

SHYAM DAS
NEUTRAL DISCIPLINE ARBITRATOR

In the Matter of Arbitration)	ARBITRATOR'S OPINION
Between)	AND AWARD
)	
)	
THE NATIONAL HOCKEY LEAGUE)	Appeal of Nazem Kadri
PLAYERS' ASSOCIATION)	Suspension
)	
)	
and)	Case Heard:
)	June 4, 2021
)	
)	
)	Award Issued:
THE NATIONAL HOCKEY LEAGUE)	June 8, 2021

Appearances

For the NHLPA:

Don Zavelo, Esq.
John R. Gerba, Esq.
Maria Dennis, Esq.

For the NHL:

Joseph Baumgarten, Esq.
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BACKGROUND

Kadri/NHL

This is an appeal under Article 18.13 of the Collective Bargaining Agreement (CBA) of a determination by the Commissioner upholding an 8-game suspension imposed on Colorado Avalanche player Nazem Kadri for On-Ice Conduct on May 19, 2021 in Game Two of the First Round Series of the 2021 Stanley Cup Playoffs between the Avalanche and the St. Louis Blues.

During the game, Kadri delivered a forceful open-ice check to St. Louis Player Justin Faulk. The on-ice official's report states:

At 13:30 of the third period, #91 N. Kadri (Colorado) delivered a hit on #72 J. Faulk (St-Louis). The hit was delivered right after Faulk shot the puck on net. It was a high hit from the blind side that made direct contact with Faulk's head. As a result of the infraction, Faulk was injured on the play. He laid on the ice for a few minutes, left the game and did not return.

Faulk sustained a concussion. Due to the injury, Faulk did not play in the remainder of Game Two or in Games Three and Four of the Series, which Colorado won in four games.

Article 18 of the Collective Bargaining Agreement (CBA) provides, in relevant part:

ARTICLE 18

SUPPLEMENTARY DISCIPLINE FOR ON-ICE CONDUCT

18.1 Supplementary Discipline for On-Ice Conduct. "Supplementary Discipline for On-Ice Conduct" means any supplementary discipline imposed by the Commissioner or

his designee for Player conduct either on the ice or in the Player or penalty bench areas vis-à-vis other participants in the game (i.e., other Players, coach or on-ice officials) in violation of the League Playing Rules. Supplementary Discipline for On-Ice Conduct may take the form of a fine or a suspension....

18.2 General. It is the parties' intention to impose Supplementary Discipline for On-Ice Conduct in a swift, effective and consistent manner with respect to conduct proscribed by League Playing Rules, including the use of excessive and unnecessary force and reckless acts resulting in injury. In doing so, however, the parties do not intend to alter the basic fabric of our game. In deciding on Supplementary Discipline for On-Ice Conduct, the following factors will be taken into account:

(a) The type of conduct involved: conduct in violation of the 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.

(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.

On May 21, 2021, following a supplementary discipline hearing held pursuant to Section 18.9 of the CBA, George Parros, Senior Vice President-Department of Player Safety, suspended Kadri for 8 games for an illegal check to the head. The analysis and rationale underlying the suspension are explained in a video issued by the DPS.

The NHLPA appealed the suspension to the Commissioner on Kadri's behalf pursuant to Section 18.12 of the CBA. The Commissioner held a hearing on May 27, 2021, at which Kadri and Parros testified. The NHLPA did not contest the imposition of supplemental discipline for a violation of Rule 48, but argued -- as it does in this NDA Appeal -- that an 8-game suspension was not supported and that a four-game suspension was appropriate. On May 31, 2021, the Commissioner issued his decision upholding the 8-game suspension imposed by the League.

Section 18.13, in relevant part provides:

18.13 Appeals to Neutral Discipline Arbitrator.

(a) If the Commissioner determines that the Player's suspension is six (6) or more NHL Games, after an appeal pursuant to

Section 18.12 above, the NHLPA, on the Player's behalf, may file an appeal of the Commissioner's determination to the Neutral Discipline Arbitrator ("NDA")....

