Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement

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THROWING THE RED FLAG ON THE COMMISSIONER: HOW INDEPENDENT ARBITRATORS CAN FIT INTO THE NFL’S OFF-FIELD DISCIPLINE PROCEDURES UNDER THE NFL COLLECTIVE BARGAINING AGREEMENT

I. INTRODUCTION

Imagine that Player A, a popular player in the National Football League (“NFL”) is allegedly involved in defrauding several charitable organizations of which he is a board member.¹ Player A is arrested and indicted on various federal criminal charges. At first, Player A is reluctant to provide federal authorities with personal and organizational financial documents because he is in complete disbelief of the allegations. Upon compliance with the requests and discussion with authorities, it comes to light that Player A’s fellow board member in the charity acted alone in the criminal activity. However, because Player A was initially reluctant to cooperate and may not have been duly diligent in running the organization, Player A pleads to an obstruction of justice charge. Player A serves no jail time and agrees to reimburse a major portion of the defrauded money.

NFL Commissioner Roger Goodell has been monitoring the situation and is disappointed that Player A was involved in the allegations, especially during a time in which the national economy was experiencing a recession. The public is not aware of the details surrounding the plea agreement and Player A’s actual level of involvement in defrauding the charitable organizations. Consequently, the public’s perception of Player A and the NFL has been negative throughout. Goodell decides to suspend Player A for the remaining six games of the season, costing him nearly $1 million in game checks, for detrimental conduct that violates the Personal Conduct Policy.² Goodell imposes a severe punishment to prevent further distraction, to show that the NFL does not support such criminal conduct, and to send a message to other players that they must be in complete control of any charitable organizations with which they are involved.

¹ This fact pattern is a hypothetical created by the author.
Player A’s only hope of reducing the punishment imposed under the Policy would be to appeal back to Goodell. He could not use the independent arbitration process that has been successfully used by National Basketball Association (“NBA”) and Major League Baseball (“MLB”) players because the NFL policy does not allow for a similar procedure. Further, Player A would not have defined discovery guidelines or standards of review for procedural protection. Thus, if Player A appeals to Goodell, his chances of a reduced suspension are minimal.

The NFL Personal Conduct Policy authorizes the NFL Commissioner to “impose discipline as warranted” whenever a player acts in a way that does not meet the high standards of NFL players. The Commissioner can punish a player for conduct that he determines to be merely irresponsible even if it is not illegal. NFL players are judged at the Commissioner’s discretion and cannot appeal punishments to an independent body. The Commissioner is the only person authorized to review the reasonableness of his decision under the Policy. Thus, an

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3 See infra Part II.B.1.d (discussing the appeal process available to players under the Personal Conduct Policy).
4 See infra Part II.B.2–3 (providing examples of how both the NBA and MLB have used independent arbitrators).
6 Personal Conduct Policy, supra note 2, at 2. “All persons associated with the NFL are required to avoid ‘conduct detrimental to the integrity of and public confidence in the National Football League.” Id. at 1.
7 Id. at 1–2. “[A]n employee of the NFL or a member club [is] held to a higher standard and expected to conduct [himself] in a way that is responsible, promotes the values upon which the League is based, and is lawful.” Id. Persons who violate any part of this standard are still subject to discipline because “[i]t is not enough simply to avoid being found guilty of a crime.” Id.
8 See id. at 3. All appellate hearings are held “pursuant to Article XI of the [NFL] Collective Bargaining Agreement.” Id.
NFL player has no way of reversing the Commissioner’s decision if it is excessive or arbitrary. The NFL Players Association (“NFLPA”) cannot provide any relief because it did not play a role in the Policy’s implementation. This problem is unique to professional sports because it gives the owners and commissioners power to prevent an employee’s access to an entire industry. Furthermore, the agreements between the employers and employees are governed not just by contract law but by labor laws.

The appeal rights of players should be increased in order to limit Goodell’s nearly unchecked authority under the current disciplinary structure in the NFL. When Goodell imposes discipline, the Policy takes precedence and vacates other independent appeal rights. This ignores the successful use of arbitration in the NBA and MLB, federal and state policies supporting arbitration, and the proper procedural protections recommended by courts and legislatures for appellate review processes. With the expiration of the NFL Collective Bargaining Agreement (“CBA”) at the end of the 2010 league year, the NFLPA should negotiate for an improved Personal Conduct Policy that provides players proper appeal rights.

The purpose of this Note is to advocate that the Personal Conduct Policy should become a part of a new collective bargaining agreement and that it should include an independent arbitration process in order to preserve players’ appeal rights when punished for off-field conduct. Part II begins with an overview of arbitration and the judicial and

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10 See infra Part II.B.1.d (discussing the creation of the Personal Conduct Policy).
11 See infra note 250 and accompanying text (explaining the unique authority of commissioners in professional sports).
12 See infra note 45 (discussing collective bargaining agreements under the rules of labor law).
13 See infra Part II.B.1.c (explaining that when the commissioner imposes discipline, any dispute arising from that discipline will be heard by the commissioner alone).
14 See infra Part II.B.2–3 (discussing the grievance procedures utilized in the NBA and MLB); infra Part II.A (discussing the development of the use of arbitration through judicial and legislative support); infra Part III.D–E (analyzing the need for impartiality, standards of review, and reasonably defined procedures in appellate review).
15 See Goodell’s Authority to be Part of Talks, ESPN (July 28, 2009, 12:46 PM), http://sports.espn.go.com/nfl/news/story?id=4360661 (discussing the plans to evaluate the commissioner’s authority during negotiations for a new CBA); NFL Owners Opt Out of CBA, NFL, http://www.nfl.com/news/story?id=09000d5d80868b78&template=without-video&confirm=true (last visited Aug. 31, 2010) (explaining that the owners voted unanimously to exercise the option to shorten the current agreement by two years and to begin negotiations for a new agreement).
legislative interpretation of awards.\textsuperscript{16} It concludes by examining the current disciplinary structure in the NFL as well as in the NBA and MLB.\textsuperscript{17} Part III analyzes the NFL commissioner’s role as a final judge under current arbitration laws\textsuperscript{18} and how unilateral implementation of the Policy gives the commissioner such broad authority.\textsuperscript{19} It also examines the “best interests” authority of each league’s commissioner\textsuperscript{20} and compares the standards of review and the appeal procedures used in the NFL, NBA, and MLB.\textsuperscript{21} Part IV proposes that the Policy be amended and incorporated into a new NFL collective bargaining agreement to limit the commissioner’s disciplinary authority and expand players’ appeal rights.\textsuperscript{22}

II. BACKGROUND

There have been numerous instances of improper off-field conduct by NFL players since Roger Goodell was named Commissioner.\textsuperscript{23} In

\textsuperscript{16} See infra Part II.A (discussing how the use of arbitration gained support through the courts and legislation).

\textsuperscript{17} See infra Part II.B (discussing the governing documents of the NFL, NBA, and MLB, as well as the disciplinary authority of each league commissioner).

\textsuperscript{18} See infra Part III.A (discussing the role of the NFL commissioner in the context of arbitration principles).

\textsuperscript{19} See infra Part III.B (analyzing the creation of the Personal Conduct Policy as a working condition).

\textsuperscript{20} See infra Part III.C (analyzing the best interests authority of commissioners in professional sports).

\textsuperscript{21} See infra Part III.D–E (comparing and analyzing the different procedural protections and standards of review used in the appellate procedures in professional sports).

\textsuperscript{22} See infra Part IV (explaining how the Personal Conduct Policy should be incorporated into the new CBA).

\textsuperscript{23} Peter King, Goodell’s the Guy: Owners Tab Chief Operating Officer as NFL Commish, SPORTS ILLUSTRATED (Aug. 9, 2006, 6:56 PM), http://sportsillustrated.cnn.com/2006/writers/peter_king/08/08/commish.elected/index.html. Roger Goodell was elected by the owners to succeed Paul Tagliabue as the eighth commissioner of the NFL following twenty-four years of working in the League. \textit{Id.; see also Michael Vick Timeline, ASSOCIATED PRESS (Aug. 13, 2009, 9:48 PM), http://sports.espn.go.com/nfl/news/story?id=4398110 (“NFL commissioner Roger Goodell suspends Vick indefinitely without pay from the NFL.”).} Michael Vick pled guilty to federal dog fighting conspiracy charges and was in federal custody from November 2007 to July 2009. \textit{Id.; see also Timeline of Trouble for Pacman Jones, ESPN (Jan. 8, 2009), http://sports.espn.go.com/espn/otl/news/story?id=3823894 (“While Jones awaits formal charges from the Las Vegas incident, commissioner Roger Goodell suspends him for the 2007 season, telling him in a written statement: ‘I must emphasize to you that this is your last opportunity to salvage your NFL career.’”).} Following a suspension for the entire 2007 season, Pacman Jones continued to have various run-ins with the law that led to yet another suspension for six games in the 2008 season. \textit{Id.; see also Burress Pleads Guilty on Felony Charge, ESPN (Aug. 21, 2009, 11:55 AM), http://sports.espn.go.com/nfl/news/story?id=4411373 (explaining that Plaxico Burress was sentenced to two years in prison after pleading guilty to the attempted criminal
response to these events, Goodell has exercised his authority under the NFL’s governing documents and has disciplined players. Goodell’s disciplinary decisions have raised concern among players and the NFLPA. The concerns center on the strict punishments that Goodell imposes under the broad disciplinary authority granted to him by a Personal Conduct Policy that was implemented without negotiation.

Other professional sports leagues use arbitration to resolve disputes to remedy some of the concerns analogous to those being voiced in regard to Commissioner Goodell’s recent disciplinary rulings. Currently, the NFL does not allow independent review of rulings under

24 See infra Part II.B.1 (discussing the governing documents of the NFL, which include the Personal Conduct Policy, the CBA, the NFL Constitution and By-laws, and the Uniform Player Contract).

25 See Goodell’s Authority, supra note 15; see also Dan Le Batard, NFL Commissioner Roger Goodell’s Methods Not Working, MIAMI HERALD, Aug. 23, 2009, http://www.miamiherald.com/sports/columnists/dan-le-batard/story/1198456.html (on file with author) (suggesting that the disciplinary actions taken by Commissioner Goodell have not worked to reduce detrimental behavior by players).

26 See Goodell’s Authority, supra note 15 (explaining that Goodell’s disciplinary decisions since taking over as commissioner have caused the NFLPA and its new leader, DeMaurice Smith, as well as the players, to question the breadth of the commissioner’s authority to discipline players); see also Goodell Strengthens NFL Personal Conduct Policy, USA TODAY, Apr. 11, 2007, http://www.usatoday.com/sports/football/nfl/2007-04-10-new-conduct-policy_N.htm (explaining that under the new conduct policy, players as well as teams that violate the policy will receive longer suspensions and larger fines); infra Part III.B (discussing the lack of negotiation prior to the implementation of the Policy as a working condition).

27 See, e.g., 2007–2011 Basic Agreement, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, 38–39, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf (last visited Sept. 24, 2009) [hereinafter MLB Basic Agreement] (stating that a grievance filed in response to a disciplinary decision could ultimately end up in arbitration); see also Nat’l Basketball Ass’n v. Nat’l Basketball Players Ass’n, No. 04 Civ. 9528(GBD), 2005 WL 22869 (S.D.N.Y. Jan. 3, 2005) (affirming a grievance arbitrator’s reduction of a suspension determined by the commissioner); In re Nat’l Basketball Players Ass’n ex rel Player Latrell Sprewell & Warriors Basketball Club & Nat’l Basketball Ass’n, 591 PLI/Pat (Pub. L. Inst.) 469 (2000) (Feerick, Arb.) (holding that because the commissioner’s suspension of player Latrell Sprewell was not in the interest of fairness and justice, the arbitrator was correct in reducing it).
the Personal Conduct Policy.\textsuperscript{28} With the expiration of the NFL CBA at the end of the 2010 season, NFLPA leader DeMaurice Smith will have the opportunity to negotiate for impartial arbitration akin to what the NBA and MLB allow.\textsuperscript{29}

Part II.A of this Note will explore increased legislative and judicial support for the use of arbitration.\textsuperscript{30} It will also present the grounds for vacating or modifying an arbitration award.\textsuperscript{31} Part II.B will examine the current governing documents that form the disciplinary structure in professional sports leagues beginning with the NFL and concluding with the NBA and MLB.\textsuperscript{32}

A. The Development of Arbitration

Arbitration is used in place of litigation as an alternative method of dispute resolution.\textsuperscript{33} Generally, two parties use it as the final step in a grievance procedure that is often through a collective bargaining agreement.\textsuperscript{34} Though there are several methods of arbitration, for the

\begin{itemize}
\item \textsuperscript{28} See infra Part II.B.1.d (explaining the appeals process for disciplinary decisions under the Policy).
\item \textsuperscript{29} Goodell’s Authority, supra note 15; see NFL Owners Opt Out of CBA, supra note 15 (stating that the current agreement has been shortened and will expire at the end of the 2010 season).
\item \textsuperscript{30} See infra Part II.A (discussing arbitration and its application in labor situations).
\item \textsuperscript{31} See infra Part II.A.3 (stating the statutory and common law grounds for invalidating an arbitration award).
\item \textsuperscript{32} See infra Part II.B (discussing the discipline in the governing documents of the NFL, NBA, and MLB).
\item \textsuperscript{33} Collective Bargaining, LEGAL INFO. INST., http://topics.law.cornell.edu/wex/collective_bargaining (last visited Aug. 15, 2010); see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (stating that in contracting to arbitrate a claim, the parties are agreeing to forgo the use of a judicial forum to resolve the issue); Mark Berger, Arbitration and Arbitrability: Toward an Expectation Model, 56 BAYLOR L. REV. 753, 756 (2004) [hereinafter Berger, Arbitrability] (explaining that the Supreme Court has made it clear that arbitration is “simply the substitution of one decision making forum for another.”); see also United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) (explaining that arbitration is a substitute for litigation in commercial disputes, but in labor disputes, arbitration is a substitute for labor strife).
\item \textsuperscript{34} Mark E. Zelek, Labor Grievance Arbitration in the United States, 21 U. MIAMI INTER-AM. L. REV. 197, 197 (1989). “Over ninety percent of American collective bargaining agreements provide for some form of grievance procedure, ending in arbitration, to resolve all disputes over the application or interpretation of the agreement.” Id. Submission of a dispute to a mutually agreed upon third party arbitrator comes after the parties first make an attempt to settle the dispute through negotiation between unions and management. Id. The grievance process is a three to four step process that begins when an employee notifies a supervisor of a grievance soon after it has occurred. Id. at 202. As negotiations for a settlement remain at an impasse, the grievance moves up the levels of management. Id. Once the steps have been exhausted with no settlement, the grievance is submitted to an arbitrator. Id. at 202-03; see also Int’l Ass’n of Machinists & Aerospace Workers v. Gen.
purposes of this Note, the term “arbitration” will refer to grievance arbitration.\textsuperscript{35} Grievance arbitration refers to the use of an independent arbitrator to resolve the contractual language issues in a labor dispute between two parties.\textsuperscript{36} The use of this form of arbitration started with the implementation of various pieces of legislation.\textsuperscript{37} As arbitration grew in popularity, courts began to examine the issues of when and for what purposes arbitration may be used.\textsuperscript{38} Finally, following the establishment of a policy supporting arbitration, grounds for vacating awards were carved out.\textsuperscript{39}
1. Arbitration and Legislation

Arbitration did not become popular in the United States until the late nineteenth and early twentieth centuries. Initially, courts were reluctant to give significant weight to private arbitration awards. However, federal and state legislatures adopted measures to increase the legal enforcement of arbitration agreements. Congress enacted the Federal Arbitration Act (“FAA”), which made commercial arbitration agreements “valid, irrevocable, and enforceable.” The FAA also

40 See FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 2 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997) (discussing the use of arbitration throughout the history of the world). King Solomon used an arbitration procedure similar to that which is used today. Id. Phillip II included arbitration in treaties as a method to resolve disputes over territories. Id. Commercial disputes in the Middle Ages and between Native American tribes were settled by arbitration. Id.; see also MASSEY, supra note 35, at 2–3 (discussing the growth of grievance arbitration clauses from the late 19th century and on). The United Mine Workers Association incorporated a grievance arbitration clause into its constitution at its founding convention in 1890. MASSEY supra note 35, at 2. Grievance arbitration in labor disputes became the popular process of alternative dispute resolution around the time of World War II as a method to avoid work stoppages affecting the production of war materials. Id. at 3. By 1944, 73% of American labor contracts contained an arbitration clause. Id. That number rose to 95% in the 1980’s and has continued to rise to 98% today. Id.

41 Berger, Arbitrability, supra note 33, at 754. “Private arbitration was viewed as usurping the jurisdiction of the legal system, and therefore courts permitted the parties to refuse to abide by their prior agreement to arbitrate without fear of any significant legal sanction.” Id.; see also Ins. Co. v. Morse, 87 U.S. 445, 451 (1874) (discussing a line of cases that held arbitration agreements illegal if they attempted to supersede the jurisdiction of the courts); Wood v. Humphrey, 114 Mass. 185, 186 (1873) (discouraging the elimination of the courts jurisdiction by an arbitration agreement).


