving it as an affirmative defense. *See Southwest Airlines*, 132 Lab. Arb. Rep. (BNA) 1539,1555-56 (Jennings, Arb.). In particular, the union must establish "that an employee was treated differently than others" and that "the circumstances surrounding his/her offense were substantively like those of individuals who received more moderate penalties." ELKOURI at 15-77 (quoting *Genie Co.*, 97 Lab. Arb. Rep. (BNA) 542, 549 (1991) (Dworkin, Arb.)); *see also Logan-Hocking Sch. Dist.* at 561 ("[a] claim of disparate treatment would require a showing that another employee who was situated similarly to the Grievant was treated differently for the same or a similar offense").

As Professor Elkouri has explained:

> Where a reasonable basis for variations in penalties does exist, variations will be permitted notwithstanding the charge of disparate treatment . . . . Thus, '[i]n order to prove disparate treatment, a union must confirm the existence of both parts of the equation. It is not enough that an employee was treated differently than others; it must also be established that the circumstances surrounding his/her offense were substantively like those of individuals who received more moderate penalties.

ELKOURI at 15-76-15-77. In other words, a claim of disparate treatment cannot be sustained where "variations in discipline [are] reasonably appropriate to the variations in circumstances." *Id* at 15-77. The fact that lesser discipline may have been imposed on other employees does not demonstrate disparate treatment absent evidence that the other employees were similarly situated "in all material respects." *See United Refining Co.*, 123 Lab. Arb. Rep. (BNA) 271, 275 (2006) (Franckiewicz, Arb.). "In order for comparative employees to be considered similarly situated, all relevant aspects of the complainant's situation must be nearly identical to those of the comparative employees." *City of Tulsa*, 130 Lab. Arb. Rep. (BNA) 714, 722 (2012) (McReynolds, Arb.); *see also City of Ocoee*, 132 Lab. Arb. Rep. (BNA) 1703, 1717 (2014) (Mantione, Arb.) ("the quantity and quality of the comparator's misconduct must be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges"); *Defense Supply Ctr.*, 127 Lab. Arb. Rep. (BNA) 193, 198 (2009) (Sellman, Arb.) (finding that none of the eight individuals proffered by the union were comparable employees where none of them worked in the same work unit or under the same director as the Grievant and their conduct was not as egregious as the Grievant's). Thus, employers are free to differentiate in the level of discipline based on the "degree or flagrant nature of the misconduct." *Southwest Airlines* at 1555.

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The standard of review urged by the NFLPA is fundamentally at odds with the clear terms of the CBA, established past practice, and even the very case authority cited in support of the NFLPA's claims of "industrial due process." In this appeal, it is Mr. Rice's burden to convince the Hearing Officer that Commissioner Goodell abused his discretion by imposing an indefinite suspension following the release of the videotape that clearly showed Mr. Rice's outrageous conduct. It will be made clear at the hearing that Mr. Rice cannot do so.

Sincerely,

Daniel L. Nash