STATEMENT BY

JOHN GAGE
NATIONAL PRESIDENT
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

REPRESENTING

THE UNITED DEPARTMENT OF DEFENSE WORKERS COALITION

BEFORE

THE SENATE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS

REGARDING

FINAL REGULATIONS: THE DEPARTMENT OF DEFENSE
NATIONAL SECURITY PERSONNEL SYSTEM

ON

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Madam Chairman and Members of the Committee: My name is John Gage, and I am the National President of the American Federation of Government Employees, AFL-CIO (AFGE). On behalf of the more than 700,000 civilian employees of the Department of Defense (DoD) represented by 36 unions of the United Department of Defense Workers Coalition (UDWC), including 200,000 represented by AFGE, I thank you for the opportunity to testify today.

Introduction

The UDWC has testified several times this year about our numerous serious objections to the draft regulations that DoD published on February 14, 2005 to create the National Security Personnel System (NSPS). The Coalition submitted comments detailing our critique of the Department's proposals with regard to collective bargaining, employee appeals of adverse actions, and the establishment of a pay for performance system to replace existing statutory pay systems. In addition, the Coalition spent months in "meet and confer" offering DoD options and alternatives which would have changed and enhanced current procedures without sacrificing important employee rights that Congress intended to be safeguarded by the law. We produced and distributed a document entitled *Contrasting Plans for the Department of Defense: Labor's Proposals for Positive Change Versus Management's Unlawful Return to the 19th Century* to demonstrate clearly how our suggestions could achieve these objectives.

I only wish that I could testify today that our effort and dedication had paid off, and that the Administration had listened carefully and decided to create a system that would have credibility with the rank-and-file employees the 36 unions have been elected to represent. Instead, DoD has, as demonstrated by the final regulations, steadfastly refused to address basic issues related to fairness, transparency, and accountability. Unless these regulations are changed, NSPS will become a source of corruption, scandal, and mismanagement and will deflect the agency from its important national security mission for years.

I cannot overstate the level of anger, alienation and outrage that the NSPS regulations have generated. Our members are loyal Americans who help to defend this country every day, and they are astonished by the campaign of misinformation and deception conducted by DoD and OPM officials to put in place an agenda that is so in conflict with American values, the proper maintenance of a civil service system, and good management principles geared toward improving organizational performance. DoD's public relations campaign cleverly uses all the right words in an attempt to mislead the Congress, the press, and the public, but the workers at DoD know that the agency officials have abused their authority and breached the trust given to them by the Congress.

Since enactment of the National Defense Authorization Act for Fiscal Year 2004, the unions repeatedly indicated our willingness to speed up the discipline and adverse action process. While we have very strong concerns about a pay for

performance system, we offered to negotiate over pay and a new pay system that would provide for a nationwide component to keep all employees comparable with the private sector, a locality component to keep all employees comparable with the private sector and living costs, and a performance component with fixed percentages tied to performance levels. We offered to engage in national-level, multi-unit, and multi-union bargaining. We also offered to speed up the timeframes for bargaining, to work with a new concept of post-implementation bargaining when necessary to protect national security and defense, and to engage in mediation-arbitration processes by mutually selected independent arbitrators in order to quickly resolve any bargaining disputes. We believe these changes alone would allow DoD to succeed in implementing new processes that would enhance the mission of the agency.

Now that the Department has published the final regulations with virtually meaningless revisions to the draft regulations to which we and tens of thousands of others objected so strongly, we must urge the Congress to rectify this situation through a legislative correction. The final regulations simply cannot stand.

The Meet and Confer Process

I am compelled to set the record straight with respect to the process used by the Department of Defense and the Office of Personnel Management referred to as "meet and confer" and the attempts by the Department to convey to Congress, the public and DoD workers that the design of NSPS was a collaborative and inclusive process, as required by the statute. Nothing could be further from the truth.

The Installation Level

The Department's numerous town hall meetings held across the country and attended by tens of thousands of employees were nothing more than a public relations scheme attempting to sell the concept of a new personnel system using catch phases and buzz words. In almost every instance, details of proposed plan specifics were not provided to employees, nor could their questions be properly answered during the question and answer sessions following the presentation. Furthermore, in almost every instance, union requests to be allowed a few minutes to present its views at the town hall meetings were not allowed.

The National Level

During the nearly two months of the meet and confer process, the Coalition's concerns and questions about provisions of the draft regulations and the still-yet-undisclosed "implementing issuances" were met with the following Department response: "the position of the administration remains extremely rigid and inflexible on this subject." The Department's negative attitude toward the statutory requirement to engage in the meet and confer process, demonstrated by their blatant unwillingness to engage in genuine give-and-take, denied the unions any meaningful role in the creation, design, or implementation of the

system. My reading of the law is that Congress did not consider this statutory requirement to be *pro forma*, but rather that it expected the process to be taken seriously by both management and unions, in order to develop a system that could work.

The 2003 Debate

I urge the committee to recall the stated objectives of the NSPS as well as the language of the law that established the Defense Secretary's authority to create it. On June 4, 2003, Defense Secretary Donald Rumsfeld testified before the Senate Governmental Affairs Committee regarding the NSPS. In that testimony, he claimed that NSPS was necessary "so our country will be better prepared to deal with the emerging 21st century threats" and promised the Congress that "here is what the National Security Personal System **will not do**, contrary to what you may have read:…**It will not end collective bargaining**. To the contrary, the right of Defense employees to bargain collectively would be continued. What it would do is to bring collective bargaining to the national level, so that the Department could negotiate with national unions instead of dealing with more than 1,300 different union locals—a process that is grossly inefficient." (Emphasis in original).

But Secretary Rumsfeld's promises have not been kept. Nothing in the NSPS regulations is perceptibly connected to "21st century threats." And his Department's final regulations effectively end collective bargaining by prohibiting bargaining on almost all previously negotiable issues, and granting the agency the authority to unilaterally void any and all provisions of collective bargaining agreements via the issuance of internal regulations and issuances. Furthermore, although the Secretary claimed that the creation of national level bargaining was urgent, not once since enactment of the Act in 2003 has he invoked such an elevation.

Six "Flashpoint" Issues

The Final Regulations

In my testimony before the Senate Armed Services Committee on April 14, 2005, I highlighted six "flashpoint" issues that constituted the most egregious examples where the draft regulations for NSPS deviated from both the law and the stated objectives of Secretary Rumsfeld when he testified in 2003 that NSPS would be merely a source of freedom from the "bureaucratic processes of the industrial age" to meet the "security challenges of the 21st century." In the following section, I will reiterate these points to show how the final regulations have dealt with these issues.

1. ***The draft regulations proposed radically reducing the scope of collective bargaining. The final rules made cosmetic changes to this issue, but none that would address the Coalition's concerns.***

The scope of bargaining must be restored so that the very institution of collective bargaining can continue to exist in DoD. In fact, the NSPS will effectively eliminate collective bargaining by greatly expanding the management rights clause as compared to current law, thereby rendering most previously negotiable issues to be "off the table." As a result, the final regulations do not follow the law with respect to its instructions to maintain collective bargaining rights for affected DoD employees.

In addition, DoD must not be permitted to unilaterally override provisions of collective bargaining agreements or unilaterally reduce the scope of bargaining via "issuances." DoD has made clear they, through politically appointed individuals – not career commanders, intend to use the initial implementing issuances to override any and all of the current collective bargaining agreements. This unilateral power to disregard existing agreements would eliminate collective bargaining and is modeled after the same activity found illegal in the DHS case. There is not even rudimentary showing of any need for any type of national security reasoning.