43 9 U.S.C. § 2 (2006); see also Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 273–77 (1995) (holding that the Federal Arbitration Act was validly established by Congress under its Commerce Clause power and that any transaction involving interstate commerce between two parties who have reached an arbitration agreement is within the scope of the FAA); Southland Corp. v. Keating, 465 U.S. 1, 15–16 (1984) (holding that the FAA’s creation under Congress’s Commerce Clause authority makes it enforceable in both federal and state courts); Lipinski, supra note 34, at 330–31 (discussing Congress’s enactment of the FAA and other arbitration legislation). A segment of labor arbitration, however, does not seem to be within the scope of the Federal Arbitration Act based upon statutory language, which states that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1 (2006).
provided for a stay of litigation in cases involving arbitrable issues and a court order that would compel arbitration of the dispute as well as discovery of material evidence.\textsuperscript{44} Despite congressional intent to reduce the courts’ hostility towards commercial arbitration agreements, parties to labor agreements did not find the same relief in the FAA.\textsuperscript{45}

Labor disputes between employers and unions that have collectively bargained arbitration agreements are governed by section 301(a) of the Labor-Management Relations Act.\textsuperscript{46} With the creation of the Act, Congress expressed its preference for arbitration rather than strikes or litigation as a method to resolve labor disputes.\textsuperscript{47} The Supreme Court held in \textit{Textile Workers Union of America v. Lincoln Mills of Alabama} that section 301 of the Act allows a party to sue in federal court to compel the

\textsuperscript{44} 9 U.S.C. §§ 3, 4, 7. If a court is satisfied that a matter is arbitrable under the agreement at issue, it will stay the action until the arbitration process has been completed. \textit{Id.} § 3. A party that alleges a failure to arbitrate a dispute in the face of a written agreement to arbitrate may petition a United States district court to hand down an order to follow the arbitration procedure. \textit{Id.} The arbitrator has the authority to summon any person as a witness and to bring any material piece of evidence before the hearing. \textit{Id.} § 7; see also \textit{In re Sec. Life Ins. Co. of Am.}, 228 F.3d 865, 870–71 (8th Cir. 2000) (holding that an arbitrator has the power to order the production of documents by any party prior to a hearing because it promotes the policy of efficiency). \textit{But see Life Receivables Trust v. Syndicate 102 at Lloyd’s of London}, 549 F.3d 210, 216–17 (2d Cir. 2008) (holding that the arbitrator does not have the authority to order discovery from non-parties).

\textsuperscript{45} See \textit{Dean Foods Co. v. United Steelworkers}, 911 F. Supp. 1116, 1123 (N.D. Ind. 1995) (applying the FAA to commercial arbitration awards in areas of interstate commerce and admiralty but not to labor arbitration awards); Kenneth M. Curtin, \textit{An Examination of Contractual Expansion and Limitation of Judicial Review or Arbitral Awards}, 15 OHIO ST. J. ON DISP. RESOL. 337, 339 (2000) (citing H.R. REP. NO 68-96, at 1 (1924)) (explaining Congress’s intention to reverse past animosity towards arbitration agreements and to make them as enforceable as other contracts). Arbitration in the context of commercial disputes is different from that of a labor dispute because each provides different functions. \textit{United Steelworkers v. Warrior & Gulf Navigation Co.}, 363 U.S. 574, 578 (1960). In labor disputes, arbitration is closely linked to CBAs that are a more encompassing code of governance than contracts that serve as the basis of commercial disputes. \textit{Id.; see also Ludwig Honold Mfg. Co. v. Fletcher}, 405 F.2d 1123, 1127 (3d Cir. 1969) (explaining that the FAA can be used as guidance in judicial review of labor agreements); \textit{Textile Workers Union v. Am. Thread Co.}, 113 F. Supp. 137, 142 (D. Mass. 1953) (explaining that federal courts should use the FAA as a guide in enforcing labor arbitration agreements).

\textsuperscript{46} 29 U.S.C. § 185(a) (2006). Section 301(a) of the Act provides that “[s]uits for violation of contracts between an employer and a labor organization representing employees . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties.” \textit{Id.; see Am. Thread Co.}, 113 F. Supp. at 142 (concluding that § 301 gives federal courts specific authority to enforce arbitration agreements in labor contracts). \textit{See generally Lipinski, supra} note 34, at 327 n.10 (discussing Congress’s enactment of § 301 of the LMRA).

\textsuperscript{47} 29 U.S.C. § 173(d). Section 203(d) of the Act provides that the final method agreed upon by the parties is the method for settling grievances over the interpretation of a collective bargaining agreement. \textit{Id.}
other party to either submit to arbitration of a dispute as previously agreed or to comply with an arbitrator’s award.\textsuperscript{48} A CBA used in professional sports leagues that contains arbitration agreements is subject to the rules of the National Labor Relations Act ("NLRA").\textsuperscript{49} Under this Act, employers and the labor union representing the employees must collectively bargain all conditions of employment.\textsuperscript{50} Courts have held that an organization must also use collective bargaining to establish a grievance settlement procedure.\textsuperscript{51} NFL provisions not created through arms-length bargaining may be improper and not part of the agreement.\textsuperscript{52}

\textsuperscript{48} 353 U.S. 448, 458–59 (1957); see also Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83–86 (2002) (discussing the types of gateway procedural questions that are subject to judicial resolution as opposed to arbitration); First Options of Chi. v. Kaplan, 514 U.S. 938, 944–45 (1995) (discussing the court’s role in determining if there was an agreement to arbitrate an issue); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 556–58 (1964) (holding that procedural issues are questions to be resolved through the arbitration process because adjudication by courts could entangle it with substantive issues subject only to arbitration).

\textsuperscript{49} 29 U.S.C. §§ 151–169; see also Flood v. Kuhn, 407 U.S. 258, 282 (1972) (holding that Major League Baseball is a business engaged in interstate commerce); NLRB v. Fainblatt, 306 U.S. 601, 606–08 (1939) (explaining that industries involved in or affecting interstate commerce are subject to the NLRA); Kan. City Royals Baseball Corp. v. Major League Baseball Players Ass’n, 409 F. Supp. 233, 270 (W.D. Mo. 1976), aff’d on other grounds, 532 F.2d 615 (8th Cir. 1976) (explaining that the MLB CBA is subject to the same laws as a CBA in another industry).

\textsuperscript{50} 29 U.S.C. § 157. Labor unions are given their authority under section 7 of the NLRA, which states that employees have the right to organize themselves into labor organizations and collectively bargain through self-chosen representatives. Id. Employees designate representatives that shall collectively bargain for “rates of pay, wages, hours of employment, or other conditions of employment.” Id. § 159(a).

\textsuperscript{51} See NLRB v. Indep. Stave Co., 591 F.2d 443, 446 (8th Cir. 1979) (explaining that grievance-arbitration procedures are terms of employment and mandatory subjects of bargaining under the NLRA).

\textsuperscript{52} See, e.g., Mackey v. Nat’l Football League, 543 F.2d 606, 616 (8th Cir. 1976) (presenting an example of a rule that was improper because bargaining did not take place in its implementation). The NFL’s implementation of the Rozelle Rule restricting player movement was not the result of “bona fide arm’s-length bargaining” but instead the unilateral creation by the teams. Id. The Rule was not a quid pro quo for other benefits to the players and was outside the scope of the CBA. Id.; see, e.g., Nat’l Football League Players Ass’n v. NLRB, 503 F.2d 12, 17 (8th Cir. 1974) (holding that a rule that would fine players $200 for leaving the bench area during a fight was unilaterally implemented by the owners and was therefore improper). The commissioner must consult with both parties in the promulgation of a rule. Id. See generally PAUL D. STAUDOHAR, PLAYING FOR DOLLARS: LABOR RELATIONS AND THE SPORTS BUSINESS 71–72 (1996) (explaining that the Rozelle Rule allowed the commissioner to force a team that signed a free agent to compensate the team to which the free agent previously belonged).
2. Arbitration in the Court System

The Court further established governing principles for judicial review of arbitration agreements and awards in a group of cases known as the “Steelworkers Trilogy.” First, when a party attempts to compel another party to arbitrate, a court will presume that the dispute is arbitrable. To rule otherwise, a court would need to have nearly definitive evidence that it was not within the intentions of the parties to arbitrate that dispute. Therefore, if an arbitration agreement is particularly broad, the chance of a dispute escaping arbitration is minimal.

The second principle gained from the Trilogy is that judicial review of an arbitrator’s award is very limited. The scope of review does not extend to the merits of the award or the principles of interpretation that the arbitrator applied to the agreement. Instead, a court may review an arbitration award in reference to various statutory or judicial grounds for


54 See Am. Mfg. Co., 363 U.S. at 567–68 (explaining that lower courts are never to decide the merits of, or whether there is equity in, a grievance that is filed if there is an agreement between the two parties to submit all grievances to arbitration). This includes any grievance that seems frivolous on its face. Id. at 568. Deciding the merits “under the guise of interpreting the grievance procedure of collective bargaining agreements . . . usurps a function which under that regime is entrusted to the arbitration tribunal.” Id. at 569.

55 Warrior & Gulf Navigation Co., 363 U.S. at 582. The Court held that “[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” Id. at 582–83; see also Berger, Arbitrability, supra note 33, at 769–70 (explaining that there should be a presumption of arbitrability).

56 Zelek, supra note 34, at 200–01. By establishing this rule, the Court made it very difficult for parties to an arbitration agreement to utilize the courts. Id.; see, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 626 (1985) (discussing the presumption that in commercial contract disputes the controlling intentions of the parties are generously construed towards arbitrability); Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 (1983) (explaining that in non-labor cases brought under the FAA, questions as to arbitrability “should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability”).

57 See Enter. Wheel & Car Corp., 363 U.S. at 597 (stating that an arbitrator’s award is legitimate if it “draws its essence” from the contract between the two parties).

58 See id. at 596 (“The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.”); Zelek, supra note 34, at 201 (explaining that an arbitrator’s informed judgment will be used in interpreting and applying the terms of a CBA to a grievance).
vacation or modification. Furthermore, this rule reflects the policy that the parties to an arbitration agreement bargained for an arbitrator’s interpretation of the agreement.

Furthering these principles, the Court stated in United Paperworkers International Union v. Misco, Inc. that so long as an arbitrator acts within his or her authority to properly interpret or apply the agreement, a court cannot overturn that decision even if the arbitrator bases his decision on mistakes of fact or law. The Court emphasized that arbitration, grievance procedures, and the responsibilities of the arbitrator are essential to the collective bargaining process and courts can only invalidate the decisions on certain grounds.

3. Vacating or Modifying Arbitration Awards

Although courts generally give great deference to arbitration awards, courts may vacate the decision of an arbitrator in some circumstances. In labor disputes, courts have stated that an arbitration

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59 See infra Part II.A.3 (discussing the grounds for invalidating an arbitration award); see also Enter. Wheel & Car Corp., 363 U.S. at 596 (explaining that giving courts expansive judicial review, including final authority on the merits of the arbitration awards, would undercut the federal policy of making arbitration the primary method of resolution in labor disputes). If the merits of every arbitration award were reviewable by a court, the provisions of an arbitration agreement pertaining to finality would be meaningless. Enter. Wheel & Car Corp., 363 U.S. at 599.

60 Enter. Wheel & Car Corp., 363 U.S. at 599. Because the parties bargained for the arbitrator’s interpretation and construction of the collective bargaining agreement, a court has no standing to overrule the arbitrator based on a different opinion of interpretation. Id.; see Zelek, supra note 34, at 201 (explaining that if a party to an agreement disagrees with the contracted-for arbitrator’s interpretation of the agreement, that party may renegotiate the terms of the agreement or the arbitrator used).

61 484 U.S. 29, 37–38 (1987). A court should not reject the factual findings or the interpretation of the contract by an arbitrator. Id. The Court stated the following in regards to judicial review of mistakes of law or fact:

Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

Id.; see also Major League Baseball Players Ass’n v. Garvey, 532 U.S. 504, 509–10 (2001) (discussing that the limited role of the courts does not include evaluating the merits of the grievance); E. Associated Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57, 62 (2000) (explaining that if a court decides that an arbitrator has acted within his scope of authority, that court should treat the arbitrator’s decisions as representative of the agreement between the two parties regarding the dispute).


63 See Enter. Wheel & Car Corp., 363 U.S. at 599 (holding that a court cannot overrule an arbitrator based on a difference of opinion because the parties bargained for the
award can be overturned if an arbitrator goes outside the terms of the agreement and “dispense[s] his own brand of industrial justice.” This does not include declining to follow the precedent of previous decisions because arbitrators are not bound by the decisions of previous arbitrators. In some cases, however, courts have overturned arbitration agreements for egregious error of law.

A lack of reasonable procedural protection can also lead to the vacation of disciplinary decisions. Reasonable procedures include sufficient advance notice of a claim, the opportunity for a hearing, and the orderly presentation of evidence. If procedures are insufficient, a sanction may be per se illegal because it is inherently defective. Arbitration agreements are also affected if there is not a definitive interpretation of the arbitrator); Berger, Arbitrability, supra note 33, at 764 (stating that the current state of arbitration law includes a “highly deferential standard of review”); Lipinski, supra note 34, at 334–39 (discussing both statutory and common law grounds for overturning arbitration awards).


Int’l Union v. Dana Corp., 278 F.3d 548, 555–56 (6th Cir. 2002). Most circuits have held that labor arbitrators are only bound by previous arbitrators’ decisions if the CBA stipulates the creation of such a common law. Id.


See John C. Weistart, Player Discipline in Professional Sports: The Antitrust Issues, 18 WM. & MARY L. REV. 703, 710–13 (1977) (discussing the use of reasonableness as a standard of review for disciplinary decisions). Notions of procedural protection are similar to constitutional due process requirements. Id. at 713. However, those requirements “must be tempered by the peculiar nature of . . . private decision-making.” Id.; see also, e.g., Bridge Corp. of Am. v. Am. Contract Bridge League, Inc., 428 F.2d 1365, 1369 (9th Cir. 1970) (discussing the use of an unreasonable rule to evaluate agreements and practices in labor self-regulation).

See Weistart, supra note 67, at 712, 715 (explaining what defines procedural fairness).

See, e.g., Blalock v. Ladies Prof’l Golf Ass’n, 359 F. Supp. 1260, 1265–66 (N.D. Ga. 1973) (holding that the procedures in place were insufficient and so the sanction handed down to the female golfer was per se illegal and a violation of antitrust laws). The suspension was imposed without a proper hearing. Id. at 1265.
standard of review on which an arbitrator can base his decision.70 Moreover, if the sanction is banishment instead of a fine, an examination of the procedural protections is even more important.71

The Supreme Court has stated that improper procedural aspects of discipline can also bring about antitrust violations.72 Procedural protections ensure proper notice and a hearing, which allow for the administration of antitrust laws.73 Reasonable procedures encourage compliance with substantive antitrust statutes and discourage arbitrary disciplinary action by the commissioner.74

Courts can overturn or modify commercial agreement awards on statutory grounds under the FAA.75 Courts allow modifications of commercial arbitration awards in cases of miscalculations of awards for a matter not submitted to the arbitrator.76 Viable grounds for vacation include an arbitrator exceeding his or her powers as well as improper

70 See, e.g., Allstate Ins. Co. v. Clymer, No. 93-0348, 1993 U.S. Dist. LEXIS 12175, at *7 (E.D. Pa. July 1, 1993) (holding that when an insurance contract is ambiguous as to the proper standard to apply, the contract will be construed against the insurer). The contract was ambiguous because it referred to two different standards of review. Id. at *2.
71 See Weistart, supra note 67, at 714 (explaining that the need for a careful procedural structure increases with the severity of the punishment). The degree of procedural protections required will vary with the severity of the consequences and the sophistication of the fact situation. Id. at 714; cf. Mullane v. Cent. Hanover Trust Co., 339 U.S. 306, 313 (1950) (discussing the idea that in a case where the deprivation of fundamental rights and liberties are at stake, the procedural protection provided should be “appropriate to the nature of the case”).
72 See Silver v. N.Y. Stock Exch., 373 U.S. 341, 364–65 (1963) (explaining that by not providing the proper procedural safeguards, a private organization exceeds its authority to self-regulate under antitrust laws). Antitrust laws were not created by Congress to protect fundamentally unfair self-regulation. Id. at 364.
73 Id. at 362–63; see also Weistart, supra note 67, at 710–13 (discussing the applicability of procedural safeguards to the adjudication of antitrust laws). Procedures “serve to define more precisely the factual basis for the group’s actions as well as the defenses and contentions of the accused” and allow a court to better determine “whether a basis exists for the discipline and whether the action is justified.” Weistart, supra note 67, at 711.
74 Silver, 373 U.S. at 362. While anti-trust issues are not a pertinent aspect of the discussion or analysis in this Note, they are nevertheless a major part of the legal discussion regarding professional sports leagues. See Marc Edelman, Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade, 58 CATH. U. L. REV. 631 (2009) (discussing the anti-trust implications of the Personal Conduct Policy); Weistart, supra note 67, at 703 (explaining the anti-trust issues that arise as consequences of the structure and operation of professional sports leagues).
75 9 U.S.C. §§ 10–11 (2006). Section 10 allows for the vacation of an award or a rehearing by the arbitrators. Id. § 10. Section 11 provides for an order to modify or correct an arbitration decision. Id. § 11; see also Dean Foods Co. v. United Steelworkers, 911 F. Supp. 1116, 1123 (N.D. Ind. 1995) (explaining that the FAA applies to commercial arbitration awards in areas of interstate commerce and admiralty but not to labor arbitration awards).
behavior by the arbitrator such as fraud or corruption. Evident partiality by the arbitrator is also prohibited. Courts evaluate evidence of partiality or bias on the basis of whether a reasonable person would conclude that an arbitrator is partial after reviewing all of the circumstances. A material relationship existing between the arbitrator and a party meets this standard. Courts have held that there is evident

77 Id. § 10(a)(1)–(4).
78 See id. § 10(a)(2) (stating that a court may vacate an arbitrator’s award if it is shown that the arbitrator was not impartial); Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984) (holding that the standard for evident partiality that would violate the FAA is whether a reasonable person, after analyzing all of the circumstances, must conclude that the arbitrator is biased); Joel Fischman & Dirk D. Potter, Pinch-Hitting for Baseball’s Present System—Impartial Arbitration as a Method of Dispute Resolution, 14 U.C. DAVIS L. REV. 691, 704 (1981) (discussing how the commissioner of Major League Baseball is “naturally partial towards management” because he is in fact appointed by the owners); Weistart, supra note 67, at 715–17 (evaluating the presence of prejudice and bias in disciplinary decisions in professional sports); see also Jan Stiglitz, Player Discipline in Team Sports, 5 MARQ. SPORTS L.J. 167, 178 (1995) (discussing the importance of a neutral arbitrator in disputes over discipline of serious off-field misconduct). But see Matthew B. Pachman, Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy, 76 VA. L. REV. 1409, 1417–20 (1990) (explaining that often arbitrators are chosen for special expertise in an area, the type of expertise a commissioner utilizes as the final authority); Jason M. Pollack, Take My Arbitrator, Please: Commissioner “Best Interests” Disciplinary Authority in Professional Sports, 67 FORDHAM L. REV. 1645, 1706 (1999) (recognizing that it is difficult for a third party arbitrator to avoid imposing her views on a ruling).

