

**TESTIMONY OF MICHAEL E. RANDALL, PRESIDENT, NATIONAL
ASSOCIATION OF AGRICULTURE EMPLOYEES BEFORE THE HOUSE
SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION AND
THE SENATE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT
MANAGEMENT, THE FEDERAL WORKFORCE AND THE DISTRICT OF
COLUMBIA
March 25, 2004**

“NAAE” The National Association of Agriculture Employees represents the Legacy Agriculture bargaining unit personnel split between DHS and USDA in March 2003. We continue to represent employees in both as a rank-and-file union. We can make comparisons of the two communication styles and management between APHIS-PPQ and CBP. We can see the “before” and “after”. As President of NAAE, I would like to share our experiences with the Subcommittee as they relate to the proposed DHS Personnel System.

Development of the DHS Personnel System Proposal, to this point, has been a collaborative process among Management, Labor and select specialists. NAAE devoted 15% of its small staff of our rank-and-file union leaders to a nearly 100% effort on the process. In viewing the results, we believe we were heard in certain areas, particularly in position classification, an area with a history of difficulty for us--Legacy-Customs and Immigration Inspectors have a journeyman level of GS-11; our journeyman level is a GS-9. We didn't expect to be 100% satisfied customers; however, we never suspected just how disappointed we would be. DHS and OPM need to materially modify their proposal if they intend to provide a humane system and environment that will address the needs of our specialty in the Department's mission and be fair to our bargaining unit employees.

The proposed DHS Personnel System will not attract and maintain a highly skilled and motivated workforce for performing Agriculture Quarantine Inspection functions. That presages disaster for DHS's mission to the extent it encompasses protecting American agriculture and food supply.

In order to make sweeping changes in the personnel system and be successful in accomplishing DHS's missions, the Department will need “buy-in” from the employees. Unfortunately, given Customs and Border Protection's refusal to adhere to the personnel system by which it has been obligated to abide since March 2003 and its evident lack of desire to improve the lot of our agriculture bargaining unit employees through purely administrative actions it could have taken. We do not because we cannot **trust** CBP or DHS in their roll-out of a new personnel system.

Pay and Classification

Parity among all employee components has been CBP's public cry; inequality has been the result. Legacy-Agriculture employees have Title V based workweek scheduling (and premium pay) systems that are negotiable, while the other two Legacy agencies have special non-negotiable statutory pay systems. In this past year, CBP has implemented (unilaterally and without negotiations) draconian scheduling changes resulting in inequalities in pay and degraded working conditions for Legacy agriculture employees as compared to their new co-workers, Legacy INS and Customs. More importantly, CBP scheduling actions also have resulted in the failure to meet the agriculture protection mission. Employees have been spread thin with new schedules and work has been left undone as CBP cancels necessary overtime work to "save money." Spreading the employees thin and canceling necessary quarantine work does not surprise us. These decisions are now routinely made by Legacy INS and Customs supervisors who view the Agriculture mission as secondary or non-existent. Nothing makes agriculture inspection employees angrier than not being able to protect American agriculture, the sole reason they signed on as federal employees in the first place. Result: we lack **trust**.

DHS's pay-banding proposal provides the employee a pay bundle as one unit. A private sector job-family comparison may set the base, and a performance determined "award" share composes the balance. Agriculture inspectors are fearful of this performance component. Last year, CBP inserted other Legacy agency managers (from INS and Customs) into the front-line agriculture reporting chain. Many Legacy agency managers from the other agencies have demonstrated and continue to show disdain and disregard for the agriculture protection mission. These managers are now in our performance evaluation food chain. As Agriculture inspectors know, a bit of bad food in the food chain causes Mad Cow. We do not **trust**.

NAAE is concerned about the concept of proposed "pay pools" to be used in determinations of the distribution of award amounts. As work units are unequal in size, there will always be disparities apparent in the pay pools between work units from the vantage point of the employees deprived of an equal share. The Department should be mindful of this fact and not rely upon a unit's "overall contribution to the mission." It may not be an employee's own fault that he or she is in a location that doesn't contribute as much.