Additionally, DoD reserves the right to use issuances to note matters that can be taken off the table for future rounds of negotiations. Thus a union must constantly operate in fear of enforcing the contract lest the rights be upheld by an arbitrator and then declared in an issuance to be forever off the table in any future round of bargaining. This makes a mockery of collective bargaining and the resulting agreements.

2. ***The draft regulations created a biased, pro-management board to resolve labor-management disputes. The final regulations do not correct this problem.***

5 USC 9902(m)(6) specifies that the board that hears labor-management disputes arising from NSPS must be independent of DoD management. Both the proposed and final NSPS regulations would establish an internal board made up entirely of individuals appointed by the Secretary. Such a board would have no independence or credibility. While the Department may claim that they changed the draft so that the unions are permitted to suggest candidates for one of the three positions, the fact is that the selection authority will still rest solely in the hands of the Secretary. The bias is unmistakable.

In addition, Secretary Rumsfeld promised the Congress prior to the enactment of the law authorizing the establishment of NSPS that any board established to hear disputes arising from NSPS would be independent. The final regulations instead create an internal, employer-dominated labor board which duplicates the functions and costs of the Federal Labor Relations

Authority. It is absolutely critical that this board be entirely separate and distinct from DoD management.

3. ***The draft NSPS regulations changed the standard for mitigation by the Merit Systems Protection Board (MSPB) of discipline and penalties imposed on employees. The new standard would have been virtually impossible to meet and would effectively remove the possibility of mitigation. In the final regulation, DoD revised the standard from "wholly without justification" to "totally unwarranted." If the committee can discern a distinction between the two, the Coalition's attorneys would be very interested to hear it.***

The Merit Systems Protection Board in its landmark decision, Douglas vs. Veterans Administration, 5 MSPR 280, established criteria that supervisors must consider in determining an appropriate penalty to impose for an act of employee misconduct. These twelve factors are commonly referred to as "Douglas Factors." The federal courts have used the Douglas Factors and the current system allows for a standard of penalties to be reasonable in order for employees to have a meaningful right to have adverse actions mitigated by the MSPB. Now arbitrators and MSPB Administrative Judges will have their hands tied.

Further and in contrast to the past 25 years of law, the final NSPS regulation adds additional bureaucratic delay by declaring that adverse action arbitrations will no longer be final and binding. Instead, they will become essentially advisory subject to DoD review and then may be reviewed by the MSPB, thereby reducing the rule and power of arbitrators and Administrative Judges. This is entirely insupportable and contrary to Congressional intent. Since DoD wins close to 90% of its current MSPB cases, there is simply no justification for eliminating a fair adjudicative process for employee appeals.

4. ***The draft regulations did not require performance standards to be in writing. It appears that the final regulations corrected this egregious problem.***

Under NSPS, performance appraisals will be the crucial determinant of salary, salary adjustment, and job security. Because of this, it is crucial that the standards--against which performance will be measured--be made in writing. It is our understanding that employees will be able to use the negotiated grievance and arbitration system to present evidence to an impartial body that their performance appraisals are inaccurate. However, the authority of arbitrators to review and change performance ratings will be greatly limited due to the narrowed scope of collective bargaining under NSPS and the potential inability to grieve such violations that flow from "implementing issuances." This narrowed scope is further threatened by hostile review from the management-dominated National Security Labor Relations Board (NSLRB).

5. The draft regulations did not provide any safeguards to prevent a general lowering of pay for the DoD civilian workforce. The final regulations made no improvement in this area.

The final regulations permit a general reduction in salaries for all DoD personnel compared to rates they would have been paid under statutory systems, regardless of performance or market data. An ability to reduce entry level salaries, in addition to an ability to refuse annual adjustment of salaries for those who perform satisfactorily, as permitted in the final regulations, will by definition conspire to reduce DoD salaries generally. Consequently, there must be constraints on the ability of DoD to lower salaries or withhold salary adjustments generally. These safeguards must be established not only to protect the living standards of the civilian DoD workforce relative to the rest of the federal workforce, but also to guarantee the ongoing economic vitality of communities with DoD installations. At a minimum, the Defense Department must be held to the longstanding (16 out of the past 18 years) practice of "pay parity" between the overall payroll adjustments of its civilian and military workforces.

6. The draft regulations weakened veterans preference and eliminated seniority completely in determining retention for Reductions-in-Force, by requiring retention to be determined only on an employee's most recent performance appraisal. The final regulations only say that "ratings of record" will be used for retention, leaving ambiguous how many years of ratings will be considered and what the effect is. It is clear that veterans preference will be weakened and seniority still will be virtually eliminated as a component for retention.

Procedures for deciding who will be affected by a Reduction in Force (RIF) must be based on more than a worker's performance appraisals. The final NSPS regulation could allow an employee with three years of service and three outstanding ratings to have superior retention rights to an employee with 25 years of outstanding ratings and one year of having been rated merely "above average." The opportunities for age discrimination in such a system are indisputably apparent. Such RIF rules are patently unfair and must not be allowed to stand.

Salary Determination and Performance Management

Pay, Performance Management, and Classification

DoD's regulations indicate its desire for radical change to pay and classification systems, and, as the law requires, creation of a pay-for-performance system "to better link individual pay to performance, and provide an equitable method for appraising and compensating employees." No objective data or reliable information exists to show that such a system will enhance the efficiency of DOD

operations or promote national security and defense. As with the proposed system at the Department of Homeland Security, most of the key components of the system have yet to be determined.

One thing, however, is clear. The design, creation and administration of the concept DoD has proposed will be complex and costly. A new level of bureaucracy will have to be created, and given DoD's ideology and proclivities, it is highly likely that this costly new bureaucracy will be outsourced to provide some lucky private consultants with large and lucrative contracts. The private consultants will make the myriad, and yet-to-be identified, pay-related decisions that the new system requires. Although the contractors who anticipate obtaining this "make-work" project are undoubtedly salivating over the prospect, our country would be better served if the resources associated with implementing and administering these regulations were dedicated more directly to protecting national security and defense.

The unions told DoD during our meetings last year that until these and other important details of the new system have been determined and piloted, the undefined changes cannot be evaluated in any meaningful way. Unfortunately, we were forced to exercise our statutory collaboration rights on vague outlines, with no fair opportunity to consult on the "real" features of the new classifications, pay and performance management system. This circumvents the Congressional intent for union involvement in the development of any new system, as expressed in Public Law 108-13.

We recommended to DoD that the pay, performance management, and classification concepts be withdrawn in their entirety and published for comment and recommendations only when: 1) the Agencies are willing to disclose the entire system to DOD employees, affected unions, Congress, and the American public; and 2) the Agencies devise a more reasonable approach to testing any radical new designs before they are implemented on any widespread basis. It is simply wrong to ask us to accept systems that establish so few rules and leave so much to the discretion of current and future officials. As the representatives of DOD employees, it is our responsibility to protect them from vague systems, built on discretionary authority that is subject to abuse.

We believe that any new system must contain the transparency and objectivity of the General Schedule. Critical decisions on pay rates for each band, annual adjustments to these bands and locality pay supplements and adjustments must be made in public forums like the U.S. Congress or the Federal Salary Council, where employees and their representatives can witness the process and have the opportunity to influence its outcome, or through collective bargaining. We are concerned that these decisions will now be made behind closed doors by a group of DoD managers (sometimes in coordination with OPM) and their consultants.

