

TESTIMONY OF DEMAURICE SMITH
EXECUTIVE DIRECTOR, NATIONAL FOOTBALL LEAGUE PLAYERS
ASSOCIATION
BEFORE THE SUBCOMMITTEE ON COMMERCE, TRADE AND CONSUMER
PROTECTION
UNITED STATES HOUSE OF REPRESENTATIVES
NOVEMBER 3, 2009

Good morning Chairman Waxman, Subcommittee Chairman Rush, and Members of the Subcommittee, my name is DeMaurice Smith, and I thank you for the opportunity to testify concerning the important issues being considered by your Subcommittee today.

I serve as the Executive Director of the National Football League Players Association, having been elected to that position by the NFLPA Board of Representatives back in March of this year. Although I am relatively new to my job, one of my first priorities was to become fully conversant with the NFL/NFLPA Policy on Anabolic Steroids and Related Substances ("the Policy"). The Policy has been in place for many years, and it has been very successful in terms of preventing the use of performance enhancing substances in the National Football League.

As Executive Director of the NFL Players union, it is extremely important to me that our players compete on a level playing field, and that the competition among these elite athletes occurs without the help of any substances that could artificially enhance performance. Moreover, I am keenly aware that our players' choices, both on and off the field, affect not only themselves, but also members of the vast audience who watch them play -- particularly young people who play sports and aspire to higher levels of competition. I am also keenly aware that there can be serious adverse health effects

Testimony of DeMaurice Smith, Executive Director NFLPA

from using steroids and other substances, and the health of our players is always the absolute top priority for our union.

It is for these reasons that our union first negotiated a very strict policy in the early 1990s, and later agreed with the NFL to make changes over time to strengthen that policy. As you may know, we have year-round, random testing of our players, and the Policy has a “strict liability” feature which makes every player responsible for what he puts into his body. As a result, players will be suspended under the Policy even when they do not know that a product they are using contains a prohibited substance.

We test at least 10 players per week per team during the season, and a player is likely to be tested about six times in the off season. A player’s first positive test typically brings an automatic four game suspension. A second positive test brings an eight game suspension, and a third positive test results in a suspension of up to one year. As a testament to the success of the Policy, there have been only 5 two-time offenders since the Policy was put in place in 1993, and no player in our history has been suspended for a third offense.

We have also placed great emphasis on education under the Policy, and we have developed various educational materials to warn our players about the health risks in using steroids. Players are encouraged to call a “hotline” number to check on the acceptability of various products under the Policy. The hotline is a crucial safety measure inspired by the League and our union to ensure that our players have immediate access to information about ingredients in supplements. We have also created the Sports Nutrition Label Certification Program, which certifies to the players that products of any company participating in the program are free of any substances that are prohibited under the Policy. As a result, players who want to use supplements can obtain them through our certification program, knowing that use of those certified supplements will not cause them to test positive for a prohibited substance.

Testimony of DeMaurice Smith, Executive Director NFLPA

Against this background, it is unfortunate that the Policy has attracted some negative attention recently in the so-called *StarCaps* case in Minnesota, and I want to take a few moments to comment on that case. Most importantly, I want to emphasize what the *StarCaps* case is not about. It is not about players who used a product to enhance their performance. It is not about players who were trying to gain a competitive advantage. Instead, it is about the use of a product known as “StarCaps,” which was used by some players to help them lose weight.

StarCaps was marketed over-the counter as an all-natural product, and the list of ingredients on its packaging did not include any banned substances. The players who ingested the product did not know, nor were they ever told, that StarCaps actually contained bumetanide, an unlisted ingredient and a prescription diuretic that is prohibited under our Policy. In normal circumstances, of course, it does not matter under the Policy whether the players knew this or not, since they are responsible for everything they put in their bodies. But this case did not involve normal circumstances. That is because, unbeknownst to the players, the person appointed by the NFL as the Independent Administrator of the program had previously become aware that StarCaps contained bumetanide, but he, along with other league officials, failed to inform the players of that fact. Making matters worse, a league lawyer interfered with the Administrator’s independence, by dictating that he change his response to such cases to ensure that players who unknowingly took StarCaps would be suspended.