79 Morelite Constr. Corp., 748 F.2d at 84. Requiring the mere appearance of bias is too low of a standard whereas requiring actual proof of bias is too high of a standard. Id.; see also Labor Arbitration Rules, AM. ARBITRATION ASS’N §§ 5, 11, 17, http://www.adr.org/sp.asp?id=32599 (last visited Aug. 15, 2010) (stating that arbitrators must be neutral). An arbitrator can be removed if he or she has a personal or financial interest in the outcome of the dispute. Labor Arbitration Rules, supra, § 17. See generally Merrick T. Rossein & Jennifer Hope, Disclosure and Disqualification Standards for Neutral Arbitrators: How Far to Cast the Net and What is Sufficient to Vacate Award, 81 ST. JOHN’S L. REV. 203, 203–09 (2007) (discussing the requirement of impartiality and how courts have defined evident partiality).

80 See, e.g., Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137 (2d Cir. 2007) (holding that there was evident partiality when an arbitrator’s employing corporation had done more than $275,000 in business with the corporation of one of the involved parties); see also Commonwealth Coating Corp. v. Confl’nt Cas. Co., 393 U.S. 145, 148 (1968) (holding that a business relationship between the arbitrator and one of the parties was significant despite a minimal transfer of payments). An arbitrator “must be unbiased . . . [and] also must avoid even the appearance of bias.” Id. at 150; see also The Code of Ethics for Arbitrators in Commercial Disputes, AM. BAR ASS’N, 3–6 (Feb. 9, 2004), http://www.abanet.org/dispute/commercial_disputes.pdf (stating that impartiality is required to uphold the process and that an arbitrator must disclose any partial relationships). An arbitrator must disclose “[a]ny known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties.” The Code of Ethics, supra, at 5.
partiality when the arbitrator’s company was in business negotiations with one of the parties.\(^81\) Being a part of the management team of a party may also evidence a material relationship.\(^82\)

These grounds for vacation protect against lack of impartiality and procedural safeguards, the same dangers that have drawn concern in the NFL system.\(^83\) The dangers stem from a disciplinary structure made up of several governing documents that grant the NFL Commissioner broad authority to impose punishment on NFL players.\(^84\) Within the disciplinary structure of professional sports, the use of a Personal Conduct Policy with no independent appeal process distinguishes procedures of the NFL from those of the NBA and MLB.\(^85\)

### B. Disciplinary Structure in Professional Sports

Executive leadership in professional sports leagues, as in any other industry, has the power to discipline employees; however, the leagues organize the disciplinary structure in a way that is unique to professional sports.\(^86\) Unlike other industries, professional sports leagues subject player-employees to discipline by both league officials and teams.\(^87\) In general, the league commissioner holds the most powerful disciplinary authority in terms of scope and enforcement.\(^88\) The commissioner can

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\(^{81}\) *Applied Indus. Materials Corp.*, 492 F.3d at 139.

\(^{82}\) See *Nat’l Football League Players Ass’n v. NLRB*, 503 F.2d 12, 16 n.3 (8th Cir. 1974) (explaining that although the NFL commissioner must act impartially, he may be considered an agent of management preventing impartiality). *But see Nat’l Football League Players Ass’n v. Nat’l Football League*, 654 F. Supp. 2d 960, 968 (D. Minn. 2009) *aff’d by* Williams v. Nat’l Football League, 582 F.3d 863 (8th Cir. 2009) (explaining that although the presiding designee provided legal advice to one of the parties prior to the hearing, the foreseeable partiality had been accepted by the NFLPA when it agreed to the terms of the NFL CBA).

\(^{83}\) See *infra* Part III.A (discussing the commissioner’s role as an arbitrator of disputes under FAA standards).

\(^{84}\) See *infra* Part II.B.1 (discussing the disciplinary structure of the NFL).

\(^{85}\) See *infra* Part II.B.1.d (discussing the Personal Conduct Policy and commissioner authority).

\(^{86}\) See *Molinas v. Nat’l Basketball Ass’n*, 190 F. Supp. 241, 243–44 (S.D.N.Y. 1961) (discussing the importance of rules and regulations to a league’s survival). In *Molinas*, the plaintiff was suspended for violating a league rule prohibiting gambling. *Id.* at 242. The court held that “[e]very league . . . must have some reasonable governing rules, and these rules must necessarily include disciplinary provisions.” *Id.* at 243–44; *see also* Weistart, *supra* note 67, at 703 (explaining the unique relationship between players, clubs, and commissioners with regards to discipline in professional sports).

\(^{87}\) See Stiglitz, *supra* note 78, at 167–68 (analogizing the disciplinary structure in professional sports to that in a traditional employment setting).

\(^{88}\) See *Milwaukee Am. Ass’n v. Landis*, 49 F.2d 298, 299 (N.D. Ill. 1931) (explaining that the authority given to the commissioner is as expansive as the language of the agreement through which the office was created); RAY YASER ET AL., *SPORTS LAW CASES AND
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discipline players, coaches, and other league employees for misconduct through fines, suspensions, or banishment. Within the NFL, this authority to discipline granted to its commissioner is shaped by several overlapping governing documents.

1. Governing Documents of the National Football League

Four documents form the disciplinary structure of the NFL: the Constitution and Bylaws, the Player Contract (“the Contract”), the CBA, and the Personal Conduct Policy. Each document shapes the authority of and methods available to the commissioner for disciplining a player. The documents prescribe how an appeal of disciplinary action is heard. The following subsection will discuss the governing documents, the authority each grants, and the appeals processes involving either the commissioner or a grievance procedure culminating with arbitration.

a. Disciplinary Authorities

The NFL governing documents allow both teams and the commissioner to discipline players by vesting them with the authority to terminate a player’s contract for improper conduct. Article VIII of the

MATERIALS 379–80 (2006) (describing the commissioner’s dominant authority over league matters); infra Part III.C (discussing the best interests authority given to commissioners).


90 See infra Part II.B.1 (discussing the role of each governing document in determining the scope of the commissioner’s disciplinary authority).

91 See Pachman, supra note 78, at 1417–20 (discussing which of the NFL’s governing documents takes precedence over the others in certain situations); see also Stiglitz, supra note 78, at 171–72 (providing a general discussion of the overlap of rules in professional sports).

92 See infra Part II.B.1.a (explaining how each governing document authorizes the commissioner to discipline); infra Part II.B.1.b (explaining the sections of each document that involve disciplinary authority and procedures).

93 See infra Part II.B.1.c (discussing the methods of appeal before the commissioner and the grievance process).

94 NFL Player Contract, NFL COLLECTIVE BARGAINING AGREEMENT 2006–2012, 248, available at http://nflplayers.com/images/fck/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006-20%202012.pdf (last visited Aug. 15, 2010). Paragraph 11 of the contract gives the Club the power to terminate the contract for conduct that is “reasonably judged by [the] Club to adversely affect or reflect on [the] Club.” Id. at 252. Paragraph 15 of the contract provides the Commissioner with the same authority. Id. at 253.
NFL CBA specifically discusses “Club Discipline,” giving each team disciplinary authority over its players.\textsuperscript{95} It lists numerous infractions, along with corresponding sanctions, for which a team may punish a player.\textsuperscript{96} Article VIII also gives clubs authority to discipline a player for additional infractions of conduct detrimental to the club.\textsuperscript{97}

Article XI of the NFL CBA and section 8.3 of the Constitution give the commissioner power to discipline players as well as the ultimate authority to resolve disputes stemming from that discipline.\textsuperscript{98} This authority extends to situations involving coaches, owners, and NFL employees.\textsuperscript{99} If the club and the commissioner discipline a player for the same conduct, the commissioner’s expansive scope of authority results in his decision taking precedence.\textsuperscript{100}

\textbf{b. Scope of the Authority}

The standard NFL Player Contract defines the scope of player conduct and discipline.\textsuperscript{101} Upon signing a contract with any team, the player agrees to maintain proper conduct and recognizes that “the


\textsuperscript{96} \textit{Id.} at 19–20. Article VIII provides a maximum discipline schedule for conduct including weight violations, damaging equipment, ejection from a game, losing a playbook, and tardiness. \textit{Id.}

\textsuperscript{97} \textit{Id.} The maximum penalty under the detrimental conduct clause is set at a fine equal to one week’s salary and/or a suspension without pay for no more than four weeks. \textit{Id.} at 19; see also Chiefs Give Two-Week Suspension to RB Johnson, Who Plans Appeal, NFL (Oct. 28, 2009), http://www.nfl.com/news/story?id=09000d5d813c7ea&template=with-video-with-comments&confirm=true (discussing the Kansas City Chiefs’ suspension of Larry Johnson for two weeks for using a gay slur). If Johnson planned to appeal the punishment, the appeal could go to an independent arbitrator because it was team discipline and would therefore fall under Article IX of the NFL CBA for a Non-Injury Grievance. \textit{Club Discipline, supra} note 95, at 20.

\textsuperscript{98} \textit{Commissioner Discipline, supra} note 9, at 34. The procedures for disputes arising from the commissioner’s disciplinary power are “[n]otwithstanding anything stated in Article IX (Non-Injury Grievance).” \textit{Id.}

\textsuperscript{99} \textit{NFL Constitution, supra} note 89, at 28. The commissioner has authority to oversee a dispute certified to him between two or more members of the NFL. \textit{Id.} The commissioner may preside over a dispute between a player or coach and any team. \textit{Id.} This includes disputes among players, coaches, or teams as well as those between players and league officials on and off the field. \textit{Id.}

\textsuperscript{100} \textit{Commissioner Discipline, supra} note 9, at 35. “The Commissioner and a Club will not discipline a player for the same act or conduct. The Commissioner’s disciplinary action will preclude or supersede disciplinary action by any Club for the same act or conduct.” \textit{Id.; see also Club Discipline, supra} note 95, at 20 (explaining that discipline imposed by the commissioner supersedes team discipline when it is for the same action).

\textsuperscript{101} \textit{NFL Player Contract, supra} note 94, at 252–53. This includes either on-field or off-field conduct. \textit{Id.} at 248.
success of professional football depends largely on public respect for and approval of those associated with the game.”\textsuperscript{102} The Contract explains that a team or the commissioner can discipline players for conduct that reflects poorly on the character and integrity of the game or the player and diminishes public confidence.\textsuperscript{103} The Constitution also grants the commissioner authority to discipline any player who commits such conduct.\textsuperscript{104} As the ultimate arbiter, the commissioner uses his judgment to define conduct that is detrimental to the best interests of the NFL.\textsuperscript{105}

The commissioner may fine, suspend, or terminate a player’s contract when he determines that a player’s conduct was harmful to the NFL.\textsuperscript{106} While there are set fine amounts and punishments listed in the Constitution, section 8.13(B) allows the commissioner to recommend an increased punishment when he deems necessary.\textsuperscript{107} The commissioner’s decision is final and unappealable if the owners and an executive committee accept that recommendation.\textsuperscript{108}

\textsuperscript{102} Id. at 248. The player “agrees to give his best efforts and loyalty to the Club” for the public approval of the game. Id. The contract is between the player and team and is valid for the specified term. Id.

\textsuperscript{103} Id. at 252–53. A team may terminate a player’s contract for personal conduct that adversely reflects on the team. Id. at 252. The contract recognizes the value of the integrity of the game and focuses on conduct involved with gambling activity, drugs and substance abuse, and any other detrimental conduct. Id. at 253.

\textsuperscript{104} NFL Constitution, supra note 89, at 29–35. Gambling and conduct harmful to the League’s best interests is discussed specifically in the Constitution as grounds for disciplinary action. Id. at 34–35. If a player is found to have bet on any games in the League or failed to report knowledge of a betting scheme, the Commissioner has the authority to discipline that player in various ways including banishment. Id. at 34.

\textsuperscript{105} Id. at 35. The Commissioner’s arbitration authority includes “[a]ny dispute involving . . . members in the League or any players or employees of the members of the League . . . that in the opinion of the Commissioner constitutes conduct detrimental to the best interests of the League.” Id. at 28; see also Janine Young Kim & Matthew J. Parlow, Off-Court Misbehavior: Sports Leagues and Private Punishment, 99 J. CRIM. L. & CRIMINOLOGY 573, 576 (2009) (explaining that the league commissioner has “indeterminate discretion” to define conduct that is detrimental to the best interests of the league).

\textsuperscript{106} NFL Player Contract, supra note 94, at 253. The player has the opportunity for a hearing with representation in front of the commissioner before the disciplinary decision takes effect. Id.; see also supra note 23 (providing several examples of Goodell’s disciplinary decisions in response to instances of detrimental conduct).

\textsuperscript{107} NFL Constitution, supra note 89, at 31–34; see also Belichick Draws $500,000 Fine, but Avoids Suspension, ESPN (Sept. 14, 2007), http://sports.espn.go.com/nfl/news/story?id=3018338 (stating that the NFL fined Bill Belichick $500,000 and deprived the New England Patriots of a draft pick for their involvement in spying on an opposing team). Goodell followed the guidelines under the Constitution for disciplining a coach or team for a violation of the competitive aspects of the game. NFL Constitution, supra note 89, at 31.

\textsuperscript{108} NFL Constitution, supra note 89, at 31–34. The Executive Committee is made up of one representative from each team. Id. at 23.
c. Grievance Procedures Available for Players

The NFL CBA, entered into by League management and the NFLPA, governs the terms and conditions of employment in the NFL. It is the preeminent document in terms of governance over the League’s disciplinary and grievance policies. The NFL CBA states two procedures for player appeals: the grievance procedure and an appeal to the commissioner. The Non-Injury Grievance procedures in Article IX of the NFL CBA govern disputes over team discipline of a player. A player may file a grievance about a dispute that involves interpretation of the CBA. The procedure begins with filing a grievance, continues with the selection of arbitrators, and ends with a hearing that results in the arbitrator’s final decision. Thus, Article IX appears to give a player an opportunity for

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110 See Terwilliger v. Greyhound Lines, Inc., 882 F.2d 1033, 1040 (6th Cir. 1989) (holding that in the case of a dispute, a bargaining agreement takes precedence over other documents because of the national policy encouraging uniform labor law and arbitration); 1 ROBERT C. BERRY & GLENN M. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES 139 (1986) (explaining that in the case of a dispute, a mutually agreed-upon collective agreement takes precedence); see also Pachman, supra note 78, at 1417–20 (discussing the hierarchy of the league governing documents).

111 Non-Injury Grievance, NFL COLLECTIVE BARGAINING AGREEMENT 2006-2012, 23, http://nflplayers.com/images/fck/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf (last visited Aug. 16, 2010) (discussing the process of the grievance procedure, which includes filing, notice, hearing, and the arbitrator’s award); Commissioner Discipline, supra note 9, at 34 (explaining that when a player is disciplined by the commissioner for conduct detrimental to the NFL, the commissioner will hear all appeals); see also NFL Player Contract, supra note 94, at 252, 254 (explaining that under the Player Contract an arbitrator comes into play in two situations: injury grievances and disputes over the interpretation of the Contract). These situations give way to the procedure outlined in the current NFL CBA. Id.

112 Club Discipline, supra note 95, at 20. “Any dispute involved in Club discipline may be made the subject of a non-injury grievance under Article IX.” Id.

