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Monday Morning Quarterback: What Labor Practitioners Can Learn From "Deflategate"

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Turn down the lights and roll the film on the recent district court decision to vacate the four game suspension of New England Patriots' quarterback Tom Brady. The much ballyhooed proceeding known as "Deflategate" holds valuable lessons for all labor practitioners, regardless of whether they cheer for or against the Patriots.

The Deflategate Litigation

This disciplinary proceeding arose out of allegations that during the first half of the AFC Championship game on January 18, 2015, the New England Patriots used footballs that did not meet the minimum air pressure inflation standards under NFL rules. The League conducted an investigation, led by outside counsel, Ted Wells of Paul, Weiss, Rifkind, Wharton & Garrison LLP. As a result of the investigation, Tom Brady was found to have been "generally aware" of the actions of other Patriots' employees in the deflation of footballs and to have failed to cooperate with the investigation. For his misconduct, Mr. Brady was suspended without pay for four games.

The National Football League Players Association appealed Mr. Brady's suspension. Under the parties' collective bargaining agreement, NFL Commissioner Roger Goodell served as the arbitrator. After the arbitration hearing, Commissioner Goodell denied the appeal and sustained the four game suspension.

In an action in the U.S. District Court in New York, the NFL sought to confirm the arbitration award and the Players Association sought to vacate it. On September 3, 2015, District Court Judge Richard Berman denied the motion to confirm, granted the motion to vacate, and vacated the four game suspension. The NFL has subsequently appealed.

It is not the intention of this article to analyze the court's decision under the Federal Arbitration Act and the jurisprudence generally limiting judicial review of labor arbitration awards, nor to evaluate the merits of the case for and against Mr. Brady's suspension. Rather, we will "break down the film" of the proceeding and the court's decision, as every good coaching staff does on Monday morning, and identify four critical lessons for labor practitioners to incorporate into their game plans.

Four Critical Lessons Learned

1. Everyone on the Team Needs the Playbook.

One of the principal reasons that the district court vacated the arbitration award was the court's conclusion that Mr. Brady did not have notice of the prohibited conduct and the potential discipline.

The concept of notice is fundamental to effective management of employees. In the discipline context, the first question that is regularly asked in any review (arbitral, administrative or judicial) is whether the employee had adequate notice of the work rule or performance standard at issue and the possible consequences of the failure to meet the expectation of the rule or standard. Establishing and disseminating clear work rules and performance expectations from the first day a player laces up his cleats is on page one of the HR playbook.

The Deflategate proceeding highlights three common sub-issues on this topic. First, the issue of notice should be analyzed from the player/employee's point of view. An employer that provides a handbook to its employees, but also maintains a separate policy manual with distribution limited to management staff, may have difficulty enforcing discipline against employees for violations of policies in the management manual. We turn to Deflategate for an example. Each year, the NFL issues to all players the "League Policies for Players," which not surprisingly contains a rule regarding uniform and equipment violations. The NFL also maintains a "Competitive Integrity Policy," but that policy is only issued to team chief executives, presidents, general managers and head coaches. At the appeal hearing, NFL Executive Vice President Troy Vincent, the author of Mr. Brady's suspension letter, acknowledged that the investigative report was based on, and the policy against tampering with footballs was contained in, the Competitive Integrity Policy. The Players Association argued forcefully that the Competitive Integrity Policy, which was not issued to Mr. Brady, could not properly provide a basis for discipline and the district court agreed.

Second, the nature of the alleged misconduct here – tampering with equipment in a championship game and obstruction of an investigation – raises the question: are there circumstances in which no pre-existing rule is necessary because the conduct is so obviously impermissible that proof of wrongdoing can support discipline even in the absence of a specific rule? Of course, the answer is yes, but the application of this principle can be difficult.

In Mr. Brady's case, the application of the patently obvious misconduct principle was complicated by several factors. For example, as to tampering, the investigation only concluded "[Mr. Brady was] at least generally aware of the actions of the Patriots' employees involved in the deflation of the footballs and that it was unlikely that their actions were done without [his] knowledge." The League relied on this conclusion when issuing the initial suspension, but the Judge was underwhelmed, asserting "I am not sure I understand what in the world that means, that phrase [generally aware of the inappropriate activities of other Patriot employees]."

