

DECISION ON APPEAL

The National Hockey League Players' Association (the "NHLPA" or the "Union"), on behalf of Buffalo Player Patrick Kaleta, has appealed from an October 15, 2013 supplementary discipline decision suspending Mr. Kaleta for ten (10) games. This shall constitute my determination of Mr. Kaleta's appeal. For the reasons described herein, I find that the decision suspending Mr. Kaleta for ten (10) games was supported by clear and convincing evidence.

SUMMARY OF FACTS

At approximately 3:08 of the first period of the October 10, 2013 Regular Season game between the Buffalo Sabres and the Columbus Blue Jackets (Game #49), Mr. Kaleta (a forward with Buffalo) delivered a check to the head of Columbus defenseman Jack Johnson. Video footage of the incident shows Mr. Johnson, who had slowed up at the Buffalo blue line to receive an on-side pass from a teammate, proceeding gradually into the offensive zone, effectively gliding along the sideboards looking to make a play toward the middle of the ice or toward the Buffalo goal. Video footage also shows Mr. Kaleta back-checking through the neutral zone and approaching Mr. Johnson laterally and from behind with considerable speed. As Mr. Johnson prepares to release the puck, he begins to pull up and opens his body slightly toward the middle of the ice and toward the oncoming check from Mr. Kaleta. Immediately after Mr. Johnson shoots the puck toward the Buffalo goal, Mr. Kaleta finishes his check on Mr. Johnson, making contact primarily with Mr. Johnson's chin and then possibly (and secondarily) with Mr. Johnson's left shoulder. As a result of the contact, Mr. Johnson spins violently in a counterclockwise direction and stumbles toward the boards and glass.

PROCEDURAL HISTORY

On October 15, Brendan Shanahan (Senior Vice President of Player Safety) held an in-person supplementary discipline hearing in New York.¹ Later that day, Mr. Shanahan announced that Mr. Kaleta would be suspended for ten (10) games for an illegal check to the head of Mr. Johnson. The Union raised no objections -- procedural or otherwise -- with the conduct of the disciplinary hearing itself, during which all parties, including Mr. Kaleta, were provided a full and fair opportunity to be heard.

By letter to me dated October 16, 2013, the NHLPA gave notice of an appeal on behalf of Mr. Kaleta pursuant to Section 18.12 of the Collective Bargaining Agreement (the "CBA"). The NHLPA's letter indicated, in part, that the Union challenged Mr. Shanahan's determination that Mr. Kaleta had violated Playing Rule 48 (Illegal Check to the Head), asserting that "[t]he decision is not supported by clear and convincing evidence that the hit in question was avoidable" In particular, the Union asserted that there was a material change to the "position of [Mr. Johnson's] body. . . that occurred immediately prior to the hit," which "significantly contributed to the head contact." The Union also asserted that "there is no reasonable basis upon which to assert that the Player should have taken a different 'angle of approach' to the hit." The NHLPA thus concluded that there was "no basis upon which supplementary discipline may be assessed pursuant to Rules 48 and 28" Finally, the NHLPA asserted that, even assuming that the Player violated Playing Rule 48, the disciplinary penalty that was assessed -- a ten (10) game suspension -- was an "unreasonable and unwarranted" increase from previous discipline. (A copy of the Union's notice of appeal is attached hereto as Exhibit A.)

¹ Mr. Shanahan has served in the role of the NHL's Senior Vice President of Player Safety since June 2010. Prior to joining the National Hockey League in 2009, Mr. Shanahan played 1,524 games in the League as a Player over a 21-year NHL career. Mr. Shanahan is a 2013 inductee into the Hockey Hall of Fame.