113 Non-Injury Grievance, supra note 111, at 23.

114 Id. at 23–27. A player, team, the league management, or the NFLPA must file a grievance within forty-five days of the incident on which the grievance is based and provide written notice to the NFL and the parties involved. Id. at 23. If the grievance is not resolved following an answer from the opposing parties, an appeal may be made by filing a written notice with the Notice Arbitrator. Id. at 23–24. “[E]ach party will submit to the other copies of all documents, reports and records relevant to the dispute” no later than ten days prior to the hearing. Id. at 24. The hearing will take place in front of an arbitration panel made up of four arbitrators jointly accepted by the NFLPA and Management Council. Id. at 24–25. Each party has the right to discharge any of the arbitrators by serving written notice on the arbitrator and the opposing party. Id. An arbitrator will be
independent arbitration. However, a clause in the opening section supersedes its application by requiring players to use any of the other dispute resolution procedures included in the CBA, such as an appeal to the commissioner.115

Players disciplined by the commissioner for conduct that is detrimental to the integrity of, or public confidence in, professional football can appeal to the commissioner in writing.116 Upon receiving an appeal, the commissioner, or a person designated by the commissioner, will preside over a hearing in which the player may be represented by counsel and may present all relevant evidence.117 Yet, the commissioner’s written decision is the “final and complete disposition of the dispute and will be binding upon the player(s) and Club(s) involved.”118 That final authority is a part of the NFL commissioner’s broad authority under the Personal Conduct Policy.119

d. Personal Conduct Policy

The NFL league management and owners created the Conduct Policy in May 2000 as a response to increased criminal conduct by NFL players.120 This policy symbolized the NFL’s prevention-first attitude by

chosen from the remaining candidates based on his available dates. Id. at 25–26. Parties involved will have the right to present all evidence relevant to the grievance including witnesses. Id. The arbitrator will issue a written decision which may not alter the provisions of the CBA in any way or grant additional remedies not provided for in the CBA. Id. at 26; see also Impartial Arbitrator, NFL COLLECTIVE BARGAINING AGREEMENT 2006–2012, 152, http://nflplayers.com/images/fck/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf (last visited Aug. 16, 2010) (providing a complete description of the role of an independent arbitrator as utilized in the Collective Bargaining Agreement); Injury Grievance, NFL COLLECTIVE BARGAINING AGREEMENT, 28, http://nflplayers.com/images/fck/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf (last visited Aug. 16, 2010) (listing nearly identical procedures for an injury grievance).

115 Non-Injury Grievance, supra note 111, at 23. Grievances filed under this section give way to any CBA procedure that requires an impartial arbitrator, special master, or the court system to resolve the dispute. Id.
116 Commissioner Discipline, supra note 9, at 34. Appeals must be submitted to the commissioner in writing within twenty days of receiving the punishment. Id.
117 Id. at 34–35. The hearing takes place within ten days of the receipt of notice of appeal. Id. at 34. The commissioner confers with the Executive Director of the NFLPA regarding who will serve as the commissioner’s designee. Id.
118 Id. The commissioner may alter, but never increase, fines and suspensions for on-field unnecessary roughness or unsportsmanlike conduct penalties. Id.
119 See infra Part II.B.1.d (explaining how the creation of the Policy increased the commissioner’s disciplinary authority, which includes disciplining misconduct that falls short of criminal behavior).
focusing more on deterring future misconduct through preventative programs. Despite the creation of the Conduct Policy, players continued to engage in off-field misconduct when Goodell became commissioner in 2006. As a result, Goodell responded with longer suspensions and a stricter Personal Conduct Policy in both writing and application.

Id. Between January 1, 2000, and the implementation of the Conduct Policy in May 2000, there were nearly twenty incidents that resulted in arrests or citations more serious than speeding tickets. Id. These incidents included charges of murder, assault, various drugs and weapons charges, felony theft, sexual assault, domestic violence, and driving under the influence. Id.

121 Banks, supra note 120.
122 King, supra note 23; see also Judy Battista, Goodell Says He’ll Punish N.F.L.’s Problem Players, N.Y. TIMES, Mar. 27, 2007, http://www.nytimes.com/2007/03/27/sports/football/27nfl.html [hereinafter Battista, Problem Players] (discussing NFL players that would become “targets of Goodell’s tougher personal-conduct policy”); Timeline of Trouble for Pacman Jones, supra note 23 (discussing plans by Goodell to meet with several players regarding their run-ins with the law). Prior to the 2007 season, Adam “Pacman” Jones had been arrested and charged with various felonies and misdemeanors on numerous occasions. Id.; see also Schrotenboer, supra note 120 (listing the arrests of NFL players and the resulting punishments since 2000). In the time period between the creation of the Conduct Policy in May 2000, and the hiring of Commissioner Goodell in 2006, there were at least 218 incidents alleging NFL players of criminal conduct and resulting in either arrest or citation. Schrotenboer, supra note 120. Since January 1, 2000, there have been more than 475 incidents of alleged criminal conduct by NFL players. Id.; see also NFL Aims to Tackle Public Relations Problem of Player Arrests!, TOTAL CRIMINAL DEFENSE, http://www.totalcriminaldefense.com/news/celebrity-spotlight/miscellaneous/nfl-player-arrests.aspx (last visited Aug. 17, 2010) (explaining that 40% of the arrests since 2000 have come from about fifty players or 3% of the players in the league).

The new Policy reiterates that players, coaches, and other NFL employees are required to refrain from conduct detrimental to the NFL. The language now states that the League expects the players to act "in a way that is responsible, promotes the values upon which the league is based, and is lawful." The standard of conduct in the Personal Conduct Policy is higher than simply avoiding criminal activity because conduct does not need to reach the level of criminal liability to be in violation of the Policy.

The Personal Conduct Policy grants the commissioner broad disciplinary authority with little restriction. The player’s only appellate right under the CBA is for a hearing in front of the commissioner. The implementation of this broad authority has led critics to frame it as a violation of the NLRA, which regulates the and irresponsible conduct). Compare Schrotenboer, supra note 120 (stating that in 2006, Jared Allen received a two-game suspension following a second arrest in less than five months for driving under the influence, and reporting that Ray Lewis was fined $250,000 based on charges of murder, felony murder, and aggravated assault in the death of two men and his guilty plea for obstruction of justice), with NFL Aims to Tackle Public Relations Problem of Player Arrests, supra note 122 (explaining that Goodell suspended Adam Jones for an entire season without pay, which resulted in a loss of more than $1.2 million in salary, restricted Jones from going to any night clubs, and gave Jones a curfew following several arrests, including his final arrest for which he was sentenced to one year of probation).

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124 Personal Conduct Policy, supra note 2, at 1.
125 Id.
126 Id. at 1. A player can be disciplined for any improper conduct, even if it merely presents a risk of damaging the reputation of the NFL. Id. at 1–2. Misconduct includes conduct that imposes an inherent danger to others as well as conduct that impairs the integrity or reputation of the NFL and its teams. Id. at 2. This includes any threatening behavior towards players, coaches, or other league employees in or outside the workplace. Id. at 1; see also Young Kim & Parlow, supra note 105, at 577–78 (discussing the differences between the Conduct Policy and the previous policy). The new Policy is in "stark contrast to the NFL’s previous conduct policy, which required the NFL Commissioner to withhold punishment of an athlete unless there was a conviction or some form of plea by the athlete." Young, Kim & Parlow, supra note 105, at 578.

127 Personal Conduct Policy, supra note 2, at 2–3. The Conduct Policy contains no restrictions on the magnitude of punishment, stating only that upon completion of an investigation into alleged improper conduct, "the Commissioner will have full authority to impose discipline as warranted." Id. at 2.
128 Id. at 3. The Personal Conduct Policy states that players that appeal disciplinary decisions are “entitled to a prompt hearing pursuant to Article XI of the [CBA] and the NFL Constitution and Bylaws, to be conducted by the Commissioner or his designee.” Id.; see also Commissioner Discipline, supra note 9, at 34 (stating that all appeals will be made to the commissioner); Jim Wyatt, Commissioner Hears ‘Pacman’ Jones’ Appeal, USA TODAY, May 12, 2007, http://www.usatoday.com/sports/football/nfl/titans/2007-05-11-pacman-appeal_N.htm (explaining that Commissioner Goodell would preside over Adam Jones’ appellate hearing for discipline for off-field misconduct). Because any further appeal could only be to the commissioner under the Conduct Policy, Jones’s only other option would be a lawsuit through the court system. Wyatt, supra.
relationship between labor unions and workers and requires both impartiality and collective bargaining of all rules and policies that will have a practical effect on the working conditions of employees.\textsuperscript{129} Working conditions in the NFL include salary and player movement.\textsuperscript{130} Because the commissioner created the Conduct Policy, controls the magnitude of punishments, and sits as the final arbiter for players disciplined under the policy, the NFL may be violating the NLRA.\textsuperscript{131} The disciplinary structure and appeal rights under the Policy that provide this broad and improper authority to the commissioner are significantly different from the structures of other professional sports leagues.\textsuperscript{132}

\textsuperscript{129} 29 U.S.C. §§ 151–169 (2006). Under the NLRA, employees designate representatives that shall collectively bargain for “rates of pay, wages, hours of employment, or other conditions of employment.” Id. § 159(a); see also Nat’l Football League Players Ass’n v. NLRB, 503 F.2d 12, 17 (8th Cir. 1974) (stating that the commissioner violated the NLRA “by unilaterally promulgating and implementing a rule” that would institute an automatic fine for any player that left the bench during a fight or altercation on the field); Pollack, supra note 78, at 1709 (discussing the effect of the Conduct Policy on working conditions); infra Part III.B (explaining how the Policy can be characterized as affecting working conditions without collective bargaining).

\textsuperscript{130} See infra text accompanying note 217 (discussing rules that affect the salary of players and therefore affect working conditions).

\textsuperscript{131} See Adam B. Marks, Note, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union’s Members by Not Fighting the Enactment of the Personal Conduct Policy, 40 CONN. L. REV. 1581, 1593–98 (2008) (discussing concerns regarding an inherent lack of impartiality by the commissioner in the exercise of his disciplinary authority); infra Part III.B (discussing the implementation of the Policy as a working condition); see also Atlanta Nat’l League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213, 1226 (N.D. Ga. 1977) (recognizing that a commissioner’s authority to issue disciplinary action is framed by the terms of the collective bargaining agreement). If the commissioner exercises his or her punitive authority outside the scope of the agreement, the commissioner breaches that agreement. Atlanta Nat’l League Baseball Club, Inc., 432 F. Supp. at 1226; see also Nat’l Football League Mgmt. Council & Nat’l Football League Players Ass’n, 203 N.L.R.B. 958, 969 (1973) (explaining that a unilateral change in a working condition constitutes an unfair labor practice that violates the collective bargaining agreement); In re Arbitration Among Nat’l Football League Players Ass’n, Nat’l Football League Mgmt. Council, & Nat’l Football League (Oct. 25, 1986) (Kasher, Arb.), cited in Ethan Lock, The Legality Under the National Labor Relations Act of Attempts By National Football League Owners to Unilaterally Implement Drug Testing Programs, 39 U. FLA. L. REV. 1, 15 (1987) (imposing a new drug testing program would be a unilateral change in the conditions of employment, which were not collectively bargained). But see Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44 (1998) (recognizing that a labor union has a duty of fair representation under § 9(a) of the NLRA). While the NFLPA may not have been in breach by allowing the unilateral implementation of the Conduct Policy, it does have a duty of fair representation “to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” Id. (quoting Vaca v. Sipes, 386 U.S. 171, 177 (1967)).

\textsuperscript{132} See infra Part II.B.2-3 (discussing the disciplinary structures of the MLB and NBA).
2. Discipline in Major League Baseball

In 1921, Major League Baseball (“MLB”) became one of the first of the major professional sports leagues to create the office of the commissioner, doing so through the Major League Agreement (“MLA”).\(^{133}\) Kenesaw Landis became the first MLB commissioner in response to the gambling problems that were tarnishing the image of the game.\(^{134}\) Landis first exercised his power by banning from baseball each of the Chicago White Sox players who allegedly threw the 1919 World Series, although each player was acquitted of related charges in state court.\(^{135}\) Parties challenged this powerful authority vested in the MLB Commissioner’s office but the courts found it valid under the MLA.\(^{136}\) The Major League Constitution, formerly the MLA, and the Basic Agreement, MLB’s collective bargaining agreement, establish the MLB’s authority to punish misconduct.\(^{137}\) Under the Constitution, the MLB Commissioner may punish players and other employees for conduct that is not in the best interests of the League.\(^{138}\) The Basic Agreement creates


\(^{134}\) Ambrose, supra note 133, at 1080. “In the early days of baseball, open gambling was as common as a well-executed sacrifice bunt. Gamblers filled the stands and bet on everything, including individual at bats.” Wayne S. Quirk, Baseball’s Big Inning: The Sacrifice of the 1919 Black Sox, in SPORTS AND THE LAW, MAJOR LEGAL CASES 111, 113 (Charles E. Quirk ed., 1996); see also Pachman, supra note 78, at 1414 (discussing the Black Sox scandal); Pollack, supra note 78, at 1650–58 (discussing the era of MLB leadership under Landis).

\(^{135}\) See Judge Landis Bars “Clean” Sox from Baseball Forever, N.Y. WORLD, Aug. 3, 1921, at 3 (explaining Commissioner Landis’s decision to ban players that bet on the 1919 World Series); The Chicago Black Sox Banned From Baseball, ESPN CLASSIC (Nov. 19, 2003), http://espn.go.com/classic/s/black_sox_moments.html (detailing the timeline of the scandal beginning from the initial allegations to the banishment of the players by the commissioner).

\(^{136}\) Milwaukee Am. Ass’n v. Landis, 49 F.2d 298, 301 (N.D. Ill. 1931) (explaining that while the commissioner was given broad authority, it was valid under the language agreed upon in the Major League Agreement); see also Young Kim & Parlow, supra note 105, at 575–76 (discussing the development of the best interests authority in the MLB that coincided with Landis’s decision to banish the baseball players involved in the scandal).

\(^{137}\) Major League Constitution, supra note 89, at 2; MLB Basic Agreement, supra note 27.

\(^{138}\) Major League Constitution, supra note 89, at 2; see also Atlanta Nat’l League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213 (1977) (upholding Kuhn’s punishment of Ted Turner for detrimental actions); Pachman, supra note 78, at 1417–20 (discussing the creation of the MLA and the authority granted to its commissioner).
the disciplinary structure and a grievance procedure.\textsuperscript{139} Article XII of the
Basic Agreement states that a player may be disciplined for just cause by
his team, the vice president of on-field operations, or the
commissioner.\textsuperscript{140} The just cause requirement in the Basic Agreement
mandates that player discipline be reasonably commensurate with the
conduct.\textsuperscript{141}

Once a valid party disciplines a player, the player may utilize the
multi-step grievance procedure outlined in Article XI if he feels the
disciplinary decision was improper.\textsuperscript{142} The grievance could ultimately
go to independent arbitration if the initial steps of the procedure do not
result in settlement.\textsuperscript{143} Procedural protections include requirements for
notice of the investigation and discipline of a player as well as full
discovery of all documents and evidence found in the investigation.\textsuperscript{144}

\textsuperscript{139} MLB Basic Agreement, supra note 27, at 32–45.
\textsuperscript{140} Id. at 43.
\textsuperscript{141} See id. (explaining that when a grievance is filed, the issue to be resolved is whether
there was just cause for the punishment); infra Part IIID (discussing the use of various
standards of review including just cause); see also In re Arbitration Between Major League
Baseball Players Ass’n & Comm’r of Major League Baseball (1992) (Nicolau, Arb.), reprinted
in 1 UNDERSTANDING BUSINESS & LEGAL ASPECTS OF THE SPORTS INDUSTRY 541 (1992)
[hereinafter MLBPA v. Comm’r] (explaining that the standard of review for the
commissioner’s decision to ban Steve Howe from baseball was just cause); Pollack, supra note 78, at
1693–94 (discussing an arbitrator’s definition of just cause as a standard of
review for the punishment of baseball pitcher Steve Howe). There was no just cause for the
suspension of Steve Howe because the punishment was not “reasonably commensurate
with the offense” or “appropriate, given all the circumstances.” Pollack, supra note 78, at
1693–94. See generally Roger I. Abrams & Dennis R. Nolan, Toward a Theory of “Just Cause”
in Employee Discipline Cases, 1985 DUKE L.J. 594 (1985) (discussing the use of just cause as a
standard review for disciplinary decisions in other professional industries).
\textsuperscript{142} MLB Basic Agreement, supra note 27, at 43.
\textsuperscript{143} See id. at 38. The first step of the procedure involves the player discussing the matter
with a designated team representative. Id. at 36. If no settlement is reached, the player will
submit a written notice of grievance to that representative who will then render a decision.
Id. Secondly, a player may appeal the representative’s decision to a designated
representative of the Major League Labor Relations Department (“LRD”). Id. After
meeting to discuss the matter, the representative of the LRD will issue a decision. Id.
Appeal of that decision would go to arbitration. Id. at 37. The arbitration hearing will
involve one impartial arbitrator. Id. at 38. If the parties disagree on this point, there will be
a panel of three arbitrators: the impartial arbitrator plus an additional arbitrator chosen by
each side. Id. The full and final decision of the arbitrator or arbitration panel may affirm,
modify, or reverse the previous decision. Id. Arbitration hearings are conducted under the
Rules of Procedure listed in the Basic Agreement. Id.; see also id. at 226 (delineating the
Rules of Procedure used in Grievance Arbitration Hearings).
\textsuperscript{144} Id. at 44–45. A disciplined player and the MLBPA must receive written notice of the
discipline. Id. at 44. Reasonable advance notice of any investigatory interview is required.
Id. at 45. “A [p]laye who is disciplined shall have the right to discover, in timely fashion,
all documents and evidence adduced during any investigation of the charges involved.”
Id. at 44.
The MLB Basic Agreement ("MLB CBA") employs one impartial arbitrator or a panel of three arbitrators, two of whom are chosen by the respective parties. If parties disagree on the arbitrator, the American Arbitration Association provides a list from which parties can choose an arbitrator.