So we must recognize that reliance on the obvious misconduct principle requires proof of such misconduct. And, in the absence of clear proof, there is a risk that, on review, the discipline could be overturned because of ambiguities in the application of such principles.

Third, the requirement of notice extends not only to the conduct at issue, but the likely consequence or discipline as well. Some work rules lend themselves to precise discipline. A point system for attendance violations with a progressive discipline structure based on points accrued is a classic example. Similarly, Article 42 of the NFL's CBA contains an extensive list of infractions and maximum penalties that a team may impose on its players.

Other employers opt for a more open-ended description of the potential discipline for any violation (e.g., "up to and including termination of employment"). In those settings, the level of discipline tends to be established over time and with experience. Arbitrators and reviewing courts look for comparators to judge whether the employee was on notice of the potential consequences and whether the discipline imposed was consistent with prior, similar situations.

Again, two aspects of the NFL's rules and disciplinary practices were problematic for the district court. The rule in the Players' Policies relating to equipment and uniform violations stated: "First offenses will result in fines." There was also evidence that obstruction of league investigations was an offense that warranted a fine. In fact, in one recent arbitration, former Commissioner Paul Tagliabue, serving as the Commissioner's designated arbitrator, stated in his award that the NFL's practice was to fine but not suspend players for such misconduct. In 40 years with the League, there was no record of any player being suspended for obstructing an investigation.

2. Consistent Treatment of All Players Matters.

This last point on notice reinforces another lesson: the importance of consistent treatment for similar misconduct. Both the Players Association and the NFL identified prior disciplinary actions and arbitration decisions to support their respective positions on the appropriateness of a four game suspension. Judge Berman was persuaded by the Players Association's precedent that a fine, and not a suspension, was the appropriate discipline for the asserted violations. Former Commissioner Tagliabue's arbitration award citing 40 years of such history was compelling to the court.

So what can a new commissioner, coach, CEO or HR Vice President do to make a change — to enforce more rigorous discipline, change priorities or enhance performance standards? Clearly, on a prospective basis, work rules and performance standards can be modified to reflect new priorities and initiatives. Often, collective bargaining agreements provide management with the right to establish reasonable rules with proper notice to the union and employees. In the absence of a contractual right, such rule changes would be a subject for negotiations.

When faced with a particular incident, and the opportunity to set a new precedent, the new decision maker may seek to make a subtle change based on nuanced circumstances that differentiate the present case from prior incidents. There is also a school of thought that endorses making a substantial change to the status quo, for example a significant suspension for conduct that previously gave rise to a fine, recognizing that the action may be challenged in arbitration or on judicial review. Even if it is overturned or reduced on review, the new management has remained true to its espoused principles. It is also possible that such a significant change in precedent is the opening position in an anticipated negotiated resolution, which may well include a new, more rigorous standard for future cases in exchange for a compromised penalty in the present case. Certainly, Judge Berman in the weeks before his decision, created opportunities for such a negotiated resolution of Mr. Brady's suspension, but to no avail.

3. Calling an Audible During an Employment Proceeding Can Leave the Team Exposed.

One of the uncommon elements of the player discipline procedure under the NFL's CBA is the provision that allows the Commissioner to serve as the final and binding arbiter of discipline disputes. Typically in a discipline arbitration, the parties select a neutral arbitrator and the employer bears the burden of proving "just cause" for the discipline based on the facts the employer had obtained through its investigation prior to imposing the discipline. By contrast, in the NFL's discipline appeal procedure, following the initial assessment of discipline, there is an evidentiary hearing, after which the Commissioner (or his selected designee) renders a final decision based on a preponderance of the evidence – new and old – under a standard described in the CBA as discipline "for conduct detrimental to the integrity of, or public confidence in, the game of professional football."

As a result, the specific rationale for the discipline may change based on the evidence presented at the appeal hearing. Such was the case with Mr. Brady's suspension. The Commissioner relied heavily on the evidence, newly revealed at the appeal hearing, that Mr. Brady had "destroyed" his cell phone on or about the day he was interviewed by Investigator Wells and as a consequence the 10,000 text messages on that phone were no longer available. This information was not contained in the investigative report and was not known at the time of the initial discipline.