STANDARD OF REVIEW

Section 18.12 of the CBA provides for the right to appeal to the Commissioner any decision regarding Supplementary Discipline for On-Ice Conduct. The CBA directs in connection with any such appeal that I determine whether the “decision was supported by clear and convincing evidence.”²

THE OCTOBER 21 HEARING

As set forth in CBA Section 18.12, where, as here, the underlying disciplinary decision results in a suspension of six (6) or more games, and such decision is appealed, I am required to hold an in-person hearing. I held such a hearing on October 21 at the offices of the League. In attendance at the hearing on behalf of Mr. Kaleta were Mr. Kaleta himself, his agent, Anton Thun, NHLPA representatives Roman Stoykewych, David Sinclair and Maria Dennis, and Buffalo General Manager Darcy Regier. Also at the hearing were members of the League office staff, including Bill Daly, David Zimmerman, Julie Grand and Brendan Shanahan, who was called to testify, and Joseph Baumgarten from Proskauer Rose.

The hearing began at 2:15 p.m. and concluded at approximately 5:35 p.m. All parties were given a full and fair opportunity to be heard and there were no objections raised at the hearing. The transcript of the hearing was received at the League office on October 22.

² More specifically, CBA Section 18.12 (Appeal to Commissioner) provides, in relevant part: “The NHLPA, on the Player’s behalf, may file an appeal to the Commissioner of any decision regarding Supplementary Discipline for On-Ice Conduct imposed by the League The Commissioner shall endeavor to hear all appeals on an expedited basis and will determine whether the decision was supported by clear and convincing evidence In the event the League’s underlying decision results in a suspension of six (6) NHL Games or more, the Commissioner shall conduct an in-person hearing. The Commissioner shall have the authority to consider any evidence relating to the incident even if such evidence was not available at the time of the initial Supplementary Discipline for On-Ice Conduct decision For purposes of [an appeal pursuant to] Section 18.13 below, the Commissioner’s decision shall represent the complete and final decision of the League regarding whether the Player’s conduct violated League Playing Rules, as well as the length of the suspension imposed on the Player.”

THE PLAYING RULES AT ISSUE

Playing Rule 28 authorizes the Commissioner (or his designee, here, Brendan Shanahan) to assess fines and/or suspensions for any violation of the League's Playing Rules committed during the course of a game, whether or not such offense has been penalized by the Referee.³ Here, Mr. Kaleta was suspended based on a determination that he had violated Playing Rule 48, which provides:

48.1 Illegal Check to the Head – A hit resulting in contact with an opponent's head where the head was the main point of contact and such contact to the head was avoidable is not permitted.

In determining whether contact with an opponent's head was avoidable, the circumstances of the hit including the following shall be considered:

- (i) Whether the player attempted to hit squarely through the opponent's body and the head was not "picked" as a result of poor timing, poor angle of approach, or unnecessary extension of the body upward or outward.
- (ii) Whether the opponent put himself in a vulnerable position by assuming a posture that made head contact on an otherwise full body check unavoidable.
- (iii) Whether the opponent materially changed the position of his body or head immediately prior to or simultaneously with the hit in a way that significantly contributed to the head contact.

THE NHLPA'S CONTENTIONS

The NHLPA's case on behalf of Mr. Kaleta consisted of video footage of the check on Mr. Johnson and the testimony of Messrs. Kaleta and Regier (as well as argument by counsel) to the effect

³ Playing Rule 28.1 (Supplementary Discipline) provides in relevant part: "In addition to the automatic fines and suspensions imposed under these rules, the Commissioner [or his designee] may, at his discretion, investigate any incident that occurs in connection with any . . . game and may assess additional fines and/or suspensions for any offense committed during the course of a game or any aftermath thereof by a player . . . whether or not such offense has been penalized by the Referee."

that no Rule 48 violation had occurred at all, because the contact to Mr. Johnson's head was not avoidable. Specifically, as to its Rule 48 argument, the Union contended that:

1. Mr. Shanahan's decision failed to take into account evidence of a "material change to the body of the opponent (Mr. Johnson) immediately prior to the hit," which change significantly contributed to the head contact (Tr. 5); and
2. There was no evidence supporting the conclusion that the Player "could reasonably [have been] expected to take another angle of approach," particularly in light of the fact that Mr. Kaleta was properly executing his back-checking responsibilities as part of the Buffalo Club's defensive system (Tr. 6-7).

