



STATEMENT OF COLLEEN M. KELLEY  
NATIONAL PRESIDENT  
NATIONAL TREASURY EMPLOYEES UNION

ON

BEYOND READINESS: AN EXAMINATION OF THE  
CURRENT STATUS AND FUTURE OUTLOOK OF THE  
NATIONAL RESPONSE TO PANDEMIC

BEFORE

THE HOUSE COMMITTEE ON  
HOMELAND SECURITY

JULY 29, 2009

Chairman Thompson, Ranking Member King, distinguished members of the Committee; I would like to thank the Committee for the opportunity to provide this testimony. As President of the National Treasury Employees Union (NTEU), I have the honor of leading a union that represents hundreds of thousands of federal worker including thousands of Transportation Security Officers (TSOs) at the Department of Homeland Security's (DHS) Transportation Security Administration (TSA) and 22,000 Customs and Border Protection (CBP) Officers, Agriculture Specialists (CBP AS) and trade enforcement specialists who are stationed at 327 land, sea and air ports of entry (POEs) across the United States. TSOs, CBP Officers and CBP AS make up our nation's first line of defense in the wars on terrorism, drugs, contraband smuggling, human trafficking, agricultural pests, and animal disease while at the same time facilitating legitimate trade and travel.

Employees on the frontlines of our nation's borders and airports are exposed to many threats, the newest being exposure to the H1N1 influenza. On Wednesday, April 22, 2009, the first reports of H1N1 flu exposure in the U.S. became public and the press began reporting on a swine flu outbreak originating in Mexico. To date, it is suspected that there have been as many as two million H1N1 flu cases in the U.S. H1N1 flu outbreaks are documented daily. Currently, at the U.S. Coast Guard Academy in New London, Connecticut, over ten percent of the freshman class has H1N1 flu.

This outbreak has raised serious concerns about how the federal government creates and communicates policies to protect the health of key frontline federal personnel. Most troubling to NTEU, is that key stakeholders, including federal employees and their employee representatives, are not being consulted in the development of pandemic response strategies and had not been afforded the opportunity to participate in the development of or comment on the November 2005 National Strategy for Pandemic Influenza and the May 2006 Implementation Plan. NTEU commends the Chairman for recognizing this glaring weakness in the Committee's January 2009 report entitled, "Getting Beyond Getting Ready for Pandemic Influenza" and for calling the new Administration to address this shortcoming. I applaud the Homeland Security Committee for holding this timely hearing.

Policies to mitigate health risks for federal employees should vary according to the type of work being done and the potential for exposure. The general guidelines, which include staying out of crowds, do not adequately address situations where an employee's entire work shift requires him or her to be in close contact (within six feet) of literally thousands of travelers, which is the case for Transportation Security Officers, Customs and Border Protection Officers and Agriculture Specialists.

Specific guidance must be developed and communicated clearly and in writing to these employees who are at increased risk of exposure. It is unacceptable and shocking that more than three months after the initial onset of H1N1 flu in the U.S. and despite repeated urging from NTEU and others, there is still no comprehensive guidance in place to protect the health of these frontline employees.

The September 2007 CBP Operations Plan for Pandemic Response states that "CBP is the first line of our nation's defense against a pandemic, both overseas and along our border." This plan was formulated in response to the possible outbreak H5N1 avian flu pandemic. According to this plan, "CBP could experience a substantial reduction of personnel due to illness (approximately 30% to 50%), potentially having a substantial impact on sustaining continuity of CBP operations...Once a pandemic begins to spread, significant numbers of infected travelers at and between the POEs may be searched, detained, transported, and housed by CBP pending removal or transfer into the custody of medical authorities, impacting CBP's ability to perform its mission...In spite of this, CBP must continue to carry out its priority mission to prevent the entry of terrorists and their weapons, regardless of the circumstances. **To accomplish this, CBP will need to protect its workforce...**" (Emphasis Added.)

