

BEFORE THE UNITED STATES SENATE
COMMITTEE ON COMMERCE,
SCIENCE AND TRANSPORTATION

STATEMENT OF DONALD M. FEHR,

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28 SEPTEMBER 2005

Thank you Mr. Chairman. My name is Donald M. Fehr and I am the Executive Director of the Major League Baseball Players Association. I appreciate this opportunity to testify today about what our union has done and is continuing to do to combat the use of illegal performance-enhancing substances in Major League Baseball.

The last time I appeared before this Committee, on March 10, 2004, I explained how the new Joint Drug Agreement contained in our 2002 collective bargaining agreement was working. We had conducted a year of survey testing in 2003, which produced positive test results for between 5 and 7% of players (I believe the actual number of positive tests was in the 80s), with the result under our agreement being that in 2004 we were about to begin the random testing of individual players with disciplinary consequences. I expressed my belief that the 2004 testing program would be a significant deterrent to the use of unlawful performance enhancing drugs, and that the number of positive tests would drop dramatically. I also pointed out that by the end of the season we would have hard data (the 2004 results) by which to gauge whether our agreement had been effective, and whether my prediction would prove accurate.

I recognize that not everything I said that day was well received. Chairman McCain said that he did not disagree with anything in my opening statement, but nonetheless indicated he thought we needed a much stronger program. Senator Dorgan said he was disappointed that we had made so little progress since a Committee hearing in the summer of 2002, and indicated his dissatisfaction that under our 2002 agreement,

players who tested positive for the first time were not suspended or publicly identified, but instead referred to treatment. Based on these and other criticisms, the Chairman urged us to commit to revisit the issue. We did.

We soon began discussions with the clubs to amend our agreement, even though we had no legal obligation to negotiate, and announced our new agreement last January. In it, we tried to address each of the major criticisms which had been leveled at our program: (1) we added additional tests, and established a program under which a player could never be certain that he would not be tested again; (2) we added off-season testing; and (3) we increased the penalties, including the public identification and suspension of a player who tested positive for the first time. While reluctant to take this last step, the players believed that public identification of those who test positive for the use of unlawful performance-enhancing drugs, with the attendant necessary consequences of widespread criticism and shame, would be a significant deterrent.

On the day of the announcement, Mr. Selig praised both the agreement and the Players Association for agreeing to an unprecedented mid-term renegotiation of a significant provision in our collective bargaining agreement. In early March, he said he was “very confident that we will effectively rid our sport of steroids” in 2005. President Bush said the new agreement was good for baseball and good for society. Some members of Congress indicated that they hoped that more would be done, but still clearly felt that the new agreement was a very positive step. By all accounts, we had significantly enhanced our program. At about the same time we learned that the 2004 program was

working well. There were twelve confirmed positive tests, out of more than 1100 administered.

Both the new agreement we reached and the results in 2004 – the hard data – constitute strong evidence of progress. And yet, only two months after the announcement of the new agreement, and before we even were able to implement it, we appeared on March 17, 2005, before the House Committee on Government Reform. Again, our program received harsh criticism. I believed then, and continue to believe, that much of that criticism was not well founded.

A few weeks after the hearing, despite his previous emphatic support of the new program, Commissioner Selig publicly called for us to renegotiate yet again. Members of the House Government Reform Committee, as well as the House Energy and Commerce Committee which held a hearing on May 18, also asked us to do so, as did Members of the Senate. And so, yet again, we have. I informed the Commissioner that we would discuss the issues with the players, and I spent much of the summer traveling to meet with all of the players on all 30 teams to give each player an opportunity to hear and discuss these difficult issues. During and subsequent to my meetings with the players, we have been actively negotiating with the clubs to see what additional agreement we may be able to reach.¹

¹ Both sides agreed that it would be unfair to implement new testing rules during the 2005 season. Indeed, Mr. Selig said he thought it was unfair to do so in the minor leagues, where the program is unilaterally implemented by the owners. We also believed that the results of our 2005 testing program would be helpful to our discussions.

Meanwhile, we now have results from the 2005 testing program. Some believed there might be far more positive test results in 2005 than in 2004 for one simple reason: many substances which were perfectly legal until last January are now illegal, as a result of the passage of the Anabolic Steroid Control Act of 2004. The substances covered in the bill were automatically added to our program. As a practical matter, what this meant was that a player could test positive this year merely by continuing to use something he had legally purchased as recently as New Years Day 2005. And, of course, we have a very diverse membership, some of whom live in countries in which I believe some of those products can still be legally obtained.

