

Office of the Commissioner
MAJOR LEAGUE BASEBALL



ALLAN H. (BUD) SELIG
Commissioner of Baseball

By Hand

June 27, 2008

Chairman Henry Waxman
Ranking Minority Member Tom Davis
Congress of the United States
House of Representatives
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Chairman Waxman and Ranking Member Davis:

I am writing in response to your letter of June 12, 2008. I welcome the opportunity to address your concerns.

As a general introduction, I want to stress several points about the 2004 steroid testing program. First, as I testified in 2005 before the Committee, Baseball did in fact see a dramatic reduction in positive steroid tests in 2004. One thousand one hundred thirty three (1,133) tests were conducted in 2004. Of those, twelve were positive for steroids. We are convinced that the reduction occurred because we went from an anonymous survey program in 2003 to a disciplinary program in 2004. As we have continued to improve our program, positive rates have dropped even further and we had only two steroid positives in 2006 and three in 2007.

Second, the Report of Senator George Mitchell, who conducted an investigation into Baseball's past at my direction, was issued more than two years after the 2005 Committee hearing. The allegation in that report that a union official had notified a player that he would be tested at a certain time came as a complete surprise to me and to all of us in the Commissioner's Office. Mr. Robert Manfred, Executive Vice President of Labor for Major League Baseball, who was responsible for overseeing management's role in the new steroid testing program, believed in March 2005 that all the tests were

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conducted on an unannounced basis, without advance notice to any player as required by the program.

Third, at the time of the hearing in March 2005, the only witness from Major League Baseball (as opposed to the Major League Baseball Players Association) who was aware of the general delay in the commencement of testing in 2004 or the delay in the testing of the 100-plus players involved in the BALCO seizures was Mr. Manfred. The reason for this is that the relevant decisions were made in the context of the functioning of the Health Policy Advisory Committee ("HPAC"), the deliberations of which were treated as confidential under the Joint Drug Agreement then in place. There is a sound policy behind this rule of confidentiality. In particular, the fewer people with knowledge of the administrative decisions made about the drug testing program (particularly decisions that affect the scheduling of tests), the less likely the possibility of leaks or allegations of improper interference with the program.¹

Fourth, the activities about which you inquire occurred in response to an extraordinary, unforeseen set of circumstances. To the best of our knowledge, the seizure of Baseball's testing records in the BALCO investigation was the first time that law enforcement officials had sought large numbers of records from a private employer's workplace drug testing program as part of a criminal investigation. As a result, Major League players faced the realistic prospect of criminal prosecution based on evidence from a drug test that they were promised would be anonymous. In addition, the seizure undermined representations made to players that drug testing records generally would be confidential. Because the confidentiality of the program had been a principal concern of the players and their union in the negotiation of the program, it is no exaggeration to say that the seizure threatened the continued viability of the entire drug testing program.

Fifth, all the actions taken by HPAC in 2004 were structured in a way that was designed to protect the integrity and effectiveness of the testing program. Specifically, it was agreed that players would not be informed of delay in the commencement of testing generally or of the longer delay for the 100-plus players involved in the BALCO seizures. Absent such notice, players had to assume that they were at risk to be tested, thus preserving the deterrent effect of the program. In fact, given that the program in effect for 2004 required only one test per player per year, delaying the testing had the positive effect of keeping players at risk longer. Equally important, the agreement was that the 100-plus players were to be told only that their records had been seized, not anything about the timing of future tests. Once these notifications were accomplished, the agreement was to resume testing in full compliance with the program. The collection agency, CDT, was to schedule tests without informing the bargaining parties or the

¹ The bargaining parties have mutually agreed to waive the confidentiality requirement applicable to HPAC deliberations on rare occasions only to allow consultation with counsel on legal issues and to allow Messers Orza and Manfred to report a very limited number of matters to their immediate supervisors, Messers Fehr and DuPuy, respectively.

players about the date or time of the tests and the tests were to be conducted on an unannounced basis.²

In fact, at the time of the hearing in March 2005, no witnesses from Major League Baseball had any knowledge of the actual content of the conversations between the union and its 100-plus members for whom records were seized or the precise timing of those conversations.³ All Mr. Manfred knew was that the process was complete at some point in mid September.⁴ Until the issue was raised in the context of the Mitchell investigation,

² The one test per player rule in force during 2004 presented those responsible for the administration of the program with a difficult problem. If a player were tested early in the year, that player could use performance enhancing substances without fear of detection until the following season. Conversely, if a player were tested late in the season, he remained "at risk" until the test date, but he had the knowledge that he would be tested within a shifting window (i.e., the window between the current date and the close of the season).