It was therefore extremely troubling to NTEU that DHS issued conflicting and confusing guidance to frontline CBP Officers and TSOs during the initial H1N1 spring outbreak. Shortly after the swine flu outbreak became public in late April 2009, NTEU started receiving questions from our members at ports of entry around the country. In numerous locations, personal protection equipment (PPE), including gloves and N-95 respirators, was distributed to employees. At JFK Airport in New York, for example, distribution to CBP employees began on April 25<sup>th</sup> and continued through April 26<sup>th</sup> with little guidance. In the afternoon of the 26<sup>th</sup> employees were initially told they were only to wear the respirators if in contact with an ill individual. Later they were told they were not to wear the respirators at all, so as not to alarm the public or offend passengers.

On April 26<sup>th</sup> Homeland Security Secretary Napolitano sent a message to DHS employees working near the Southwest border. That message stated: "CDC recommends that a distance of six feet should be maintained between all employees and someone who appears ill. The use of N95 masks is suggested if an employee must maintain closer contact than the six feet of distance."

On April 28<sup>th</sup>, a CBP spokesperson was quoted in [CNSNews.com](http://CNSNews.com) saying, "CBP officers and Border Patrol agents are provided personal protection gear which they may utilize at their discretion."

On April 30<sup>th</sup> a DHS spokesperson was quoted in a media report saying, "the Department of Homeland Security has not issued an order saying our employees cannot wear masks."

Transportation Security Officers at Dallas/Fort Worth Airport were issued masks on April 26<sup>th</sup> and on the 28<sup>th</sup> told they could not wear them unless they were dealing with a traveler exhibiting swine flu symptoms.

According to a press report in the Washington Times on May 2<sup>nd</sup>, a TSA PowerPoint presentation was distributed to TSA employees on April 29<sup>th</sup> that stated: ". . . the routine wearing of protective masks by TSA personnel in the workplace is not authorized . . . In addition to not being medically necessary, the masks interfere with normal [transportation security operation] duties and hold the potential for unnecessarily alarming the public ..."

NTEU requested a copy of the PowerPoint presentation, but was told it was not available

for public distribution.

As soon as questions began coming in to NTEU from our members around the country as to whether they could wear respirators or masks, NTEU began trying to find out what the current policy was and urged that these employees be allowed to wear the masks if they felt their health was at risk. We contacted CBP, TSA and DHS. DHS was saying it had not issued a department wide order prohibiting the voluntary wearing of masks, but CBP and TSA were clearly enforcing such a prohibition.

Some statements from DHS that appeared in the press indicated that managers who were preventing the wearing of masks were misinformed about the actual policy. The idea that a few managers were misinformed is clearly not accurate. NTEU heard from many, many employees from around the country and attached to this testimony are affidavits from some of them relating instances of supervisors demanding that they remove respirator masks. Many of them are disturbingly threatening and many include comments indicating the reason was fear of alarming the public. I trust this Committee will ensure that the employees providing these affidavits will be free from any negative impact.

On April 30<sup>th</sup>, DHS issued Interim Guidance stating that: "Employees who work closely with (either in contact with or within 6 feet of) people specifically known or suspected to be infected with the H1N1 virus **must** wear respiratory protection." (Emphasis Added.) The guidance did not address the question of the voluntary donning of masks. In addition, the Interim Guidance noted it was being released "as an interim measure until the Office of Personnel Management provides comprehensive guidance for all federal employees." OPM has since indicated it does not intend to provide such government wide guidance, stating that on questions such as this, affecting narrow segments of the workforce, decisions are up to the individual agency.

On May 1st, I wrote to DHS Secretary Napolitano and OPM Director Berry urging that written guidance be issued immediately clarifying that these frontline employees would be allowed to wear masks at their discretion. On May 5<sup>th</sup>, CBP Acting Commissioner Ahern sent out an employee message reiterating the mandatory use of respirators when employees were in close contact with people known or suspected to be infected with the H1N1 virus. The message included no reference to the voluntary wearing of respirators despite NTEU's repeated requests to CBP for such guidance.