A player may not file a grievance, however, if it concerns an action taken by the commissioner involving "the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball." Furthermore, at any point during the process, the commissioner may determine that the conduct in question involves the integrity of the game and remove it from the grievance process. If either situation arises, the commissioner will issue a decision that constitutes "full, final and complete disposition of [the] complaint." Consequently, a MLB player is not always assured an appeal; rather, it depends upon the section of the Basic Agreement under which the punishment is levied.

The 2005 suspension of Kenny Rogers by MLB Commissioner Bud Selig demonstrates the importance of the distinction between an appealable and a non-appealable disciplinary decision. Selig suspended Rogers for twenty games and fined him $50,000 following an altercation with a television cameraman. Although Selig could have punished Rogers for detrimental conduct under Article XI(A)(1)(b) so that Rogers would have had no right to appeal, he issued the suspension...
and fine under Article XII of the Basic Agreement instead.\textsuperscript{153} As a result, Rogers retained the right to appeal Selig’s decision, which he did by filing a grievance that went to arbitration.\textsuperscript{154} The arbitrator determined that Selig’s punishment was excessive and reduced the suspension to thirteen games.\textsuperscript{155} Thus, an arbitrator may limit the MLB Commissioner’s disciplinary authority, similar to the practice in the NBA.\textsuperscript{156}

3. Disciplinary Procedures in the National Basketball Association

The NBA Uniform Player Contract (“NBA UPC”) details the level of conduct that players must uphold.\textsuperscript{157} Section 5 requires a player to refrain from doing “anything that is materially detrimental or materially prejudicial to the best interests of the Team or the League.”\textsuperscript{158} Finally, the NBA UPC requires players to adhere to Article 35 of the NBA Constitution, which provides a more detailed listing of conduct expected of an NBA player.\textsuperscript{159} If a player makes or endorses any statement or acts in a way that is detrimental to the best interests of the NBA, he may be

\textsuperscript{153} Marks, supra note 131, at 1619; see also MLB Basic Agreement, supra note 27, at 32 (stating that an action which was taken “by the [c]ommissioner involving the preservation of the integrity of . . . the game of baseball” cannot give rise to the use of the grievance procedure in Article XI).

\textsuperscript{154} MLB Basic Agreement, supra note 27, at 43. Article XII of the MLB CBA allows the commissioner to discipline a player for just cause and provides the Grievance Procedure through which players can seek review of the reasonableness of such discipline. \textit{id}. at 43–45; Rogers Loses Appeal in Altercation with Cameraman, ESPN (July 28, 2005), http://sports.espn.go.com/mlb/news/story?id=2117962; see also Marks, supra note 131, at 1620 (discussing the suspension of Rogers under a section that allowed for independent review).


\textsuperscript{156} See infra Part II.B.3 (discussing arbitrators’ decisions in cases involving NBA commissioner discipline).


\textsuperscript{158} \textit{id}. at A-2. Conduct must be at the level of “the highest standards of honesty, citizenship, and sportsmanship.” \textit{id}. The Commissioner’s disciplinary decision under this section is “final, binding, conclusive, and unappealable.” \textit{id}. at A-3.

\textsuperscript{159} \textit{id}; see also Misconduct, supra note 89 (explaining that misconduct involves actions in violation of the best interests of the game, actions that are illegal, gambling on any game, and tampering with a player or coach already under contract). Conduct must “conform to standards of morality or fair play.” \textit{id}. at art. 35(e).
subject to a commissioner-imposed fine or suspension. Furthermore, conduct that “does not conform to standards of morality or fair play, that does not comply at all times with all federal, state, and local laws” can result in a suspension.

All disciplinary decisions of the commissioner are subject to review by the Board of Governors and are then appealable under the grievance and arbitration procedure of the NBA Collective Bargaining Agreement (“NBA CBA”). A formal grievance must state the issues and must be filed within a certain time limit. Both parties agree on a grievance arbitrator and retain the ability to discharge that arbitrator.

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160 Misconduct, supra note 89, at A-14.
161 Id.; see also Mike Wise, Image-Conscious N.B.A. Suspending Iverson and Rider, N.Y. TIMES, Oct. 4, 1997, http://www.nytimes.com/1997/10/04/sports/pro-basketball-image-conscious-nba-suspends-iverson-and-rider.html (discussing NBA Commissioner David Stern’s decision to suspend Allen Iverson and Isaiah Rider following separate criminal charges). Stern suspended Iverson for one game after he pled no-contest to charges stemming from weapons and drug possession charges. Wise, supra. Stern suspended Rider for two games following a no-contest plea to illegal possession of cell phones and a conviction for possession of marijuana. Id. Stern cited Article 35 of the NBA Constitution in imposing the suspensions. Id. In discussing the importance of players’ character and a positive league image, Stern stated that “criminal conduct is not part of acceptable life in the N.B.A.” Id.
162 Misconduct, supra note 89, at A-15; Grievance and Arbitration Procedure and Special Procedures with Respect to Disputes Involving Player Discipline, NAT’L BASKETBALL PLAYERS ASS’N, 326–42, http://www.nbpa.org/sites/default/files/ARTICLE%20XXXI.pdf [hereinafter Grievance/Arbitration Procedure]. A player must discuss his complaint with the adverse party before filing a formal grievance. Grievance/Arbitration Procedure, supra, at 327; see also Nat’l Basketball Ass’n v. Nat’l Basketball Players Ass’n, No. 04 Civ. 9528(GBD), 2005 WL 22869 (S.D.N.Y. Jan. 3, 2005) (discussing the case in which a grievance arbitrator reduced Jermaine O’Neal’s twenty-five game suspension for an altercation with fans during an NBA game to fifteen games because it was without just cause). Nat’l Basketball Ass’n, 2005 WL 22869, at *1. A federal district court held that the suspension was arbitrable and upheld the arbitrator’s reduction of the suspension. Id. at *10; see also In re Nat’l Basketball Players Ass’n ex rel Player Latrell Sprewell & Warriors Basketball Club & Nat’l Basketball Ass’n, 591 PLI/Pat (Pub. L. Inst.) 469 (2000) (Feerick, Arb.) [hereinafter In re Sprewell] (discussing how Latrell Sprewell, who was suspended from the NBA for one year in 1997 after he attacked and choked his head coach during practice, successfully appealed his suspension to a grievance arbitrator). The arbitrator reduced the suspension because he found that the commissioner’s decision was not in the interest of “justice and fairness.” In re Sprewell 591 PLI/Pat at 573.
164 Id. at 333. In the event disagreement persists, outside help is obtained from the Conflict Prevention & Resolution Institute. Id. Recognizing the importance of impartiality, none of the possible arbitrators have any recent business affiliation or relationship with professional athletes or leagues. Id.
of non-privileged documents is available to each party.\textsuperscript{165} The grievance arbitrator will hear the dispute and issue an award.\textsuperscript{166}

Despite successful player appeals, the NBA CBA, like the MLB governing documents, maintains a provision that removes the review of the disciplinary decisions from an arbitrator and gives final disposition to the commissioner or his designee.\textsuperscript{167} If the commissioner’s decision concerns the integrity of the game and results in a financial impact of $50,000 or less, any appeal must be made to the commissioner.\textsuperscript{168} However, if the financial impact of the discipline is greater than $50,000, the player may bring an appeal before the grievance arbitrator who will apply an “arbitrary and capricious” standard of review to the commissioner’s decision.\textsuperscript{169}

The NBA’s policy, as well as the MLB’s, reflects a pro-arbitration stance lacking in the NFL: both leagues’ commissioners maintain broad disciplinary authority, including best interests authority, which an independent voice can review.\textsuperscript{170} Incorporation of independent arbitration by the NBA and the MLB in its grievance procedures is representative of the development of and support for arbitration found

\textsuperscript{165} Id. at 330–31.
\textsuperscript{166} Id. at 331–32. The arbitrator is chosen by both sides for the duration of the collective bargaining agreement. Id. at 333. In the event that both parties cannot agree on an arbitrator, the International Institute for Conflict Prevention and Resolution (“the CPR Institute”) will provide a list of eleven attorneys from which the parties will choose an arbitrator. Id. at 333–34. Questions of substantive arbitrability will be determined in a judicial proceeding in federal court in the Southern District of New York. Id. at 332; see also Berger, Arbitrability, supra note 33, at 787 (discussing the distinction between substantive arbitrability and procedural arbitrability).
\textsuperscript{167} Grievance/Arbitration Procedure, supra note 162, at 335; see also cases cited supra note 162 (discussing cases in which NBA players successfully appealed a commissioner’s disciplinary decision).
\textsuperscript{168} Grievance/Arbitration Procedure, supra note 162, at 335.
\textsuperscript{169} Id. at 336; see also In re Sprewell, supra note 162 (discussing Latrell Sprewell’s appeal of his suspension for attacking his coach). A ruling is not arbitrary and capricious if there was “a rational connection between the facts found and the choice made.” Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024, 1032 (9th Cir. 2008).
\textsuperscript{170} Compare Grievance/Arbitration Procedure, supra note 162, at 336 (allowing an NBA player to appeal a commissioner’s suspension or fine for conduct detrimental to the NBA to an independent arbitrator if the punishment is of sufficient magnitude), and MLB Basic Agreement, supra note 27, at 43 (stating that an MLB player can use the grievance procedure to determine if the commissioner had just cause for a disciplinary decision), and supra text accompanying note 153–54 (explaining that MLB Commissioner Selig suspended Kenny Rogers so that he maintained a right to an appellate hearing with an independent arbitrator), with Personal Conduct Policy, supra note 2, at 3 (stating that a NFL player’s only appellate right is for a hearing conducted by the commissioner or his designee). The NFL Personal Conduct Policy refers to the procedure in Article XI of the NFL CBA, which directs all appeals to the commissioner or his designee. Commissioner Discipline, supra note 9, at 34.
in courts and from legislators. The unilateral implementation of the NFL Personal Conduct Policy, absent procedural safeguards and an independent process, has resulted in the possible violation of arbitration principles as well as players with nominal appeal rights and a commissioner with excessive authority.

III. ANALYSIS

The disciplinary structure of the NFL, defined most recently by the Personal Conduct Policy, precludes an outside body from reviewing the commissioner’s punishment of players for off-field misconduct. Although the NFL Commissioner’s authority to decide what is detrimental to the best interests of the League is similar to the power of commissioners in other leagues, the procedural safeguards are less defined. Instead of independent arbitration, decisions under the Policy are reviewed only by what may be a biased voice.

Courts and legislatures have created a policy to support arbitration clauses. Additionally, courts have utilized the arbitration process to promote efficiency, impartiality, and the rights of all parties. The protections inherent in the arbitration process are absent from the method of discipline for off-field misconduct utilized by the NFL, whose policy contains features that may be impermissible under the FAA or the NLRA.

Part III.A of this Note evaluates the NFL commissioner’s role as the arbiter of disputes under arbitration law with a specific look at the question of impartiality. Part III.B examines the implementation of the

171 See supra Part II.A.1 (discussing the increase in popularity of the use of arbitration in labor disputes).
172 See Personal Conduct Policy, supra note 2, at 2 (explaining the NFL Commissioner’s authority to discipline and preside over appellate hearings); supra Part II.B.1.c (discussing the grievance procedures available to NFL players).
173 See infra Part III.E (detailing the similarities and differences among league operating agreements).
174 See infra Part III.A (discussing the role of the commissioner in hearing disputes under the rules of the FAA).
175 See supra Part II.A (discussing the development of arbitration in the courts and legislatures).
176 See Applied Indus. Materials Corp. v. ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137 (2d Cir. 2007) (holding that partiality prevents a person from acting as an arbitrator when a material relationship with an arguing party is established); supra Part II.A.2 (discussing the arbitration principles gleaned from court holdings).
177 See infra Part III.A–B (discussing the NFL Commissioner as arbiter of his rulings and outlining the implementation of the Conduct Policy).
178 See infra Part III.A (analyzing the NFL commissioner as a final arbiter under arbitration laws).
Personal Conduct Policy as a unilaterally employed working condition. Next, Part III.C analyzes the scope of authority vested in a commissioner to discipline for detrimental conduct not in the “best interests” of the league. Part III.D explores the various standards of review that leagues have used in analyzing disciplinary decisions. Finally, Part III.E compares the procedural safeguards in the NFL, NBA, and MLB’s operating agreements.

A. Analyzing the Commissioner’s Role as Final Arbiter Under Current Arbitration Laws

One of the greatest concerns about the current disciplinary structure in the NFL is whether the commissioner is able to maintain the desired impartiality as the final authority in the appeals process. The NFL CBA gives the commissioner the power not only to discipline the players but also to give the “full, final and complete disposition” of any appeal. In addition, he maintains a close working relationship with both the owners and the NFL Management Council. Management even chooses and provides compensation for the commissioner. Thus, there is a clear material relationship between the final arbiter, in this case the NFL commissioner, and a party that results in evident partiality in the resolution of a player’s grievance. The player suffers because the

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179 See infra Part III.B (discussing the possibly improper implementation of the Personal Conduct Policy).
180 See infra Part III.C (examining the “best interests” authority vested in the commissioner).
181 See infra Part III.D (discussing standards of review used in professional sports leagues).
182 See infra Part III.E (discussing the procedural safeguards in professional sports leagues’ governing documents).
183 See Nat’l Football League Players Ass’n v. NLRB, 503 F.2d 12, 16 n.3 (8th Cir. 1974) (explaining that the NFL governing documents put the commissioner in the role of arbitrator that requires impartiality). The court reasoned that “when he acts in the capacity of an arbiter, he must act in an impartial manner within the authority given to him by the [CBA], and that he must decide matters presented to him on the basis of the evidence submitted by the parties.” Id.
184 Commissioner Discipline, supra note 9, at 34. The final appeal may also be heard by a commissioner designee. Id.; see also supra Part II.B.1 (explaining the commissioner’s decisions under the NFL governing documents).
185 See supra Part II.B.1.d (discussing the interaction between the commissioner, the owners, and the NFL Management Council in the implementation of the conduct policy); see also supra note 109 (explaining the relationship between the NFLMC and NFL owners).
186 NFL Constitution, supra note 89, at 28.
NFL commissioner, also influenced by management, plays the role of both prosecutor and judge.187

The FAA clearly states that a court may overturn an arbitration award when there is evidence that an arbitrator has been biased in his judgment.188 Impartiality is difficult to maintain because a commissioner responsible for an entire league will do what is in the best interest of the league and disregard the interests of the individual players.189 This could result in the commissioner’s tendency to be biased and adversarial to those players he disciplines.190 The fact that the commissioner, who creates, enforces, and interprets the rules, is not a disinterested party violates the standards of the arbitration process.191

The NFL Player Contract mentions the American Arbitration Association ("AAA"), which requires impartiality by all arbitrators.192 The AAA labor arbitration rules explain that an arbitrator is not neutral if that person "has any financial or personal interest in the result of the arbitration."193 If this language were applied to the NFL, there could be

187 See supra Part II.B.1.c (explaining that when the commissioner disciplines a player and the player appeals the commissioner’s decision, the commissioner presides as the arbitrator).
188 9 U.S.C. § 10(a)(2) (2006). A court may vacate an arbitration award “where there was evident partiality or corruption in the arbitrators, or either of them.” Id.
189 See Shaun Payne, Hugh Fullerton and the Press’s Revealing Coverage of the Black Sox Scandal, 1919–1921, HISTORIC BASEBALL, http://www.historicbaseball.com/scplayers/jacksonmedia.html (explaining the decision by Commissioner Kenesaw Landis to ban the players that allegedly bet on the 1919 World Series). Landis, the first commissioner of Major League Baseball, explained his decision to banish all of the Chicago Black Sox players who were found not guilty of throwing the 1919 World Series, by stating the following: “Just keep in mind that regardless of the verdict of juries, baseball is entirely competent to protect itself against the crooks, both inside and outside the game.” Id.
190 See also Commonwealth Coating Corp. v. Cont’l Cas. Co., 393 U.S. 145, 148–49 (1968) (explaining that when the relationship between the arbitrator and a party includes a history of minimal business transactions, there is significant evidence of partiality); Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137 (2d Cir. 2007) (holding that a material relationship shows evident partiality precluding a person from arbitrating a dispute). But see Nat’l Football League Players Ass’n v. Nat’l Football League, 654 F. Supp.2d 960, 963–64 (D. Minn. 2009) aff’d by Williams v. Nat’l Football League, 582 F.3d 863 (8th Cir. 2009) (explaining that foreseeable partiality that was collectively bargained for does not violate the requirement of impartiality).
191 See Applied Indus. Materials Corp., 492 F.3d at 137 (defining a material relationship that constitutes evident partiality); supra Part II.B.1.b (discussing the NFL commissioner’s various roles in the disciplinary structure).
192 Labor Arbitration Rules, supra note 79, §§ 5, 11. “The AAA shall establish and maintain a Panel of Neutral Labor Arbitrators and shall appoint arbitrators there from as hereinafter provided.” Id. § 5.
193 Id. § 17.
grounds for removal of the commissioner as arbiter. The commissioner is essentially a representative of the league management that hired him and pays his compensation, thus creating a financial conflict. Furthermore, a personal conflict could exist because the commissioner must review the validity of his own decision. Despite the conflict, the NFLPA cannot find relief in the AAA labor arbitration rules because the NFL CBA’s injury grievance procedure supersedes the arbitration rules in the Player Contract.