Major League Baseball's position in 2004 was that preserving the deterrent effect of the program by scheduling tests late in the season was most important. The predictability created by the ever-shortening testing window was, therefore, inevitable. The delay of the testing for the 100-plus BALCO players increased this problem at the margin, if at all.

This problem of predictability -- as opposed to knowledge of actual test dates -- is common in drug testing programs. For example, in sports with irregular, episodic competitions like track and field or swimming, athletes know that they are going to be tested in a very predictable and often narrow "in competition" window. Yet, these sports, as part of the Olympic movement, routinely are credited with having no-notice, unannounced testing programs.

³ In the course of preparing this response, Mr. Manfred learned for the first time from the union more precise information about the timing of notifications to players. That information will be provided directly to the Committee by Mr. Fehr.

⁴ Mr. Manfred urged Mr. Orza to complete the notification process more than once. See "Report to the Commissioner of Baseball of an Independent Investigation into the Use of Steroids and Other Performance Enhancing Drugs by Players in Major League Baseball," 282 (2007).

Mr. Manfred had no knowledge of the allegation that the content or the timing of the 100-plus conversations had provided any players with significant, additional information about the timing of tests.

Sixth, no Major League Baseball witness had any intention of withholding significant information from the Committee.⁵ The focus of the questioning in March 2005 was the terms of Major League Baseball's policy and its deficiencies. There was little inquiry into the facts surrounding the actual operation of the program in 2003 or 2004 and, as a result, there simply was not a question which prompted disclosure of the suspension of testing. Moreover, the Baseball witnesses did not try to hide the fact that 2004 BALCO seizures had caused problems for the program. In his prepared statement, Mr. Manfred commented as follows:

The Committee's letter characterizes as extraordinary a provision that would suspend testing in the face of a government effort to obtain across-the-board testing results from our program. At the outset, I should point out that this provision related only to individually, identified-by-name drug test results, and not general oversight activities of the type reflected in the subpoena issued to baseball. It also does not apply if the government's investigation is supported by individualized probable cause for particular players. It is also important to understand that this provision did not arise in a vacuum. Baseball has faced efforts by law enforcement authorities to obtain across-the-board testing results, absent individualized showings of probable cause. All the provision does is temporarily suspend the program while we resist an attempt by law enforcement officials to premise a criminal probe on private drug testing results.⁶

⁵ It has been suggested that notice to the 100-plus players made the comparison of 2003 and 2004 test results misleading. As an initial matter, it is widely recognized that results from testing programs should not be taken as reliable measures of usage. See generally, Uryasz, Frank "Drug Testing Programs Designed to Deter, Not Measure," Newsletter of the National Center for Drug Free Sport, Inc., Second Quarter 2008 (copy attached). This is because testing programs are designed to deter, not measure, use. In fact, it was clear at the time of the March 2005 hearing that there was nothing comparable about the 2003 and 2004 results. The program changed from an anonymous, non-disciplinary program in 2003 to a disciplinary program in 2004. Players who were using performance enhancing substances knew that this change put them at great risk and they had every incentive to change their behavior. Major League Baseball believed in 2005 and continues to believe that this fundamental change in the deterrent effect of the program resulted in the lower positive rate in 2004. It is hard to imagine how a belated notification that the federal government had seized information about 2003 tests would motivate a player to continue to use steroids and try to avoid detection. In reality, the more likely result would be that the player would stop using which is, of course, consistent with the deterrent purpose of the program.

⁶ *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. 290 (2005) (statement of Robert D. Manfred, Jr., executive vice president of labor relations and human resources, Major League Baseball).

Finally, Mr. Manfred never intended to conceal the suspension of testing from the Committee. In fact, it was Mr. Manfred who provided Senator Mitchell with much of the information on the suspension of testing contained in his report.

