

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION

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In The Matter of Arbitration Between \*

ALONZO MAYES \*

and \*

STEPHEN W. ZUCKER \*

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\* NFLPA Case No. 03-64

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OPINION AND AWARD OF

ROGER P. KAPLAN, ESQ., ARBITRATOR

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APPEARANCES:

For Alonzo Mayes: Marc R. Pollack, Esq.

For Stephen W. Zucker: James H. Falk, Jr., Esq.

STATEMENT OF THE CASE

On August 28, 2004, Mr. Thomas J. DePaso, Staff Counsel of the National Football League Players Association (NFLPA) appointed the undersigned as the Arbitrator in the above-captioned case. I held arbitration hearings on Friday, April 30, 2004 and Wednesday, September 8, 2004 in Alexandria, Virginia. Both parties had the opportunity to examine and cross-examine witnesses as well as present evidence in support of their respective positions. A verbatim transcript was made

of the hearings. I received post-hearing briefs from both parties on approximately October 18, 2004.

### ISSUES

The parties agreed upon a stipulation of the issues.

They are:

1. Whether Alonzo Mayes' grievance dated August 1, 2003 was timely filed pursuant to Section 5(B) of the NFLPA Regulations Governing Contract Advisors?
2. Did Contract Advisor Stephen Zucker fail to file an injury grievance under the NFL Collective Bargaining Agreement in violation of his responsibility?
3. If so, what damages does Stephen Zucker owe Alonzo Mayes for this failure?

### PERTINENT NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS (as amended through November, 2003)

#### SECTION 3: STANDARD OF CONDUCT FOR CONTRACT ADVISORS

The objective of the NFLPA in implementing these Regulations is to enable players to make an informed selection of a Contract Advisor and to help ensure that the Contract Advisor will provide effective representation at fair, reasonable, and uniformly applicable rates to those individual players he/she represents, and to avoid any conflict of interest which could potentially compromise the best interests of NFL players.

A. General Requirements

Consistent with this objective, a Contract Advisor shall be required to:

(14) Fully comply with applicable state and federal laws;

(15) Become and remain sufficiently educated with regard to NFL structure and economics, applicable Collective Bargaining Agreements and other governing documents, basic negotiating techniques, and developments in sports law and related subjects. \* \* \*

(17) Act at all times in a fiduciary capacity on behalf of players.

B. Prohibited Conduct

Contract Advisors are prohibited from:

(14) Engaging in unlawful conduct and/or conduct involving dishonesty, fraud, deceit, misrepresentation, or other activity which reflects adversely on his/her fitness as a Contract Advisor or jeopardizes his/her effective representation of NFL players;

(22) Violating any other provision of these Regulations.

SECTION 5: ARBITRATION PROCEDURE

A. Disputes

This arbitration procedure shall be the exclusive method for resolving any and all disputes that may arise from the following:

. . . .

(4) Any other activities of a Contract Advisor within the scope of these Regulations . . .

B. Filing

The arbitration of a dispute under Section 5(A)(2)-(5) above shall be initiated by the filing of a written grievance either by the player or Contract Advisor. Any such grievance must be filed within six (6) months from the date of the occurrence of the event upon which the grievance is based or within six (6) months from the date on which the facts of the matter become known or reasonably should have become known to the grievant, whichever is later. A player need not be under contract to an NFL club at the time a grievance relating to him hereunder arises or at the time such grievance is initiated or processed.

PERTINENT PROVISIONS OF MAYES' STANDARD REPRESENTATION AGREEMENT  
(dated March 14, 2000)

3. Contract Services

Player hereby retains Contract Advisor to represent, advise, counsel, and assist Player in the negotiation, execution, and enforcement of his playing contract(s) with the National Football League.

In performing these services, Contract Advisor acknowledges that he/she is acting in a fiduciary capacity on behalf of Player and agrees to act in such manner as to protect the best interests of Player and assure effective representation of Player in individual contract negotiations with NFL Clubs. \* \* \*

12. Term

The term of this Agreement shall begin on the date hereof and shall continue for the term of any player contract executed pursuant to this Agreement; provided, however, that either party may terminate this Agreement effective five (5) days after written notice of termination is given to the other party.\* \* \*

## FACTS

This grievance protests the alleged failure of Mr. Stephen Zucker to file a timely injury grievance on behalf of Mr. Alonzo Mayes against the Miami Dolphins (Dolphins). It also alleges that Zucker engaged in a pattern of conduct designed to deceive Mayes as to the status of the injury grievance so as to prevent Mayes from filing a timely Player/Contract Advisor grievance against him.

