

**MINUTES**  
**MIGRANT AND SEASONAL FARMWORKERS BOARD MEETING**

**February 7, 2007**

The Migrant and Seasonal Farmworkers Board Meeting was held at the Virginia Employment Commission Administrative Office in Richmond, Virginia.

The following Board Members were present: Kenneth Annis, Chairman; Veronica Donahue, Tupper Dorsey, Richard Hall, Hart Hudson, J. M. Scott, and Peter Von der Lippe. The following Board Members were absent: Mario Moreno, Vice-Chairman; Elisia Almendarez-Moore, Thomas Kellum, Adrian Reddington, Kelly Robinson, Sharon Saldarriaga, and Christian Schweiger. Staff in attendance from the Virginia Employment Commission were: Dolores Esser, Nicholas Kessler, Joyce Fogg, Jack Turner, Michelle Abraham, Will Jacobs, and Evelyn Lewis. The following guests and speakers were present: Elaine Trugillo, Labor Services International, LLC; Jim Mooney, U. S. Department of Labor, Wage and Hour Division; Toni Harper, Appalachian Council; Gary Hagy, Virginia Department of Health; and Mr. & Mrs. Robert Dodd, Dodd's Acres Farm.

**Call to Order**

Chairman Kenneth Annis called the meeting to order at 10:08 a.m.

**Welcome and Introduction**

Chairman Annis welcomed Marlene Larios, Telamon Corporation, who was attending on behalf of Board Member, Sharon Saldarriaga, who was unable to attend.

He extended greetings to the guests, board members, and all those present.

**Approval of Agenda**

Chairman Annis moved that the agenda be approved. It was approved by unanimous vote.

**Approval of Minutes**

Chairman Annis moved that the minutes of the October 18, 2006, meeting be approved. The minutes were approved by a unanimous vote.

**Update on Federal Legislation**

Jack Turner distributed handouts with an update of the federal legislation. The Agricultural Job Opportunities, Benefits and Security Act (AgJOBS) bill was introduced January 10, 2007. It is a proposed immigration law that would provide agricultural employers with a stable, legal labor force while protecting farmworkers from exploitative working conditions. The AgJOBS compromise was reached in 2000 after years of Congressional and labor-management conflict

resulting in tough negotiations between the United Farm Workers (UFW), major agricultural employers, and key federal legislators. This bill is dedicated to Farmworkers only. It is giving them a path to legalization.

During the last Congress, AgJOBS enjoyed several victories, notably, the Senate included AgJOBS in the bipartisan, comprehensive immigration bill it passed in May 2006. AgJOBS sponsors and supporters look forward to passing AgJOBS this Congress. The new bill numbers are S.237 and H.R.371.

If enacted, AgJOBS would create an “earned adjustment” program, allowing many undocumented farmworkers and agricultural guestworkers to obtain temporary immigration status based on past work experience with the possibility of becoming permanent residents through continued agricultural work, and revise the existing agricultural guestworker program, known as the “H-2A temporary foreign agricultural worker program.”

Those who qualify would apply to workers in agriculture, primarily employees of farms and ranches. Undocumented farmworkers and recent H-2A guestworkers wishing to become immigrants would have to complete a two-step process: a.) Step One – Apply for a “Blue Card” Temporary Resident Status; b.) Step Two – Earn Legal Permanent Resident Status, Prospective Work Requirement.

The AgJOBS compromise would modify the H-2A Temporary Foreign Agricultural Worker Program, which permits employers to hire guestworkers to fill agricultural jobs that last no longer than ten months. Most basic H-2A requirements that protect U. S. workers from adverse effects and foreign workers from exploitation would continue, including the “50% rule” requiring the hiring of U. S. workers who apply during the first half of the season, the “3/4 minimum work guarantee,” workers’ compensation coverage, and transportation cost reimbursement.