In terms of your more specific inquiries, I would offer the following responses:

1. As reported by Senator Mitchell, there was an initial delay in the commencement of testing of all players in 2004. On July 8, 2004, testing began for all but the 100-plus players whose testing records were seized as part of the BALCO investigation. Testing of the group of 100-plus was commenced on September 21, 2004 after the notifications were complete.

One point of clarification is in order. When Mr. Manfred was interviewed by Senator Mitchell, his recollection was that there was an initial, general suspension of testing based on the BALCO seizures. He did not recall at the time that the broader delay of testing early in the season actually was caused by operational considerations unrelated to BALCO. These included: (1) the failure of the bargaining parties to reach agreement on how to distinguish "true" positives from adverse analytical findings caused by nutritional supplements not banned under the 2004 program; (2) the need to establish new procedures with the WADA-certified laboratory in Montreal which was used for the first time in 2004⁷; and (3) the need to select and obtain new collection kits acceptable to the Montreal Laboratory. With these facts in mind, it might be more accurate to say that there was a delay in the commencement of testing, rather than a suspension. In any event, players were not told of the delay or when testing would commence.

The operational issues were resolved by mid to late June and testing started on July 8, 2004. It was in this time frame that the agreement was reached to have a separate suspension of testing for the 100-plus players involved in the BALCO seizures in order to allow the union to notify players of the seizures. Again, the players were not advised at any time that the program had been temporarily suspended and thus they remained at risk.

The suspension of testing for the 100-plus players was effectuated by HPAC. Section 1.D.1(j) of the 2004 version of Major League Baseball's Joint Drug Prevention and Treatment Program authorized HPAC "to take any and all other reasonable actions to ensure the proper administration of the program." The seizure of records in the BALCO

⁷ The relationship with the Montreal Laboratory was formalized on May 9, 2004. Our research suggests that a February 10, 2004 article in the San Francisco Chronicle was the first indication that Quest Diagnostics, Inc. (Baseball's laboratory in 2003) was involved in "prescreening" samples for BALCO and/or its clients seeking to determine if purportedly undetectable steroids could be detected. This was a motivating factor in the decision to move to the Montreal Laboratory. The timing of the report, however, made it almost impossible for a new lab to be in place when camps opened in late February and testing could have started.

case made it impossible to comply with the general confidentiality presumption that governed the testing program as well as the following provision on Survey Testing:

At the conclusion of any Survey Test, and after the results of all tests have been calculated, all test results, including any identifying characteristics, will be destroyed in a process jointly supervised by the Office of the Commissioner and the Association.⁸

HPAC undertook the action with respect to the 100-plus players involved in the BALCO seizures to “ensure the proper administration of the Program” in light of the BALCO-related developments.

Mr. Manfred did not disclose the suspension of testing to the Committee. His intent was not to conceal the information, but to respond accurately and adequately to the many questions and concerns from Committee Members about whether the testing program itself that had been negotiated with the MLBPA was sufficient to deter steroid use in the future. No question was asked that would have prompted a disclosure of the delay of the tests. All of the Major League Baseball witnesses answered the Committee’s questions fully and accurately.

Moreover, the suspension of testing had no material effect on the operation of the program in 2004. Players were not told of either the initial delay in the start of testing or the suspension applicable to the 100-plus players. As a result, the deterrent effect of the program was preserved. In fact, given that the program called for only one test per player, per year, the delay of testing until later in the year kept players at risk longer, enhancing the deterrent effect.

The agreement concerning the 100-plus players involved in the BALCO seizures allowed the union to inform players that testing records from 2003 had been seized. The union was in no way authorized to share with players any information about the scheduling of 2004 tests and, in fact, had no information about when any particular test would be scheduled. As of the hearing in March 2005, Mr. Manfred had no reason to believe that the timing or content of the union notifications had given players any advance notice of when their tests would occur.

The 2004 testing was conducted in accordance with the existing policy. All players, including the 100-plus players involved in the BALCO seizure, were tested. CDT, the collection company, selected the dates on which particular players would be tested and no player was given any advance notice of the particular date upon which he would be tested.

⁸ 2004 Drug Program, Addendum A, Section 2 (iv).