The NHLPA also argued that, even assuming Mr. Kaleta's check to Mr. Johnson's head was illegal under Playing Rule 48, the ten (10) game suspension assessed to Mr. Kaleta was disproportionate and excessive. In particular, the NHLPA contended that in considering and determining the appropriate length of suspension to be assessed against Mr. Kaleta:

1. Mr. Shanahan improperly reviewed evidence consisting of prior on-ice incidents involving Mr. Kaleta that had not resulted in Supplementary Discipline (Tr. 9);
2. Mr. Shanahan improperly considered Supplementary Discipline fines that had been assessed against Mr. Kaleta for Playing Rule violations in prior seasons (Tr. 8); and
3. Mr. Shanahan incorrectly viewed the supplementary discipline suspensions imposed on James Wisniewski and Andy Sutton as the most appropriate comparables and that he instead should have only considered prior disciplinary incidents from this season involving Adam Erne, Dale Weise, Brad Stuart and Alex Edler as the most appropriate comparables (Tr. 10-11).

ANALYSIS

Violation of Playing Rule 48

In this case, there is no dispute that Mr. Kaleta's hit resulted in contact with Mr. Johnson's head (in fact, it was admitted (Tr. 12)), and that the head was the main point of contact. (Tr. 41) The only question raised on appeal is whether such contact to the head was fairly considered "avoidable." I find that there is clear and convincing evidence to support Mr. Shanahan's conclusion that the contact to Mr. Johnson's head was avoidable and, in fact, should have been avoided.

My conclusion in this regard is based on the following:

1. Mr. Johnson did not put himself in a vulnerable position by assuming a posture that made a head check unavoidable. Nor did Mr. Johnson materially change the position of his body immediately prior to or simultaneously with the hit in a way that significantly contributed to the head contact. I note that the video footage shows Mr. Johnson proceeded gradually into the offensive zone, effectively gliding along the boards for some time prior to slightly opening his body toward the middle of the ice (and the oncoming Mr. Kaleta) before releasing a shot toward the Buffalo goal. And, while Mr. Johnson does slow down and shift his body slightly in order to make a play with the puck and prior to the check, I find that this repositioning is not "material" and, indeed, should readily be expected for a Player in that position on the ice. Further, nothing in the shift of his body position rendered Mr. Johnson more vulnerable to a head check. In fact, I find that the evidence supports a contrary conclusion and that by slightly opening up his body toward the middle of the ice, Mr. Johnson provided Mr. Kaleta with more area with which to deliver a hit through Mr. Johnson's full torso, which might have made the hit permissible under Playing Rule 48.

2. The video evidence demonstrates that, at the time of the hit, Mr. Kaleta made no attempt to hit Mr. Johnson squarely through the body. Especially in light of Mr. Johnson's gradual shift in positioning which opened more of his body to the check (not less), had Mr. Kaleta attempted to hit squarely through the body, Mr. Johnson likely would have been checked backwards into the boards rather than spun around in a rotational direction. The video evidence, in fact, strongly supports the conclusion that Mr. Johnson's head was "picked" on the play in question, in clear violation of Playing Rule 48.
3. While I am not prepared to conclude that Mr. Kaleta could have, or should have, taken another "angle of approach" on the hit from its inception, I do conclude that he could have and should have avoided the hit altogether. As Mr. Shanahan testified at the hearing, "I think that there was also the option of not throwing the check. That [is] always an option." (Tr. 70)
4. I do not credit Mr. Kaleta's testimony that he "tried ducking out of the check." (Tr. 25) To the contrary, the video evidence demonstrates that Mr. Kaleta followed through on the check and made no attempt to avoid it.⁴ Nor do I credit Mr. Regier's testimony that Mr. Kaleta had insufficient time to abort the hit. (Tr. 32) As Mr. Shanahan testified, "Players of NHL caliber have that ability." (Tr. 70)
5. Neither the fact that Mr. Kaleta was playing Buffalo's "system" (*i.e.*, back checking the opposing team's Player handling the puck), nor the fact that he is relied on for his