Not only will employees be unable to participate in or influence the process, there is not even any guarantee that these decisions will be driven primarily by credible data, or that any data used in the decision-making process will be available for

public review and accountability, as the data from the Bureau of Labor Statistics (BLS) is today. Indeed, this year the Congress was forced to write language into legislation funding military operations in Iraq and Afghanistan that forbade DoD from discriminating among employees on the basis of their employment status for purposes of pay adjustments. This occurred in the wake of the revelation that in 2005, Defense officials gave "fully successful" political appointee employees a 2.5 percent raise while career members of the Senior Executive Service who are under a pay-for-performance system received just 2 percent if they were rated "fully successful." When the Department tried to justify the discrepancy, the Senate responded with language that explicitly prohibited the practice. Under NSPS, however, varying raises on the basis of factors other than labor market data or performance is entirely legal.

When the new system is implemented, employees will have no basis on which to predict their salaries from year to year. They will have no way of knowing how much of an annual increase they will receive, or whether they will receive any annual increase at all, despite having met or exceeded all performance expectations identified by DoD. The "pay-for-performance" element of the regulations will pit employees against one another for allegedly performance-based increases. This element of the proposal does not really qualify as a "pay for performance" system. Employees performing at an outstanding level could not, under the proposal, ever be certain that they would actually receive pay commensurate with their level of performance. Making DoD employees compete among themselves for pay increases will undermine the spirit of cooperation and teamwork needed to keep our country safe at home and abroad.

It is also unclear from the current state of the deficit that funds will be made available for performance-based increases to become a plausible reality, one of many facts that has DoD employees concerned and skeptical about this proposal. As a practical matter, the Coalition has voiced its concern that DoD's ambitious goal to link pay for occupational clusters and bands to market conditions fails to address the reality that pay for DoD employees is tied to Congressional funding, not market conditions. Indeed the Federal Employees Pay Comparability Act (FEPCA), the law that added a market-based locality component to the market-based General Schedule has never been fully funded, for budgetary reasons. That is, the size of the salary adjustments paid under FEPCA to GS employees has, except for once in 1994, reflected budget politics rather than the market data collected by the BLS to support the system.

NSPS, the General Schedule and the Promise of "Market-Based" Pay

Although the advocates and authors of the NSPS have offered the promise of "market-based" pay adjustments as one of the primary rationales for the replacement of the General Schedule (GS) and the procedures for its adjustment as described in the Federal Employees Pay Comparability Act (FEPCA), the fact is that FEPCA requires that GS salaries be adjusted solely on the basis of BLS market data that reveal what the private sector pays for occupations found in federal agencies. Under FEPCA, an individual federal employee's position on

the schedule is determined by job duties and performance, and the schedule itself is supposed to be adjusted according to market data.

Under the NSPS system as described in the final DoD regulations, no promises are made with regard to the use of market data, the source or quality of market data that a Secretary of Defense might choose to use, or whether the formula a Secretary of Defense chooses will affect the overall pay levels in the Department as compared to what would have occurred under the FEPCA-GS system. Instead, a Secretary of Defense will review pay ranges for "possible adjustment at least annually" but they will not necessarily be adjusted annually. A Secretary of Defense will implement issuances regarding the overall level of pay in the Department, but the formulas in these issuances will only reflect the market-based standards of FEPCA "to the maximum extent practical"—an explicit admission that NSPS will be less market-based than the system it replaces.

The two degrees of separation between NSPS and legitimate market data are significant in view of the fact that the General Schedule under FEPCA has also fallen far short of its own promises of market comparability in the almost decade and a half of its operation. In some particularly high-cost cities, the gaps between private and federal sector pay remain as high as 22%. In every year since 1994 when "locality pay," which is statutorily defined as local labor market-sensitive comparability pay, was introduced, budget constraints have prevented full implementation. In the context of a pay system like NSPS which does not even offer the promise of cost neutrality – that is, doesn't even pretend that it will *maintain* overall payroll spending in the Department – what chance is there that the market data will be utilized at all or utilized consistently?

For example, under NSPS, the Secretary will be able to utilize his discretion to adjust a pay band for one occupation in one locality based upon the market data set of his choice. But he will also be able to utilize his discretion *not* to adjust a pay band for another occupation in the same locality even if the same set of market data used to justify the other pay band adjustment would justify the adjustment. The Secretary will have the power to reward, say, accountants and ignore electricians, even if his "market data" found electricians underpaid by more than accountants, and even if the agency were experiencing more difficulty in the recruitment and retention of electricians. This degree of discretion invites abuse. Along with our recommendation regarding the importance of maintaining the tradition of overall "pay parity" between civilian and military pay adjustments, we believe that this type of discretionary authority should be circumscribed in order that some consistency be required of the Department.

GAO and AFGE in Agreement

After the draft NSPS regulations were published, they received important practical criticism from several sources, including Comptroller General David Walker who has testified twice regarding the DoD's readiness to implement any part of its proposed NSPS. We cite his testimony at length because it makes the

case so forcefully that DoD has failed to prepare for implementation by failing to fully elaborate its design, collaborate with unions representing affected employees, or train its managers and bargaining unit employees; all of which are well-known prerequisites for any measure of success. In his testimony, he cited the Government Accountability Office's (GAO) previous reports and testimony regarding the management of "human capital" in federal agencies, including GAO. In the months between the publication of the draft and final regulations, there is no evidence that DoD has made any attempt at either the design or implementation of a performance management system that would undergird its pay for performance system.

On March 15, 2005, Mr. Walker described his views on the strengths and weaknesses in DoD's attempt at "strategic human capital management" as embodied in the agency's proposed NSPS regulations. He used as reference the advice he gave to the House Government Reform Subcommittee on Civil Service and Agency Organization on April 23, 2003 as it considered the NSPS legislation. He also reiterated a March 2003 GAO publication that listed nine attributes GAO thought needed to be present in order to create "clear linkage between individual performance and organizational success."

In April 2003, when the legislation granting the Defense Secretary the authority to establish NSPS was still under consideration, Mr. Walker testified that "the bottom line is that in order to receive any performance-based pay flexibility for broad based employee groups, agencies should have to demonstrate that they have modern, effective, credible, and as appropriate, validated performance management systems in place with adequate safeguards, including reasonable transparency and appropriate accountability mechanisms, to ensure fairness and prevent politicization and abuse." Later he elaborated on this set of prerequisites as follows, calling them "statutory safeguards":

- Assure that the agency's performance management systems (1) link to the agency's strategic plan, related goals, and desired outcomes, and (2) result in meaningful distinctions in individual employee performance. This should include consideration of critical competencies and achievement of concrete results.

- Involve employees, their representatives, and other stakeholders in the design of the system, including having employees directly involved in validating any related competencies, as appropriate.

- Assure that certain predecisional internal safeguards exist to help achieve the consistency, equity, nondiscrimination, and nonpoliticization of the performance management process (e.g., independent reasonableness reviews by Human Capital Offices and/or Offices of Opportunity and Inclusiveness or their equivalent in connection with the establishment and implementation of a performance appraisal system, as well as reviews of performance rating decisions, pay determinations, and promotion actions

before they are finalized to ensure that they are merit-based; internal grievance processes to address employee complaints; and pay panels whose membership is predominately made up of career officials who would consider the results of the performance appraisal process and other information in connection with final pay decisions). (Emphasis added)

- Assure reasonable transparency and appropriate accountability mechanisms in connection with the results of the performance management process (e.g., publish overall results of performance management and pay decisions while protecting individual confidentiality and report periodically on internal assessments and employee survey results).