Just on the mechanical level of getting employees paid, we are skeptical. We doubt the Department and its paymasters can or will get this multi-scale, multi-level pay system, with its per-individual differences, working in any fair way. CBP has already demonstrated a lasting inability to get paychecks to employees in a timely manner. It took months for CBP to correct seemingly simple pay problems that left some of our employees unpaid, not even a cent, for over a month. Some employees have not been paid correctly to this date. "**Trust** us, we'll pay." I don't think so.

Last week, a Miami manager communicated to all port employees in the largest work unit with Legacy Agriculture employees that the system to track the Congressionally mandated overtime pay cap “wasn’t working so well” and confessed that CBP could not tell how much overtime each employee had worked. The manager gave the order through a unit-wide broadcast e-mail that all employees above a certain earnings level were immediately prohibited from working overtime until such time as the employee “has a consultation with me.” They were directed to, “Please bring all of your pay statements with you so we can verify the amount you have earned thus far.” Attached to this widely distributed e-mail was a table of all of the employees’ names correlated with their Social Security numbers and their corresponding pay earnings to date- this is a serious Privacy Act violation--an demonstrates why grievance rights need to be preserved. Let’s see if we **trust** you. No way!

We believe the proposed pay system is attempting to fix too many things at once. We are still feeling the effects in government of an earlier attempt of the early 1990s to fix pay, the Federal Employee’s Pay Comparability Act. The Agency could have gotten things “right” or quite a bit closer to getting things “right”, but there was not the will....or the funds. Will there be sufficient funds put into this pay effort to allow proper administration? Based upon past evidence, we doubt it. Proper funding will be key to making any system like this work. Proper performance evaluation will be a key in making the performance based system credible.

We believe certain components of the proposed pay system are worth noting as positive additions. We are supportive of the occupational cluster concept as it relates to classification issues. This treatment of classification should be curative of some of the problems NAAE experienced in USDA—the rigid Factor Evaluation System and the OPM Classification regulations. Agriculture inspectors are generalists. There are many different tasks they must perform and perform well to accomplish the agriculture protection mission. The current system rewards a specialist with higher pay and penalizes a generalist, even if the generalist is more highly valued and needed. Many agriculture inspectors were downgraded from GS-11 to GS-9 after an OPM classification review resulted in the “generalist penalty” being applied.

Other positives in the pay arena are special rates of pay, recruiting and retention bonuses, and payment for special skills. Some of the areas we need more detail in include the concept of basing pay rates upon local conditions in the private labor markets. We are particularly concerned with “captive labor markets” such as Hawaii (particularly to me—Honolulu is where I work.) A requests for a raise in Hawaii is usually met with, “If you don’t like your pay, go to the Mainland.” Another concern requiring further explanation is the formulae for setting base pay by examination of other labor market conditions. If the economy is in a recession, can the employees be put into recession too?

We are pleased DHS plans to initiate a pilot phase of the system on a number of managers. Of course, these managers do not have unions. Where will their grievances be lodged? Will there be honest feedback on the system? This remains to be seen. “You will **trust** us.” To be determined.

Labor Management Relations

The proposed DHS Personnel System places employees in a militaristic system, one not at all appropriate for the civilian labor force. The System for all intents and purposes cancels the rights and protections of the Civil Service Reform Act and its intention to have Labor provide necessary feedback in betterment of government programs.

Formal Meetings

A union right that is paramount is the right to be present a formal meetings--meetings where Management discusses working conditions with the employees. DHS has chosen to propose to abolish this right. This is the classic by-pass of the union. An excuse given in the regulation docket is that “managers might not know when a meeting is a formal meeting and if they should get it wrong it is at the manager’s legal peril.” We can offer no explanation for the origin of this regulation, except from our experience over the past year. CBP is not interested in communicating with the union or employees. CBP is interested in one-way communication top to bottom. We cannot see how this attitude will help in the defense of the country. Border inspectors, agriculture inspectors are the nation’s eyes and ears. They need to provide feedback on what they hear and see. They need resources to perform their work. Resources that often are obtained by unions (DHS proposed prohibitions upon negotiations will make sure this never happens again.) Instead, CBP employees have been given reason to fear speaking out. They are being separated from their union. DHS states that unions still might attend meetings. What the docket does not say is “*if permitted*”. Rank-and-file union officers would be subject to a work assignment to “stay away.” Congress did not give DHS the right to create a new Department where employees have to testify to the inadequacies of their Agency shrouded by a curtain. This union by-pass tactic is an old management method of control. Let’s not repeat the errors that other Agencies committed. Open speech-- **internally** on the program, open speech for the employees and their union.