⁴ I note, in this context, none of the video presented during either Mr. Kaleta's or Mr. Regier's testimony, including video prepared by the Buffalo Club solely for the purpose of the hearing, showed the actual follow-through of Mr. Kaleta's hit.

“energy” and “grittiness” and ability to make “hits” (Tr. 21, 29) excuses Mr. Kaleta from his conduct in violation of the League’s Playing Rules -- in this case, Playing Rule 48.

The Appropriate Penalty

As I noted in my most recent disciplinary opinion involving San Jose (then Phoenix) Player Raffi Torres, dated July 2, 2012, the CBA does not prescribe a formulaic basis for the determination of Supplementary Discipline. To the contrary, Article 18 (like its predecessors, Exhibit 8 to the 2005-2012 CBA and Exhibit 8 to the 1995-2004 CBA) embodies a recognition that each case must be decided on the basis of its own particular facts and circumstances. The following factors are prescribed (in CBA Section 18.2) as appropriate for consideration:

- (a) The type of conduct involved: conduct in violation of League Playing Rules, and whether the conduct is intentional or reckless, and involves the use of excessive and unnecessary force. Players are responsible for the consequences of their actions.
- (b) Injury to the opposing Player(s) involved in the incident.
- (c) The status of the offender and, specifically, whether the Player has a history of being subject to Supplementary Discipline for On-Ice Conduct. Players who repeatedly violate League Playing Rules will be more severely punished for each new violation. (Emphasis in original)
- (d) The situation of the game in which the incident occurred, for example: late in the game, lopsided score, prior events in the game.
- (e) Such other factors as may be appropriate in the circumstances.

I have concluded based on my review of the matter that there is clear and convincing evidence to support Mr. Shanahan’s determination that a ten (10) game suspension is the appropriate penalty in

this case. My conclusion is based on both the nature of the violation and, even more significantly, on Mr. Kaleta's prior disciplinary record, as discussed below.

As an initial matter, it bears repeating – though it should not be necessary to do so – that head hits are a matter of great concern to the League and the Players and that violations of Rule 48 are among the most serious Playing Rule infractions in the game. This can come as no surprise to anyone associated with the NHL as I have been very clear, consistent and vocal on these points. As I wrote in my July 2, 2012 opinion concerning the suspension of Raffi Torres:

Notably, Rule 48 was initially adopted by the NHL Board of Governors during the 2009/10 season with the support of the NHL General Managers and NHL/NHLLPA Competition Committee in response to a growing concern regarding head hits and head injuries generally, and with respect to blindside head hits in particular (which the Rule was originally written to prohibit). Little more than a full season later, the NHL decided to broaden the scope of Rule 48 to prohibit hits from any direction in which a Player's head is targeted and is the principal point of contact. These changes were implemented for the 2011/12 season, and again were supported by NHL General Managers and the NHL/NHLLPA Competition Committee, and were approved by the NHL Board of Governors.

It is fair to say that the focus on head hits and concussions has been a top priority of the NHL (and the NHLPA) for some time, and the adoption of Rule 48 -- together with the many steps that have been taken to educate Players regarding the Rule -- sent a clear message regarding the seriousness with which the League views targeted hits to the head.