It is important to note that the Department of Defense is not only unprepared to meet these prerequisites with regard to its non-supervisory workforce, it is also behind almost every other executive branch agency in applying for and receiving OPM certification of a "performance appraisal system" that is necessary in order to be able to provide higher pay adjustments to senior executives. The Departments of Agriculture, Commerce, Education, Energy, Health and Human Services, Transportation, Treasury, Veterans Affairs, Homeland Security, Interior, Labor, Justice and many others have all applied for and received certification, but not the Department of Defense. (see http://www.opm.gov/ses/certification.asp).

The Comptroller General's March 2005 testimony listed six areas where the proposed NSPS regulations either fell short of the GAO's principles, or where too little detail or information was provided to make an evaluation. The six were as follows:

1) "DoD has considerable work ahead to define the details of the implementation of its system, including such issues as **adequate safeguards to help ensure fairness and guard against abuse**." (emphasis added)

2) Although the proposed NSPS regulations would "*allow* the use of core competencies to communicate to employees what is expected of them on the job" (emphasis added), it does not require this. It should be noted that the 2003 GAO statement does not suggest requiring the use of core competencies, only allowing them. Now GAO says that requiring the use of core competencies helps create "consistency and clarity in performance management."

3) The NSPS proposed regulations contain no "process for continuing involvement of employees in the planning, development, and implementation of NSPS."

4) DoD needs a Chief Management Officer to oversee human resources management in order to "institutionalize responsibility for the success of DoD's overall business transformation efforts" because they believe that this void is partially responsible for the failure of previous DoD reform efforts.

5) An effective communications strategy that "creates shared expectations among employees, employee representatives, managers, customers, and stakeholders" would be beneficial and that DoD has no such communications strategy in place.

6) Finally, GAO's testimony asserts that DoD does not have an "institutional infrastructure in place to make effective use of its new authorities," by which it means that DoD needs a "human capital planning process that integrates DoD's human capital policies, strategies, and programs with its program goals and mission, and desired outcomes; the capabilities to effectively develop and implement a new human capital system; and importantly, a set of adequate safeguards, including reasonable transparency and appropriate accountability mechanisms, to help ensure the fair, effective, and credible implementation and application of a new system."

These six shortcomings are essentially identical in content to the four "statutory safeguards" the Comptroller General said in 2003 had to be present for a system to be successful in furthering an agency's mission and preventing politicization and abuse. As such, it is fair to say that GAO appears to have been in agreement with us that DoD had failed both in its proposed and final regulations to design a system that will be either workable or that adheres to the principles GAO has identified for performance-based systems that protect the merit system. The only concession DoD has made in its final regulations is to allow employees to use negotiated grievance and arbitration procedures to challenge performance appraisals, which if upheld, would add a measure of accountability with regard to issues of "fairness" and "abuse."

Neutral Scholars' Views of NSPS-like Pay Schemes

The only truly objective academic survey and analysis of the appropriateness and effectiveness of pay for performance in the federal sector has been conducted by Iris Bohnet and Susan Eaton of Harvard's Kennedy School of government.[1] Their work is apolitical, and is based on empirical data of outcomes in the private and public sectors rather than projections or anecdotes from those with a material or political interest in carrying out a particular agenda.

[1] "Does Performance Pay Perform? Conditions for Success in the Public Sector", by Iris Bohnet and Susan C. Eaton, in Donahue, John D. and Joseph S. Nye Jr. (2003). For the People: Can We Fix Pubic Service? Washington: Brookings, pp 238-254.

Professors Bohnet and Eaton have identified through their research "conditions for success" for pay for performance in the public sector generally, and the federal sector in particular. They describe their work as providing a "framework" for determining whether and in what circumstances it makes sense to make "incentive pay" a percentage of salaries in the pay system for federal workers. Their analysis combines economics, human resource management, and social psychology in both theory and practice.

Bohnet and Eaton start out by defining pay for performance as a system that ties pay to output "in a proportional way, so that the more output, the higher the pay" and connect this approach to the views of Frederick Taylor, first published in 1911, who argued that workers had to be "motivated to do their jobs more efficiently" by external factors. It is instructive to recognize that although advocates of the Bush Administration's legislation repeatedly describe their approach as a modernization, it would in fact take us back about 100 years with regard to an understanding of "performance management."

Bohnet and Eaton note that the best empirical studies of performance pay use "simple jobs" where measuring performance is straightforward. Even then, however, the analysis of the success of pay for performance becomes ambiguous because of the trade-off between quality and quantity. Their survey of this research shows that while workers whose jobs require just one, discrete task, such as replacing windshields, have been shown to improve output in response to the pay incentives of "piece rates," when just one more factor – quality—is added to the equation, even then the conclusion becomes unclear. That is, if you only look at quantity, workers can be expected to produce more if they are paid more for higher output. But if quality is considered, the overall benefit to the enterprise is less clear.

The three primary "conditions of success" identified by Bohnet and Eaton depend upon "the kind of output produced, the people producing the output, and the organizational setting in which the people produce the output." Their conclusion is that the "conditions for success are generally not met by empirical reality in the private sector—and even less so by the empirical reality in the public sector."

The first "condition of success" is that output should consist of a single task that is clearly measurable and linked to a single individual. As everyone knows, the vast majority of federal employees are charged with completing multiple tasks only a small fraction of which are clearly measurable or susceptible to linkage to the work of a single individual. Bohnet and Eaton use the example of workers at the Occupational Safety and Health Administration who, under a pay for performance scheme that attempted to measure output, would have a strong incentive to focus on workplace safety rather than workplace health concerns because preventing an injury, e.g. falls from a platform, is far more measurable and linkable to the work of an individual agent, than is preventing a disease from developing 15 years into the future. Is preventing falls more valuable to OSHA than preventing cancer by limiting exposure to carcinogens? Would focusing

more on preventing injury than on preventing illness improve OSHA's performance as an agency?

Linking increases in output, performance, productivity, or contribution to mission to individuals would seem to be an uncontroversial prerequisite to implementation of an individualized pay for performance scheme. However, Bohnet and Eaton describe the near impossibility of achieving this in the context of some federal agencies' mission such as the State Department's responsibility to "promote the long-range security and well-being of the United States." It is in this context that they cite the fact that although more and more work in the federal and non-federal sectors is performed by teams of employees, even team awards can create perverse incentives to be a "free rider" and enjoy the benefits of other people's efforts.

Perhaps this is why the Department of Homeland Security (DHS) has fallen back on the truly irrational and subjective use of pay for personal "competencies" rather than pay for performance, even though their system pretends to be a pay for performance system. DoD has yet to reveal, even in its final regulations, whether it will also use such indefensible criteria to evaluate workers. Paying according to personal attributes such as ability to learn, lead, and conduct oneself in a pleasant and professional manner is an obvious recipe for favoritism and corruption in the context of a federal agency. While no private business would survive the rigors of competition in the market if it paid employees according to such ephemera, a federal agency could get away with such a corruption of the public trust indefinitely, at least until someone blew the whistle or some type of disaster exposed the effect of mismanagement.

With regard to Bohnet and Eaton's second "condition for success," the question is whether pay for performance motivates federal employees. Their literature review focuses on the fact that federal employees have been found to be "much less likely than employees in business to value money over other goals in work and life." They cite the work of numerous psychologists and economists that suggest that "performance pay can even decrease performance if it negatively affects employees' intrinsic (inner-based) motivation." They discuss so-called "public service motivation" which was found in a 1999 study of federal employees to be the primary source of high performance.

