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UNLOCKING THE POTENTIAL WITHIN HOMELAND SECURITY: THE NEW HUMAN RESOURCES SYSTEM

HEARING

BEFORE THE

OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA SUBCOMMITTEE

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

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CONTENTS

	Page
Opening statements:	
Senator Voinovich	1
Senator Akaka	4
Senator Lautenberg	6
Senator Pryor	18

WITNESSES

THURSDAY, FEBRUARY 10, 2005

Hon. David M. Walker, Comptroller General, U.S. Government Accountability Office	8
Ronald J. James, Chief Human Capital Officer, U.S. Department of Homeland Security	10
Dr. Ronald P. Sanders, Associate Director for Strategic Human Resources Policy, U.S. Office of Personnel Management	12
Darryl A. Perkinson, National Vice President, Federal Managers Association	26
Colleen M. Kelley, President, National Treasury Employees Union	28
John Gage, National President, American Federation of Government Employees	30
Richard N. Brown, President, National Federation of Federal Employees	32
Kim Mann, on behalf of the National Association of Agriculture Employees	34

ALPHABETICAL LIST OF WITNESSES

Brown, Richard N.:	
Testimony	32
Prepared statement	142
Gage, John:	
Testimony	30
Prepared statement	122
James, Ronald J.:	
Testimony	10
Prepared statement	74
Kelley, Colleen M.:	
Testimony	28
Prepared statement	110
Mann, Kim:	
Testimony	34
Prepared statement	152
Perkinson, Darryl A.:	
Testimony	26
Prepared statement	94
Sanders, Dr. Ronald P.:	
Testimony	12
Prepared statement	80
Walker, Hon. David M.:	
Testimony	8
Prepared statement	45

APPENDIX

Copy of Section 2301 of Title 5 submitted by Senator Akaka	43
Neil A.G. McPhie, Chairman, U.S. Merit Systems Protection Board, prepared statement	162
Post-hearing comments from United DOD Workers' Coalition	165

Page

Questions and responses for the Record from:
Mr. Walker 303
Mr. James 309
Dr. Sanders 322
Mr. Perkinson 332
Ms. Kelley and Richard Brown 335
Mr. Gage 342
Mr. Mann 346

UNLOCKING THE POTENTIAL WITHIN HOMELAND SECURITY: THE NEW HUMAN RESOURCES SYSTEM

THURSDAY, FEBRUARY 10, 2005

U.S. SENATE,
OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA SUBCOMMITTEE,
OF THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., in room SD–342, Dirksen Senate Office Building, Hon. George V. Voinovich, Chairman of the Subcommittee, presiding.

Present: Senators Voinovich, Akaka, Lautenberg, and Pryor.

OPENING STATEMENT OF SENATOR VOINOVICH

Senator VOINOVICH. The hearing will please come to order. I want to thank all of you for coming.

Almost 1 year ago on February 25, 2004, this Subcommittee convened a hearing entitled "The Key to Homeland Security: The New Human Resources System." The purpose of that hearing was to consider the Department of Homeland Security's proposed regulations for their new human resources system.

Today's hearing, "Unlocking the Potential Within Homeland Security: The New Human Resources System," will consider the final regulations.

Before we proceed I want to say that I understand there are many strong feelings about these regulations. However, I would like to ask those here today to respect the decorum that is customary in the U.S. Senate. I am asking the audience not to respond to the witnesses' testimony, the questions Senators will be asking, or the answers of the witnesses to questions.

I commend the Department of Homeland Security, the Office of Personnel Management, Department employees, and representatives of Homeland Security employees for the time they have invested in developing this new human resources management system. I personally want to thank former Secretary of Homeland Security, Tom Ridge, and former Director of the Office of Personnel Management, Kay Coles James, for their commitment to this process. I know that they were both engaged in this personally, and I admire their dedication.

The 2-year process, the development of the regulations has gone through is a relief to me. Many of us were concerned that these

regulations would be rapidly developed and implemented. However, that has not been the case. The Homeland Security Act of 2002 was signed by the President on November 25, 2002. Proposed regulations were published in the *Federal Register* on February 20, 2004. The final regulations, the topic of today's hearing, were published only 9 days ago on February 1.