In the 16 months since the Torres opinion was rendered, the League has continued its commitment to better protect Players' heads through the adoption and enforcement of new Playing Rules, in addition to continuing to evaluate whether existing rules merit further refinement. For example, prior to this Season, two such new rules were implemented: a mandatory visor rule (Playing Rule 9.7) and Playing Rule 46.6 which prohibits Players from removing their helmets prior to engaging in fisticuffs. In addition, Playing Rule 48 was revised this past offseason with the input and approval of the

NHLPA to further clarify that the “intentionality” of the head hit is not a stated element of the Rule; rather, a Player’s reckless disregard for an opponent’s head in delivering a body check will itself be sufficient to constitute a violation of Playing Rule 48.⁵ Accordingly, Players have even less justification today than they may have had previously in executing body checks that have the potential (or likelihood) of resulting in an opponent’s head being the main point of contact. And this is especially true for Players who have demonstrated a pattern and propensity to violate Playing Rules that are intended to protect the heads of opposing Players.⁶

Regrettably, Mr. Kaleta stands out for his repeated violations of -- and seeming indifference to -- the Playing Rules put in place to protect other Players, and, particularly, other Players’ heads. Specifically, Mr. Kaleta has committed a series of other serious, head-related Playing Rule violations in each of the four most recent prior seasons.

In November 2009, Mr. Kaleta was suspended for two (2) games for boarding Philadelphia Flyers forward Jared Ross. Mr. Kaleta drove into Mr. Ross from behind, causing him to hit his head violently into the glass.

In October 2010, Mr. Kaleta was fined for driving his head into, and “head-butting,” New Jersey Devils forward Travis Zajac.

⁵ Previously, Playing Rule 48 required the “targeting” of a Player’s head. “A hit resulting in contact with an opponent’s head where the head is targeted and the principal point of contact is not permitted.” NHL Official Playing Rules 2011/12 (emphasis added). Playing Rule 48 was amended this past summer to make it clear that the “intentionality” that may be connoted by the word “targeting” is not an essential element of a finding that Playing Rule 48 has been violated.

⁶ Ensuring stiff punishment for Players who repeatedly violate Playing Rules, and repeatedly attempt to hurt other Players, is vital to the safety and well-being of all Players. This is something I have discussed with Players and the NHLPA generally over my tenure as Commissioner (both in the context of Competition Committee meetings and otherwise), and particularly in recent years. It is essential to the long-term best interests of the game.

Mr. Kaleta was also fined for charging New Jersey defenseman Mark Fraser in the same game. In the Fraser incident, Mr. Kaleta launched himself up into Mr. Fraser's upper body, making significant contact with Mr. Fraser's head.

In November 2011, Mr. Kaleta was suspended for another "head-butting" violation in contravention of Playing Rule 47. In a game between Buffalo and the Philadelphia Flyers, Mr. Kaleta intentionally and illegally drove his head into the face of Philadelphia forward Jakub Voracek. Mr. Shanahan issued a four (4) game suspension to Mr. Kaleta, based on the severity of the conduct and Kaleta's prior disciplinary record.

Later that same month, Mr. Kaleta was fined for recklessly swinging his stick, resulting in contact with the face and head of Phoenix Coyotes defenseman Derek Morris in violation of Playing Rule 60 (High-Sticking).

Mr. Kaleta was suspended most recently in March 2013 for shoving New York Rangers Player Brad Richards from behind, causing him to crash violently into the boards and to miss two (2) games due to a resulting injury. That violation resulted in a five (5) game suspension based on the nature and severity of the conduct and Mr. Kaleta's prior disciplinary record (the full extent of Mr. Richards' injury was not known at the time the supplementary discipline was issued).

This is a remarkable record over the span of just three and one-half seasons for a Player who is only in his eighth NHL season, and, as noted above, has demonstrated a total disregard for the safety of other Players and, in particular, their heads. It is not only the frequency of his prior offenses but, even more so, the fact that all of the offenses involved in some way contact with or an injury to an opponent's head that leads inexorably to the conclusion that Mr. Kaleta has not responded adequately to the progressive discipline that has been meted out to him thus far. In these circumstances, and supported by the comparable recent cases involving Columbus Player James Wisniewski and former

Edmonton Player Andy Sutton, as discussed below, which I find applicable here, I have no hesitation in affirming the determination that a meaningful increase in the quantum of discipline to be imposed on Mr. Kaleta is warranted and that a suspension of ten (10) games is an appropriate punishment.