Unit Determinations

At NAAE we have difficulty reconciling the possible outcomes of determination of “an appropriate unit” and its likely effect upon our bargaining unit of agriculture inspectors. The regulation calls for an emphasis upon recognition of the organizational structure of the Agency in determining “an appropriate unit.” NAAE is concerned that DHS will define as “an appropriate unit” a single inspectional unit comprised of all Legacy Agriculture, Customs, and INS officers and inspectors. NAAE believes that placing the agriculture inspection workforce within the Customs line operation under Customs’ control and Customs supervision, as it currently is, is irrational. This **dreadful mistake** will not become apparent until there is some serious outbreak of agricultural pestilence, aided and abetted by this faulty management structure. Such a serious outbreak is inevitable. It is only a matter of time under this “one unit” management concept. Practically all Legacy Agriculture management above the level of GS-12 have been separated from their employees. These agriculturally schooled managers have been

shipped off to departments with names like Administration, Enforcement, Intelligence, etc., often promised little opportunity (or forbidden) to utilize their agriculture expertise. The few Legacy Agriculture managers placed in port positions with wider scope of authority in a port, such as a Port Director, can exert little direct control over the day-to-day lives of the agriculture employees who were formerly part of their cohesive agriculture port unit.

The probable outcome of a unit determination will be the end of agriculture inspectors representing agriculture inspectors and the agriculture mission interest. Instead, this agriculture job specialty may be represented, under the “appropriate unit” theory, by another union whose primary interest is armed law enforcement employee representation. NAAE is convinced that DHS intends to use the “an appropriate unit” license to the detriment of the interests of our unarmed, science educated professionals performing regulatory compliance work designed to protect American Agriculture.

Official Time

NAAE is pleased that official time provisions remain nearly identical as provided in the current Statute. The time-tested provisions prove that Congress was not wrong in the original Civil Service Reform Act. We only wish that the Department had taken the course of utilizing some of the other tried-and-true provisions of the Act.

“Negotiations”

Prohibitions upon negotiations extend to Employee Deployment and New Technology. These prohibitions on bargaining are so expansive in scope they effectively preclude any meaningful negotiations, including anything classified as “work.” Bars on negotiations over “deployment” exclude most actions employees could perform involving a verb, ANY verb. What is not classifiable as a “deployment?” Not much if anything.

Bars upon negotiating “new technology” could preclude negotiations upon almost any item an employee touches. When I asked DHS specifically about safety issues arising from an introduction of new radiation producing detection equipment, the response was “The intention is to prohibit negotiations upon the introduction of any and all new technology.” I just wanted to know if the bargaining unit could get some information about the safety parameters of new machinery; negotiation gives us the right to know. No negotiations, no right to learn. The flat out prohibition upon bargaining takes that right away.

This past weekend I received an urgent communication from a bargaining unit employee asking for union help. She is about to be “excessed.” Her work unit anticipates a reduction in force for all part-time employees. The words and the actions of the local Officer in Charge leave no doubt that the employees will be “riffed.” My reading of the personnel system proposal says that the impact of lay-offs would be negotiable. NAAE has not heard from CBP Labor Relations about any reduction-in-force. When will CBP tell NAAE about the reduction in force? After the employees are gone? You don’t have to **trust** us about anything you don’t have to know about.

This ban on negotiations is totally overkill. We have had successful negotiations in USDA over the years regarding “deployment” issues. Those issues surround even **emergency** temporary duty for agricultural pest outbreaks at many locations in the country in all types of weather and working conditions. These emergency assignments typically come with little to no advanced notice. In USDA, we have negotiated protocols for getting employees to these emergency hot-spots quickly. We have dealt with and adequately addressed impact and implementation issues associated with such matters as single parents having to leave home, childcare needs, employee desiring to increase their professional skills by taking additional coursework, and planned leave. Dealing with these type issues makes a difficult but necessary situation more bearable. None of our negotiations has ever interfered with an emergency temporary duty deployment. All negotiations were in anticipation; they were done in advance and provided Management with adequate flexibility. Preventing negotiations upon “deployment” puts these negotiations out of bounds.