Another aspect of the "people factor" in evaluating the potential impact of pay for performance is the unpredictable way people may react to changes in their pay. Bohnet and Eaton discuss the differences in attitude toward "absolute" and "relative" pay. Research shows that wage cuts of a particular amount cause more harm than the positive effects of wage increases of the same amount. In other words, especially in zero-sum pay for performance schemes where one worker's gain is another's loss, the impact from the loss outweighs the impact of the gain for the enterprise as a whole.

Regarding the question of relative pay, these scholars argue as follows:

> Comparisons with similar others, or "social comparisons," are a second reason why performance pay may not work; they involve considerations of both procedural and distributive justice. This simply means that for a pay system to enjoy legitimacy and acceptance (both are required for effectiveness), employees must see it as fair in terms of process and outcomes. Recent research suggests that even if outcomes are agreed to be fair, performance can be negatively affected if the process through which the outcomes are achieved is perceived as unfair…
>
> Human psychological processes make differentiation among close co-workers extremely controversial…The "silver medal syndrome" based on a study of Olympic champions, shows that the most disappointed people are those who come in second in a competition, having hoped they would be first. (p.17)

These are just two ways in which pay for performance schemes misunderstand federal employees' motivation to perform their jobs well, and might actually lower overall performance. Bohnert and Eaton also ridicule the "carrot and stick" method that Administration officials have repeatedly used to justify both the imposition of pay for performance and the elimination of union rights. Professor Levinson of the Harvard Business School calls this the "great jackass fallacy" because of the image of the animal that most people imagine standing between the proverbial carrot and stick, and argues that it is a self-fulfilling prophesy in the context of personnel management. If people are treated as if they need the threat of a proverbial beating in order to perform, they'll act with the same enthusiasm and intelligence of the beast in question.

The efficacy of pay for performance also has been shown to depend upon the type of organization imposing it. Federal agencies are particularly inappropriate venues for pay for performance, according to the researchers, because federal employees "serve many masters" including Congress, executive branch political appointees, career managers, and the public at large. Often there are competing objectives that put employees being rated for performance facing ambiguous or contradictory goals. Unlike a private sector firm where the objective of profit maximization is clear, in a federal agency there may be conflicting "political or programmatic differences" which make it virtually impossible for federal employees' performance to be measured objectively.

Does anyone believe that Michael Brown, the former head of the Federal Emergency Management Agency (FEMA) is the lone federal manager or political appointee who won his position on the basis of factors other than competence and experience and could be expected to do a poor job of setting performance objectives for career employees, and appraising their performance relative to these objectives? The fundamental differences between the public and the private sectors are so often denied by proponents of pay for performance, yet evidence of politicization in federal agencies should remind everyone of how difficult it is for apolitical, career civil servants to perform in the public interest

over the objections of those with political agendas who have been granted authority to run agencies.

No one finds fault with the concept of pay for performance. Yet real-world implementation is notoriously difficult and highly unlikely to produce the desired results. In fact, as the Harvard scholars have shown in their survey of empirical research on implementation of pay for performance in the public sector, the danger is not only that pay for performance will fail to improve results, it is likely to make many things worse. The "conditions for success" for pay for performance management identified by the research simply do not exist in the Defense Department and they never will.

Labor Relations

Notwithstanding our substantive arguments, the Coalition believes that the procedures for generating changes in the Labor Management Relations system have, so far, been contrary to the statutory scheme prescribed in the National Defense Authorization Act for Fiscal Year 2004, Section 9902 (m), LABOR MANAGEMENT RELATIONS IN THE DEPARTMENT OF DEFENSE.

This portion of the law describes a very specific manner of statutory collaboration with time lines, which was not followed. The law requires that employee representatives participate in, not simply be notified of, the development of the system. Instead, DoD published comprehensive proposed regulations, gave the Coalition copies, then sat through meetings but refused to engage in any give-and-take. Simply put, DoD's implementation of the statutorily required meet-and-confer process was a farce.

As you know, Public Law 108-136 protects the right of employees to organize, bargain collectively, and to participate through labor organizations of their own choosing in decisions that affect them. Specifically, Congress intended to have the NSPS preserve the protections of Title 5, Chapter 71, which DoD's final regulations would eliminate. DoD's position, made manifest in its final regulations, is that Chapter 71 rights interfere with the operation of the new human resources management system it envisions and plans to implement. Despite this Congressional mandate to preserve the protections of Chapter 71, DoD's final regulations will:

1. Eliminate bargaining over procedures and appropriate arrangements for employees adversely affected by the exercise of core operational management rights, unless permission is granted by the Secretary of Defense.

2. Eliminate bargaining over otherwise negotiable matters that do not significantly affect a substantial portion of the bargaining unit.

3. Set and change conditions of employment and void collectively bargained provisions through the release of non-negotiable Departmental NSPS implementing issuances.

4. Eviscerate a union's right to participate in formal discussions between bargaining unit employees and managers.

5. Drastically restrict the situations during which an employee may request the presence of a union representative during an investigatory examination.

6. Allow agencies to unilaterally implement changes to conditions of employment.

7. Assign authority for resolving many labor-management disputes to an internal Labor Relations Board, composed exclusively of members appointed by the Secretary.

8. Grant broad new authority to establish an entirely new pay system, and to determine each employee's base pay and locality pay, and each employee's annual increase in pay, without requiring any bargaining with the exclusive representative.

Our unions have expressed strong objections to DoD's total abandonment of Chapter 71, along with the law associated with the statute's interpretation. Congress intended to have Chapter 71 rights upheld, and DoD should not pretend that Congress' intent was unclear. Chapter 71 should be the "floor" of any labor relations system DoD designs. However, the design of DoD's plan is to minimize the influence of collective bargaining so as to undermine the statutory right of employees to organize and bargain collectively. We know that when Congress enacted provisions to protect collective bargaining rights, it did not intend that those rights be eviscerated in the manner that DoD's final regulations will allow.

Restrictions on Collective Bargaining

The NSPS-imposed shift from statutory pay systems such as the General Schedule and the Federal Wage System to an as yet undefined pay for performance system will have profound consequences for the DoD workforce, but the degree of its impact will vary from worker to worker and depend upon numerous factors such as funding, training, and whether accountability safeguards and procedures are attempted or prohibited. In contrast, the restrictions on collective bargaining contained in DoD's final NSPS regulations would by definition harm everyone in a bargaining unit equally because they are uniformly negative.

For this reason, it is useful to consider the effects of taking five particular issues "off the table" that have been successfully negotiated by federal agencies including DoD: overtime policy, shift rotation for employees, safety and health programs, flexitime and alternative work schedules, and deployment away from regular work locations.

Currently, Title 5 U.S. Code, Chapter 71 allows negotiation of collective bargaining agreements, and negotiation of procedures and appropriate arrangements for adversely affected employees in the exercise of a management right. These allow management and the union to bargain provisions that address the effects of management actions in specific areas. Such bargaining can be either in negotiation of term agreements or negotiations during the life of such agreements in response to management-initiated changes. However, under the draft regulations for NSPS, unions and management will no longer be permitted to bargain over "procedures and appropriate arrangements," including simple, daily, non-security related assignments of work.

The following are five examples of current DoD labor-management contract provisions which would no longer be negotiable under NSPS.