The bills would modify some current H-2A requirements in important ways:

- The program’s application process would be streamlined to become a “labor attestation” program, rather than the current “labor certification” program, to respond to employers’ demands to reduce paperwork, time frames, and government oversight.
- H-2A employers must provide free housing to non-local U. S. and foreign workers but, under AgJOBS, could choose to provide a monetary housing allowance if the state’s Governor has certified that there is sufficient farmworker housing available in that area.
- Employers would still offer the highest of the “Adverse Effect Wage Rate” (AEWR), the prevailing wage or the federal or state minimum wage. AgJOBS would reduce the AEWR to the 2002 levels and freeze them for three years. During this three-year period, the Congressional General Accountability Office (GAO) and a special commission would issue studies and recommendations as to the appropriate wage rate formula. If Congress fails to enact a new formula within three years after enactment, the AEWRs will be adjusted by the previous years’ inflation in the consumer price index, and annually thereafter, up to four percent per year.

- H-2A workers would have the right to file a federal lawsuit to enforce their wages, housing benefits, transportation cost reimbursement, minimum-work guarantee, motor vehicle safety protections, and the other terms of the written H-2A job offer.
- Employers of goat herders and dairy workers would join employers of sheepherders in being eligible to participate in the H-2A program even when they seek year-round workers. These workers would be able to work up to three consecutive years, at which time they would be eligible to apply to adjust their status to lawful permanent residency subject to the availability of employment-based visas. Other H-2A workers would continue to hold temporary work permits with no opportunity to become permanent residents through the H-2A program.

After discussion among the MSFW Board, it was a consensus that the AgJOBS bill may have difficulty with passing.

### **Wage/Hour Issues**

Jim Mooney with the U. S. Department of Labor, Wage and Hour Division, Northeast Regional Agricultural Coordinator, gave a Powerpoint presentation report on Wage and Hour issues. He recently took over the H-1B Program in his office.

He stated that a region consists of 13 district offices. Virginia is covered by three district offices.

Wage and Hour has four laws that are enforced and protect the Migrant and Seasonal Farmworkers that affect growers:

- Fair Labor Standards Act of 1938 covers:
  - Minimum Wage
  - Overtime
  - Child Labor Law
- OSHA Act passed in 1980:
  - Taken over by Wage and Hour Division in 1996
  - Field Sanitation
  - Temporary Labor Camp
  - State Plan States – Virginia is actually one, and the federal government helps fund the Virginia Occupational Safety & Health Act (VOSH). Wage and Hour has an agreement with VOSH that if they see a problem, Wage and Hour will make a referral to VOSH.
- Migrant and Seasonal Agricultural Worker Protection Act passed in 1983:
  - Disclosure – whatever is promised on the disclosure is what the employer has to abide to
  - Promised Wage
  - Housing Standards
  - Vehicle Safety Standards: insurance, licenses, vehicle inspections
- Farm Labor Contractor Registration:
  - Registration and Issuance of License
  - FBI Fingerprints
  - Medical Exam

- Registration of Employees
- MOUs with Virginia, New Jersey, and Florida
- Wage and Hour Regulations H-2A Program:
  - Enforcement transferred to Wage & Hour Division in 1986
  - Adverse Effect Wage Rate (AEWR)
  - Transportation and Subsistence
  - $\frac{3}{4}$  Guarantee
  - 50% Rate
  - Disclosure

Compliance Assistance has become a very strong tool in working with the employer instead of working against the employer. With the Compliance Partnership Agreement (CPA), associations establish strategic partnerships with agriculture business associations for training, disseminating literature, periodic meetings for updates on regulations, participating in conferences, information sharing, and fostering member monitoring agreements.