I do not find persuasive the NHLPA's arguments in favor of a lesser penalty.

I reject the NHLPA's argument that Mr. Shanahan improperly reviewed evidence of prior hits by Mr. Kaleta that did not result in the imposition of Supplementary Discipline. In doing so, I note that there is nothing in the record that establishes that Mr. Shanahan actually relied on such evidence. The NHLPA has referred to an e-mail from Damian Echevarietta to Mr. Shanahan on the afternoon of October 15 attaching links to video showing prior hits by Mr. Kaleta, but the NHLPA, in its cross-examination of Mr. Shanahan, did not elicit any testimony that he, in fact, even viewed, much less relied on, these incidents in making his decision. Further, Mr. Shanahan's video explanation of the basis for the ten (10) game suspension to Mr. Kaleta refers solely to the suspension and fine history described above.⁷

I do note, however, that even had Mr. Shanahan given consideration to those prior events in assessing the issue of appropriate discipline for Mr. Kaleta in this case, it would have been perfectly appropriate and permissible for him to do so. While the NHLPA contends that such evidence may not be considered under Section 18.2 of the CBA, the Union's argument is belied by a plain reading of the section. In particular, Section 18.2(c) lists the factors that may be taken into consideration as including:

The status of the offender and, specifically, whether the Player has a history of being subject to Supplementary Discipline for On-Ice Conduct. Players who repeatedly violate League Playing Rules will be more severely punished for each new violation. (Emphasis in original)

⁷ Likewise, I have not reviewed video of prior on-ice incidents involving Mr. Kaleta that did not result in Supplementary Discipline in this appeal, and my decision here does not rely on any such evidence.

The emphasized sentence expressly and unequivocally states that a violation of League Playing Rules may be taken into account in determining the appropriate punishment for a subsequent violation -- regardless of whether the earlier violation itself had resulted in the imposition of Supplementary Discipline.

Next, I reject the NHLPA's contention that the suspension should be reduced because Mr. Shanahan improperly relied on fines assessed against Mr. Kaleta in prior seasons. The NHLPA's position rests on Section 18.7(e) of the CBA, which provides as follows:

A recipient of a fine will not be treated as a "repeat" offender for purposes of calculating the amount of compensation that will be forfeited upon suspension pursuant to Section 18.15. However, such a disciplinary fine will carry consequences for the balance of that season and any further Supplementary Discipline for On-Ice Conduct that is imposed in that season will take into account the offense for which the Player has been fined.

The first sentence quoted above cross-references the "repeat offender" provisions of Section 18.15, which sets forth different formulae for calculating the compensation to be forfeited as a result of a suspension depending on whether the Player is a "first offender" or a "repeat offender." (A "repeat offender" is one who is suspended twice within an eighteen (18) month period.) The "repeat offender" status applies only for purposes of calculating lost salary, however. Nothing in Article 18 limits the League's right to consider suspensions that occurred more than eighteen (18) months earlier in determining the number of games for which a Player should be suspended for a subsequent offense. Moreover, I note that the Union's notice of appeal does not challenge Mr. Shanahan's consideration of the prior (2009, 2011 and March 2013) suspensions of Mr. Kaleta in determining the quantum of discipline here. Rather, the Union objects to Mr. Shanahan's consideration of the three (3) fines previously assessed against Mr. Kaleta based on the second sentence of Section 18.15, which the NHLPA has characterized as a "sunset clause" that precludes consideration of fines imposed in prior seasons (Tr. 79-83).