Department policies cannot be negotiated for impact and implementation. We strongly suspect the Department will just cloak all subordinate policies with the “Departmental” label, thus avoiding negotiations. There are no meaningful tools to prevent this abuse.

We are all for speeding up the process of negotiations to agreement, but not at the expense of real, meaningful negotiations. Speed for speed sake will undercut due process and destroy confidence in the fairness of the system.

The proposed regulations offer to allow negotiations if and only if changes have a “substantial effect” upon the appropriate unit. This escape route gives DHS Management regulatory license to ignore these employees comprising a minority of a large bargaining unit, and those affected solely because they are in a professional specialty occupation employing few individuals. We fear the CBP Agriculture Specialist may be deemed in the “ignore” category. Would negotiations on medical accommodations find a place on the barred negotiations list? It just may, it might depend upon how many people get sick. Would it not be a “substantial” part of “an appropriate unit.”

Consultation and collaboration are good, but if differences are not settled by agreement or understanding, talk remains cheap. Many issues have been resolved when there are good communications. Good communication, especially *prior* to changes, can resolve myriad issues for the Agency and the employees. The proposed regulations do not provide adequately for this necessary component of dispute resolution. The negotiation prohibitions are the last straw.

During our first year with CBP, CBP management showed little to no interest in complying with the existing law and regulations regarding labor relations. CBP continually violated a FLRA mediated settlement agreement we reached previously with USDA. The agreement required negotiations to occur prior to implementation of any change in shifts or tours of duty. Undersecretary Janet Hale issued a memo clearly stating

that this and other pre-DHS agreements were binding upon DHS Management. Nevertheless, CBP insisted upon implementing without negotiating and offered only “post-implementation bargaining.” Negotiations have yet to occur despite numerous requests. In another instance, CBP wanted to implement use of radiation detectors immediately and offered “post-implementation bargaining.” NAAE does not have any problem with radiation detectors. We wanted to know the protocol for use and safety. CBP “hadn’t worked that out yet,” we were told. We also wanted to know what if any steps need to be taken to protect employee health, if or when employees contact a certain amount of radiation. CBP didn’t know. We can’t say CBP didn’t care, but we are the ones that eventually had to call the company and talk to the designer of the equipment to find out the problems and solutions for our safety concerns. The foolish thing about this incident is that *CBP didn’t even have radiation detectors on inventory* to pass out to all employees. This is clearly a time when the Agency could have negotiated “new technology;” it would not have hurt or delayed anything, and it didn’t have to be “post-implementation.” These proposed new prohibitions seem designed to perpetuate lack of open communication between the parties through a total ban. Communication solves problems.

In the interest of promoting dialogue and communications, NAAE has retracted a number of unfair labor practice charges this year it has had to file in the face of CBP’s refusal to negotiate before implementation. However, a number of the most egregious violations remain under FLRA investigation.

We have worked tirelessly with CBP when the Agency asserts an individual item relates to national security. But when the Agency asserts that practically everything is “national security”, we must raise a jaundiced eye. Most recently, CBP is preventing NAAE from obtaining a regular list of the names of our own bargaining unit members and the locations where they work. This is a long-observed contract requirement and is standard practice in federal labor relations. CBP irrationally asserts it is a national security item. They claim the List might “fall into the wrong hands.” Does CBP not want NAAE to know who the employees we represent are? Does CBP not want NAAE to know where the employees we represent work? We presume CBP could easily print out this information from a computer. Presumably, it has the payroll list of employees and knows who came over from USDA-APHIS. NAAE will be forced to make up this list by hand. The Agency does not **trust** us. What an insult!

Even when CBP does not assert national security, it implements countless changes without negotiating, occasionally offering “post-implementation” bargaining. This is another way to say, “we really don’t want to negotiate with labor and the employees it represents; we spit on your contract and agreements. It does not please the king.” CBP, a law enforcement agency, should observe the law, not flaunt it.

Now DHS would changes the rules to legalize all CBPs transgressions. This is not a confidence booster.