Zucker is a principal of Zucker Sports Management Group, located in Northbrook, Illinois. He has been a certified National Football League Players Association (NFLPA) Contract Advisor since 1986. On November 30, 2001, I issued a decision suspending Zucker for 60 days and fining him \$5,000 for violation of Section 3(B)(19) of the NFLPA Regulations Governing Contract Advisors (NFLPA Regulations) by failing to disclose in writing his receipt of a fee paid from a third party in return for providing services to an NFL player. As described below, on June 3, 2004, I issued a decision revoking Zucker's certification as a Contract Advisor for one (1) year for engaging in prohibited conduct in failing to file an injury grievance on behalf of Mayes. See The National Football League Players Association Disciplinary Committee and Stephen W.

Zucker, NFLPA Case No. 03-D4 (Kaplan, 2004) (Disciplinary Award)<sup>1</sup>.

Mayes is a former NFL player. In 1998, after completing his collegiate football career at Oklahoma State University, the Chicago Bears (Bears) drafted Mayes in the fourth (4<sup>th</sup>) round of the 1998 NFL Draft. Mayes played in the NFL for the Bears and then for the Dolphins. On August 24, 2002, Mayes injured his left knee in a preseason game against the Houston Texans (Texans), which later resulted in his retirement from the NFL.

On March 14, 2000, Mayes and Zucker signed a Standard Representation Agreement (Agreement). Paragraph 3 of the Agreement provided that Zucker's responsibilities included representing, advising, counseling and assisting Mayes in the "negotiation, execution, and enforcement of his playing contract(s) in the National Football League". (Emphasis supplied). Paragraph 3 provided further that Zucker was required to act in a "fiduciary capacity" on behalf of Mayes and Zucker agreed to "protect the best interests" of Mayes. In addition, a June 22, 2000 letter from Ian Greengross (Zucker's Senior Associate) to Mayes stated that one of the "career related services" that Zucker's firm performed in return for its

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<sup>1</sup> This case was the appeal of the NFLPA Disciplinary Committee's decision. The transcript of that appeal is part of the record in the present case.

compensation was to provide "representation for all NFL grievances, hearings or appeals".

In November 2001, Mayes signed a two (2) year NFL Player Contract with the Dolphins which was negotiated by Zucker on his behalf. Pursuant to that Contract, Mayes was to be paid \$188,000 in the 2001 NFL season and \$205,000 in the 2002 NFL season. (The NFL's mandated minimum salary was later raised to \$225,000 and Mayes should have been paid at that level for the 2002 NFL season.)

As indicated above, while playing for the Dolphins, Mayes suffered an injury to his left knee on August 24, 2002. Following an initial medical examination and obtaining a second medical opinion, which was arranged for by Zucker, the Dolphins terminated Mayes' NFL Player Contract on September 17, 2002.

Mayes contacted Zucker's office the same day that he was terminated by the Dolphins. Ms. Pam Holby of Zucker's office advised Mayes that Zucker was in Europe, but that she would contact him.

Zucker called Mayes the following day, September 18<sup>th</sup>. In the Disciplinary Award, I found that there was considerable conflict between the testimony of Mayes and Zucker as to the substance of that conversation, but that the NFLPA Disciplinary Committee failed to establish that Zucker told Mayes he would

take care of filing an injury grievance. Zucker, however, returned from Europe on September 26, 2002; at that time, he did not contact the NFLPA to ascertain or verify whether an injury grievance had been filed.<sup>2</sup> There is no dispute that an injury grievance was never filed.

DePaso testified in both the present case and the appeal of the disciplinary decision. He stated that in December 2002, Zucker called him in an effort to "resurrect the injury grievance" and that Zucker had fired his assistant Ms. Pam Holby for inappropriate conduct. DePaso testified that Mayes contacted the NFLPA office in December 2002 to check on the status of his injury grievance. He told Mayes that such a grievance was untimely and that he had explained that to Holby. DePaso testified further that Mayes did not understand that the NFLPA had filed a non-injury grievance, but not an injury grievance. He explained that Mayes seemed to be confused and acted as though "somebody was telling him something else".

DePaso testified that he spoke to Mayes a number of times in February and April 2003. He stated that by April 2003, he believed that Mayes was "figuring out" that in fact the NFLPA had not filed an injury grievance for him.

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<sup>2</sup> Zucker did not testify in the present proceeding; he did testify in the earlier appeal of the NFLPA Disciplinary Committee's decision.

In an August 15, 2003 affidavit, Greengross stated that in December 2002 (after he left Zucker's employ in July 2002), he spoke to Mayes, but declined to give him an opinion as to whether Zucker had failed to file a timely injury grievance. He stated, however, that he told Mayes that he had six (6) months within which to file a grievance with the NFLPA if he believed that Zucker had failed to file his injury grievance. Greengross stated and confirmed in his later testimony at the arbitration hearing that he next spoke to Mayes in April 2003 regarding "his [Mayes'] concerns of an injury grievance filing".