The second sentence, however, is not a “sunset clause.” It does not by its terms (or by implication) require expungement of a prior record or preclude in any way consideration of fines imposed in prior seasons. Rather, it directs that disciplinary fines assessed in the current season must be taken into account by stating that such a fine “will” carry consequences for the balance of the season and that any further incident requiring discipline in such season “will” take into account the offense for which the Player has been fined. Because Section 18.7(e) is silent with respect to the consideration of fines issued in prior seasons, Section 18.2 must be reviewed to determine the significance (if any) of such fines in determining discipline for subsequent violations. As I have already discussed, Section 18.2(c) states unambiguously that Players who repeatedly violate League Playing Rules “will be more severely punished for each new violation.” This statement – which by its terms has no temporal limitation – clearly permits the consideration of prior Playing Rule violations that resulted in fines. To construe the provision otherwise would lead to an absurd result, *i.e.*, a prior violation of a Playing Rule that did not result in a fine can be considered in determining Supplementary Discipline for a subsequent violation, while a prior violation that resulted in a fine cannot be considered.

My conclusion not only gives meaning to all the provisions of Article 18, it is entirely consistent with the principle of progressive discipline, which generally accords the greatest weight to the most recent offenses and less weight (but not necessarily no weight) to offenses that are more remote in time.

I note here that past practice also supports my conclusion. There is ample evidence that Mr. Shanahan has on numerous occasions assessed discipline on the basis of a Player’s prior record that included Supplementary Discipline fines issued in prior seasons – and that the Union has acquiesced in

that practice by not appealing those suspensions to me or raising any objection to his practice of doing so.⁸

I also note that in the context of a Supplementary Discipline hearing and appeal, the Union is perfectly within its rights in arguing – as it regularly does on behalf of Players involved in disciplinary hearings – that a Player’s good behavior (*i.e.*, the absence of prior offenses) during a lengthy career should be considered as a mitigating factor. The corollary must also be true, *i.e.*, that a career history marked by repeated violations of Playing Rules -- particularly those intended to protect the health and safety of other Players (whether in the same season or prior seasons) -- may be an aggravating factor. Further, I reject the notion that progressive discipline can only be imposed for progressively “worse acts,” as opposed to the repetition of the same “bad acts.”

Finally, I reject the Union’s contention that the penalty assessed to Mr. Kaleta should be reduced because it is more excessive than the penalties assessed to other Players who have been suspended for head shots (Playing Rule 48 violations) this season. None of the Players cited by the NHLPA has a record that even remotely comes close to Mr. Kaleta’s extensive prior history of discipline assessed in connection with incidents in which he targeted Players’ heads. Mr. Edler and Mr. Stuart each had one suspension prior to this season (in Mr. Stuart’s case, his suspension was in 2001). Messrs. Erne and Weise had no prior discipline whatsoever. While these comparables might have been appropriate for Mr. Kaleta had this offense been his first offense (or even his second offense), they are clearly inapposite here given Mr. Kaleta’s disparate and distinguishing disciplinary history.

⁸ The practice of considering and relying on Supplementary Discipline fines from prior seasons for purposes of assessing discipline for later-occurring offenses is well-established and long-standing in the parties’ bargaining relationship and co-exists with CBA language that has remained substantively unchanged since 1995. Prior year Supplementary Discipline fines have been expressly relied in numerous prior cases, including but certainly not limited to: Marty McSorley (11/7/00); Scott Parker (10/15/01); Patrick Kaleta (11/2/11); Raffi Torres (12/3/11); Andy Sutton (12/7/11); and Ryan Clowe (2/22/13).

By contrast, Messrs. Wisniewski and Sutton – the two comparables cited by Mr. Shanahan in his testimony at the appeal hearing -- had extensive disciplinary history at the time of their most recent suspensions, more closely resembling Mr. Kaleta’s disciplinary history. Each had been subject to the imposition of supplemental discipline on multiple occasions for targeting opponents’ heads. Most recently, Mr. Wisniewski was suspended for four (4) pre-season and eight (8) regular season games in September 2011 for an illegal check to the head. That suspension followed three (3) prior suspensions for similar offenses, as well as a suspension for an unrelated offense (making an obscene gesture). Similarly, at the time of his December 2011 suspension for eight (8) games (for charging), Mr. Sutton had previously been suspended three (3) times (and fined on two (2) other occasions) for similar head-related offenses during his approximately 14-year NHL career.