Adverse Action

Recently, I provided some emergency long-distance counsel and advice to an employee who had become involved in an ethics question, a question I had dealt with before in USDA—an employee purchase (at market price) from a vendor we regulate at an airport site (If the practice were totally illegal, CBP employees could not fly on airlines and Agriculture inspectors could not eat imported food.) USDA’s answer would be a hand slap and a promise from the employee to “not do it again.” CBP’s procedure was quite different, I still do not know what discipline will be meted out. Our fears are the worst; CBP has expended too many resources in pursuing the employee. It will now be a matter of justifying the investigation expenditure, or investigator pride. CBP Internal Affairs investigators descended upon the employee and ordered the employee into a formal meeting. The employee was afforded Weingarten union representation rights. The employee’s representative was present. The employee was read Kalkines Rights, and the employee was *Mirandized*. The employee made a statement to the investigators and the employee was presented an affidavit to sign. There were glaring inaccuracies in the statement and the employee requested to redact the statement. The investigator told the employee that it was an “*administrative matter*” and the employee was illegally ordered to sign the statement *as is*. The on-site union representative did the best he could with his limited experience in disciplinary matters. He implored the investigators to permit the employee to redact the statement with employee’s legal counsel, away from the investigators. This was not allowed. The investigator admitted in the middle of the process that he wasn’t sure which regulation and procedure to follow, but that he had to proceed “the way he knew how.” In fact, certain calls to me and NAAE’s General Counsel were made with the investigator insisting upon staying in the room. The employee was forced to stay in the presence of the investigator while preparing the redactions. Getting the investigator to even accept the concept of redactions of a sworn statement was like pulling teeth. The investigator had never heard of such a thing before. The employee left after signing a heavily redacted statement. Is Miranda the new standard in intimidation of employees for “purely administrative matters?” Will a Mirandized employee be prevented from obtaining legal counsel?

Above we detailed a hand slap type infraction, now we examine the routine and mundane. Agriculture inspectors have a tough job. We inspect without warrant and we informally seize agriculture products or items that may be injurious to American Agriculture. Often we seize gifts of food being brought by passengers from other countries. These gifts may be a forgotten taste of home for an immigrant or a new citizen. These may be the only gifts travelers bear as food is the most inexpensive commodity. Taking these food items may bring anger and resentment upon the inspector, often in the form of letters of complaint. USDA had an administrative process to deal with such complaints. This USDA process was fair to the employee and provided a minimum amount of disruption and anxiety for the employee. A common complaint takes the form of “Your Inspector took my salami and stuff his face.” Of course the inspector didn’t eat the salami, it was incinerated or steam sterilized—destroyed. The inspector likely would not even remember the passenger. CBP has a different approach to this common problem;

it must send out an Internal Affairs team to see if the inspector looks like he or she has been consuming salamis (never mind if the inspector buys them on his or her own.)

Limited Representation in Investigations

The proposed regulations provide that representatives of the Office of Inspector General, Office of Security, and Office of Internal Affairs are “not representatives of the Department for this purpose.” Our experience thus far is that **ALL** investigations in CBP are Internal Affairs investigations. NAAE vigorously opposes turning our employees over to these lion’s dens. Especially in view of investigator behavior cited above. Do DHS Agriculture employees deserve to have lessened rights by virtue of the fact of their transfer to DHS? No!.

We fear the onslaught of the new disciplinary apparatus. NAAE supports full judicial review being available to our employees in an effort to reclaim the rights of employees. Fully 90% of disciplinary actions NAAE has chosen to defend as a union have been reversed, often with the admonishment to Management from the arbitrator or FLRA “Wrong, wrong, wrong!” Justice should be served not reserved.

Limitations on MSPB

The MSPB will only be insuring EEO and Prohibited Personnel Practice rights. Any other case defect or finding of insufficient fact may result in a remand to DHS’s own disciplinary board. MSPB cannot mitigate penalties in these remand cases. NAAE is very concerned about this new limitation upon MSPB. We believe in many instances that this will prevent MSPB from getting at root causes. Insufficient evidence cases and “only partly guilty” will be returned to the Department only to have the heretofore uncharged “tripping over the shoelaces charge” reserved by DHS Management for just such an occasion tossed into the disciplinary mix. Where is justice?