It is clear that there has been a very deliberate and collaborative process, and I thank the Administration for this. For example, DHS and OPM used the statutory authority to enlist the assistance of the Federal Mediation and Conciliation Service to facilitate the dialog with labor organizations and extended that process beyond the 30-day requirement in law.

It is clear to me when comparing the final regulations to the proposed regulations that DHS and OPM have made some significant changes. For example, the new system will establish a Compensation Committee to gather input from multiple sources, including employee unions, in determining employee pay. In addition, the final regulations now allow employee input in determining members of the Homeland Security Labor Relations Board.

Another significant change in the final regulations is a requirement for post-implementation bargaining on management actions for employees adversely impacted for more than 60 days. Some of you may recall that I raised the importance of post-implementation bargaining at the hearing that we had last February.

These examples represent an increase in union involvement from the proposed regulations. In addition, some changes like the Compensation Committee create a role for unions unique to the Federal Government.

These new regulations represent historic changes to the Federal civil service. I would like to remind my colleagues of the enormous changes the legislative proposal authorizing these regulations underwent in Congress.

My colleagues may remember that the original legislative proposal offered almost a blanket exemption, a blanket exemption from Title 5 for the Department, similar to what was authorized for the Transportation Security Administration.

Many of us were very concerned with this proposal including my good friend in the House of Representations, Rob Portman. As a result, the enacted legislation included far less flexibility than initially sought by the Bush Administration.

I understand that all parties are not satisfied with the final regulations, and they will have an opportunity today to explain their concerns to the Subcommittee.

When the Senate was considering the Homeland Security Act, I suggested to my colleagues that the law allow for binding arbitration over the six chapters of Title 5 that were waived. Based on my experience working with employees unions as Mayor of Cleveland and Governor of Ohio, I thought that the process would have brought all parties to an agreement on the regulations more quickly and with less friction.

Having an independent third party make final decisions on points of contention would have fostered, I believe, additional collaboration over the regulations and given more credibility to the

process. However, this suggestion was not well received by my colleagues or the Administration.

So as a part of the largest government reorganization in half a century we have the new personnel system authorized by Congress. Regarding this, I have this observation for both the Administration and union representatives here today: Nothing less than the security of our Nation is at stake. That is why we created the Department, to secure the homeland and protect us from terrorism. We must find a way to work together. The people of this country no less.

To the Administration I say it is your obligation to continue to collaborate with the Department's employees and their unions and to do right by them in this new system. They must be treated equitably. The merit principles of the civil service that have served our country so well must be upheld. Managers must receive excellent training so that they can make fair judgments regarding employee performance. This point will be discussed in greater detail by the Controller General. Employees must receive the training and resources they need to make the most of his or her God-given talent.

To the union leaders, I say it is your duty to roll up your sleeves and work with the Department of Homeland Security and the Office of Personnel Management to make this new system work well.

It is my hope that the collaboration and dialog the Department and its employees have engaged in over the past 2 years will continue into the future. I expressed this sentiment to the President's nominee for the Secretary of Homeland Security, Judge Chertoff, when I met with him 2 weeks ago. I suggested to Judge Chertoff that one of the first actions that he takes is to bring in the representatives of the employee unions and visit. I encouraged him to initiate a personal dialog with them so they know that he, too, is very much concerned about the Department's human resources system.

As I stated a year ago there is no doubt in my mind that the only way any organization can be successful is to have the best and brightest minds focused on the important task at hand.

I know the employees of the Department of Homeland Security are hard-working and dedicated. It is my hope that the new human resources management system will assist the Department in fostering a high-performing culture that empowers these workers, encourages innovation, and supports and rewards them.

It is because of my unwavering commitment to the employees of the Department of Homeland Security and its mission that I have called this hearing today. I understand the ramifications the system will have in the Department itself and the rest of the Federal service. I am committed to ensuring its success, and I know the Members of this Subcommittee are committed to that.

I look forward to hearing the testimony of our witnesses today and a continued dialog over these important reforms.