On May 8<sup>th</sup>, I sent a second letter to Acting TSA Administrator Rossides and a letter to Acting CBP Commissioner Jayson Ahern asking again for written guidance that these employees be allowed to wear respirators/masks at their discretion.

On May 14, 2009, I testified before the House Committee on Oversight and Government Reform Subcommittee on the Federal Workforce, Postal Service and District of Columbia about the Department of Homeland Security's (DHS) refusal to allow Customs and Border Protection (CBP) and Transportation Security Administration (TSA) employees to wear a respiratory mask, if they so choose, to help protect them from infection from the swine flu virus.

At the hearing, Subcommittee Chairman Stephen Lynch (D-MA) offered to work with

NTEU on legislation if this situation was not quickly corrected by the Department. On Friday, May 29<sup>th</sup>, the Department of Homeland Security Under Secretary for Management, Elaine Duke, issued an updated guidance regarding the use of Personal Protective Equipment (PPE), as it applies to working in close proximity to persons exhibiting symptoms of the H1N1 virus. But again, the guidance failed to provide a clear and reasonable policy allowing for the donning of a mask at your discretion in situations not involving close contact with an apparently infected person. On June 1st, I sent a letter to DHS Under Secretary Duke seeking clarification of the May 29<sup>th</sup> guidance.

On June 4th, the House of Representatives passed H.R. 2200, the TSA Authorization Act. On the House floor, Representative Lynch offered an amendment to provide that any TSA personnel may voluntarily wear personal protective equipment (including surgical and N95 masks, gloves, and hand sanitizer) during any emergency. NTEU worked closely with Representative Lynch and strongly supported this amendment. The Lynch amendment was passed by voice vote and became part of the bill. The bill now goes to the Senate for consideration.

Unfortunately, H.R. 2200 was limited to TSA related provisions; therefore, the amendment does not address the discretionary use of PPE by CBP Officers and CBP Agriculture Specialists at the ports of entry that also daily come into close contact with thousands of travelers transiting into the U.S.

On June 16, NTEU testified before the Senate Homeland Security and Governmental Affairs Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia on this issue. NTEU asked the Committee to include similar language to the Lynch amendment in any upcoming legislation that includes CBP jurisdiction.

Working with House Appropriators and Representative Lynch, NTEU got language in H.R. 2892, the FY 2010 DHS House appropriations bill that would allow DHS personnel the discretionary use of masks without being subject to discipline.

Also, NTEU serves on the Federal Advisory Committee on Occupational Safety and Health (FACOSH). NTEU believes that the Occupational Safety and Health Administration has the expertise to formulate the pandemic flu workplace health and safety response and submitted a resolution to that effect at their scheduled meeting in June. As a result, a FACOSH work group was established to address emerging worker health and safety issues, including the voluntary use of PPE by federal workers, surrounding the H1N1 flu.

Despite these continued efforts, CBP issued a new guidance on June 17, 2009 that stated that "employees may use the personal protective equipment (PPE) in situations where they believe it is needed to safely carry out their duties." This guidance, however, was followed by management guidance on June 19 that stated "Any employee who feels it is necessary to don PPE to perform their normal duties, must first contact their immediate supervisor...If after consultation with their supervisor the employee still has concerns, the employee will be allowed to wear PPE...Each request to don PPE must be considered on a case by case basis by CBP management."

NTEU met with DHS and CBP officials on July 14 and raised this contradictory language and asked them to agree to a Memorandum of Understanding (MOU) with us that is clear and unambiguous. On July 23, NTEU received a proposal that we believe will be acceptable to our members. As of the submission of this testimony, NTEU and CBP appear close to an agreement.

Unlike the June 19<sup>th</sup> CBP guidance, on May 29, 2009, TSA issued Policy Guidance on Personnel Protective Equipment that is clear and allows TSOs discretionary use of N95 masks. But the May 29<sup>th</sup> TSA guidance was not shared with TSA employees and, according to TSOs, was only just distributed to TSA personnel after the reported H1N1 flu-related death of a TSO at the San Juan Airport on July 19<sup>th</sup>.