Those concerns were not realized. The 2005 results demonstrate that the players take our program seriously. So far this year we have conducted more than 1400 tests. Only nine players have been suspended for testing positive, of which only five were full-time Major Leaguers in 2004, and only four of whom will have a full year of major league service in 2005. Two of the nine had no Major League service through 2004; two had less than two months. And one of the nine players suspended did not use steroids in 2005 at all. The arbitrator found that the low level detected in his urine was the result of a prior use, before the 2004 season, for which this player had already been disciplined twice, under the Minor League program. It was for that reason that the Players Association believed, and still believes, that this third suspension was fundamentally unfair and inappropriate, representing a kind of double jeopardy.

Clearly these results are very encouraging, and one can hope that the final results

will demonstrate that the Mr. Selig's prediction (that we will effectively rid the game of steroids in 2005) will turn out to be accurate.²

Of course, as everyone here is well aware, one of the players suspended does have substantial Major League service. Senator McCain has indicated that the suspension of Rafael Palmeiro brought this issue to the forefront again. To an extent, I feel as if we are caught in a catch-22. Before the Palmeiro suspension, a primary criticism leveled at our program had been that it could not be working because no well-known players had been suspended. After the Palmeiro suspension we hear that the program cannot be working because Rafael Palmeiro was found to be in violation of the program. But you can't have it both ways. With all due respect, our program is working well. It has resulted in a dramatically reduced incidence of steroid use, and applies to all players equally, without regard to seniority, ability or status in the game. Nor does the Palmeiro suspension demonstrate that our penalties are inadequate. The consequences of making this suspension public have been devastating for the player.

Let me turn now to our current discussions with the owners. Unfortunately, as of the time that this is written, we have not yet reached a comprehensive new agreement, and, in labor negotiations, no final agreement is made until all outstanding issues have been resolved. But we have made significant progress in each of the areas of concern identified by Mr. Selig, and have reached or are very near agreement on several of the key issues which we have been discussing. We have agreed to conduct significantly more

²The incidence of positive test results is at a very low level, and while zero is our goal, it may be unrealistic to expect that it will be reached. No testing program has been entirely free of positive tests. But we are

tests. The number of tests performed each year would double, and the new annual number of tests would be approximately 3,000. We have agreed upon a framework for testing for amphetamines, something that baseball has never before tried to do, and have essentially agreed on a penalty structure for amphetamine positives. We have offered to move more of our testing and administrative functions to an outside entity in order satisfy a criticism – even if, as we believe, it is uninformed – that we need to create more transparency and independence. We also have agreed to clarify the language regarding governmental investigations.

However, we have yet to reach agreement on a new penalty structure to be applicable to players who are found to have used unlawful steroids. Although the Players Association has made a proposal for enhanced penalties, we have been unable to meet the Commissioner's demands, particularly with respect to penalties for a first-time offender. Specifically, the agreement we entered into in January calls for a 10-day suspension for a first positive. The MLBPA has proposed doubling that to a presumptive 20-game suspension. The Commissioner would have the right to impose a suspension which could under certain circumstances become 30 games, and the player would be able to argue that the circumstances were such that the penalty should be reduced (but not below 10 games). Mr. Selig's proposal presumes a 50-game penalty, with the possibility that he could increase it to 60 games, and the player could argue that it should be reduced to 40. For a second violation, the current agreement calls for a 30-day suspension. The MLBPA has proposed that this be increased to a presumptive 75-game suspension, with circumstances under which the Commissioner could impose 100 games, and the player having the right

to argue to an arbitrator for a reduced penalty, but at least 50 games. Mr. Selig's proposed presumptive penalty is 100 games, although he could impose up to 120 games, and the player could argue for a lower penalty of 80 games. And for a third positive test result, the current agreement calls for a 60-day suspension. We have proposed that the new agreement give the Commissioner the right to impose whatever suspension he believes is appropriate and consistent with just cause, including a permanent ban, with the player having the right to argue to an arbitrator that the penalty is not warranted under the facts of his particular case. Mr. Selig's position is that after a third violation, a player should be permanently banned, without arbitral review or any other review, or even an examination of the particular facts and circumstances of the individual case.