When a group of NFL players had their suspensions for violations of the drug policy upheld, they filed a claim against the NFL and its chief legal officer (“CLO”), who presided as the final arbiter of the dispute, arguing that the CLO had extended legal advice to parties involved. In NFLPA v. NFL, the court examined the claim of bias and found that there had been no bias beyond the foreseeable partiality. The NFLPA had “agreed to a certain amount of partiality in the arbitrator” when it negotiated the CBA that made the commissioner or one of his officers the final arbiter. Thus, the commissioner is recognized as partial in his role as an arbiter under the CBA. The Personal Conduct Policy that refers to the procedures of the CBA, however, was not negotiated by the NFLPA, making the resulting partiality improper.

194 See NFL Constitution, supra note 89, at 28 (explaining that the commissioner, who serves as an arbitrator, is elected by and is compensated by members of league management).
195 See supra text accompanying note 186 (explaining that the commissioner is hired and paid by the NFL). But see Labor Arbitration Rules, supra note 79, §§ 13–14 (discussing the process by which both parties to an arbitration agreement take part in choosing the arbitrators).
196 See Commissioner Discipline, supra note 9, at 34 (making the commissioner the final authority for disputes).
197 See NFL Player Contract, supra note 94, at 254 (recognizing that the NFL CBA supersedes AAA procedures).
198 Nat’l Football League Players Ass’n v. Nat’l Football League, 654 F. Supp. 2d 960, 963–64 (D. Minn. 2009) aff’d by Williams v. Nat’l Football League, 582 F.3d 863 (8th Cir. 2009). In Williams, Kevin Williams, Pat Williams, Charles Grant, Deuce McAllister, and Will Smith tested positive for a banned substance in violation of the NFL’s Policy on Anabolic Steroids and Related Substances. Id. at 963. The players appealed their resulting suspensions to the Commissioner who designated Chief Legal Officer, Jeffrey Pash, as the Hearing Officer. Id. Pash upheld the suspensions and the players appealed to the courts. Id. at 964–65.
199 Id. at 969.
200 Id. at 968.
201 See id. (discussing the inherent partiality of the commissioner under the NFL CBA).
202 Compare Commissioner Discipline, supra note 9, at 34 (discussing a negotiated aspect of the NFL CBA that makes the commissioner an arbitrator of disputes), with supra text accompanying note 26 (stating that the Personal Conduct Policy, which requires the use of Article XI of the NFL CBA, was not collectively bargained).
Although the commissioner’s role as final arbiter may exceed the scope of the FAA, AAA, and current court rulings, the federal policy against partiality is still apparent. It is clear that impartiality is essential to arbitration, the process that preserves the appeal rights of League players. There may have been acceptance of the partiality by the NFLPA, but the NFLPA did not accept the terms of the Personal Conduct Policy, which utilizes the CBA’s appeals process, through negotiation with the NFL.

B. Personal Conduct Policy as a Working Condition

The Personal Conduct Policy was established without negotiation between the NFL and the NFLPA. The commissioner’s method of promulgating this policy raises the question of whether the Conduct Policy affects the players’ employment conditions.

Under the NLRA, a commissioner or the owners may not make unilateral changes that would affect the working conditions negotiated under the CBA. Furthermore, a commissioner cannot enforce a rule or disciplinary sanction that contravenes the terms of the CBA. The NFL supported these principles when former commissioner Pete Rozelle attempted to...
implement a new rule regarding in-game fights that was alleged to be a unilateral change to players’ working conditions.210 Rozelle put into action a rule that would fine players $200 for leaving the bench area during a fight.211 The NFLPA filed a complaint with the National Labor Relations Board, alleging that the League had violated the NLRA by unilaterally adopting the rule, a process that constituted a refusal to bargain.212 The Eighth Circuit ultimately held that the owners, not the commissioner, had unilaterally promulgated the rule, violating the principles of the NLRA.213 However, if the commissioner played the principal role in implementing the rule, it would be improper and unethical for him not to include both the owners and the NFLPA in the discussion.214 Although Rozelle had the authority to fine players for conduct detrimental to the league, he did not have the authority to create


211 NFLMC v. NFLPA, 203 N.L.R.B. at 959. The Board held that Commissioner Rozelle had promulgated the rule, and that the owners did not commit any unfair labor practices because they merely approved Rozelle’s implementation of the rule. NFLMC v. NFLPA, 203 N.L.R.B. at 959. It further held that the NFLPA had conceded that “the Commissioner has, and always has had, the authority to impose fines for conduct detrimental to football with or without the approval of the owners.” Id. The Board viewed Rozelle, who realized the need for the rule, as the catalyst for its creation. Id. Rozelle felt that the rule may affect the competitive aspects of the game and so he referred it to the owners and competition committee. Id.; see also 29 U.S.C. § 158(a)(5) (stating that it is an unfair labor practice for an employer as a party to a labor agreement “to refuse to bargain collectively with the representatives of his employees”). Interfering with or prohibiting an employee subject to a CBA from engaging in collective bargaining or other negotiating activities is also an unfair labor practice. § 158(a)(1); see also supra Part II.B.1.a (describing the authority given to the commissioner to fine players for detrimental conduct).

212 Id. at 14; NFLMC v. NFLPA, 203 N.L.R.B. at 958. The Board held that Commissioner Rozelle had promulgated the rule, and that the owners did not commit any unfair labor practices because they merely approved Rozelle’s implementation of the rule. NFLMC v. NFLPA, 203 N.L.R.B. at 959. It further held that the NFLPA had conceded that “the Commissioner has, and always has had, the authority to impose fines for conduct detrimental to football with or without the approval of the owners.” Id. The Board viewed Rozelle, who realized the need for the rule, as the catalyst for its creation. Id. Rozelle felt that the rule may affect the competitive aspects of the game and so he referred it to the owners and competition committee. Id.; see also 29 U.S.C. § 158(a)(5) (stating that it is an unfair labor practice for an employer as a party to a labor agreement “to refuse to bargain collectively with the representatives of his employees”). Interfering with or prohibiting an employee subject to a CBA from engaging in collective bargaining or other negotiating activities is also an unfair labor practice. § 158(a)(1); see also supra Part II.B.1.a (describing the authority given to the commissioner to fine players for detrimental conduct).

213 See id. at 17 (explaining that as an agent of both the owners and the NFLPA, the commissioner creates a “serious breach of ethics” if he does not consult with both parties in the promulgation of a rule).
the rule.\textsuperscript{215} No matter the commissioner’s role in the promulgation of a rule, the governing documents of the NFL do not give the commissioner the authority to make or change rules that affect the working conditions of the players.\textsuperscript{216}

Based on these holdings, the promulgation of the Personal Conduct Policy could be seen as a violation of the NLRA if it is found to affect working conditions.\textsuperscript{217} The Conduct Policy reduces player salaries through fines and suspensions and restricts player movement, which practically affects the working conditions of players.\textsuperscript{218} In fact, the implementation of the Policy has resulted in greater fines and longer suspensions.\textsuperscript{219} The practical effect of any employment rules on working conditions makes them an issue subject to mandatory bargaining.\textsuperscript{220} Thus, the Conduct Policy’s practical effect on player working conditions suggests that the Policy must be negotiated.

The unilateral implementation of the bench-fine rule is similar to the implementation of the Conduct Policy. Yet, when then-Commissioner Tagliabue instituted the first conduct policy, he worked with the NFL Management Council to implement the guidelines.\textsuperscript{221} Commissioner Goodell consulted with owners and the rest of the League even less than Commissioner Tagliabue had before announcing the new Conduct

\textsuperscript{215} \textit{Id.} at 15–16. There was no factual basis for the Board’s assumption that the commissioner created the rule because he had the authority to do so. \textit{Id.} at 17.

\textsuperscript{216} \textit{See id.} at 16 n.3 (“It seems clear . . . that whether the Commissioner is an agent of the Employers, the joint agent of the Union and the Employers, or an independent third party, he has no authority to make changes in practices which affect employment conditions of the players.”).

\textsuperscript{217} \textit{See 29 U.S.C. § 158(d)} (identifying “wages, hours, and other terms and conditions of employment” as working conditions that may not be altered by the commissioner, but must be collectively bargained); \textit{Mackey v. Nat’l Football League}, 543 F.2d 606, 615 (8th Cir. 1976) (discussing what courts have defined as mandatory subjects of bargaining).

\textsuperscript{218} \textit{See Mackey}, 543 F.2d at 615 (holding that the Rozelle Rule was a mandatory subject of bargaining under the NLRA); \textit{Nat’l Football League Mgmt. Council & Nat’l Football League Players Ass’n}, 203 N.L.R.B. 958, 961–62 (1973) (explaining that fines reduce a player’s salary, a working condition, and are therefore a mandatory subject of bargaining); \textit{see also supra note 23} (discussing when Commissioner Goodell has used his authority under the Conduct Policy to suspend and fine players); \textit{supra note 52} (discussing the absence of arms-length bargaining in the creation of the Rozelle Rule).

\textsuperscript{219} \textit{See Goodell Strengthens NFL Personal Conduct Policy, supra note 26} (discussing the punishments of Adam Jones and Chris Henry as well as “longer suspensions and larger fines for individuals who violate the policy”).

\textsuperscript{220} \textit{See Mackey}, 543 F.2d at 615 (“Whether an agreement concerns a mandatory subject depends not on its form but on its practical effect.”).

\textsuperscript{221} \textit{See Banks, supra note 120} (explaining that after two months of internal discussions among members of the NFL Management Council, the NFL presented the new Conduct Policy at the League meetings).
Policy. Although it is unclear whether the owners or Goodell was the catalyst behind the Policy, it is certain that Goodell unambiguously desired its implementation. If that desire led to a determining role in the promulgation of a rule affecting the working conditions of players, then Goodell was assuming a duty that was not his, but was that of a labor negotiator.

If a claim is filed against Commissioner Goodell for unilaterally promulgating a rule that alters the working conditions of the players, a court may find sufficient grounds for a NLRA violation. On the other hand, Goodell has consistently stated that any disciplinary action taken under the Conduct Policy has resulted from conduct detrimental to the NFL. Because the governing documents of the League definitively vest in Goodell, as the NFL Commissioner, authority to discipline those who harm the best interests of the league, the Policy could be a vehicle through which Goodell is legitimately exercising that best interests authority. Nevertheless, the implementation of the Policy was absent

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222 See Goodell Strengthens NFL Personal Conduct Policy, supra note 26 (explaining that while there were no official collective bargaining negotiations, Commissioner Goodell did meet with NFLPA executive director Gene Upshaw prior to announcing the new Conduct Policy).

223 See Battista, Problem Players, supra note 122 (discussing Commissioner Goodell’s plans for the new Conduct Policy as well as his intentions to meet with the owners prior to unveiling the policy).

224 See Preamble, supra note 109, at 3 (discussing the formation of the NFL CBA through negotiations between the NFL Management Council and the NFLPA). The Management Council is “the sole and exclusive bargaining representative of present and future employer member Clubs of the National Football League.” Id.; see also Pollack, supra note 78, at 1711 (discussing the importance of the limited role of a commissioner in labor negotiations, and, in particular, the preclusion of the NFL commissioner from labor negotiations).

225 See generally Marks, supra note 131, at 1593–1601 (discussing whether the Conduct Policy was unilaterally implemented and if the NFLPA would have any judicial recourse).

226 See Battista, Bans for Misconduct, supra note 123 (detailing Goodell’s reasoning behind the suspensions of Adam Jones and Chris Henry); Battista, Problem Players, supra note 122 (discussing the suspension of Adam Jones and Goodell’s response that the misconduct taints the reputation of the NFL); Goodell Strengthens NFL Personal Conduct Policy, supra note 26 (explaining that Goodell viewed the Conduct Policy as the next step in ensuring that players continue to uphold the higher standard of responsible conduct to which all members of the NFL are held). In a letter written to the suspended players, Goodell wrote the following: “Your conduct has brought embarrassment and ridicule upon yourself, your club and the N.F.L., and has damaged the reputation of players throughout the league . . . You have engaged in conduct detrimental to the N.F.L. and failed to live up to the standards expected of N.F.L. players.” Battista, Bans for Misconduct, supra note 123.

227 See Marks, supra note 131, at 1596 (stating that a valid reason for the Conduct Policy is “to better the reputation and public opinion of the NFL and its players”); supra Part II.B.1.d (discussing behavior that is detrimental to the NFL and can result in discipline under the authority given to the Commissioner by the Policy).
any bona fide bargaining or quid pro quo for the NFLPA. The “best interests” authority of Goodell may preclude any such benefit, leaving the players without practical appeal rights.

C. “Best Interests” Authority in Professional Sports

The authority granted to the NFL commissioner to discipline for conduct that is detrimental to, or not in the best interests of the League and the sport itself is common among all governing documents in the NFL. Commissioner Goodell, like past NFL commissioners, has used this authority to justify his disciplinary decisions. Still, it is not clear what type of conduct is contrary to “best interests.” Other sports have defined “best interests” broadly and subjectively, giving great discretion to the commissioner.

228 See Mackey v. Nat’l Football League, 543 F.2d 606, 615–16 (8th Cir. 1976) (discussing the absence of bona-fide bargaining and any benefit for the NFLPA in the promulgation of the Rozelle Rule); supra note 26 and accompanying text (discussing the lack of negotiation that preceded the implementation of the Conduct Policy).

229 NFL Player Contract, supra note 94, at 253. The Player Contract reminds a player that the success of the NFL depends on public respect for the league and that any conduct that damages the integrity or public confidence in the game will be sanctioned upon the reasonable judgment of the NFL Commissioner. Id.; NFL Constitution, supra note 89, at 29. The Constitution gives the commissioner the following best interests authority:

The Commissioner is authorized . . . to hire legal counsel and 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 party or organization not a member of, employed by, or connected with the League or any member thereof is guilty of any conduct detrimental either to the League, its member clubs or employees, or to professional football.

NFL Constitution, supra note 89, at 29; see also supra Part II.B.1.c (discussing the authority to discipline for detrimental conduct under the NFL CBA).

230 See Nat’l Football League Mgmt. Council & Nat’l Football League Players Ass’n, 203 N.L.R.B. 958, 959 (1973) (discussing the concession that Commissioner Rozelle had the authority to fine players for conduct detrimental to football in the context of the promulgation of the Rozelle Rule); supra note 23 (discussing Goodell’s use of the Conduct Policy to discipline players for conduct that is damaging to the reputation of the NFL).

231 See Pachman, supra note 78, at 1411 (discussing the conduct that falls in the “gray area” between definite detrimental conduct and conduct that does not offend the league’s best interests). Conduct in the gray area provokes the question of whether players should subject themselves to the complete disciplinary authority of the commissioner and give up personal rights in exchange for the privilege to play in the league. Id.

232 See Finley v. Kuhn, 569 F.2d 527, 534 (7th Cir. 1978) (holding that the commissioner was given the unambiguous authority to determine if any action is in the best interests of the game); Atlanta Nat’l League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213, 1222–26 (N.D. Ga. 1977) (explaining that it was within his authority under the Major League Agreement for the MLB Commissioner to suspend the chief executive of the Atlanta Braves, Ted Turner); Milwaukee Am. Ass’n v. Landis, 49 F.2d 298, 299 (N.D. Ill. 1931) (holding that the agreement within the League created a commissioner’s office with the
The office of the MLB Commissioner was created in a way that gave the holder of the position “all the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial pater familias.” Attempts to curtail this authority have not succeeded because courts recognized that the chartering language of the League clearly showed that the parties intended the commissioner to wield expansive authority to protect the best interests of the League. The language in the operating agreement of the NFL regarding “best interests” authority is similar to that of the MLB agreements. Both leagues allow for the commissioner to supersede grievance procedures when a grievance is filed in response to discipline for detrimental conduct. In practice, however, the MLB Commissioner has refrained from using that authority at times, allowing the players an independent appeal. Furthermore, the NBA and the MLB do not have separate player conduct policies similar to the NFL’s, which more closely define characteristics of “a benevolent but absolute despot”). But see Prof’l Sports, Ltd. v. Va. Squires Basketball Club, Ltd. P’ship, 373 F. Supp. 946, 950 (W.D. Tex. 1974) (holding that the commissioner was given authority to arbitrate disputes between clubs, but that there was not the same authority to arbitrate commissioner-created disputes). For example, see Holtzman, supra note 147, at 186, which discusses former MLB Commissioner Bowie Kuhn’s assertion that the governing documents of the League did not establish an objective standard in measuring “best interests” authority.

233 Landis, 49 F.2d at 299; Major League Agreement, supra note 133, at art. I, § 2(a). The Major League Agreement provides for the punishment of conduct that violates the “best interests” of the League. Major League Agreement, supra note 133, at art. I, § 2(a).

234 See Pachman, supra note 78, at 1420–29 (discussing the judicial review of commissioner actions under the “best interests” authority). The conflict between Pete Rose and MLB Commissioner A. Bartlett Giamatti represents a recent example of the exercise of the “best interests” clause. Id. Although it was resolved in a settlement prior to adjudication, Giamatti’s actions in investigating gambling allegations against Rose reinforced the wide-ranging use of the commissioner’s disciplinary authority for the best interests of the game. Id.