1. Overtime Policy

In general, AFGE locals negotiate overtime policies using two basic premises. First, the union's interest is in having management assign overtime work to employees who are qualified to perform the work and who normally perform the work. Second, the union seeks a fair and consistent means of assigning or ordering overtime, so it is not used as an arbitrary reward or punishment. In the years before unions and management negotiated the fair rotation of overtime, it is significant to note that employees filed hundreds of grievances over denial of overtime. Since clear and transparent procedures have been negotiated and are well known to employees, these grievances have practically disappeared, saving untold financial resources for the government.

In negotiations, AFGE locals have requested that overtime should be first offered, then ordered. By treating overtime first as an opportunity, workers, based on their personal circumstances, get an opportunity to perform extra work for overtime pay or compensatory time.

Commonly, contract language requires overtime to be offered to employees within specific work units, job descriptions or occupational fields to ensure employees performing the work are qualified. Additional contract language allows for the assignment or ordering of overtime if a sufficient number of qualified employees do not volunteer to perform the necessary work. Normally, employee seniority is applied in determining which volunteers will receive the overtime (most senior) and reverse seniority (least senior) in ordering overtime in the absence of volunteers.

This basic contract language over the procedures to be used in assigning overtime provides predictability for both employees and management in dealing with workload surges that force the use of overtime in organizations. Organizations that frequently rely on overtime will usually adopt an overtime scheduling roster.

Under current law, the agency has the right to "assign work" which would include overtime assignments. However, the statute requires bargaining over procedures and appropriate arrangements for employees affected by the exercise of a management right if requested by the union. In this way, federal employee representatives are permitted to bargain over important issues dealing with overtime.

However, under the final NSPS regulations, both overtime policies in current contracts as well as the unions' right to negotiate similar provisions in the future are undermined. Specifically, management could issue a Department or even a component level policy or issuance that would negate current contract language dealing with overtime procedures and preclude further negotiations, unless management determined that current contracts were not in conflict with the NSPS.

In addition, the new NSPS management rights section prohibits DoD managers from bargaining over the procedures they will use when exercising their management rights, which would include assigning overtime.

2. Shift Rotation for Employees

In industrial DoD settings, shift work is common. Usually there are three shifts: day, evening, and graveyard. Although an evening or graveyard shift may appear unattractive to some, others may prefer such shifts due to increased rates of pay, or because they help the worker handle child or elder care responsibilities with a spouse who works a day shift. Shift work assignment is a frequent subject for bargaining, with the union's primary focus on providing predictability and stability in workers' family and personal lives and on equitable sharing of any shift differentials (increased pay) or burdens of work performed outside the normal day shift. Contract language often calls for qualified volunteers first, then the use of seniority when making decisions about shift work, or provides for the equitable rotation of shifts.

Under current law, management is permitted to negotiate over the numbers, types and grades of employees or positions assigned to a tour of duty and is required to bargain over the procedures it uses to exercise its right to assign work, including assignments to shift rotations.

However, under the final NSPS regulation, both shift work policies in current contracts as well as the unions' right to negotiate similar provisions in the future are undermined. Specifically, management could issue a Department or even component level policy or issuance that would negate current

contract language dealing with shift work and preclude further negotiations, unless management determined that current contracts were not in conflict with the NSPS.

In addition, the new NSPS management rights section includes determining the numbers, types, and grades of employees or positions assigned to a work project or tour of duty, making this no longer a permissive subject of bargaining, but a prohibited matter. The final regulation goes on to specifically prohibit management from negotiating over the procedures used to exercise such rights, including assignments to shift rotations.

3. Safety and Health Programs

Worker safety and health has always been of paramount importance to unions. Many AFGE locals representing DoD's blue collar industrial workforce have negotiated, over many years, comprehensive safety programs and often are involved in negotiated workplace safety committees with the employer.

For example, today's state-of-the-art welding operations in DoD's industrial operations exist as the result of years of negotiation over workplace safety practices, personal protective equipment, training, technologies and practices, ventilation and moving to safer, newer welding practices. These practices have not only protected employees, but have saved countless DoD dollars in the elimination of on-the-job-injuries, lost time due to accidents, improved work processes and prevented financial losses as the result of destroyed or damaged material and equipment.

Currently, safety and health matters are covered by a section of the law which allows, at the election of the agency, bargaining over issues dealing with technology, methods, and means of performing work. In addition, negotiations are required over appropriate arrangements for employees adversely affected by the exercise of management's rights.

The final NSPS regulations threaten both safety and health policies in current contracts as well as the unions' right to negotiate similar provisions in the future. Specifically, management could issue a Department or even component level policy or issuance that would negate current contract language dealing with safety and health policies and preclude further negotiations, unless management determined that current contracts were not in conflict with the NSPS.

In addition, the new NSPS management rights section includes technology, methods, and means of performing work, making this no longer a permissive subject of bargaining, but a prohibited matter. The proposal limits severely the types of provisions that could be negotiated as "appropriate arrangements."

4. Flexitime and Compressed Work Schedules

Under chapter 61 of Title 5, U.S. Code, federal employees may work under flexitime and compressed schedules. Examples of **flexitime** are 7 a.m. to 4 p.m. or 9:30 a.m. to 6:30 p.m., rather than the traditional 8 a.m. to 5 p.m. shift. Examples of **compressed** work schedules are Monday through Thursday for 10 hours per day with Friday off, or Tuesday through Friday for 10 hours per day with Monday off, rather than 8 hours per day Monday through Friday. Today's DoD installations often operate daily on a 10 to 12 hour business day meeting customer demands longer and faster than ever before in the Department's history.

Legislation authorizing flexitime and compressed work schedules was enacted to assist employees in handling job, family and community responsibilities. In addition, Congress recognized that such schedules would go a long way toward improving commuting times in crowded metropolitan areas.

Ensuring sufficient choices for employees and protecting the capability to perform the vital work of the Department have always been the two guiding principles used in bargaining these arrangements. Currently, work schedule options include core hours, permitted changes by employees, and protections for management in ensuring completion of the agency mission.

Flexitime and compressed work schedules are negotiated under provisions of Title 5, chapters 61 and 71, which provide that for employees in a unit represented by a union, establishment and termination of such work schedules, "shall be subject to the provisions of the terms of …a collective bargaining agreement between the agency and the exclusive representative."

In contrast with the final NSPS regulations, neither Congress nor the employees can be certain if DoD will overreach and threaten flexitime and compressed work schedules in current contracts as well as the unions' right to negotiate similar provisions in the future. Specifically, DoD's political appointees could set down an issuance to negate current contract language dealing with flexitime and compressed work schedules, and/or preclude further negotiations. While this will certainly force the employee organizations into lengthy and costly litigation, it is clear from the actions of DoD that they cannot be trusted to exercise their authority in a fair and rational manner. Perhaps if DoD had followed the law in the formulations of this new system to begin with, issues such as this might have been resolved in an amicable manner.

In addition, the new NSPS management rights section specifically prohibits management from negotiating over the procedures used to exercise its rights and limits severely the types of provisions that could be negotiated as "appropriate arrangements." We fully expect DoD to overreach and misapply

both of these factors in an effort to further limit or eliminate bargaining over alternative schedules.

5. Deployment Away From Regular Work Location

Today, DOD reshapes its workforce and makes assignments to locations different from an employee's normal workplace using reorganizations, transfers of function, details, and in the use of designated positions requiring travel or deployment. In most instances, the union and management deal with these instances on a case-by-case basis. This allows bargaining for the specific circumstance and avoids imposing a one-size-fits-all agreement.