These experiences with DHS during the initial and continuing outbreak of H1N1 influenza highlights the need for open and frank communication between federal agencies, their employees and their employee representatives. The U.S. Government expects a resurgence of the H1N1 flu strain in the fall and continues to prepare for the upcoming 2009-2010 winter flu season. The timing, severity and the geographic location of the resurgent H1N1 influenza remains unknown, but important issues must be addressed now for all federal workers, especially those on the frontline who are responsible for keeping our air, sea and land ports open to trade and travel. Those issues include:

- 1) Clear guidance is needed as to whether some federal workers should receive priority when a vaccination is approved and distributed to the public.
- 2) Federal leave policy must be clear, especially in the case of working parents who may have a sick or quarantined child or a child whose school or daycare is closed.
- 3) Social distancing is a key factor in preventing the spread of flu. For this reason, federal telework programs must be up and running to facilitate continuity of operations.
- 4) In the case of substantial reduction of personnel due to illness, shifting of job location and duties of federal personnel may be necessary to maintain operational control. Shift extensions, overtime, cancellation of leave and travel requirements will be critical in order to address a pandemic induced reduction in the federal workforce.
- 5) Clear written personnel policies must be in place to address these contingencies and frequent, updated communication with the federal workforce and federal employees' representatives is absolutely essential.

NTEU appreciates the Committee's continued focus on pandemic preparedness and its insistence on common sense guidance with respect to protecting frontline DHS personnel and the entire federal workforce. NTEU pledges to work with Congress and our agency partners to address the personnel challenges of a potentially severe pandemic and help to ensure the continuity of federal services.

Thank you again for holding this important hearing.

**AFFIDAVIT**

I, Ryan K. Imamura, do hereby state:

1. I am employed by the U.S. Bureau of Customs and Border Protection, Department of Homeland Security, in the position of CBP Officer. I am currently assigned to the port of Las Vegas at McCarran International Airport.
2. My assigned duties include processing of inbound passengers to ensure compliance of U.S. customs and immigration laws. In the course of these duties I regularly come into frequent contact with members of the traveling public from Mexico. These contacts routinely require interaction within six feet of these travelers.
3. CBP employees at my Port were generally instructed that we were not authorized to wear protective masks unless we were within six feet of an individual who was actively exhibiting flu-like symptoms. These instructions were issued orally at muster to CBP employees by Port Director Debbie Sanders, on or about April 28, 2009.
4. On May 1, 2009, I sent an e-mail message to Ms. Sanders through my respective chain of command. The subject was a request for discretionary use of an N95 respirator mask as means of minimizing my chance of contracting H1N1 and in turn infecting my wife, 20 month old daughter and my newborn son. Also included were references to CDC disseminated information that individuals infected with H1N1 could be contagious while not showing outward signs of being sick.
5. Approximately, one hour later, CBP Chief Antonio Gonzalez, came and verbally informed me that Port Director Sanders denied my request. I asked Chief Gonzalez if I would be receiving a written response and he declined. I noted the time and immediately sent an e-mail message to NTEU stewards Monique Jacobs and Ken Eagan regarding the management response. I also sent a copy to Chief Gonzalez so he would have an opportunity to correct anything I may have misinterpreted. To date, Chief Gonzalez has neither challenged nor corrected my recollection of this encounter.
6. CBP management is gambling with the health and lives of its employees and their families. We are a group of dedicated, vigilant and hardworking professionals that love our jobs and our country. All we ask in return is the right to protect ourselves and our families while we protect America.

I swear/affirm under penalty of perjury the foregoing is true and correct to the best of my knowledge and belief.