* * *

(c) The NDA shall hold an in-person hearing and shall determine whether the final decision of the League regarding whether the Player's conduct violated the League Playing Rules and whether the length of the suspension imposed were supported by substantial evidence. The NDA shall issue an opinion and award as soon as practicable.... The NDA shall have full remedial authority in respect of the matter should he/she determine that the Commissioner's decision was not supported by substantial evidence. The NDA's decision shall be final and binding in all respects and not subject to review.

An arbitration hearing was held on June 4, 2021 by videoconference. The parties introduced the record of the Commissioner's hearing and certain additional exhibits. No witnesses were called. Both parties presented arguments in support of their respective positions.

The League insists that the Commissioner's decision is supported by substantial evidence and must be upheld. The following excerpts from the Commissioner's decision (excluding footnotes and transcript references) set forth the basis and rationale for his determination:

As I have noted in prior supplementary discipline opinions, the CBA does not

prescribe a formulaic basis for the determination of appropriate supplementary discipline. To the contrary, Article 18 embodies a recognition that each case is unique and must be decided on the basis of its own particular facts and circumstances.

The framework for my inquiry as to the appropriate level of discipline for on-ice conduct in violation of the Playing Rules involves a review of the...factors set forth in Section 18.2 of the CBA....

I review these factors below. However, it bears repeating what I have said in previous supplementary decision opinions, which is that head checks are a matter of great concern to the League, our Clubs and our Players. Violations of Rule 48 are among the most serious Playing Rule infractions in the game....

Mr. Kadri has played in the NHL for more than eleven (11) years. He testified that he is familiar with and understands Rule 48, and that he regards it as an important rule.

Simply stated, Rule 48 is -- and has been for many years -- an important and integral part of the Playing Rules governing the game. As such, the overwhelming majority of Players complete their career without ever once violating the rule. By contrast, those Players -- like Mr. Kadri -- who have violated Rule 48 multiple times during their careers (and have been suspended multiple times for penalties involving opposing Players' heads) stand out.

As for the factors referred to in Article 18.2, I find as follows:

The Type Of Conduct Involved

Mr. Kadri's conduct violated Rule 48. Both Mr. Kadri and the NHLPA acknowledged that violation. Moreover, as Mr. Parros indicated, it is not a "close call" that Mr. Kadri violated Rule 48. Even if I accept as true Mr. Kadri's contention that he did not intend to make head contact with Mr. Faulk (or to injure him), his actions were nonetheless reckless. It is no excuse to say that Mr. Faulk was eligible to be hit. Mr. Kadri chose a poor angle of approach towards Mr. Faulk and, to make matters worse, as he delivered the check, he elevated his shoulder up and into Mr. Faulk's head, which was not necessary to deliver the check. The force used was excessive and manifested a disregard for the safety of the opposing Player.

Injury To The Opposing Player

Mr. Faulk suffered a concussion on the play. As indicated above, he missed the remainder of Game Two and the final two remaining playoff games.

The Status Of The Offender

Mr. Kadri's prior supplementary discipline history is relevant to my analysis.... The goal of supplementary discipline is not simply to punish conduct that is in violation of League Rules, but also to deter future misconduct.

This is Mr. Kadri's sixth suspension in his NHL career -- three (3) of which have come during the last four (4) Stanley Cup Playoffs:

On November 13, 2013, Mr. Kadri was suspended three (3) Regular Season Games for goaltender interference against Minnesota Player Niklas Backstrom. Mr. Kadri struck Mr. Backstrom directly and forcefully in the head during the play, causing injury.

On March 16, 2015, Mr. Kadri was suspended four (4) Regular Season Games for an illegal check to the head of Edmonton Player Matt Fraser in violation of Rule 48, causing an injury.

On April 2, 2016, Mr. Kadri was suspended four (4) Regular Season Games for cross-checking Detroit Player Luke Glendening. During the incident, Mr. Kadri intentionally struck Mr. Glendening's head with his stick in retaliation for an earlier action on the same shift. Mr. Glendening did not suffer an apparent injury on the play.