In February 2003, Mayes sought a loan from Tinker Federal Credit Union (Tinker). Ms. Cindy Kelly, the loan officer with whom he dealt, testified that in order to close the loan, Tinker needed to verify present and future income. She stated that she contacted Zucker Sports Management and spoke to "somebody" (an male individual). In response to her inquiry regarding income verification, she received a fax from Zucker Sports Management which showed, among other provisions, Paragraph 5 of Mayes' NFL Player Contract which contained his salary for the 2001 and 2002 NFL seasons. Kelly testified further that the person to whom she spoke mentioned an "injury something". She stated that on the basis of the "injury something" and the salary information she received by fax, she was satisfied that Mayes would have the future income to repay the loan.

In the appeal of the disciplinary decision, Zucker testified that "At the time I talked to the loan officer [Kelly] I sincerely believed that something had been filed by the Union and that he [Mayes] had a good shot of winning that case and that's what I told them." Zucker Sports Management wired \$500 to Tinker on February 10, 2003.

These above-described events formed the basis of a Complaint filed by the NFLPA Disciplinary Committee on June 4, 2003 and amended on June 6, 2003 and the decision rendered by the NFLPA Disciplinary Committee on July 24, 2003 revoking Zucker's certification for two (2) years. As noted earlier, I rendered an Opinion and Award on the appeal of that decision in the matter of The National Football League Players Association Disciplinary Committee and Stephen W. Zucker, NFLPA Case No. 03-D4 (Kaplan, 2004) (Disciplinary Award). In that decision, I found that Zucker engaged in prohibited conduct in violation of Sections 2(D), 3(A)(15) and (17) and 3(B)(13) and (22) of the NFLPA Regulations by "failing to timely file an injury grievance on behalf of Alonzo Mayes"; I revoked Zucker's certification as a Contract advisor for one (1) year.

On August 1, 2003, Mayes filed the instant grievance with the NFLPA. Mayes claimed that Zucker had failed to file a timely injury grievance and that Zucker intentionally deceived him into believing that such grievance had been filed. Mayes argued that Zucker breached his fiduciary duty to him and that

Zucker's failure had caused him "a serious financial crisis". He sought damages in the amount of his "entire pay for the remainder of the 2002 season after my termination", plus other costs.

Zucker responded on August 16, 2003; he sought to have the grievance dismissed. Zucker asserted that Mayes' grievance was untimely under Section 5.B. of the NFLPA Regulations. He claimed that Mayes' grievance did not comply with the requirement of Section 5.B. to state the facts and circumstances giving rise to the grievance, the portions of the Standard Representation Agreement which Mayes alleged that he violated, and the relief sought by Mayes.

In July 2003, Zucker filed an answer and supplementary answer in the Disciplinary Case that are part of the record herein. Zucker asserted that he had been misled by Holby's criminal, dishonest conduct and that he did not know or have reason to know of her misconduct. He argued that he had satisfied his duty to Mayes when he gave Mayes advice from Europe to call the NFLPA immediately. Zucker claimed that Mayes chose to ignore his advice and relied on Holby to his detriment.

Based on the inability of the parties to resolve this matter amicably, it proceeded to arbitration as set forth earlier in this decision.

## DISCUSSION AND ANALYSIS

In this grievance for damages, Mayes has the burden of proving that Zucker failed to file his injury grievance and that he is entitled to damages as a result. The assertion that the grievance was untimely is, in effect, an affirmative defense. The burden of proof for this argument rests with Zucker. For the reasons which follow, I find that the grievance is timely and that Mayes met the burden to prove his entitlement to damages.

The evidence established that Zucker never filed an injury grievance. While the record (including the findings in the Disciplinary Award) was inconclusive as to whether Zucker directed Mayes to file an injury grievance, the evidence is clear that Zucker never followed up to confirm that such grievance had been filed and never ascertained the status of the grievance (or non-grievance) until the time for filing such grievance had expired.

Failure to check the status of the injury grievance within the limitations period was a clear breach of Zucker's fiduciary duty; it also demonstrated a failure to fulfil his obligations under the Agreement to represent, advise, counsel and assist Mayes in the "negotiation, execution, and enforcement of his playing contract(s) in the National Football League". (Emphasis supplied). Additionally, Zucker's failure was a lapse in his

commitment as enunciated in Greengross' June 2000 letter regarding the services that Zucker Sports Management would provide to Mayes.

Further, the record showed that Zucker knew that he had failed to file the injury grievance. Notwithstanding any assertion to the contrary, I have held that the player-Contract Advisor relationship continues beyond the termination of a Standard Representation Agreement so long as the player and Contract Advisor conduct themselves as though that Agreement were in effect<sup>3</sup>; thus, Zucker's obligations continued following Mayes' termination by the Dolphins. Having failed to file a grievance timely, Zucker did not contact Mayes as to the status of the situation, despite his obligation under the Agreement to do so. His efforts in his December 2002 conversation with DePaso to "resurrect" the injury grievance demonstrated that Zucker was aware of his failure.