Signed: *R. Imamura*

Dated: 05/11/2009

AFFIDAVIT

I, Maria M. Seda Franqui, do hereby state:

1. I am employed by the U.S. Customs and Border Protection, Department of Homeland Security, in the position of Customs and Border Protection Agriculture Specialist. I am currently assigned to the Laredo, Texas Port of Entry, a land port across the border from Mexico.
2. My assigned duties include processing vehicles, passengers, and pedestrians inbound to the United States from Mexico to ensure compliance with, among other laws, U.S. Agriculture, Customs, and Immigration laws. In the course of performing those duties, I regularly come in contact with members of the traveling public inbound from Mexico. The performance of my regularly assigned duties as a CBP Officer requires that I routinely maintain contact within six feet of individuals arriving from Mexico.
3. On or about April 27, 2009, at approximately 1700 hours I was assigned to and working the secondary inspection area at the Laredo Port of Entry. I was in the process of inspecting a vehicle and its passengers, and writing a penalty. A young woman (age 14-16 years), one of the passengers in the vehicle I was inspecting began vomiting. Despite the obvious illness, Supervisory Customs and Border Protection Officer Francisco Molina ordered me to remove the protective mask I was wearing. He said he had decided that the woman was sick because she was pregnant and that I did not need to wear the mask unless the passenger showed signs of sickness. The woman's mother had also placed an ice-pack over the woman's head at all times I was present with her. I understood that I had to obey the orders of the supervisor, and that is why I removed the protective mask.
4. I desired to wear the mask because of concerns about contracting swine flu.

I swear/affirm under penalty of perjury the foregoing is true and correct to the best of my knowledge and belief.

Signed: Maria M. Seda Franqui Dated: 05/08/2009

**AFFIDAVIT**

I, Lilia Pineda, do hereby state:

1. I am employed by the U.S. Bureau of Customs and Border Protection, Department of Homeland Security (hereinafter referred to as "CBP") in the position of CBP Officer. I am currently assigned to the Otay Mesa Port of Entry, a land border.
2. My assigned duties include processing inbound passengers, vehicles and pedestrians to ensure compliance with U.S. Customs and Immigration laws. In the course of performing those duties, I regularly come in contact with members of the travelling public inbound from Mexico. These contacts routinely require contact within six feet of those individuals.
3. On or about April 28, 2009, I was working at Otay Mesa, Primary Lane 4, and decided to wear an N-95 respirator mask. I made this decision for several reasons. I have been fitted for an N-95 respirator mask. (I had also been trained to fit other CBP Officers for the N-95 respirator mask.) I was encountering individuals who were coming from Mexico City and other cities in central Mexico, where the swine flu is prevalent. Also, I had a cold at the time and felt I was especially vulnerable to getting another illness. I was also concerned about exposing other family members to the swine flu, including my infant nephew, whom I see regularly.
4. At approximately 9:30 a.m., while wearing the N-95 respirator mask while working, I was approached by Chief Kait who instructed me to remove my mask. I explained to him that I had taken the training for respirator fit test trainer, that I felt it was a health and safety issue for me to wear the mask, that I had been fitted for a respirator mask, etc. Despite my objection, Chief Kait refused to allow me to wear the mask. He repeatedly asked me angrily with his hands at his waist, "Are you going to comply or do you want to go home sick." I did comply.

I swear/affirm under penalty of perjury the foregoing is true and correct to the best of my knowledge and belief.

Signed: \_\_\_\_\_



Dated: 05/08/09

## AFFIDAVIT

I, Kenneth Eagan, do hereby, state:

1. I am employed by the U.S. Bureau of Customs and Border Protection, Department of Homeland Security, in the position of Customs and Border Protection Officer. I am currently assigned to the Las Vegas Port of Entry, an airport.

2. My assigned duties include processing inbound passengers, to ensure compliance with U.S. customs and immigration laws. In the course of performing those duties, I regularly come in close contact with members of the traveling public arriving from Mexico. These contacts routinely require contact within six feet of those individuals.