On April 12, 2018, Mr. Kadri was suspended three (3) Playoff Games for boarding Boston Player Tommy Wingels. Mr. Kadri delivered a forceful and deliberate hit that drove Mr. Wingels' head and body into the boards. Mr. Wingels did not suffer an apparent injury on the play.

Just one year later, on April 13, 2019, Mr. Kadri was suspended for the remainder of the First Round Stanley Cup Playoff Series, which resulted in a suspension of five (5) total Playoff Games, for cross-checking Boston Player Jake DeBrusk. Notably, Mr. Kadri delivered a hard cross-check to Mr.

Debrusk's head. Mr. DeBrusk did not suffer an apparent injury on the play.

Although several different rule violations were called on the above incidents, each involved a common element, critical to my analysis in the instant matter: in each case, there was forceful contact involving the head of an opponent, three (3) of which caused an injury to the opposing Player.

The Situation Of The Game

In the incident, there were no noteworthy circumstances of the kind mentioned in Article 18.2(d)....

Other Factors As May Be Appropriate

As noted in the DPS suspension video and at the hearing, Mr. Kadri has a significant history of supplementary discipline. As recited above, this is Mr. Kadri's sixth suspension for on-ice misconduct during his NHL career -- all involving hits impacting the head of an opposing Player.

Mr. Kadri admits that he is aware of the significance of Rule 48, and the need to play within the confines of the Rules. However, he has consistently failed to do so during his career. Indeed, it is troubling that Mr. Kadri has committed significant offenses resulting in suspensions during three (3) of the last four (4) Stanley Cup Playoffs in which he has participated, representing a clear and recent pattern of on-ice misconduct over the last several years.

Unlike Mr. Kadri's two (2) most recent prior supplementary discipline offenses that

occurred in 2018 and 2019, respectively, the forceful hit Mr. Kadri delivered on Mr. Faulk...resulted in a serious injury to the victim. It is clear that Mr. Kadri continues to disregard the safety and well-being of opponents and has not adequately received the message. I agree with the DPS determination that a lengthy suspension under these circumstances is necessary and appropriate, and supported by clear and convincing evidence.

Mr. Parros did not apply a strict formula to determine the quantum of discipline here and I find that a strict formula is neither necessary nor appropriate, particularly since Mr. Kadri has been assessed six (6) supplementary discipline suspensions for head-related offenses (including this supplementary discipline suspension), three (3) of which were assessed during the Stanley Cup Playoffs.

Weighing the factors described above, I find that an eight (8) game suspension is appropriate for the following reasons.

First, it is consistent with the principle of progressive discipline. The two (2) most recent supplementary discipline suspensions assessed against Mr. Kadri, both of which occurred in the playoffs, resulted in suspensions of three (3) and five (5) playoff games, respectively. An increase to eight (8) games represents an appropriate escalation for the latest repeat offense. That is particularly true because this incident (unlike the other two) resulted in an injury.

Second, to the extent that the NHLPA has argued that the suspension should be

reduced because playoff games "count more" than regular season games, even assuming all eight (8) games of Mr. Kadri's suspension will be served in the playoffs, it constitutes an "apples to apples" comparison to Mr. Kadri's immediate prior two (2) suspensions that also occurred during the playoffs, as Mr. Parros noted.

Third, while I am not bound by any formula, a comparison with discipline levied in similar circumstances confirms my decision.... [A discussion of discipline issued to Patrick Kaleta in 2013 and to Tom Wilson in 2018 follows.]

The NHLPA stated during the hearing that a four (4) playoff game suspension was the appropriate penalty here. I reject that argument for the reasons discussed above. In addition, I note the following:

First, the fact that Mr. Kadri stated that he did not subjectively intend to injure Mr. Faulk, and that the Rule 48 violation occurred during the course of play, does not justify reducing the suspension below eight (8) games. The absence of malicious intent to injure has already been taken into account. Had the conduct occurred under more egregious circumstances than present here (e.g., had Mr. Kadri acted with evident intent to injure), I would have had no hesitation in imposing a suspension longer than eight (8) games.