Performance Improvement

DHS has proposed to eliminate the PIP, performance improvement period. The pip requirement formalizes communication and memorializes that communication happen. The regulation contemplates taking the disciplinary/conduct action without having communicated with the employee while adding in a few possibilities for communication. How is this supposed to help and cultivate a loyal and knowledgeable workforce? We believe this proposal is ripe for abuse, and it will be abused routinely—discipline without communication—the new standard.

Excepted Service

NAAE is opposed to the requirement of an excepted service period of two years for our career Agriculture Biological Technician staff who desire to advance within CBP. Excepted Service is merely a two-year “honorary employee” status. More than 500

technician employees, loyal workers, transferred to CBP from USDA in March 2003. These employees have been given little direction or encouragement from CBP Management as to what their fate shall be under CBP. In USDA, these technicians were an essential part of the baggage clearance operation. They assisted Agriculture inspectors in operation of the baggage screening X-Ray machinery, data processing, contraband destruction, laboratory maintenance as well as a host of other functions. In CBP the message is there is no usefulness to this function. These employees have been given a distinct non-professional uniform, denied the opportunity to obtain a security clearance (this forbids touching any computer they formerly used as USDA employees), told that “they will be leaving the baggage room” (to work unknown) and given veiled directions out the door. Many of these long-time employees do not have the required agriculture college training to become CBP Agriculture Inspectors. There may only be one way for these employees may advance should CBP feel they are “redundant”—and that will be to apply for jobs as CBP Officers. Most Agriculture Bio-technicians could qualify as CBP Officers, but there is a hitch: they must apply to a job announcement and compete as if they are applying from the street as if they never worked for the government. No internal announcements for merit hiring. Not only this. They must be treated as an honorary employee for two years. This hiring method does not treat “family” as family. The Agency is already abusing the two-year probationary concept and applying it in ways it should never be applied.

The Future?

Many of these proposed personnel system changes will cement the foundations of an authoritarian, law enforcement workplace. Agriculture work is regulatory enforcement; compliance from the public is sought, not extracted. Agriculture work requires that input be taken from the field. Changes in a scientifically sound program must be suggested, observed, and tested from the field, the front line. These things cannot be dictated from central control, particularly from CBP management dominated by former Customs managers who have zero training, experience or understanding of the Agriculture mission and no desire to learn. The employees as well as their communication vehicle, the Union, need to provide feedback and exchange ideas with Management on how best to carry out the programs and freely without fear of intimidation or criticism. This is how our agriculture protection services worked in USDA. This is not how our agriculture protection services are working in CBP. The communications are absent; the atmosphere is chilled. Experienced career employees with an Agricultural mission to protect and uphold are afraid to speak out. Their performance evaluations will hang in jeopardy over their pay. The adverse action system and its proposed very limited appeals rights are too easy for a Management to abuse in retaliation.

Our history with CBP tells us the concern for work and family life for the betterment of the employees and the mission is out the door.

DHS needs experienced professional, scientifically schooled Agriculture inspectors to continue the agriculture protection mission. It will not succeed should DHS/CBP decide to replace these inspectors with generic law-enforcement types. Many Agriculture inspectors have been offended by the CBP management style. They are being chased away from the Agency. Career change is at the center of discussion with many long-term employees not yet at the retirement threshold.

350 vacancies transferred from USDA last March have burgeoned into well over 500 vacancies to date. We do not wonder why. The proposed new personnel system, unless drastically overhauled and humanized, guarantees these vacancies will only grow in number.

With communication, trust can be built. Without communication there is no trust and the system fails. There are a number of “keepers” in the proposal; however, there is too much in the proposal that thwarts communication and kills mutual respect and trust. The Department would be wise to return to the standards and values set by the joint Management, Union and Employee Design Team and carefully review the words and the “fit” of the proposed regulations to the standards, rather to rely upon a management agenda. All reviewers should see that there are some major “fit” problems with these proposals.

NAAE thanks you for the opportunity to present this testimony. We hope that it provides insight into some of the problem areas and positives in the new personnel system proposal. We hope our testimony will help lead to discussions on a personnel system the American People, the Department and the employees all can live with and will assist the Committees in further discussions of oversight of the Agricultural protection mission in CBP.

Respectfully,



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