I now yield to my good friend, the Senator from Hawaii. This is the first hearing in which Senator Akaka is my Subcommittee's Ranking Member. Senator Akaka and I have spent many years working together on Federal personnel issues. We have gotten to know each other a lot better through our Bible study group. I treasure Senator Akaka's friendship, and I appreciate his leader-

ship and commitment to the human capital issue. Senator, I look forward to working with you in your new capacity as Ranking Member of this Subcommittee. Senator Akaka.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Thank you, Mr. Chairman. I am especially pleased to join you as the Ranking Member of this Subcommittee and to join you as the leader of human capital issues here in the Senate. As we all know, you and I have enjoyed a long and successful partnership, and I look forward to that partnership continuing in working with you on this Subcommittee.

I also want to welcome our panelists, Comptroller General Walker, Mr. James, and Dr. Sanders to our hearing this morning. We certainly are grateful and have appreciated the work of Secretary Tom Ridge as he developed the Homeland Security office here in our country. We have much to do and we are starting to do it.

Our hearing this morning marks the first public forum on the final personnel rules issued jointly by the Department of Homeland Security and the Office of Personnel Management. I know there is strong disagreement over these final regulations. Many who join us today believe their input was not valued and their views were not fully addressed.

However, I want to commend DHS and OPM for the collaborative and open manner in which employee groups and stakeholders were involved in the development of these regulations. All agencies should undertake organizational change in a similar cooperative and inclusive manner.

I, too, participated in the consultation process by submitting detailed comments on the proposed regulations last year which discussed the preservation of employee rights and protections. I am pleased that some of my suggestions were included in the final regulations, which are an improvement over those proposed a year ago. The rules retain protections found in current law that permit judicial review, use of preponderance of evidence standard for employee appeals, provide for employee grievances, and govern the awarding of attorney fees.

However, the regulations fall short of our common goal of protecting the merit principles on which our country's Federal civil service have been developed and which serve as a model throughout the world. The principles of merit and fitness call for fair and equitable treatment of employees, and protection from arbitrary action, personal favoritism, and coercion for political purposes. We must avoid undermining the merit system, and we do not want to return to the spoils system.

Mr. Chairman, I ask unanimous consent that Section 2301 of Title 5, which contains the merit systems principles be included in the hearing record.[1]

Senator VOINOVICH. Without objection.

Senator AKAKA. Without adhering to this provision of law we may put at risk the government's ability to attract skilled new workers and retain experienced employees who have already chosen Federal service. The intent of allowing the Department of

[1] The copy of Section 2301 of Title 5 appears in the Appendix on page 43.

Homeland Security to implement a new personnel system to ensure an effective and efficient workforce to meet the challenges and fulfill the missions of the Department. As such, it is essential that this and any human resources system be both fair and perceived as fair in order to be credible. I believe that DHS regulations fall short of this goal.

The final rules will bring dramatic changes in the way DHS hires, fires, classifies and pays employees. It will also seriously diminish collective bargaining rights of employees. The rules eliminate bargaining for a majority of routine issues and deny union input on policy implementation.

The creation of an internal Homeland Security Labor Relations Board and International Mandatory Removal Panel, coupled with the restrictions on the Merit System's Protection Board and the Federal Labor Relations Authority to review DHS cases undermines the effectiveness and credibility of these procedures. These regulations will curtail employee bargaining rights and deny opportunities for front-line employees to provide critical input on departmental programs and directives.

A well-managed organization values employee input, and its senior managers understand the critical role front-line workers have in protecting mismanagement. I am concerned that these changes could be detrimental to carrying out the Department's programs and directive successfully.

Mr. Chairman, you and I believe that the government's most important asset is the Federal workforce, whose dedication, commitment, and courage are demonstrated every day. We should value the work performed by these men and women, which requires our unwavering effort to make sure that any government reorganization is done right the first time. Nor should we ignore employee morale, which plays a significant role in maintaining the DHS workforce.

Congress was told that DHS and Department of Defense, which will release its proposed personnel system next week, needed "flexible and contemporary" personnel systems to meet their national security missions because Title 5 was outdated and inflexible.