235 Compare Major League Agreement, supra note 133, at art. I, § 2(a) (explaining that the commissioner has the authority to discipline any player, coach, or other league official for conduct “detrimental to the best interests of the national game of base ball”), with Commissioner Discipline, supra note 9, at 34 (authorizing the commissioner to discipline for “conduct detrimental to the integrity of, or public confidence in, the game of professional football”).

236 MLB Basic Agreement, supra note 27, at 32–33 (giving the commissioner the authority to hear all appeals of discipline resulting from conduct detrimental to the integrity of and public confidence in the game); supra Part II.B.1.c (explaining that although the NFL CBA does contain a section on a non-injury grievance procedure, it is superseded by the commissioner’s disciplinary authority under article XII).

237 See supra Part II.B.2 (explaining that Commissioner Bud Selig disciplined Kenny Rogers in a way that allowed Rogers to appeal to an independent arbitrator under the league grievance procedure); see also MLB Basic Agreement, supra note 27, at 128 (discussing Commissioner Selig’s reluctance to utilize his authority to prevent the use of the grievance procedure when conduct was deemed detrimental to the game).
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... detrimental conduct and reiterate the commissioner’s authority in that area. The expansive scope of the NFL commissioner’s authority has been questioned but courts have yet to expressly limit the breadth of his “best interests” authority. So long as a commissioner, with no standard for review, acts within the scope of the authority granted to him under a sport’s operating agreement, courts have not overturned commissioner decisions. This means Commissioner Goodell has a magnitude of authority analogous to that given in theory to the commissioner of the MLB; that is, the authority of a benevolent despot. To counter such authority and partiality, the NFLPA must negotiate an independent arbitration process in the new CBA that contains a defined standard of review similar to one found in NBA or MLB procedures with which to assess disciplinary decisions for off-field misconduct.

D. Standards of Review

Arbitrators in general evaluate the disciplinary decisions of commissioners based on the guidelines provided in the operating

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238 See Personal Conduct Policy, supra note 2, at 1 (requiring NFL players to refrain from detrimental conduct); supra Part II.B.3 (discussing the NBA Commissioner’s authority to discipline for detrimental conduct).

239 See Nat’l Football League Players Ass’n v. NLRB, 503 F.2d 12, 15–16 (8th Cir. 1974) (acknowledging that the commissioner had the authority to fine players for conduct detrimental to the NFL without directly holding the Rozelle Rule to be outside the scope of that authority); Dryer v. L.A. Rams, 709 P.2d 826, 832–33 (Cal. 1985) (refraining from limiting the best interests authority of the commissioner while holding that the case involved a contract dispute and not a disciplinary decision so the commissioner could not invoke his best interests power).

240 See Finley v. Kuhn, 569 F.2d 527, 539 (7th Cir. 1978) (explaining that MLB Commissioner Bowie Kuhn’s nullification of the sale of three players was upheld pursuant to the authority granted by the League’s operating agreement). The court stated that “[t]he Commissioner has been given broad power in unambiguous language to investigate any act, transaction or practice not in the best interests of baseball, to determine what preventive, remedial or punitive action is appropriate in the premises, and to take that action.” Id. at 534. The court recognized that assessing the best interests of the game required some expertise that the judiciary did not have. Id. at 537. The commissioner had the requisite expertise; therefore, he was entrusted to discipline. Id. The court would not decide if the commissioner’s decision was right or wrong, only if it was within the language of the agreement and not arbitrary or capricious. Id. at 539 n.44; see also Atlanta Nat’l League Baseball Club v. Kuhn, 432 F. Supp. 1213, 1222 (N.D. Ga. 1977) (recognizing that a determination of what is in the best interests of baseball is not for courts to decide and that the commissioner had the authority under the operating agreement to hand down the punishment); Pollack, supra note 78, at 1679–85 (discussing the judicial deference shown to the best interests authority in the case Finley v. Kuhn); supra text accompanying note 169 (discussing the appropriateness of the arbitrary or capricious standard in such cases).

241 See Landis, supra note 135 (discussing the court’s holding that the commissioner was given broad authority).
If a commissioner’s decision violates the standard of review, the arbitrator will reduce or rescind the punishment. Maintaining the fundamental fairness of a disciplinary decision, analogous to principles of industrial due process, is important even when “best interests” and deterrence are the objectives.

In the NFL operating agreement, a commissioner is instructed only to use his “best interests” discretion and discipline based on a series of factors. In contrast, other professional sports leagues utilize standards of review such as “just cause” and “arbitrary and capricious.” The NBA CBA provides for the use of the “just cause” standard in grievance procedures when punishments are not severe. The MLB CBA requires the grievance arbitrator to use the same “just cause” standard of review, reflecting the idea that the commissioner maintains a certain amount of discretion and that the discipline should equal the offense. In practice, the standard of review has been successful in each league, both upholding and shortening suspensions.

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242 See supra Part II.B (discussing the standards of review that leagues incorporate into their operating agreements).
243 See supra Part II.B.2 (discussing the MLB arbitrator’s reduction of the punishment of Kenny Rogers).
244 See re Nat’l Basketball Players Ass’n ex rel. Player Latrell Sprewell & Warriors Basketball Club & Nat’l Basketball Ass’n, 86 (2000) (Feerick, Arb.) (holding that fairness in discipline is like standards of industrial due process); see also MLBPA v. Comm’r, supra note 141 (explaining that principles of fairness should not be ignored in order to achieve deterrence). See generally Raymond L. Hogler, Industrial Due Process and Judicial Review of Arbitration Awards, 31 LaB. L.J. 570 (1980) (discussing that within industrial due process, an employee must be given the opportunity to present his or her side of a case before being discharged by an employer).
245 See Personal Conduct Policy, supra note 2, at 2-3 (listing the factors the commissioner should analyze disciplining first-time or repeat offenders). “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.” Id. at 2; see also supra Part III.C (discussing the “best interests” discretionary authority given to the NFL commissioner under the League’s operating agreements).
246 See Grievance/Arbitration Procedure, supra note 162, at 327 (stating when an arbitrary and capricious standard should be used); supra note 141 (discussing the just cause standard of review used by arbitrators in MLB disciplinary cases).
247 See supra text accompanying notes 167-69 (explaining how the severity of the punishment by the commissioner may determine the appellate procedure available to the player).
248 MLB Basic Agreement, supra note 27, at 43; see also MLBPA v. Comm’r, supra note 141 (explaining that just cause standards include determining if the punishment was appropriate considering the offense).
249 See Nat’l Basketball Ass’n v. Nat’l Basketball Players Ass’n, No. 04-CV-9528(GBD), 2005 WL 22869 (S.D.N.Y. Jan. 3, 2005) (holding that a suspension was without just cause); Brown, supra note 155 (stating that an arbitrator found the suspension excessive under a just cause standard); Peter Gammons, Suspended Romero ‘Didn’t Cheat,’ ESPN (Jan. 6, 2009,
A commissioner must meet a high burden when justifying his disciplinary decisions because his decision can hinder a player’s employment in that sport. That commissioner’s decision, therefore, must be strictly scrutinized so as to prevent a player’s exclusion from employment in an entire industry. The NBA CBA does this by requiring arbitrators to use an “arbitrary and capricious” standard of review in cases of more severe discipline. The NFL CBA, also able to prevent employment in an entire industry, does not make an allowance for more severe punishments. Recent punishments in the NFL that restrict personal freedoms should require, at the very least, an applicable standard of review like that in the NBA.

In Allstate Insurance Co. v. Clymer, the court, presented with an arbitration agreement that provided for the use of two different standards of review, found the agreement ambiguous and construed it against the party bringing the claim. The NFL CBA fails to define a standard of review applicable for any level of commissioner discipline. This language may be held ambiguous because it leaves the commissioner with no guidance and only his own interpretation. Under judicial holdings, a court may not overturn the commissioner’s interpretation as to the proper standard of review under the agreement because of a difference in opinion. Therefore, without a defined

1:36 PM), http://sports.espn.go.com/mlb/news/story?id=3812334 (reporting that J.C. Romero’s fifty-game suspension for steroid use was upheld in arbitration).

250 See MLBPA v. Comm’r, supra note 141 (explaining that a commissioner in a professional sports league has control over a player’s employment that employers in other industries do not have).

251 See id. (explaining why a commissioner in professional sports must justify disciplinary decisions using a standard higher than in other industries).

252 See supra Part II.B.1 (explaining that the NFL CBA does not provide a defined standard of review).

253 See Weistart, supra note 67, at 734 (explaining that the basic inquiry to be made regarding a punishment is one of reasonableness). Although a professional sports league should have the ability to punish players, rigid rules of personal conduct should be balanced against personal freedoms to ensure reasonable punishment. Id. at 731–34; see also NFL Aims to Tackle Public Relations Problem of Player Arrests!, supra note 122 (discussing the punishment of Adam Jones that included a curfew and prevented Jones from going to night clubs).


255 See Commissioner Discipline, supra note 9, at 34 (stating only that the commissioner or his designee will preside at a hearing and issue a final written decision); supra Part II.B.1.c (describing the NFL CBA’s guidelines for the implementation of commissioner discipline).

256 See supra text accompanying note 60 (explaining that an arbitrator interprets an arbitration agreement).

standard like one found in the NBA or MLB, the NFL commissioner is free to determine how to review appeals of imposed punishment.\textsuperscript{259} The absence of a defined standard, one of several differences among the NFL appeals procedures and the NBA and MLB appeals procedures, reduces the procedural protections for players.\textsuperscript{260}

E. Comparison of the Appellate Procedures Among Professional Sports Leagues

The NFL, NBA, and MLB each use different appeal procedures depending on which governing document is used to discipline a player.\textsuperscript{261} In the NBA and MLB, it is clear that when the commissioner disciplines a player, that player may have his appeal heard by an arbitrator under the grievance procedures.\textsuperscript{262} In fact, the NBA recognizes that independent arbitrators should handle the appeals of more severe punishments.\textsuperscript{263} Conversely, a NFL player disciplined for off-field conduct by the commissioner may only appeal to the commissioner.\textsuperscript{264} The NFL does not even entertain the possibility of an alternative court should not reject the factual findings or the interpretation of the contract by an arbitrator even if it is based on a mistake of law); \textit{supra} Part II.A.2 (discussing the holdings that help define judicial review of arbitration awards).

\textsuperscript{259} See \textit{Personal Conduct Policy}, \textit{supra} note 2, at 2–3 (discussing only factors for initial determination of a possible punishment). The Conduct Policy does not give an exact standard of review and states that the commissioner has the “authority to impose discipline as warranted.” \textit{id.} at 2.

\textsuperscript{260} See \textit{Weistart, supra} note 67, at 715 (discussing standards of proof in the context of required procedural protections).

\textsuperscript{261} See \textit{supra} Part II.B (discussing the disciplinary structure of each league under its operating agreement).

\textsuperscript{262} See \textit{supra} note 162 (discussing cases in which NBA players had punishments from the commissioner reduced by an independent arbitrator through the grievance procedure in the NBA CBA); \textit{supra} Part II.B.2 (discussing the situation in which MLB Commissioner Selig chose to discipline Kenny Rogers under a section of the MLB CBA that allowed Rogers to appeal to an independent arbitrator); \textit{see also} \textit{Grievance/Arbitration Procedure, supra} note 162, at 330 (explaining that the NBA’s grievance procedures will follow the Labor Arbitration Rules of the AAA).

\textsuperscript{263} See \textit{Mullane v. Cent. Hanover Trust Co., 339 U.S. 306, 313 (1950) (stating that where the deprivation of fundamental rights and liberties are at stake, the procedural protection provided should be “appropriate to the nature of the case”); supra text accompanying notes 167–69 (discussing the provision in the NBA CBA that requires appeals of punishments resulting in a loss of more than $50,000 to be heard as provided by the grievance procedure).}

\textsuperscript{264} See \textit{supra} Part II.B.1.c–d (explaining that under both the NFL CBA and the Personal Conduct Policy, NFL players disciplined by the commissioner for detrimental off-field conduct can only appeal the decision to the commissioner or his designee).
grievance procedure in more severe cases despite several lengthy suspensions that have prevented player employment.\textsuperscript{265}

In terms of discovery, courts have supported the specific FAA guidelines that serve not only to clarify the process but also to assure that each party can present an efficient appeal.\textsuperscript{266} The collective bargaining agreements of the NBA and MLB contain specific guidelines for discovery.\textsuperscript{267} Both describe which documents must be produced upon request; the MLB CBA also details the arbitrator’s role in deciding the relevance of the evidence.\textsuperscript{268} The language of the CBAs would eliminate the ambiguity that exists in the NFL CBA and is more akin to the position of courts.\textsuperscript{269}

The NFL CBA outlines the procedures for discipline, but the processes for an appeal to the commissioner lack the definition needed to meet a reasonableness standard.\textsuperscript{270} The NFL CBA lacks specificity in regard to an appeal to the commissioner, stating that one may present relevant evidence with no mention of discovery guidelines.\textsuperscript{271} The precedence of the commissioner’s disciplinary authority and the severity of the punishments warrant stronger procedural protections for discovery.\textsuperscript{272}

Furthermore, the method in the NFL for choosing the third-party judge for the appeal of a commissioner’s disciplinary decision is much

\textsuperscript{265} See Battista, \textit{Bans for Misconduct}, supra note 123 (discussing the season-long suspension of Adam Jones and the eight-game suspension of Chris Henry); \textit{supra} Part II.B.1.d (explaining that a hearing before the commissioner is the only appellate right available to players that are disciplined under the Personal Conduct Policy).

\textsuperscript{266} See supra note 44 (discussing section 7 of the FAA and citing cases that develop the discovery authority of an arbitrator before and during an arbitration proceeding).

\textsuperscript{267} See \textit{Grievance/Arbitration Procedure}, supra note 162, at 330–31 (explaining that a party to the arbitration has the right to discovery of all non-privileged documents from the opposing party); \textit{MLB Basic Agreement}, supra note 27, at 44 (stating that all documents from an investigation are subject to the right of discovery).

\textsuperscript{268} See \textit{MLB Basic Agreement}, supra note 27, at 227 (explaining that the lead arbitrator on the arbitration panel is responsible for determining the relevancy and materiality of the evidence presented).

\textsuperscript{269} See supra note 44 (discussing courts’ holdings regarding discovery guidelines in arbitration proceedings).

\textsuperscript{270} \textit{Commissioner Discipline, supra} note 9, at 34–35; \textit{Club Discipline, supra} note 95, at 19–22; see also Weistart, supra note 67 (discussing the reasonableness standard for required procedural safeguards).

\textsuperscript{271} See \textit{Commissioner Discipline, supra} note 9, at 35 (stating that a party to the hearing may “present, by testimony or otherwise, any evidence relevant to the hearing”).

\textsuperscript{272} See Mullane v. Cent. Hanover Trust Co., 339 U.S. 306, 313 (1950) (explaining that a more severe punishment requires stronger procedural protection); \textit{Commissioner Discipline, supra} note 9, at 35 (stating that the commissioner’s disciplinary decisions supersede those of the owners or teams); \textit{supra} note 26 (discussing the increased severity of punishments that Goodell has imposed).
different than that in the other leagues. In the NFL, the commissioner or a designee of the commissioner presides over the appellate hearing, with the NFLPA consulting as to who will serve as the commissioner’s designee for the season. The NFL commissioner generally still presides over the hearing and is responsible for final decisions in every case, which abates the procedural safeguard provided by possibly having a designee serve as the arbitrator to a dispute. On the contrary, the NBA and MLB name an independent arbitrator chosen through a process that protects the rights of both parties, occasionally with assistance from outside organizations. The NBA disqualifies arbitrators who have a previous business relationship with any professional athletes or leagues. The NFL needs to recognize the importance of the impartiality of a third-party arbitrator, just as the NBA and MLB do. Subsequently, the NFL should amend the CBA so that it contains an independent arbitration process that enhances the procedural protections and appeal rights of players.

IV. CONTRIBUTION

The Personal Conduct Policy in the NFL vests the commissioner with disciplinary authority that is too broad and limits the rights of players to appeal. It does not contain reasonably defined procedures or a standard of review. Instead, it calls for a partial commissioner not

273 Compare Commissioner Discipline, supra note 9, at 34 (stating that either the commissioner or the commissioner’s designee will preside over appellate hearings), with MLB Basic Agreement, supra note 27, at 35 (explaining the MLB procedure for selecting an impartial arbitrator), and Grievance/Arbitration Procedure, supra note 162, at 333–34 (discussing the selection of an independent grievance arbitrator under the NBA CBA).
274 See id. (explaining that at the conclusion of an appellate hearing, the commissioner issues a written decision that is the final and complete decision); supra Part II.B.1.c (showing that the commissioner by and large presides over any appellate hearing for discipline issued under the Personal Conduct Policy).
275 See MLB Basic Agreement, supra note 27, at 35 (discussing the procedure delineated in the MLB CBA for choosing an independent arbitrator); Grievance/Arbitration Procedure, supra note 162 (explaining the method for selecting an arbitrator under the NBA CBA); supra Part II.B.2 (discussing the independent arbitration procedure in the MLB’s disciplinary structure); supra Part II.B.3 (discussing the independent arbitration procedure in the NBA’s disciplinary structure).
276 See Grievance/Arbitration Procedure, supra note 162, at 333–34 (stating that the NBA CBA requires all potential arbitrators to be free of certain recent business relationships).
277 See supra Part III (analyzing the commissioner’s disciplinary authority and the implementation of the Personal Conduct Policy).
278 See supra Part III.E (comparing the procedural protections in the NFL disciplinary structure with those found in the NBA and MLB); supra Part III.D (explaining that the Policy fails to properly define an exact standard of review).
only to impose punishments but also to review the validity of those punishments. Finally, the Policy furthers the already expansive “best interests” authority and constitutes a working condition that was not collectively bargained. Consequently, this Note suggests incorporating into the new NFL CBA an amended Personal Conduct Policy to both increase procedural protections and include an independent arbitration procedure.