The Wage and Hour Division results for Fiscal Year 2006 for the Richmond District Office consisted of:

- 40 Investigations
- Emphasis on housing and transportation
- 26 violations (65%)
- Mostly H-2A growers
- Only three assessed civil money penalties totaling \$2,025
- Total back wages paid \$2,299.62

The Wage and Hour Division results for Fiscal Year 2006 for the Baltimore District Office (Northampton and Accomack) consisted of:

- 55 Investigations
- 38 violations (69%)
- Predominantly housing violations
- \$70,900 civil money penalties assessed to date
- \$679 wages owed

The Wage and Hour Division's plan for Fiscal Year 2007 for the Richmond District Office consists of:

- 45 investigations
- 3 reinvestigations

The Wage and Hour Division's plan for Fiscal Year 2007 for the Baltimore District Office (Northampton and Accomack) consists of:

- 25 investigations
- 10 reinvestigations

For the entire Northeast (Maine to Virginia), there will be 302 investigations planned.

Compared to other states, Virginia is in very good shape.

### **Update on State Legislation**

Tim Freilich, with the Virginia Justice Center for Farm and Immigrant Workers, was unable to attend the meeting due to inclement weather. He forwarded handouts to Joyce Fogg to be distributed at the meeting.

The information that was distributed stated:

These bills survived the first half of the session and have now “crossed over” to the other side of the General Assembly. They can be tracked online at: <http://leg1.state.va.us>.

- **House Bill 2688** – If a person not lawfully present is injured or killed on the job, the employer, not his insurance company, would have to pay the costs of any worker’s compensation claim.
- **House Bill 2687** – Forces all Virginia employers to participate in the Basic Pilot Program to verify the work authorization of all employees. Failure to do so would allow any lawfully present employee fired by the employer to sue the employer if anyone who is unlawfully present continues to work for the employer after the firing.
- **House Bill 2622** – Any person, knowing the alien is in the United States in violation of law, who, as a part of a commercial enterprise and with the purpose of violating the immigration laws of the United States (i) transports or moves or attempts to transport or move that alien into or within the Commonwealth, (ii) conceals or shields from detection or attempts to conceal or shield from detection that alien in any place, including any building or any vehicle, vessel or other thing used as a means for transporting people; or (iii) engages in any conspiracy to commit any of the acts in clauses (i) or (ii), is guilty of a Class 6 felony. This bill could impact farm labor contractors and their employers.
- **House Bill 2605** – This bill makes it a Class 1 misdemeanor for any employer or any person acting as an agent for an employer to knowingly continue to employ, or refer for employment any alien who cannot provide documents indicating that he is legally eligible for employment in the United States; or falsely represent that the alien worker has documents. Each day of continued employment or false representation of each alien carries a fine of \$100.
- **House Bill 1970** – This bill would make it a misdemeanor under state law to be present in the United States legally. If a police officer has a reasonable suspicion that someone has committed (or is committing) a crime, the officer could detain the person without a warrant, run an immigration check, and take the person into custody. This dangerous and unconstitutional bill would destroy community policing efforts statewide. Many crime victims and witnesses will be afraid to cooperate with the police in criminal investigations and all Virginians will be less safe. With no money provided for training in immigration enforcement, this bill will result in racial profiling, divided families, and people being improperly detained by the police.
- **Senate Bill 815** – Human Anti-Trafficking Act: Would prohibit obtaining labor or services by (among other tactics prohibited) causing or threatening to cause serious harm to any person, abusing or threatening to abuse the law or legal process, knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported

passport or other immigration document or any other actual or purported government identification document, of another person; deception or fraud; debt bondage; facilitating or controlling a victim's access to an addictive controlled substance; using any scheme, plan, or pattern intended to cause any persons to believe that, if the person did not perform such labor, services, acts, or performances, that person or another person would suffer serious harm or physical restraint.

- **House Bill 1921** – This bill creates new crime: extortion by withholding immigration documents. Provides that any person who knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person and thereby extorts money, property, or pecuniary benefit or any note, bond, or other evidence of debt from him or any other person is guilty of a Class 5 felony.
- **House Bill 2937**: This bill would place a huge administrative burden on any Virginia non-profit service provider that receives state or local funding. Such non-profits would have to verify the lawful presence of everyone they serve, and determine whether they provided the “type of benefits or assistance to those persons who are otherwise ineligible.” The scope of this bill is unclear, but it will certainly distract many, many Virginia non-profits and faith groups from their core missions.
- **House Bill 1673** – This bill establishes the Virginia Commission on Immigration. The purpose of the Commission would be to study, report, and make recommendations for dealing with the impact of immigration and related policies on the Commonwealth in the areas of education, employment, and cooperative efforts with the federal government.