Collective bargaining agreement protections include such things as the use of volunteers, followed by seniority, (as described in other sections of this paper) coupled with requirements that the work be performed by qualified employees. (Of course, management has the right to set qualifications as it sees fit.) In some cases, there are also provisions calling for advance notice whenever possible.

Under current law, management has the right to "assign work…and to determine the personnel by which agency operations shall be conducted." Management and unions can negotiate the procedures management uses in exercising their authority and appropriate arrangements for employees adversely affected by such authority.

The final NSPS regulations specifically prohibit management from negotiating over the procedures used to exercise its rights to assign work and determine the personnel by which agency operations are conducted. In addition, the final regulation limits severely the types of provisions that could be negotiated as "appropriate arrangements." This will have the effect of erasing the current rules that the parties have negotiated to preserve the rights of employees to choose where they work and live. In addition, it will preclude further negotiations.

Under NSPS, agency officials could move employees arbitrarily or force a prolonged assignment anywhere in the world without regard to any hardship this could cause employees or their families. They could deploy an employee whose family obligations make absence an extreme hardship even if a similarly qualified employee volunteered for the assignment.

In some cases, employees will be forced to make unnecessary choices between family and job. Management will be able to exercise its right to assign employees and leave any collective bargaining out of the process, including the limited procedural and appropriate arrangement requirements now in current law.

The consequences of eliminating bargaining for dealing with overtime policies, shift rotation, safety and health programs, flexitime and compressed

work schedules, deployment away from regular work locations, and other important workplace issues will likely include worker burnout, increased danger to workers in unsafe situations, and strong feelings of unfairness within work units if assignments and work schedules are not offered or ordered in a fair and consistent manner. Ultimately, the inability of the employees' representatives to resolve these matters through collective bargaining will create recruitment and retention problems for the Department, as employees find more stable positions in other federal agencies, with state and local governments, or other employers.

Workforce Reshaping

The final regulations call for significant changes from current rules for conducting layoffs in the Department of Defense. These regulations will allow DoD to eliminate the jobs of employees with many years of dedicated, high-quality service while retaining younger, less experienced workers who are personal favorites of some manager. Even more mind-boggling, the Department of Defense would be able to put disabled veterans on the street while retaining non-veterans. The Department will swear to you that none of this is true. We will demonstrate how, in fact, it is.

The draft regulations eliminated seniority completely in determining retention for Reductions-in-Force (RIF), and required the retention to be determined only on an employee's most recent performance appraisal (also known as "rating of record"). The final regulations only say that "ratings of record" will be used for retention, leaving ambiguous how many years of ratings will be considered and what the effect will be. It is clear that veterans preference will be weakened and seniority still will be virtually eliminated as a component for retention.

The Coalition strongly believes that procedures for deciding who will be affected by a RIF must be based on more than a worker's performance appraisals. The final NSPS regulation could allow an employee with three years of service and three outstanding ratings to have superior retention rights to an employee with 25 years of outstanding ratings and one year of having been rated merely "above average." The opportunities for age discrimination in such a system are indisputably apparent. Such RIF rules are patently unfair and must not be allowed to stand.

The final regulations continue to play a shell game with the Congress, with DoD's workforce, and with the public. While one would expect a document called "final regulations" to contain the complete set of rules that will be applied when laying off employees, this document is replete with references to prescribing "implementing issuances" that will explain or clarify or instruct what those rules are. The Department would be simply incapable of running a RIF under these "final regulations." Too much is left unstated. DoD's response to the thousands of comments they received on numerous provisions in the proposed regulations

is, “Trust us.” I am sorry, Members of the Committee, but our duty of representation requires us to ask for more than blind trust.

The final regulations retain the four statutory retention factors found in 5 U.S. Code Section 3502: tenure, veterans preference, creditable service and performance rating. While in the Office of Personnel Management’s regulations, these factors are ranked in the order I just read, DoD will make performance rating more important than creditable service. Thus, if two employees are competing, and both have career appointments and are veterans, the next deciding factor will be their respective performance ratings.

The Department takes the position that performance ratings are a better indication of an employee’s worth to the government than the length of service those employees have provided. DoD claims in the response to the comments that “the additional weight for performance is fully consistent with the goal of increasing the likelihood that higher-performing employees will be retained in the event of a RIF.” This puts enormous faith in the belief that the new performance appraisal system will produce not only a reliable, objective, fair, timely, and accurate measurement of the employee’s performance over the preceding performance period, but also an accurate prediction of future performance. We do not share that confidence. It is beyond us how DoD can justify a system in which employees who have been most loyal to their employer will receive no loyalty from their employer in return. This system does not reflect America’s values.

During the Reagan Administration, the Office of Personnel Management proposed sweeping changes to the RIF regulations. It was claimed then, as DoD does now, that the system did not adequately base retention decisions on the relative performance of competing employees. This proposal led to years of litigation in federal court. Finally Congress stepped in with legislation prohibiting OPM from spending federal funds to implement their proposed regulations and directing that the Administration negotiate a settlement of this matter with the unions that had filed suit. The result was the system in place today. Length of creditable service has higher priority than the employee’s performance rating. A performance rating does add significant amounts to the employee’s creditable service. In order to avoid the possibility that a senior employee could be hurt by one recent rating that is lower than his or her norm, the performance credit is based on an average of the three most recent ratings over the preceding five years. So an employee gets 20 additional years for an average rating of “outstanding,” 16 additional years for an average rating of “exceeds fully successful,” and 12 additional years for an average rating of “fully successful.”

DoD’s final regulations do provide that the factors that will determine retention standing will include, “the ratings of record, as determined in accordance with implementing issuances.” The responses to the comments say that “the Department’s implementing issuances will explain how employees will receive retention credit for their multiple ratings under the Department’s personnel system.” We do not know whether this means the Department intends to use an

average system like the one the unions and OPM worked out following the previous litigation. We do not know whether this means only ratings under the NSPS will be considered, or whether ratings received while working for another agency will be considered. Apparently DoD will let us know some time in the future. This “wait and see” attitude is especially troubling, considering the time DoD has had to formulate these regulations.

Veterans Preference

DoD claims that it is preserving veterans preference, noting that it gives this factor the exact same priority as in OPM’s regulations. Under the final regulations, it is true that within a narrowly-drawn retention list, veterans with a service-connected disability of 30% or more will be retained over other veterans, who will all be retained over non-veterans. However, current RIF rules provide maximum opportunities for retention of those affected by the layoff. Once an employee’s name is reached on a RIF list, he or she is then given other placement opportunities. NSPS takes away these opportunities. The overall result will be the retention of junior employees over senior employees and the retention of non-veterans over veterans.

Under the current OPM RIF procedures, an employee who is released from his competitive level in a RIF may displace another employee who was not in this initial round of competition. He or she is permitted to "bump" to a position that is held by an employee in a lower tenure group or in a lower subgroup within the same tenure group, provided he or she is qualified to perform that position and that the position is within 3 grades or grade intervals.

For example, a Career employee may bump a Career-Conditional employee. A veteran with a service connected disability of 30% or more may bump a veteran without such a condition, or a non-veteran. He or she would also have the right to “retreat” to a position that is the same or essentially the same job that he or she previously held with the government. The retreating employee could displace someone with lower retention standing in the same tenure subgroup. Thus, a veteran with 15 years of service could displace a veteran with 10 years. A non-veteran with 10 years of service could displace a non-veteran with only 5 years.