Nor does the fact that Mr. Kadri has not been suspended for a period of one-hundred and twenty-four (124) games over twenty-five (25) months warrant a reduction in the suspension. Article 18.2 contains no provision that calls for discounting a

Player's prior disciplinary record when imposing a suspension for on-ice conduct, based merely on the passage of time between penalties....

Assuming that there may indeed be occasions when a lengthy gap in time between disciplinary suspensions justifies some amount of leniency, this is not one of those occasions. Mr. Kadri is a six (6) time recidivist over an eight (8) year period, including three (3) of the last four (4) Stanley Cup Playoffs. There is nothing about his pattern that suggests that he is entitled at this point to "credit" for good behavior or that he has reformed in a way that would warrant disregarding any part of his lengthy record. Further, as I observed above, the vast majority of NHL Players play their entire careers without being assessed a rule 48 violation. Mr. Kadri has repeatedly demonstrated an inability to avoid dangerous hits to opposing Players' heads during his career (including during three (3) of the prior (4) seasons), and the presence of an injury to the opposing Player here (which was not present in his prior two (2) offenses), underscores the need to impose a greater suspension on Mr. Kadri now.

I am not persuaded by the NHLPA's argument that the disciplinary records of Messrs. Wilson, Gudas, Marchand or Rinaldo "illustrate the concept that if a Player plays clean for a given amount of time", he shall not be considered a "Player who repeatedly violates the League Playing Rules under Article 18.2(c)." The record does not support the NHLPA's contention, as the disciplinary videos explaining the suspensions of those Players expressly refer in each case to their prior record, and

reflect that the discipline imposed was a function of the nature and severity of the offense, the presence or absence of an injury, and the Player's overall disciplinary record. In addition, I note the following:

1. Mr. Wilson's record provides the closest analogue to Mr. Kadri's record, and the number of head-related suspensions for Mr. Wilson (four (4), at the time) led to a fourteen (14) game suspension in 2018, as discussed above. Mr. Wilson thereafter played suspension free for a longer period of time than Mr. Kadri did. More importantly, his fifth suspension (for seven (7) games) in March 2021 simply did not involve as egregious or clear cut a violation as his prior violations, or as Mr. Kadri's violation here.
2. Mr. Gudas has been suspended a total of four (4) times in his career, including a three (3) game suspension in 2015, a six (6) game suspension in 2016, and a ten (10) game suspension in 2017. The lengthy increases in the latter two (2) suspensions resulted not just from the fact that Mr. Gudas was a repeat offender but from the fact that each offense involved extremely dangerous conduct. By contrast, Mr. Gudas's two (2) game suspension in 2019 involved much less severe conduct (resulting in no injury), and the video explanation suggests that he might not have been suspended at all but for his prior record.
3. Mr. Marchand was suspended six (6) times for various offenses between

March 2011 and January 2018. While his third suspension in January 2015 (two (2) games for tripping), involved a reduction from his prior five (5) game suspension, it involved considerably less serious conduct, came three (3) years (and two-hundred and forty-nine (249) games) after the prior offense, and did not involve an injury to the opposing Player.

4. Mr. Rinaldo's record actually illustrates the flaw in the NHLPA's theory. Mr. Rinaldo has been suspended five (5) times in his NHL career. Although his second suspension (in 2014) came one-hundred and twenty-seven (127) games and more than two (2) years after his first suspension, it was twice as long as his first suspension (four (4) games vs. two (2) games) -- because it involved a serious Rule 48 violation that caused an injury to an opponent. Mr. Rinaldo's next suspension (for boarding) also involved egregious conduct (and an injury to an opposing Player) and it was doubled again, this time to eight (8) games. His subsequent violation (in 2016) was committed only seventy-six (76) games later but resulted in a somewhat shorter (five (5) game) suspension -- because the conduct was not as egregious and did not result in an injury.