I should also note that Messrs. Wisniewski and Sutton were each last suspended in 2011, at a time when Rule 48 was still relatively new. It is now 2013. As I stated above, there is no longer any possibility (assuming there ever was one) to excuse a Player on the basis of his failure to appreciate the importance of Playing Rule 48 (or the broader League-wide emphasis on protecting Players’ heads), or based on an asserted inability to adjust his “gritty” or “energetic” style of play to the new requirements imposed by the League’s current Playing Rules.⁹

⁹ The NHLPA’s emphasis on the fact that Mr. Johnson did not suffer an apparent injury on the play and therefore no significant discipline was warranted is misplaced. Mr. Shanahan’s disciplinary video makes clear that the absence of an injury has already been factored into the assessment of a suspension for ten (10) games. I suspect that the suspension meted out to Mr. Kaleta likely would have been significantly longer had Mr. Johnson been injured -- just as the twenty-one (21) game penalty assessed to Raffi Torres in 2012 was based, in part, of the injury suffered by Chicago Player Marian Hossa.

CONCLUSION

The ten (10) game suspension of Patrick Kaleta was supported by clear and convincing evidence and is therefore affirmed.

Gary B Bettman

Gary B. Bettman

Dated: 10/24/13



October 16, 2013

VIA FACSIMILE & EMAIL

Gary Bettman
Commissioner
National Hockey League
1185 Avenue of the Americas
New York, NY 10036

Re: Patrick Kaleta Suspension – Notice of Appeal

Dear Gary:

We represent Patrick Kaleta of the Buffalo Sabres (“the Player”).

Pursuant to CBA Article 18.12, the NHLPA gives notice of the Player’s appeal of the League’s decision to suspend him for 10 Games, as set out in the League’s notice to the Player and reasons set out in the video posted on the NHL.com website on October 15, 2013.

The bases of the appeal are as follows:

1. The decision is not supported by clear and convincing evidence that the hit in question was avoidable and, in particular:
 - a. the decision fails to take into account the evidence of material change to the position of the body of the Player’s opponent that occurred immediately prior to the hit and evidence that such change significantly contributed to the head contact.
 - b. there is no reasonable basis upon which to assert that the Player should have taken a different “angle of approach” to the hit.

Accordingly, there is no basis upon which supplementary discipline may be assessed pursuant to Rules 48 and 28 of the League’s Official Rules.

2. The League took into account three disciplinary fines assessed by the League in previous seasons in determining the “severity of the penalty” in violation of CBA Article 18.7 (e), which limits the duration of the period of permissible reliance on fines in the assessment

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of the severity of a supplementary discipline penalty to the season in which the fine is imposed.

3. The increase in severity of penalty from previous discipline is unreasonable and unwarranted in the circumstances.
4. Such other grounds as counsel may advise.

In order to permit the Player and the NHLPA to prepare for the appeal, we request that you immediately produce, to the extent not already provided to us:

1. All video evidence that touches upon the circumstances giving rise to the discipline in the League's possession or in the possession of either Club.
2. All correspondence, notes, emails or other documents, including records or notes of any conversations or investigations by League personnel that relate to the incident in question, or that were otherwise considered by the League in the course of its consideration of whether to assess discipline and of the appropriate penalty.

We request that a hearing be scheduled at the earliest possible time.

I trust that this is satisfactory. If you have any questions, please do not hesitate to contact me.

Yours truly,

**NATIONAL HOCKEY LEAGUE
PLAYERS' ASSOCIATION**



Roman Stoykewych
Associate Counsel

cc Don Zavalo
Patrick Kaleta
Anton Thun