The Commissioner found this information "very troubling" and concluded: "there was an affirmative effort by Mr. Brady to conceal potentially relevant evidence and to undermine the investigation" and that he "willfully obstructed the investigation." The Commissioner also re-assessed Mr. Brady's culpability for the tampering of the footballs by the equipment staff, based on the hearing evidence and his assessment of credibility. He found that Mr. Brady "knew about, approved of, consented to, and provided inducements and rewards in support of" a scheme to tamper with the footballs, which constituted conduct detrimental to the integrity of the game.

These changes in the rationale for Mr. Brady's suspension, although sanctioned by the NFL's CBA, were ruled incomplete by Judge Berman. The District Court recognized that the Commissioner's finding of Mr. Brady's culpability for tampering went "far beyond" the finding of "general awareness" of others' misconduct contained in the investigative report and the initial suspension letter. In addressing the Commissioner's rationale, Judge Berman held that reliance on the "broad CBA 'conduct detrimental' policy – as opposed to specific Player Policies regarding equipment violations – to impose discipline on Brady is *legally* misplaced" (emphasis supplied). In other words, the broad authority negotiated in the CBA for the Commissioner to discipline players for conduct detrimental to the game is now, as a matter of law, reduced to sanctioning players for violations of specific player policies. This holding of the Deflategate decision, if it stands, may prove particularly problematic for the NFL.

While not directly on point, these facts should remind employers that presenting alternative, more robust explanations for their employment decisions in arbitration, or administrative or judicial proceedings can be risky. As the Seventh Circuit has explained in the employment discrimination context: "If at the time of the adverse employment decision the decision maker gave one reason, but at the time of trial gave another reason which was unsupported by the documentary evidence the jury could reasonably conclude that the new reason was a pretextual after-the-fact justification." *Perfetti v. First Nat'l Bank of Chicago*, 950 F.2d 449, 456 (7th Cir. 1991), *cert. denied*, 505 U.S. 1205 (1992).

4. Teams Can Be Penalized for Unnecessary Roughness.

One final observation arises in part from a specific holding in Judge Berman's decision and in part from its tone. To support the suspension, Commissioner Goodell had largely looked past the precedents involving equipment tampering and obstruction of investigations, and instead had clearly and forcefully relied on the discipline imposed for a violation of the performance enhancing drug policy. He described a steroid use violation as the "closest parallel" to Mr. Brady's misconduct, both warranting a four game unpaid suspension – 25% of the regular season. It plainly appears that Commissioner Goodell was making a statement to Mr. Brady and the League about the seriousness of the misconduct, which he described as an effort "to secure an improper competitive advantage" and "to cover up the underlying violation." It bears noting, in evaluating the appropriateness of the discipline, that there were no allegations of prior misconduct by Mr. Brady, he was the starting quarterback on the Super Bowl winning franchise, and has been described in the public press as the "Golden Boy" and, by some, as one of the 5 best quarterbacks in League history.

Judge Berman flatly rejected the Commissioner's comparison. He described the negotiated steroid use policy as "*sui generis*" and opined that he could not "perceive" any comparability between steroid use and Mr. Brady's conduct. He quoted Commissioner Tagliabue's arbitration decision again to the effect that a sharp change in discipline can be arbitrary and an impediment to, rather than an instrument of, change. He also noted that Mr. Brady's performance in the Championship game improved in the second half after the footballs were properly inflated. While the legal issues on appeal will address whether or not Judge Berman overstepped his authority in limiting the Commissioner's discretion to issue discipline under the CBA, the clear lesson for employers is that a wide array of circumstances matter in the evaluation of employment decisions. An employer that acts without fair consideration of all relevant factors is like a team running a naked bootleg, both do so knowing there are significant risks.

The Deflategate decision presents a strong cautionary tale for employers. Managers who conduct workplace investigations and make employment decisions must be well-trained and thoughtful in effectuating their game plans. They need to understand and evaluate the short run and potential long run implications before they speak or write the first time about those decisions. Employers must also recognize that even the best game plans cannot always anticipate the reaction of arbitrators, judges and juries – the ball can take an unexpected bounce.

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