## **Environmental Issues**

Gary Hagy with the Virginia Department of Health stated that a bill was introduced this year, House Bill 2691, to institute into the onsite sewage program for septic tank permits in which the bill would establish and give the Health Department authority to establish civil penalties for violations of people who did not correct their failing system.

Previously, the only choice the Health Department had for enforcement was to take those people to criminal court. This bill would allow assessment of civil penalties without them having a criminal record. Also included in this bill were all of the establishments that are inspected (restaurants, hotels, summer camps, campgrounds, migrant and labor camps, milk pasteurization plants).

Provisions were added to this bill for reinspection fees that states, “if the Health Department goes in and do an inspection, and the facility is in bad shape and an imminent threat to public health exists, there would be a \$250 reinspection fee for the Health Department to come back and check on those violations.” It would not require a fee for a routine inspection. This is for a habitual offender, providing them an incentive to follow the regulations. This language got included into the bill without the Health Department's approval and it was removed from the bill. The bill still exists, but with only the onsite sewage language referring to civil penalties.

If an operator or grower, who runs a good migrant camp and has a good record, this bill will not have any affect on them; however, if an operator or grower has less than a stellar record and the Health Department has to go back to get major things corrected (if reinspection conditions are

such that impose an imminent threat or the health and safety of the migrant workers are in existence), the operator of the migrant camp shall be charged a fee of \$250. The inspection would be made regardless of whether the fee is or is not paid. However, any fees that are not paid must be paid before a permit is rendered for the following year. The whole purpose of this bill is to address the operators who do not comply and have a record of non-compliance.

The Health Department also had a condition that arose in Southwest Virginia, particularly Lee County in which someone was going to construct a migrant labor camp, and the proposed water supply was going to be a spring. The Health Department would not accept a spring as a supply of water. Any permitted facility (restaurant, hotel, migrant labor camp, camp ground) must have an approved water supply. An approved water supply is waterworks in which a public water supply is issued a permit by the Commissioner through the Office of Drinking Water that is monitored and has to be sampled, or if it does not meet the criteria for a waterworks, it is a water supply that meets the structured requirements of the proper well regulations and has been tested and has been deemed acceptable by the local health director. There are no construction standards for springs. A spring in some parts of the state is an “iffy” water supply. The Health Department might accept the spring for a permitted facility only as a last result and there is no other water supply available. The Health Department will ask the operators to voluntarily submit their spring under the Office of Drinking Water Standards for a public water supply so that it is monitored regularly.

In March, the Health Department will be posting all migrant labor permitted camp inspections on the internet. There will not be any marketing of this fact. If a facility is in violation, there will be a link to provide contact information. All Health Department inspections are public documents that are available under the Freedom of Information Act (FOIA).

### **Foreign Labor Certification Conference Update**

Michelle Abraham reported that she attended the Foreign Labor Certification Training sponsored by the U. S. Department of Labor held in San Antonio, Texas in November 2006. The processing of H-2A and H-2B applications was discussed. That processing has been moved from the Regional Office to two processing centers located in Atlanta and Chicago. We are working with the Atlanta facility. This was done to streamline the processing and bring consistency to the application process throughout the country.

The topics covered in the training for all the State Workforce Agencies (SWA) staff involved in the H-2A and H-2B processing were: 1) the application process and how it is handled; 2) housing inspections and what is expected for the SWAs and whomever they designate for housing inspections; 3) adhering to the timeframe for processing to meet the deadlines that are allotted; 4) prevailing wage determinations and how SWAs’ responsibility need to be met on Ag and Non-Ag permanent applications.