For all of these reasons, I find that Mayes sustained his burden to show that Zucker failed to file an injury grievance in violation of his responsibilities.

According to Section 5(B) of the NFLPA Regulations, in order to be timely, Mayes must have filed his grievance within "six (6) months from the date of the occurrence of the event upon which the grievance is based or within six (6) months from

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<sup>3</sup> See Pro Athlete Rep. Inc. and Stoyanovich, NFLPA Case No. 99-4 (Kaplan, 1999).

the date on which the facts of the matter become known or reasonably should have become known to the grievant, whichever is later."

The evidence established that Mayes was unclear as to the status of his injury grievance. There is no evidence to support the conclusion that Zucker told Mayes that no injury grievance had been filed.

The record demonstrated that in December 2002, Mayes was confused as to the status of his injury grievance, despite a competent explanation by DePaso that there was no injury grievance pending. The evidence shows that Mayes' confusion was grounded in conflicting information received from Zucker or Zucker's office.

The evidence showed that Zucker's misconduct in relation to Mayes' loan application filed with Tinker in February 2003 only furthered Mayes' uncertainty as to the status of his injury grievance. The record made clear that Zucker represented to Tinker that Mayes was anticipating a recovery. The subsequent approval of the loan could only have reinforced Mayes' belief that the grievance had been filed timely and was active, and that he was likely to receive payment at the conclusion of that process.

The record established that it was not until April 2003, when it became clear to DePaso that Mayes was finally coming to understand that no injury grievance was pending. Thus, it was not until that time that Mayes knew or should have known that he had a claim against Zucker. Assuming arguendo that Mayes came to that understanding as early as April 1, 2003, then his filing of a grievance on August 1, 2003 is well within the six (6) month period established in Section 5(B) of the NFLPA Regulations. Therefore, I conclude that Mayes' grievance was timely filed.

Mayes argued that he suffered damages in the following amounts and categories: Salary - \$198,529 (15/17 of \$225,000) plus interest from August 1, 2003; severance pay - \$12,500; 401(k) payment - approximately \$4,000; lump sum annuity payment - \$65,000; lifetime pension benefit - \$425; less a deduction to offset workers compensation payment - negative \$8,910. While the evidence established that Zucker was responsible for failing to file a timely injury grievance, Mayes' claim appears to assume that his injury grievance would have been entirely successful. Such an assumption is speculative and the record in this case is insufficient to support such a finding.

Specifically, there was, at most, only a minuscule amount of evidence presented with respect to the nature and/or scope of Mayes' injury. Mayes failed to present evidence other than to assert that he was owed monies in specific categories; he

offered no meaningful explanation of the categories (other than his claimed salary) or the basis for his calculation of the amount that he claimed was owing. It is significant that no substantial medical evidence was placed in the record. In addition, there was no party present in this arbitration (such as an employer appearing at a workers compensation hearing) who had a significant interest in challenging such evidence, assuming such evidence had been presented. Thus, there was an insufficient capacity in this proceeding to test the accuracy and credibility of any medical evidence had it been presented. Therefore, I will not substitute my judgment for that of a decision maker in a different forum as to the validity of any injury grievance that might have been filed.

Even if further evidence related to Mayes' injury had been presented, the resolution of an injury grievance was not at issue before me. If I attempted to resolve an injury grievance or even the underlying issues inherent in such a grievance, I would exceed my authority. I am simply prohibited from ordering payment of monies based on the supposed outcome of an injury grievance proceeding which I have not held and am not empowered to hold.

The limitations in assessing the precise magnitude of Mayes' loss are described above. Such limitations do not, however, bar a recovery. I find that equity dictates that under

the facts and circumstances established in the record, an amount of \$100,000 is an appropriate measure of damages.

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AWARD

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After considering all of the evidence presented at hearing and the arguments made in the post-hearing briefs, I find that:

1. Alonzo Mayes' grievance dated August 1, 2003 was timely filed pursuant to Section 5(B) of the NFLPA Regulations;
2. Contract Advisor Stephen Zucker failed to file an injury grievance under the NFL Collective Bargaining Agreement in violation of his responsibility;
3. Pursuant to Section 5(E) of the NFLPA Regulations, Stephen Zucker will pay Alonzo Mayes \$100,000 within ten (10) days;
4. The grievance is sustained in part and denied in part.

DATED: **NOV 19 2004**

(Signed) \_\_\_\_\_ P. Kaplan

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Roger P. Kaplan

Alexandria, Virginia