The NHLPA contends that the play in question was a responsible defensive play. The execution of the check Kadri delivered was off by inches. The NHLPA stresses that the DPS accepted Kadri's assertion that he was attempting to deliver a full body check. Indeed, Parros testified that without his

prior disciplinary record, he would only have received a one- or two-game suspension. While a player's past record is a factor to be considered in determining the appropriate level of discipline, imposition of that factor is not set in stone. Consistent with the aim of progressive discipline, the fact that a player goes a significant amount of time without receiving any supplementary discipline must be taken into account. Moreover, Kadri's two prior disciplines involved emotional reactions that led to what the DPS concluded were retaliatory actions on his part. As Parros acknowledged, this was not such a case. Kadri's two prior suspensions did change his behavior, and this has to be taken into account.

The NHLPA agrees that every case must be decided on its own merits to ensure that the League is applying discipline in a consistent manner. But here a comparison to four other players -- Wilson, Gudas, Marchand and Rinaldo -- shows that discipline was not consistently applied to Kadri. In this case, Kadri played 124 games between his prior five-Playoff Game suspension and the current offense. The NHLPA asserts:

And when we look at these other Players we see a much different trend.

When we look at Mr. Wilson, the 14-game suspension, which was the issue you last heard under Article 18, Mr. Wilson then went 167 games without a suspension. And when he received another suspension just earlier this year, it was for only seven games.

It didn't start at 14 and go up. It went down.

If you look at Mr. Gudas, the next name down on the list, in November of 2017, he

has a ten-game suspension for slashing. He then went 117 games without being suspended. And when he had another suspension in February of 2019, again, two games, it went down. It did not go up.

Mr. Marchand, December of 2015 to April of 2017, 123 games in-between those two suspensions. The number of games of suspension went down.

And Mr. Rinaldo, January 2015 to March 2016, an eight-game suspension in January 2015 went down to a five-game suspension in March 2016.

And that five-game suspension was for a Rule 48 violation just like the one we're dealing with here.

And there are only 76 games in-between those two suspensions. Materially fewer than Mr. Kadri's 124 games.

Moreover, the NHLPA introduced an exhibit to show that Kadri actually was subject to supplementary discipline with less frequency than the other four players.

The NHLPA contends that a four-Playoff Game Suspension -- as it proposed to the Commissioner -- is the appropriate discipline in this case:

It correctly takes into account the 124-game period in which Mr. Kadri received no Supplementary Discipline.

It is still a robust penalty however. Missing any Playoff Game is a significant penalty to an NHL Player, let alone four.

Four games would still send the message that Mr. Parros and Commissioner Bettman referred to.

FINDINGS

Kadri's team still is in the Playoffs. This calls for as expeditious a decision as possible. Accordingly, these Findings focus on the key elements of my analysis. After full and careful consideration of the evidence and contentions of the parties, I conclude that this appeal must be denied.

The substantial evidence standard applicable in this case, pursuant to Section 18.13 of the CBA, is more deferential than the "just cause" standard generally applicable in disciplinary cases under collective bargaining agreements. In essence, if there is a reasonable evidentiary basis for the length of the suspension imposed by the Commissioner and the League in this case it must be upheld. Moreover, as I stated in Appeal of Tom Wilson (2018):

Article 18.2 does not establish a formula for determining the amount of Supplementary Discipline to be imposed. It does list specific factors to be considered including the catchall: "Such other factors as may be appropriate in the circumstances." It also calls for discipline to be imposed in a consistent manner.

In this case, the Commissioner addressed all the factors set forth in Section 18.2. He concluded that, even if Kadri did not intend to make head contact with Faulk (or to injure him), Kadri's actions were reckless and involved the use of excessive and unnecessary force. Review of the video

released by the DPS supports the Commissioner's determination that:

Mr. Kadri chose a poor angle of approach towards Mr. Faulk and, to make matters worse, as he delivered the check, he elevated his shoulder up and into Mr. Faulk's head, which was not necessary to deliver the check.