3. On Monday April 27 2009, I was scheduled to work Primary Inspection Booth 8 from 0930 until 1730. After I set up in the booth to begin processing passengers, I donned protective gloves and the N-95 mask. The first two flights of the day were from Mexico, and one of those was from Mexico City, the epicenter of the swine flu outbreak. During the second flight, Mexicana flight 996 arriving from Mexico City, Chief Gonzalez came to my assigned booth and blocked the aisle so no new passengers could approach. The other supervisor, Ernie Campbell blocked the booth door behind me. I was processing a passenger at the time and Chief Gonzalez interrupted the inspection, ordering me to remove the mask. He stated, " TAKE THE MASK OFF NOW, YOU ARE NOT AUTHORIZED TO WEAR A MASK." I finished processing the passenger, removed the nitrile gloves, used hand sanitizer to clean my hands and then removed the N-95 mask.

4. After I removed the mask, Chief Gonzalez told me not to wear a mask while processing passengers. He told me that the only time I could wear a mask was if the person standing in front of me was showing obvious signs of the flu, as had been explained in a muster briefing. I told Chief Gonzalez that if I waited for someone to hack (cough) on me, it would be too late for the mask to protect against exposure. Additionally, I advised him that according to the CDC, a person could have the flu from one to seven days without showing any symptoms, but would be contagious within 24 to 48 hours after becoming infected. He again ordered me to not wear any protective masks until flu symptoms were being displayed by the passenger in front of me.

5. CBP employees at my POE were generally instructed that we were not authorized to wear protective masks unless we were within six feet of an individual who exhibited flu-like symptoms. These instructions were issued verbally at multiple musters by Chief Gonzalez, Supervisors Ernie Campbell, Frank Hoopes, Olivia Dorsey and Port Director Sanders.

I swear/affirm under penalty of perjury the foregoing is true and correct to the best of my knowledge and belief.

Signed: 

Dated: 05/08/2009

AFFIDAVIT

I, Samuel Santiago, do hereby state:

1. I am employed by the U.S. Customs and Border Protection, Department of Homeland Security, in the position of Customs and Border Protection Officer. I am currently assigned to the Laredo, Texas Port of Entry, a port on the land border with Mexico.
2. My assigned duties include processing vehicles, passengers, and pedestrians inbound to the United States from Mexico to ensure compliance with, among other laws, U.S. Customs and Immigration laws. In the course of performing those duties, I regularly come in contact with members of the traveling public inbound from Mexico. The performance of my regularly assigned duties as a CBP Officer requires that I routinely maintain contact within six feet of individuals arriving from Mexico.
3. On April 28, 2009, and again on April 30, 2009, U.S. Customs and Border Protection management instructed me not to wear a protective mask and to remove the protective mask that I had been wearing.

On April 28, 2009, at around 0740 I arrived at Bridge 1, Laredo POE to begin my assigned shift (0800-0400). I inquired what preventive measures were being taken to avoid exposure to the Swine Flu, to which I was informed that face masks were available for use. I opted to wear one. A few minutes later Supervisor Esteban Morales communicated by radio that the use of face masks was not authorized. I asked to see the policy in writing, as I was led to believe that the masks were provided by the agency for safety reasons, to be used by all employees. After this incident, I went into the CBP Net website which indicated that the use of masks was to be at the employee's discretion if official duties were to be carried out at a distance of less than 6 feet of other individuals. I proceeded to pass this information on to Supervisor Morales, who forwarded it to Chief CBP Officer Adriana Arce.

On April 30, 2009, at approximately 0930, I was working on primary when Supervisor Juan Garza approached me and indicated that my presence was requested at a meeting with Chief CBP Officers Arturo Ramirez and Adriana Arce. I immediately complied, and when I reached the office, Supervisors Herminia Garcia, Jorge Ruiz, Esteban Morales, and Juan Garza were present. Two other CBP Officers, Miguel Medrano and Carlos Garcia, had also been called in to the meeting. Chief CBP Officer Arce and the other managers told me we were not authorized to use the face masks as protection against the risk of exposure to the Swine Flu, but that we could keep them within reach, in case we encountered an infected person. I requested the order in writing, to which Chief Arce replied that she would not put anything in writing. Chief Arce became very upset and said she could proceed to take disciplinary action against me.