A. Incorporate the Personal Conduct Policy into the New NFL CBA

The first step in amending the CBA would be to create a new article for the Personal Conduct Policy following Article XI, Commissioner Discipline, in the CBA. The current Policy is a stricter version of a previous conduct policy that was put in place to deter off-field detrimental misconduct. It was written and put into action by Commissioner Goodell with only the acquiescence of the NFLPA in apparent violation of the NLRA. Goodell assumed a duty that was not his and created rules that affect the working conditions of NFL players without including the NFLPA in a collective bargaining discussion.

By incorporating the Conduct Policy into the CBA, there would no longer be any question of violating standard labor and collective bargaining practices because it would no longer be the result of unilateral implementation. The NFLPA and League Management would engage in the bona fide bargaining required when a working condition is affected. At the very least, by having the chance to collectively bargain for its incorporation and its terms, the NFLPA could receive a quid pro quo for its acquiescence to the Policy.

Opponents may argue that the Policy was properly promulgated because owners were involved in the creation of the first Conduct Policy

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280 See supra Part III.A (discussing the requirements of impartiality in an appellate procedure in the context of the commissioner’s role as arbiter of disputes).
281 See supra Part III.C (discussing the best interests authority given to commissioners in professional sports); supra Part III.B (discussing the unilateral implementation of the Conduct Policy and whether it is a working condition promulgated absent collective bargaining).
282 See supra Part II.B.1.d (discussing the creation of the original policy and the current Conduct Policy).
283 See supra Part III.B (discussing how Commissioner Goodell was the driving force behind the Conduct Policy); supra text accompanying note 26 (explaining that the Conduct Policy was implemented without any negotiation).
284 See supra Part III.B (explaining that rules that affect working conditions are mandatory subjects of bargaining).
285 See supra Part III.B (discussing required steps for the implementation of rules).
286 See Mackey v. Nat’l Football League, 543 F.2d 606, 616 (8th Cir. 1976) (discussing the absent quid pro quo for the NFLPA in the promulgation of the Rozelle Rule).
and, thus, there is no need to include the new Conduct Policy in the CBA. Nevertheless, Commissioner Goodell’s efforts created the current Conduct Policy that punishes player conduct short of criminal behavior. It even uses the grievance procedures of the CBA in a way that was not contemplated in collective bargaining.

B. Amend the Hearing Rights in the Personal Conduct Policy

The next step following the incorporation of the Personal Conduct Policy must be to amend the language of the section entitled “Hearing Rights” to include a two-tiered procedure determined by the severity of the disputed punishment imposed by the commissioner. The procedure would utilize either the commissioner as the arbitrator or an independent arbitration panel. The amended section appears as follows, with the author’s commentary intertwined.

Proposed Amendment to “Hearing Rights” in Personal Conduct Policy

Persons filing an appeal shall be entitled to a prompt hearing pursuant to the following procedure:

a) A dispute involving an action taken by the Commissioner under this article (i) concerning conduct detrimental to the integrity of and public confidence in the NFL and (ii) resulting in a financial impact of the equivalent of one (1) punished player’s game check or less shall be subject exclusively to a hearing before the Commissioner or his designee under the procedures set forth in Article XI. The Commissioner will choose his designee with the approval of the Executive Director of the NFLPA.

b) A dispute involving an action taken by the Commissioner under this article (i) concerning

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287 See supra text accompanying note 120 (discussing the creation of the Conduct Policy in 2000).
288 See Nat’l Football League Players Ass’n v. NLRB, 503 F.2d 12, 17 (8th Cir. 1974) (explaining that the commissioner should consult with both parties in the promulgation of a rule); New Commish Goodell Gets Tough, supra note 123 (citing examples of how Commissioner Goodell strengthened the player conduct policy).
289 See Personal Conduct Policy, supra note 2, at 3 (stating that hearings shall be held “pursuant to Article XI of the Collective Bargaining Agreement”).
290 Id.
291 The proposed amendments are italicized and are the contribution of the author. The language in regular font is taken from the NFL Personal Conduct Policy. See generally Personal Conduct Policy, supra note 2, at 3.
Amending Discipline Procedures in the NFL

conduct detrimental to the integrity of and public confidence in the NFL and (ii) resulting in a financial impact of more than the equivalent of one (1) punished player’s game check shall be subject exclusively to a hearing before an arbitration panel consisting of three (3) arbitrators under the procedures set forth in Article IX §§ 2, 3, 5, and 8. The arbitrators will be selected as follows:

A) One (1) arbitrator chosen by the Commissioner from a list of arbitrators provided by the American Arbitration Association.

B) One (1) arbitrator chosen by the NFLPA from a list of arbitrators provided by the American Arbitration Association.

C) One (1) arbitrator chosen by the NFL Management Council from a list of arbitrators provided by the American Arbitration Association.

D) None of the selected arbitrators shall violate the neutrality and impartiality requirements as listed in the American Arbitration Association Labor Arbitration Rules.

Commentary

Amending the hearing rights section of the Conduct Policy with a new two-tiered dispute resolution procedure will ensure impartiality, limit the best interests authority of the commissioner, and protect players’ rights in cases involving severe punishments. Inserting the appeal procedure directly into the Conduct Policy defines the process better than simply referencing a process in another section of the CBA. This will allow independent arbitrators to moderate discipline imposed by a commissioner in a way analogous to the successful procedures in the NBA and MLB.

The new procedure prevents the evident partiality that resulted from the commissioner arbitrating the validity of his own decisions. In most cases of discipline, it will eliminate two relationships that could

292 See supra Part III (analyzing the requirements of reasonable procedures and impartiality as well as the best interests authority of the commissioner).

293 See supra Part II.B.2–3 (discussing the grievance procedures in the MLB and the NBA).

294 See supra Part III.A (discussing the commissioner’s role in reviewing his disputes and the standard of evident partiality).
compromise impartiality: a material relationship between the presiding arbitrator and an involved party and a financial and representative relationship between the commissioner and NFL management.\textsuperscript{295} Furthermore, the addition of this appeal procedure will validate any foreseeable partiality that exists when the commissioner presides over disputes involving less severe punishments because it will now be the result of collective bargaining.\textsuperscript{296}

Section (b)(D), requiring the selected arbitrators to meet neutrality requirements, further ensures the arbitration panel’s impartiality.\textsuperscript{297} Adherence to AAA Labor Arbitration Rules precludes any financial relationship between the arbitrators and the parties.\textsuperscript{298} Furthermore, sections (b)(A)–(C) prevent bias by allowing each party to the collective bargaining agreement—the NFLPA, the NFL Management Council, and the commissioner—to choose a member of the panel.\textsuperscript{299}

By limiting the discretion and the appellate purview of the commissioner, the new procedure will diminish the problem of unchecked “best interests” authority.\textsuperscript{300} Instead, an independent panel will determine whether the punishment, under the applicable standard of review, is a valid exercise of the commissioner’s authority.\textsuperscript{301} Moreover, stopping the commissioner from superseding the grievance

\textsuperscript{295} See Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137 (2d Cir. 2007) (holding that evident partiality exists when an arbitrator’s corporation has a financial relationship with an involved party’s corporation); supra text accompanying note 80 (explaining that a material relationship between the arbitrator and a party is evidence of partiality); supra Part III.A (explaining that the commissioner is a party to the dispute over which he presides and discussing the financial relationship between the commissioner and management).


\textsuperscript{297} This clause is similar in intent to Article XXXI § 6(b) of the NBA CBA. See Grievance/Arbitration Procedure, supra note 162, at 333 (stating that selected grievance arbitrators may not have professional relationships with professional athletes or leagues in the preceding five years).

\textsuperscript{298} See Labor Arbitration Rules, supra note 79, §§ 5, 11 (discussing the neutrality requirements of the AAA Labor arbitration rules). “No person shall serve as a neutral arbitrator in any arbitration . . . in which that person has any financial or personal interest in the result of the arbitration.” Id. § 17.

\textsuperscript{299} See Preamble, supra note 109, at 3 (stating that the NFLPA represents the players and that the NFL Management Council represents the league in the collective bargaining process).

\textsuperscript{300} Courts will not overturn a commissioner’s decisions that are justified by the best interests authority in operating agreements. See supra Part III.C (discussing judicial responses to best interests authority in the NFL and MLB).

\textsuperscript{301} See infra Part IV.C (defining the proposed standard of review to be amended to the Policy).
procedure guarantees that most of the commissioner’s “best interests” decisions will be reviewable.\textsuperscript{302}

The current procedural protections and appeal rights of players do not differ with the severity of the punishment.\textsuperscript{303} The two-tiered approach would establish increased appeal rights when the imposed punishment is more severe. Because the value of one game check is the threshold, minimal punishment is still controlled by the commissioner. More severe punishments should be subject to review by an independent arbitration panel because the NFL commissioner can limit or prohibit a player’s employment in the entire industry of football.\textsuperscript{304} As punishments escalate in severity towards banishment, the need for independent review and procedures increase.\textsuperscript{305}

C. Define Procedural Protections and Standards of Review

The final step will be to define the procedures of the appeal process to satisfy a reasonableness standard and to implement a standard of review for either the commissioner or the arbitration panel to follow. The amendments proposed below provide specific guidelines for discovery as well as a standard of review for either prevailing appeal procedure. The amended sections appear with the author’s commentary:

\textit{Proposed Amendment of “Procedural Protections” to the Personal Conduct Policy}\textsuperscript{306}

\textbf{Discovery Guidelines}

(a) Each party will submit to the other involved parties copies of all non-privileged documents, reports, and records that are relevant to the action giving rise to, the investigation of, and the actual dispute.

(b) A party may call witnesses to testify to non-privileged information relevant to the action giving rise to, the investigation of, and the actual dispute.

(c) The person or panel presiding over the hearing shall determine the relevance of documents and testimony submitted under this section.

\textsuperscript{302} See supra text accompanying note 167 (explaining that professional leagues often incorporate a clause that would allow the commissioner to remove a dispute from an independent grievance procedure).

\textsuperscript{303} See supra Part III.E (analyzing the procedural protections of the NFL).

\textsuperscript{304} See supra Part II.B.1.a (discussing the NFL commissioner’s authority to discipline).


\textsuperscript{306} The proposed amendments are italicized and are the contribution of the author.
(d) Parties shall adhere to all other discovery guidelines pursuant to Article IX § 5 that do not conflict with any of the language in this Policy.

Commentary

The proposed section would expand on the current “any evidence relevant” explanation to provide clear instructions for discovery resembling those in a judicial proceeding. The present guidelines simply are not adequate when the commissioner’s disciplinary decisions supersede all other discipline and can even include banishment. The proposed guidelines will adhere to judicial holdings that provide for defined discovery in arbitration cases.

Clauses (c) and (d) under the Discovery Guidelines will expedite any extended discovery or disputes over discoverable evidence. Clause (c) puts the arbitrator in the role of resolving relevance, preventing discovery disputes from being part of the arbitration process. Clause (d) preserves the existing non-conflicting provisions in the CBA because it uses the reasonable time requirements for discovery. It also precludes a party’s use of evidence that was not submitted to the other party. Each clause is necessary for an efficient discovery process.

Proposed Amendment of “Standards of Review” to the Personal Conduct Policy

Standard of Review

(a) The party or arbitration panel presiding over a dispute shall apply a “just cause” standard of review in deciding the propriety of the punishment.

(b) The party or arbitration panel applying the “just cause” standard of review shall determine whether the magnitude of punishment was commensurate with the conduct giving rise to the punishment.

307 Commissioner Discipline, supra note 9, at 35.
308 See supra Part III.E (discussing the lack of reasonable discovery guidelines in the Conduct Policy).
309 See supra note 44 (discussing the judicial intervention that has compelled discovery in cases of arbitration).
310 See Non-Injury Grievance, supra note 111, at 24 (stating that all relevant documents must be submitted no later than ten days prior to the hearing).
311 See id. (explaining when documents may or may not be used in an arbitration proceeding if discovery deadlines are not met).
312 The proposed amendments are italicized and are the contribution of the author.
Commentary

The implementation of a defined standard of review ensures fundamental fairness in the punishment of players and is increasingly important because the length and severity of punishments have increased under the Policy.313 Instead of relying on an arbitrator’s discretion, there will be a defined guideline for choosing to modify or overturn a punishment.314 The section will also provide the commissioner a standard of reference in imposing discipline.

Just cause is the proper standard of review because it holds the commissioner to a reasonableness standard.315 An arbitrary and capricious standard, while successfully used in the NBA, is less clear and that ambiguity would not substantially limit the commissioner’s authority to impose punishments.316 Just cause is a more precise standard that will require the presiding arbitrator to evaluate the dispute in the circumstances.317 The inclusion of sections (a) and (b) assures that the arbitrator will properly assess both the imposition of discipline as well as the magnitude of the punishment. Thus, this standard of review will eradicate the ambiguity that can lead to judicial intervention in arbitration proceedings.318

Following these steps to amend and incorporate the Personal Conduct Policy will result in a disciplinary system that includes reasonable procedural protections and an impartial arbitrator. It will benefit players by increasing their appeal rights to a level better suited to coexist with the authority of the commissioner to completely prohibit a player’s employment in an entire industry.319 The main argument against the proposed change to the Policy and the new CBA is that it would revoke the singular authority of the commissioner to properly punish, deter, and prevent detrimental and criminal conduct by NFL players, an authority even more necessary in an image-conscious

313 See supra Part III.D (analyzing the role of standards of review in professional sports coinciding with the increase in the severity of discipline).
314 See supra Part III.D (explaining that the present Conduct Policy only calls for the use of the commissioner’s discretion).
315 Reasonableness is also similar to the requirements for other procedural protections. See supra text accompanying note 141 (explaining the just cause standard of review and how it has been used in practice).
316 See supra Part II.B.3 (discussing the use of the arbitrary and capricious standard of review in the NBA).
317 See supra Part III.D (analyzing the use of the just cause standard).
319 See supra Part II.B.1.b-c (explaining that players may only appeal disputes to the commissioner who has expansive authority to impose discipline).
industry. However, the language that authorizes Commissioner Goodell’s disciplinary authority for certain conduct will not change nor will the NFL’s ability to protect its image. An arbitrator could just as easily uphold a severe punishment for highly publicized misconduct as it could overturn the punishment so long as there was just cause. The change will eliminate Goodell’s authority to enforce punishments without proper procedure and just cause. As a result of the amendments, the Personal Conduct Policy will become a joint action to deter detrimental and criminal conduct, collectively agreed by the commissioner, NFL management, and the NFLPA.

V. CONCLUSION

Under the NFL’s current Personal Conduct Policy, Commissioner Roger Goodell has nearly unlimited authority to discipline players for detrimental off-field conduct and then preside over disputes involving those punishments. There is no standard of review, and procedural protections for players are sparse. Further, the present Policy is not the result of collective bargaining between the NFLPA and the NFL Management Council. This is an apparent violation of NLRA standards because Goodell implemented the Conduct Policy himself, which affected player working conditions.

Amending the Conduct Policy to include an independent arbitration procedure with a defined standard of review and discovery guidelines would solve these problems. League management and the NFLPA should incorporate the amended document into the new NFL CBA through collective bargaining. Amending the new CBA would establish a new impartial grievance procedure validated by bona fide bargaining. The commissioner would maintain authority to discipline in the best interests of the NFL, while players would receive a meaningful right of appeal to an impartial arbitrator rather than the empty right to ask the commissioner to reconsider the punishment he already granted.

Returning to Player A and the charitable organizations hypothetical discussed in Part I, implementing the new Policy in the CBA would provide a better opportunity to reduce what was an excessive punishment. Because the suspension of six games would easily result in a financial impact of greater than one game check, Player A could appeal to an independent arbitration panel. Further, he could call witnesses

320 See supra note 123 (discussing by comparison the increase in criminal conduct that motivated Commissioner Goodell to implement the current Conduct Policy).
321 See supra Part IV.B (proposing under section (a)(ii) of the amendment that a dispute over a punishment resulting in the financial impact of more than one game check will be heard in front of an arbitration panel).
and introduce documents from the criminal investigation to show the arbitration panel that the punishment was improper under a “just cause” standard of review. An arbitration panel most likely would find that the punishment was not commensurate with the offense and significantly reduce Player A’s suspension.

The current NFL disciplinary structure for off-field player conduct gives the NFL Commissioner discretion to make the rules, punish misconduct, and review those punishments. The source of this authority, the Personal Conduct Policy, was not bargained for but affects the working conditions of players as much as any other provision of the NFL CBA that resulted from collective bargaining. The NFL and the NFLPA must rectify the unilaterally promulgated Personal Conduct Policy that makes the Commissioner an absolute despot with an unchallenged authority to respond to the conduct of NFL players.

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