These opportunities are eliminated under NSPS. As a result, DoD could exploit its broad discretion to select a very narrow area for a RIF. For example, DoD could eliminate a group of three jobs held by veterans with 15-20 years of service. Meanwhile however, there could be numerous jobs at the same location, for which these individuals qualify, that will continue. Assume these jobs were held by non-veterans with fewer years of service. The targeted employees would have no recourse to bump into these jobs. Despite all the reassurances DoD made in response to our comments, the NSPS Workforce Shaping regulations will result in qualified veterans with high-level performance being terminated while junior, non-veterans remain on the job.

This limitation on retention opportunities is exacerbated by the discretion DoD gives itself in the final regulations to determine the scope of competition in a RIF, known as the competitive area. Defense officials will be able to establish a much narrower scope of competition than under current Office of Personnel Management regulations. OPM requires that the minimum competitive area be a sub-division of an agency under separate administration within the local commuting area. This means that at an installation like a depot, all employees who report to that Depot Commander would be in the same competitive area. DoD departs from this procedure, allowing itself to determine competitive areas along divisions it calls "product lines" or "lines of business" or "funding lines." This will significantly narrow the competition.

For example, DoD may cut the number of positions at a depot devoted to major repair of the engines for F-16 aircraft. Under current OPM regulations, the individuals in those jobs would compete for retention with those holding other similar jobs at the depot. After all, those who work on the F-16 may also be qualified to work on the F-14 or the C-5. Under NSPS, however, repair of the F-16 engines could be defined as a "product line," so that would be the entire competitive area. Only those employees who worked on the F-16 engine would compete in the RIF. So, the aircraft mechanic who is a disabled veteran would not be able to bump and displace the non-veteran who works on the C-5. In fact, that aircraft mechanic would not even be able to compete with someone who worked on another component of that same aircraft, such as avionics. The result is a narrower scope of competition, and fewer retention opportunities for senior employees and for veterans.

During the 1990's, DoD downsized its workforce by hundreds of thousands of jobs. This upheaval following the end of the Cold War required the reorganization of major components and the creation of new DOD agencies. Yet despite its size and intensity, it occurred with minimal employee appeal to independent third party for review. Even employees adversely affected by these decisions knew, understood, and trusted the rules and their application.

Now that the 2005 BRAC decisions are being implemented, DoD will have to engage in a similar downsizing and reorganization effort. The tried and tested provisions for reshaping the DOD workforce used during the 1990's are now necessary for dealing with the changes that will occur in the next ten years. Instead, under NSPS, DoD will plunge tens of thousands of its employees into a new, unknown, untested method to reshape the workforce in an environment where collective bargaining has been drastically reduced, performance evaluations and credit are unclear or unknown to employees, and appeals of inappropriate agency actions rest with a company controlled board.

Make no mistake about it, the workforce reshaping system under NSPS will be a radical departure from DoD's current practice. It is unlikely to produce the results that the Department claims it will. On the contrary, it will be costly, unreliable, and subjective. It will promote cronyism and favoritism and will not reflect employees' true contributions to the Department's mission. It would be a mistake

to make employees' retention and placement in a RIF dependent upon this untried system. At a minimum, DoD should be required to first test the effectiveness and reliability of its performance management system for several years before applying that system to its RIF regulations.

Employee Adverse Actions and Appeals

Public Law 108-13 reflects Congress's clear determination that DOD employees be afforded due process and be treated fairly in appeals they bring with respect to their employment. When it mandated that employees be treated fairly and afforded the protections of due process, and authorized only limited changes to current appellate processes, Congress could not have envisioned the drastic reductions in employee rights that DoD's final regulations set forth. Limiting the discretion of an arbitrator or MSPB Administrative Judge to change an unfair penalty even if it is 95% unwarranted, although not if it is "totally unwarranted," does not promote fundamental fairness or national security. In these final regulations, DoD authorizes itself to overrule arbitrators, reducing arbitration from a final decision to merely being advisory. It will only serve to lengthen the appeals process rather than expedite it.

Criteria of Douglas v. Veterans Administration

For over 25 years, the MSPB has used the following "Douglas Factors" for determining if a penalty was appropriate:

1. The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.
3. The employee's past disciplinary record.
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties.
6. The consistency of the penalty with those imposed upon other employees for the same offense in like or similar circumstances.
7. The consistency of the penalty with agency guidance on disciplinary actions.
8. The notoriety of the offense or its impact upon the reputation of the agency.
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.
10. The potential for the employee's rehabilitation.

11. The mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter.
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

This new "totally unwarranted" standard is itself totally unwarranted as well as totally unfair. It also violates the § 9902(h)(1) requirement that "an appeals process . . . provide[] employees . . . fair treatment in any appeals that they bring." To make matters even worse, DoD reserves for itself the right to change the charges as a case goes along. The final regulations prohibit appellate reversal of an adverse action "based on the way in which the charge is labeled or the conduct characterized, provided the employee is on notice of the facts sufficient to respond to the factual allegations of the charge." § 9901.807(f)(3).

No evidence has ever been produced to suggest, let alone demonstrate, that current employee due process protections or the decisions of an arbitrator or the MSPB have ever jeopardized national security and defense in any way. While we believe in an expeditious process for employee appeals, we will never be able to support biasing the process in favor of management or otherwise reducing the likelihood of fair and accurate decisions. DoD has provided absolutely no data to show that the drastic changes to Chapters 75 and 77 of Title 5 would further the agency mission.

Conclusion

The 36 unions of the United Department of Defense Workers Coalition have spent the last 40 years fighting for legitimate protections and provisions for a healthy DoD work environment. We have achieved this through collective bargaining and by advocating statutory and regulatory personnel policies that are not subject to the whims of changing leadership in a department or administration. Removing these safeguards now belittles the contributions of DoD civilians.

The goal of NSPS should be the development of a system that both adheres to the law and can be successfully implemented. It cannot be emphasized strongly enough that the approach DoD has taken to date has been profoundly demoralizing for its civilian workforce. This dedicated and patriotic workforce is extremely unsettled by both the inaccurate information conveyed by the Secretary, and by the harsh prospects set forth in the final NSPS regulations. This state of affairs is neither desirable nor inevitable. But alleviating it is now in your hands.

Madam Chairman, it is so important to envision how this new system will impact individual employees. Once implemented, these final regulations will move us away from a personnel system where workers can be confident that if they suggest to their superiors more effective ways of doing business, or identify

stumbling blocks to achieving the mission, they will at least be heard and perhaps even encouraged to make these observations. Instead, the overwhelming majority of rank-and-file employees will, under NSPS, refuse to criticize something, no matter how wrong it is, nor will they bother to suggest changes, no matter how helpful the changes might be. It will no longer be worth the risk to their paychecks or their careers. The rational employee will decide whether to speak out only after he or she has ascertained the attitude of his or her pay manager.

We urge the Committee to take legislative action to require DoD to address at least the "flashpoint" issues described in this testimony: The scope of collective bargaining must be fully restored, and DoD must not be permitted the ability to unilaterally void provisions of signed collective bargaining agreements. Any DoD-specific labor-management board must be independent from DoD management. Standards for MSPB and arbitrator mitigation of penalties need to be fair. Performance appraisals must be subject to grievance and arbitration in order to ensure fairness. Strong and unambiguous safeguards must be established to prevent either a general reduction or stagnation in DoD salaries. And finally, RIF procedures must be based upon factors beyond a worker's performance appraisals.

That concludes my testimony. I will be happy to respond to any questions.