

Four Steps: Why Judge Berman Will Vacate Tom Brady's Suspension for Lack of Notice

1. NFL was Required to Provide Notice

Any arbitration award must not violate the essence of its collective bargaining agreement ("CBA"). The essence of the CBA includes (1) the express terms of the agreement and (2) prior decisions and outside evidence of the customs and practice of the parties (called the "law of shop"). The "law of shop" for the NFL CBA includes the requirement to provide advance notice of the discipline available for a given infraction (as held by Judge Doty in the *Peterson* case). Therefore, under the "law of shop" the NFL was required to give Brady notice, prior to the infraction, that he could be suspended for tampering with game balls.

2. NFL Suspended Brady Under its Policy on Integrity of the Game & Enforcement of Competitive Rules

Roger Goodell delegated his disciplinary authority to NFL Executive VP Troy Vincent. On May 11, 2015, Vincent informed Brady that he was being suspended for four games. In doing so, he relied upon the finding of the Wells Report:

With respect to your particular involvement, the report established that there is substantial and credible evidence to conclude you were at least generally aware of the actions of the Patriots' employees involved in the deflation of the footballs and that it was unlikely that their actions were done without your knowledge. Moreover, the report documents your failure to cooperate fully and candidly with the investigation, including by refusing to produce any relevant electronic evidence (emails, texts, etc.) despite being offered extraordinary safeguards by the investigators to protect unrelated personal information, and by providing testimony that the report concludes was not plausible and contradicted by other evidence.

In turn, the Wells Report (as evidenced on page 1 of the report and numerous other points of the report), relied on the NFL's Policy on Integrity of the Game & Enforcement of Competitive Rules (the "Policy") to find that Brady was "generally aware" of the actions that led to the deflated footballs:

On January 23, 2015, the NFL publicly announced that it had retained Theodore V. Wells, Jr. and the law firm Paul, Weiss, Rifkind, Wharton & Garrison ("Paul, Weiss") to conduct an investigation, together with NFL Executive Vice President Jeff Pash, into the footballs used by the Patriots during the AFC Championship Game. The investigation was conducted pursuant to the Policy on Integrity of the Game & Enforcement of Competitive Rules. That Policy provides that "[a]ctual or suspected competitive violations will be thoroughly and promptly investigated." This Report is the product of that investigation. It was prepared entirely by the Paul, Weiss investigative team and presents the independent opinions of Mr. Wells and his colleagues.

Therefore, the suspension doled out by Vincent – which was based entirely on Wells Report – was too based on the NFL's Policy on Integrity of the Game & Enforcement of Competitive Rules. Goodell's written July 28, 2015 "Final Decision" (he usually does not publish a decision at the review stage) attempts to distance this case from the Policy, however, the "Final Decision" merely affirms the suspension given out by Vincent (since Goodell delegated his power away).

3. The Policy Does Not Apply to Players and Brady Did Not Have Notice.

By its terms, the NFL's Policy on Integrity of the Game & Enforcement of Competitive Rules only applies to "Chief Executives, Club Presidents, General Managers, and Head Coaches." Importantly, and as the NFL admits, the Policy does not apply to players and Brady was never provided notice of the Policy.

4. Conclusion:

Under the Law of Shop, the NFL is required to give players notice of the policies that they may be suspended under. The NFL, via Vincent's letter to Brady relying on the Wells Report (which was conducted pursuant to and based on the Policy), suspended Brady under the Policy. Brady was not provided notice of the policy he was suspended under, violating the "law of shop", and therefore, Brady's suspension must be vacated.