The Chief indicated that the public was not to be alarmed, as it would create a negative economical impact, that the Swine Flu was only a virus, and there was no reason to be concerned. I responded that I was not a doctor, and had no medical training, so how was

I supposed to know when a person might be ill. I was also told to escort any person who was ill to another area, far from the rest of the traveling public. I wanted to know what that area was, or where it was, since we had not received instructions on how to properly process an ill person.

I asked if I was expected to pay medical expenses out of my own pocket if I were to become ill due to the Swine Flu, to which the managers indicated that the agency would not be responsible for any of my expenses, even though they would be directly responsible for any exposure and subsequent illness.

4. I desired to wear the mask because of concerns about contracting swine flu.

I swear/affirm under penalty of perjury the foregoing is true and correct to the best of my knowledge and belief.

Signed: Samuel Santiago

Dated: 05/08/2009

**AFFIDAVIT**

I, Monique Jacobs, do hereby state:

1. I am employed by the U.S. Bureau of Customs and Border Protection, Department of Homeland Security (hereinafter referred to as "CBP") in the position of CBP Officer. I am currently assigned to the Las Vegas Port of Entry, an airport.
2. My assigned duties include processing inbound passenger to ensure compliance with U.S. Customs and Immigration laws. In the course of performing those duties, I regularly come in contact with members of the travelling public inbound from Mexico. These contacts routinely require contact within six feet of those individuals.
3. On or about May 1, 2009, I sent an email to Chief Antonia Gonzalez, and requested that I be afforded the option of wearing a protective mask while processing passengers to protect me and my family against the H1N1 flu. I asked for a YES or NO answer to my question. What prompted my email was an incident that occurred earlier in the day, where a concern arose about whether an inbound passenger had been infected. By the time the passenger had been identified numerous CBP Officers had been physically within six feet of the passenger.
4. While on my nutrition break at 1728, I was approached by Chief Gonzalez. He requested that I turn off the television because he needed to speak with me. He stood in front of me - on the other side of the table - while Supervisor Hoopes stood behind me in front of the door. Chief Gonzalez then told me that in accordance with the directive, unless a passenger appears to be ill, I am not allowed to don a mask and that this was as close to in writing as I was going to get. I later confirmed in writing that based upon this conversation, I understood that I was being denied the right to don a mask unless I have visual signs of an ill passenger.

I swear/affirm under penalty of perjury the foregoing is true and correct to the best of my knowledge and belief.

Signed: \_\_\_\_\_



Dated: \_\_\_\_\_

5/8/09

M. Jacobs

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AFFIDAVIT

I, Scott Cottingham, do hereby state:

1. I am employed by the U.S. Bureau of Customs and Border Protection, Department of Homeland Security (hereinafter referred to as "CBP") in the position of CBP Officer. I am currently assigned to the Otay Mesa Port of Entry, a land border.
2. My assigned duties include processing inbound passengers, vehicles and pedestrians to ensure compliance with U.S. Customs and Immigration laws. In the course of performing those duties, I regularly come in contact with members of the travelling public inbound from Mexico. These contacts routinely require contact within six feet of those individuals.
3. On or about May 8, 2009, I was working at the Otay Mesa POE on primary and decided to wear the N-95 respirator mask. I have received the necessary training and fitting to wear the mask. I decided to wear the mask, because many of the individuals I was in contact with were coming inbound from central Mexico, where there have been many reported cases of swine flu. I was instructed to remove the N-95 respirator mask and told that I was not to return to working primary until I took the mask off.

I swear/affirm under penalty of perjury the foregoing is true and correct to the best of my knowledge and belief.

Signed: \_\_\_\_\_



Scott T. Cottingham

Dated: MAY 10 2009