The clubs' position in this bargaining seems to be that the players must give the clubs what they want or an even more punitive result will follow by legislation. But, clearly, Mr. Selig does not believe that stiffer penalties are needed in order to have an effective program. He has said on a number of occasions that the program is in fact working well, but that, somehow, this is not the issue and that does not matter.

We think it does matter. We think that the facts do matter, or they should. It is the very role and function of the Players Association, as it is of every union, to effectively represent its members to the best of its ability, and that includes individuals who will be tested and, if appropriate, punished. So we do believe, and we must believe, that fundamental fairness matters, and that the penalties should be designed for effective deterrence, not for punishment for its own sake. The penalties the clubs are asking for,

and the ones provided in the bills being discussed today, do not meet that standard.

Consider our current program. While we do not have a system of absolute strict liability, we have agreed that once a player tests positive the burden shifts to the player to show why he did not violate the program. This obviously puts the player in the nearly impossible situation of having to attempt to demonstrate how something got into his body weeks or months earlier. If he did not put it there, he will not know. Clearly there may well be results which are unfair to the player. And while some will say that a system like this is necessary in order to have an effective policy, it is also a reason that first time penalties should not be overly severe – that is, more punitive than is necessary to deter use.

There is also the possibility that a player will test positive as the result of a mistake. The player may take a single pill, not knowing what it is or thinking it is something else, and test positive. And, however unlikely we hope that it is, there certainly is also the possibility of a player being set up by someone who puts something in his food or beverage. A Major League player is not in a position to do what I have heard some cyclists do, i.e., take everything he is going to consume with him whenever he travels. And there is also the question of the science, and its limitations. We may be using the best science available but, it will likely evolve. For example, we know things now that we did not know until very recently. It used be thought that the metabolites of nandrolone were not naturally found in humans; now we know that in certain circumstances they can be. We also did not know that the metabolites could grow in a test tube; now we know otherwise. As time goes on we will likely learn other things of which we are not now

aware. Scientific mistakes will be made, and a just program must account for that reality.

If this Committee does proceed to consider legislation, be it one of the bills currently before it or one of the measures under consideration in the House of Representatives, we ask that it address several issues which to date have not received serious attention. This is especially true since different legal and regulatory concerns arise when a testing program is mandated by the federal government as opposed to one created and administered through collective bargaining. For example, what is the basis for covering some professional athletes and not others? Will covered athletes be afforded traditional due process rights? Will covered athletes be provided the same legal protections and due process rights afforded federal employees who are subject to random, suspicionless testing? What is the appropriate standard to judge the adequacy and effectiveness of an existing penalty structure? What is the mechanism for redressing the injuries suffered by a professional athlete who is incorrectly identified as testing positive? What scientific standards will be followed concerning the development and implementation of new testing methodologies or replacing those found to be out-dated or inaccurate? And, how will the Committee ensure a proposed program is Constitutional?

There are serious questions as to whether the bills before the Committee are consistent with the Constitution. See, for example, *Chandler v. Miller*, 520 US 305 (1997). In that case the Supreme Court held unconstitutional, as a violation of the Fourth Amendment, a Georgia law requiring drug testing of candidates for public office. The federal government recognized the principles set forth in *Chandler* in 1999 when it

clarified which federal employees could be subjected to mandatory random drug testing. Concerns regarding public safety or national security can justify such testing, the Fourth Amendment notwithstanding. Concerns regarding public trust, reputation for integrity, honesty or responsibility, cannot.³

Clearly, the considerations which might or might not justify federally mandated testing of professional athletes may be different than those which pertain to state or federal officials or employees, and no one can be certain what the result of any litigation would be. But given the doubt that any such legislation would be Constitutionally valid, along with the evidence that the agreement reached by the parties in collective bargaining is successfully dealing with the problem, legislation at this time is not warranted. Under the circumstances, the bargaining parties have a program whose effectiveness should at the very least be tested over time before Congress wrests control of this issue from private hands.

As I said, we have not yet reached final agreement with the clubs on a new program, but we have on a number of important issues. Hopefully we will be able to close on the remaining issues.

³ See Memorandum from the Interagency Coordinating Group Executive Committee to Federal Agencies, Guidance for Selection of Testing Designated Positions III(D)(1) (August 2, 1999). This can be found at [Hhttp://dwp.sanssa.gov/FedPgms/Files/TDPs.aspx](http://dwp.sanssa.gov/FedPgms/Files/TDPs.aspx)