Important changes that will be forthcoming are:

- On the H2A applications, more detailed information will be requested regarding U. S. worker referrals.
- The SWAs formerly reported to the national office, semi-annually, the number of applications we receive, the number of housing inspections we complete, the number of job

orders that are in recruitment, and the number of prevailing wage/practice surveys completed. It has been changed, and now this information will be reported quarterly.

- It is now a requirement that the SWAs report on a monthly basis to the national processing center the number of applications that are received, the number of housing inspection visits that are done, and the number of job orders that are in recruitment that have not been accepted for interstate clearance.

This year there has been a significant increase in H-2A and H-2B applications. The increase appears to be in tobacco growers, vegetables, nurseries, grape vineyards, dairy, and sod.

In conclusion, Mrs. Abraham reported that the Virginia Employment Commission will no longer issue crew leader registration licenses.

### **Old Business**

Chairman Annis reported that the elections for the positions of the MSFW Board Chair and Vice-Chair were due in December. Mr. Hudson made a motion that Mr. Annis continue the position of the Chair for the MSFW Board. Mr. Von der Lippe seconded the motion. There were no additional nominations. Mr. Hall made a motion that the nominations be closed. Mr. Scott seconded that motion. Mr. Annis was re-elected by a unanimous vote.

Mr. Hall made a motion that Mr. Moreno be re-elected as Vice-Chair for the MSFW Board. Mr. Hudson seconded the motion. Mr. Scott moved that the nominations be closed. The vote was passed unanimously to re-elect Mr. Moreno as Vice-Chair.

### **New Business**

There was no new business to report.

### **Items of Interest from Commissioner Dolores Esser**

Commissioner Esser reported that the Virginia Employment Commission (VEC) is funded by federal funds. Virginia still ranks 51<sup>st</sup> among 50 states including Puerto Rico and Washington, DC in the percentage of monies that the employers pay in state returns. Last year, when statistics were in, we were getting 30.2 cents back on every dollar. This is what ranks Virginia so low. It is complicated this year because last year's Congress did not pass a budget. In January, when the new Congress came in, they decided to do a continuing resolution. What this means for the VEC is that the budget is being cut by \$2.6 million. Because of this, we will be looking at a lot of reductions within the agency. Unless Congress takes some action, this agency will be in tremendous jeopardy.

Mr. Hudson would like a follow-up on the strawbail house that the Board toured in August 2006. Ms. Esser said she would like to put his request on the agenda for an upcoming meeting, and have someone come in and give an update to the Board.

### **Items of Interest from the Board Members**

Mr. Scott commented on whether letters should go to the Secretary of the Commonwealth regarding the Board's non-participating members requesting that they resign. Commissioner Esser stated that her office has let the Secretary of Administration know that there are three vacancies on the MSFW Board. Mrs. Fogg stated that we have been informed that the Governor will not make any additional appointments until after the General Assembly adjourns.

### **Public Comments**

Mr. and Mrs. Robert Dodd, Proprietors of Dodd's Acres Farm stated that they wish it was a little easier to obtain the workers that they need; however, they manage. They feel that they do have a wonderful core of workers.

Will Jacobs of the Rappahannock Migrant and Seasonal Worker Council stated that their next meeting would be organized to elect new officers, and wanted the MSFW Board to be aware of this.

Mrs. Fogg stated that she has tried to obtain updated information on all the Councils. Some of the information has been updated, but there are several vacancies and staff changes. She has forwarded at least one set of Council Meeting Minutes to the Board and the other Councils have promised to forward their meeting minutes to Mrs. Fogg; however, they continue not to do so.

Mr. Annis stated that he would like the next meeting to be held in Winchester and invite Jim Mooney of USDOL Wage and Hour to give a presentation on Partnership Agreements. The Board unanimously agreed to have the next meeting in Winchester on May 16.

The future MSFW Board meetings would be held on August 15 and November 14. The location would be decided upon.

### **Adjournment**

There being no further business, a motion was made by Chairman Annis to adjourn. It was seconded, and passed unanimously. The meeting adjourned at 12:30 p.m.