

December 13, 2010

Miles McEvoy
Deputy Administrator
USDA National Organic Program
Agricultural Marketing Service
1400 Independence Ave., SW
Washington, D.C. 20250-0268

Dear Mr. McEvoy,

It has come to our attention that Mr. Mark D. Keating was terminated from his position as an Agricultural Marketing Specialist with the National Organic Program (NOP) based on communications he had with the National Organic Standards Board (NOSB) in his professional capacity. We are concerned about the action taken against Mr. Keating, and the basis for that action, which we believe will have a severe chilling effect on communications within the NOP and between the NOP and the NOSB and other entities with whom the NOP interacts. Mr. Keating was dismissed primarily for purportedly violating a directive from his supervisor to the NOP staff stating:

The role of the NOP Standards Staff on these calls [with the NOSB] is to serve as technical experts, provide advice, perhaps pose questions to the NOSB (i.e., have you thought of how we will actually implement this through rulemaking?). Please do not interject personal opinions on issues, especially when no NOP position has been developed.

Restricting the communications of professional staff concerning policies under development to articulated NOP positions is contrary to this Administration's commitment to open government, scientific integrity and the free exchange of ideas.

On his first full day in office, President Obama issued a statement that:

My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.

President Barack Obama, *Memorandum on Transparency and Open Government*, Jan. 21, 2009. On March 9, 2009 the President issued a memorandum to all federal departments and agencies directing the development of scientific integrity policies and rules and regulations. In a speech describing that directive, he stated:

And we have watched as scientific integrity has been undermined and scientific research politicized in an effort to advance predetermined ideological agendas.

We know that our country is better than this.

....

On March 9th, I signed an executive memorandum with a clear message: Under my administration, the days of science taking a back seat to ideology are over. Our progress as a nation - and our values as a nation - are rooted in free and open inquiry. To undermine scientific integrity is to undermine our democracy.

President Barack Obama, April 27, 2009 (speech to the National Academy of Sciences).

The instruction which Mr. Keating was fired for violating represents the antithesis of these principles. It has the potential to sacrifice free inquiry, open discussion and scientific integrity to predetermined ideological agendas. The NOP staff was hired because of its knowledge and expertise concerning the organic program, and tasked with, among other things, sharing their expertise with the NOSB. Mr. Keating's position description called for him to be accorded "wide latitude to exercise independent judgment" in order to "influence, motivate, and persuade the very diverse constituent population of the NOP..."

Mr. Keating's supervisor's instruction is especially troubling in the context of the relationship between the NOP and the NOSB, as the NOSB was established to formulate and recommend policies and regulations to the NOP. It would be inappropriate for the NOP to develop an official position on a matter while the NOSB is in the process of formulating its recommendation to the NOP. Yet, according to the directive, if "no NOP position has been developed," an NOP staff member acting as a technical advisor to the Board must remain silent in any discussion of the issue with the NOSB – thus depriving the Board of the staff member's expertise and input.

NOP staff should be free to communicate their views on matters within their expertise without fear of disciplinary action if their communications are deemed not to represent an official NOP position. Rather than having NOP staff gagged and fearing disciplinary action if they misstep, the agency should encourage a free exchange of ideas. Mr. Keating's actions in flagging some of the ideas and concerns he presented to the NOSB as his personal views should be viewed as an entirely appropriate means to facilitate free communication and optimal utilization of staff expertise while avoiding any misrepresentation of official agency positions. Other agencies have policies which encourage a free exchange of ideas and opinions until an official agency position is

developed, after which employees are required to adhere to announced agency positions. For example, the Interior Department regulations provide at 5 C.F.R. §20.502:

Conformance with policy and subordination to authority.

Employees are required to carry out the announced policies and programs of the Department and to obey proper requests and directions or supervisors. While policies related to one's work are under consideration employees may, and are expected to, express their professional opinions and points of view. Once a decision has been rendered by those in authority, each employee is expected to comply with the decision and work to ensure the success of programs or issues affected by the decision.

[Emphasis added]

The policies on which Mr. Keating expressed his opinions were under consideration, and in his position, he was expected to express his professional opinions and point of view.

The instruction which Mr. Keating was fired for violating is additionally troubling because it is ambiguous and internally inconsistent. It directs NOP staff to “serve as technical experts, provide advice, perhaps pose questions to the NOSB,” and yet not “interject personal opinions on issues, especially when no NOP position has been developed.” Where is one to draw the line between providing advice and posing questions as part of one’s job, and interjecting personal opinions where there is no official NOP position, which can result in losing one’s job? The only way to be sure of compliance is to remain silent.

We ask that you step in to countermand the instruction given by Mr. Keating’s supervisor in order to insure openness and integrity in the NOP. Mr. Keating’s dismissal based upon this instruction should be reversed and Mr. Keating permitted to continue his contributions to the NOP. We would appreciate a response to this letter informing us of the action you intend to take concerning this matter.

Sincerely,

Paula Dinerstein
Senior Counsel