It is most unlikely that the suspension of testing had any material or predictable effect on the 2004 test results. It seems beyond debate that the most important factor in the lower number of positives in 2004 was the shift from anonymous, non-disciplinary Survey Testing to disciplinary Program Testing which of course, had nothing to do with any delay or suspension of testing. Moreover, even without the BALCO developments, Major League Baseball wanted to delay as many tests as late in the season as possible to enhance the deterrent effect of the program. In this regard, the initial delay for all players and the longer delay for the 100-plus players involved in the BALCO seizures were consistent with Major League Baseball's pre-existing desires.⁹ Finally, the most likely effect of notice to the 100-plus players involved in the BALCO seizures was to deter use because each player was given a personal demonstration that the program would detect use. It is hard to imagine that belated notice about the seizure of 2003 testing information put any meaningful number of players in a position to shift to the use of undetectable steroids in time to avoid a positive test.

2. Under the agreement, testing could have started with the opening of spring training. Testing for the general population of players did not begin until July 8, 2004 due to operational considerations described above. No samples were collected prior to July 8, 2004.

3. The delay in the commencement of testing for players other than the 100-plus players involved in the BALCO seizures ended on July 8, 2004. Major League Baseball does not have a list of players for whom the government seized testing materials from 2003.¹⁰ Such a list was sent to Major League Baseball in 2004 inadvertently. Because Major League Baseball was prohibited by the agreement from seeing 2003 test results for individual players, we agreed with the Players Association in 2004 to destroy the list that was sent inadvertently. As a result, it is impossible for us to segregate test results in the manner requested. All players required to be tested under the program in 2004 were tested. As previously indicated to the Committee, 1,133 tests were conducted and there were 12 positives.

4. No one from Major League Baseball had any communication with any of the 100-plus players for whom testing records were seized as part of the BALCO

⁹ In recent years, WADA has started to use "target testing" under which tests are scheduled because of a suspicion, tip or the history of the athlete. See Rozin, Skip "The Inside Dope" The Wall Street Journal, November 28, 2007. The idea of purposely keeping 100-plus players who may have been positives in 2003 at risk by delaying their tests until late in the 2004 season is consistent with this concept.

¹⁰ Your inquiries refer to the players for whom records were seized as having "tested positive" in 2003. Major League Baseball has avoided characterizing the players on the list in that manner because there were more names on the list than the number of positive results reported under the program in 2003. This is probably due to the fact that the government seized test results for samples that were positive for nutritional supplements such as androstenedione that were sold over the counter in 2003 and, thus, not banned by Baseball's program.

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investigation. As indicated above, Major League Baseball destroyed the list of names that was provided inadvertently and, thus, would not have been in a position to notify the individuals. To the best of our knowledge, only the Major League Baseball Players Association ("MLBPA") and the players involved can provide information on the precise timing and content of the conversations. Major League Baseball was advised, however, that the conversations were complete at some point early to mid-September.

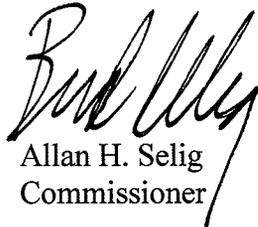
5. The suspension of testing for players for whom testing materials were seized in the BALCO investigation ended on September 21, 2004.¹¹ Samples were collected for all of the players for whom materials were seized if they were still in Major League Baseball (i.e., on a 40-man roster). As indicated above, Major League Baseball does not have information from which it can determine which 2004 positives were for players who were among the 100-plus players involved in the BALCO seizures.

6. Major League Baseball has never provided any player under any circumstance with information that he would be tested within a two-week or similar period. Major League Baseball has never informed any player of test results other than through the contractually-mandated procedures for the notification of positive test results. Major League Baseball has never informed any player when he would be tested.

7. Only Robert Manfred, Robert A. DuPuy, the President of Major League Baseball, and Francis X. Coonelly, who acted as Mr. Manfred's in-house lawyer, were aware of the suspension of testing at the time of the March 17, 2005 hearing. Mr. Alderson was not aware of the program suspension.

Again, I appreciate the opportunity to respond to your concerns.

Very truly yours,



Allan H. Selig
Commissioner

¹¹ Major League Baseball recently learned that two players for whom testing materials were seized in 2004 were tested on two separate occasions in 2004, once after September 21 and once in August. While the August tests were almost certainly an error, the occurrence of the two tests without complaint from the players is consistent with the idea that the players did not know of any suspension of testing.