Although the NHLPA argues that it was a responsible defensive play, that was merely off by inches, Parros' testimony that it was a clear-cut, forceful and significant violation of Article 48 is both credible and supportive of the conclusions reached by the Commissioner. There is no dispute that the opposing player, Faulk, suffered a concussion which caused him to miss the two remaining games played by his Club before it was eliminated from the playoffs.¹

The key factor in the Commissioner's decision to uphold the lengthy 8-game suspension issued to Kadri by the DPS was his history of supplementary discipline. That history is substantial. As spelled out by the Commissioner, this is Kadri's sixth suspension and:

Although several different rule violations were called on the above incidents, each involved a common element, critical to my

¹ The NHLPA stated that Parros testified that without his history of prior suspensions, Kadri would have received only a one- or two-playoff game suspension. Parros further testified, however, that with the injury suffered by Faulk it likely would have been a three-, or possibly even a four-game suspension.

analysis in the instant matter: in each case, there was forceful contact involving the head of an opponent, three (3) of which caused an injury to the opposing Player.

The Commissioner stressed in this case, as he did in Wilson, 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 infractions in the game.

It is true that in this case, unlike his two most recent suspensions in the 2018 and 2019 playoffs, respectively, Kadri did not act in an emotional, hotheaded or retaliatory manner, but in this instance, unlike those two prior ones, there was an injury -- a significant one -- to the opposing player. Parros testified that the DPS believed that Kadri's history showed the message was not getting through, and that the discipline needed to go up from the most recent five-playoff game suspension issued to Kadri -- without doubling that suspension as had been done in some other cases -- in order to send a strong message.² The Commissioner came to the same conclusion as the DPS, after also taking into account the comparisons with other players that the NHLPA presented to him.

The parties agree that, while consistency in imposition of supplementary discipline is called for in Section

² Parros acknowledged that this infraction was not hotheaded and was more of a hockey play, but reiterated that it still was a very severe hit. If it had been hotheaded or retaliatory, Parros indicated, the suspension likely would have been much greater.

18.2, each case must be decided on its own facts, applying the factors set out in Section 18.2. This case, unlike Wilson, does not involve use of what I concluded was an unsupported multiplier (3x in that case), nor does the evidence show, as in Wilson, a "wide disparity" between Kadri's 8-game suspension and the suspension(s) issued to other player(s) "under substantially comparable circumstances." On the contrary, as the Commissioner pointed out, in circumstances not unlike those in Wilson, the 8-game suspension issued to Kadri is very similar -- taking into account that it is being served in the playoffs -- to the 14-game suspension that Wilson received.

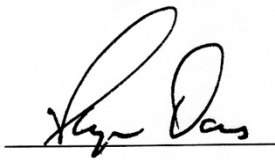
Application of progressive discipline includes consideration of significant relevant improvement in a player's conduct, although the evidence here falls short of showing a pattern of discounting prior discipline because a player has not received supplementary discipline for some period -- in Kadri's case 124 games over 25 months. Reasonable minds might differ on aspects of the proffered comparisons to the records of other players and the alleged improvement in Kadri's conduct asserted by the NHLPA, but the Commissioner has provided a reasonable basis for his conclusion that these did not warrant lesser discipline in this specific case.³

³ In reaching this determination, I have reviewed the DPS video explanations of the supplemental disciplines issued to the cited players. I also have taken into account Parros' testimony that the most recent 7-game suspension for board checking issued to Tom Wilson in March 2021, 167 games after he had received a 14-game suspension for an illegal check to the head in September 2018, was not as clear-cut of a violation and involved a lot of factors that were very rare, and that if it had been another

In summary, for the reasons stated above, the Commissioner's decision affirming the decision of the DPS suspending Nazem Kadri for 8 games is supported by substantial evidence. Accordingly, this appeal is denied.

AWARD

The appeal is denied.

A handwritten signature in black ink, appearing to read "Shyam Das", is written over a horizontal line.

Shyam Das
Neutral Discipline Arbitrator

player without Wilson's history the suspension would have been far less.