As the Executive Director of the NFLPA, I was extremely disturbed about these revelations for obvious reasons. First, I believe, and our Policy clearly contemplates, that the Independent Administrator, who is a physician well-credentialed in his field, must at all times have the health of the players as his first priority. He should not serve strictly as a disciplinarian, but also as a doctor for the players who is obligated to inform them as patients that there is a health risk in using a product that he knows they are

Testimony of DeMaurice Smith, Executive Director NFLPA

using. Frankly, the fundamental failure of that doctor to ensure immediate disclosure of the fact that StarCaps included bumetanide violated his paramount duty as a doctor - to protect patients, in this case, our players. The same goes for the league lawyer who also failed to convey the information to the players, and who also failed to inform the people answering inquiries on the hotline that StarCaps contained bumetanide. I was also disturbed when I learned that the league lawyer interfered with the Independent Administrator's discretion under the Policy.

This unique array of facts shaped our union's decision to argue in Federal District Court in Minnesota that the players' suspensions should be set aside. The Minnesota players also retained personal lawyers who filed a case alleging violations of the state of Minnesota's drug testing law. Analysis of this state law claim by the trial and appellate courts led to the conclusion by both courts that the collectively bargained Program did not preempt certain claims under the Minnesota statutes. As a union, we determined that we would not submit a filing that could undermine legal arguments made by our players that had merit given the language of the CBA and the Policy as currently drafted. We should note that there has been no judicial determination at the trial court or appellate level that the Policy directly conflicts with specific provisions of the Minnesota statute. Indeed, the *StarCaps* case is not over; the NFL has sought further review of the Eighth Circuit's preemption holding and, if necessary, could seek Supreme Court review.

That being said, as a result of the *StarCaps* case, I believe that we have to make some changes to the Policy. But the issues with the collectively bargained Program that emerged in the context of the *StarCaps* case can and should first be addressed by assiduously working with the League through the collective bargaining process. The Players Association and the League are absolutely committed to enforcement of a rigorous Policy on Anabolic Steroids and Related Substances that ensures the health and safety of the players and the integrity of the game. In September, Roger Goodell

Testimony of DeMaurice Smith, Executive Director NFLPA

and I issued a joint memo to all players that clearly stated that although the players involved in the *StarCaps* case would not be suspended at this time, the Policy remains in full effect, and they are responsible for everything they put into their bodies.

The *StarCaps* case revealed to us that we need to change the Policy to provide that, if the Independent Administrator or any league official administering the Policy finds out that a product contains a prohibited substance, they must immediately inform the NFLPA and the players of that fact. Further, we believe that the players should have outside, impartial arbitration of any disputes under the Policy, just as players in Major League Baseball, the National Hockey League, and the National Basketball Association have under their drug policies. Experience has shown that allowing the NFL to pick one of its own attorneys to arbitrate Drug Policy appeals undermines the credibility of the process. Players have to believe that they are getting a fair shake under the Policy, and this change, I believe, would enhance the Policy's effectiveness without threatening any of its basic tenets.

Most importantly, I believe we need to re-emphasize that the health of our players as our highest priority, and that there must be measures put in place to assure that the dangers of a given product, once they become known, must be revealed to the players immediately. Medical experts warn that use of diuretics can have dangerous side effects including dehydration and other problems. We lost one of our members, Korey Stringer, several years ago because of symptoms related to dehydration during early training camp practices in Minnesota. We must do everything we can to prevent that from ever happening again.

Mr. Chairman and members of the Subcommittee, let me conclude by saying that we appreciate this Committee and Subcommittee's continuing interest in the health of players at all levels of the game. We believe that the most effective way to ensure that our collectively bargained Policy does not conflict with any state law is for the League

Testimony of DeMaurice Smith, Executive Director NFLPA

and our union to draft carefully crafted language in the new CBA that reflects our acute awareness of these issues. We are confident that we can effectively work through the collective bargaining process with the league to implement changes that will better protect our players, ensure the uniform application of the drug testing policy, and strengthen the integrity of that policy. We look forward to keeping the Subcommittee apprised of our efforts and the success of this approach.