We know from the President's fiscal year 2006 budget proposal that the Administration wants to let all Federal agencies use these new regulations to modify existing personnel systems. It is premature and shortsighted to open the door to untried and untested regulations for the entire Federal Government given the lack of employee protection in the DHS rules. I support modernizing and strengthening civil service laws which is one reason why I have worked with Senator Voinovich over the years to enact legislation such as categorical ranking and compensatory time for travel. Unfortunately, many agencies fail to use existing flexibilities and most agencies lack funds to train managers on measuring performance and disciplining problem employees.

As long as these regulations and the soon-to-be released DOD rules are seen as a template for civil service reform, we need to be sure that the concerns expressed today are addressed. I want to make sure that there is a process by which employees have a real voice in policy decisions and Agency missions, and I am ready to work with DHS to: Provide increased opportunities for employees

to bargain over issues such as scheduling and posting of employees; increase employee input in Department programs; provide opportunities for meaningful and independent oversight; and develop fair, credible and transparent performance criteria, and training programs.

I thank you for the time, Mr. Chairman. I look forward to hearing from our distinguished panelists, and I thank all of you for being with us today. Thank you, Mr. Chairman.

Senator VOINOVICH. Thank you, Senator Akaka.

Senator Lautenberg, thank you very much for being here.

OPENING STATEMENT OF SENATOR LAUTENBERG

Senator LAUTENBERG. I am delighted to be here with you, Mr. Chairman. Unfortunately, I have a time commitment that will not permit me to stay, but I do want to make my opening statement. I congratulate you for convening this hearing. I want to say one thing at the start, Mr. Chairman. I have great personal respect for you. I know that you care about people. You have done it in your public service as mayor, governor, Senator, and in private conversations that we have had. I have seen you evidence concern about what we do with health care and things of that nature, and I know that you want to be fair with people and will do whatever you can to make sure that happens.

We are in disagreement I think perhaps on some of the policy changes that are anticipated here, but I say it with all due respect to you, Mr. Chairman.

Senator VOINOVICH. Thank you.

Senator LAUTENBERG. Despite your admonition that the quorum had to be preserved. [Laughter.]

Senator VOINOVICH. Senator Lautenberg, one of the things that I welcome in your participation on this Committee is your success in the business community. You are a great leader, and you appreciate probably as much as anyone how important good people are to an organization.

Senator LAUTENBERG. Thank you very much.

In case it was not obvious, I have to say that I was not in the Senate when Homeland Security Act of 2002 was passed into law. I think I am in the record as having been the oldest freshman that ever came to the U.S. Senate. [Laughter.]

If I had been here I would have objected to the personnel provisions included in the bill which denied the employees of the Department of Homeland Security the same rights to bargain and to appeal personnel decisions afforded to other Federal employees. The notion that collective bargaining rights somehow threaten national security, that Federal employees who belong to a union are somehow suspect, I find offensive. Frankly, I am appalled by the attacks on organized labor.

I have been around long enough to remember a period of time in America when jobs were so precious, and I remember a story from my father who worked in the silk mills in Patterson, New Jersey, when he and a good friend of his stood hat in hand—they wore hats in those days—waiting for the factory owner to pass out of his office so that they could appeal the decision by their foreman that if they took a religious holiday off that their jobs were terminated.

That would have been like a death knell for my father, and he trembled when he told me this story about it. The owner was a much kinder man and things went along.

But we cannot ever forget what it was that created the need for working people to organize, and when we see working people in jobs today that are only guaranteed $206 a week, it tells you that there have to be voices out there that speak to the needs of people, that $206 a week barely can take care of one person, and in many cases it is supposed to take care of a family. So we see that and we are reminded that people need attention in developing their own strength of voice.

So the first responders I recall who rushed into the emergency stairwells in the Trade Center on September 11, while civilians were filing past them on the way down, belonged to unions. I had an office in that building when I was a member of the Port Authority of New York and New Jersey before I came to the Senate, and it was an entire city included in those few buildings there. But when you saw the heroism and the price paid by so many people who were union members, it says that it cannot be a bad thing for people to be able to express themselves in a collective fashion.

I am a strong believer in protecting the Federal workforce. I have great respect for people in the Federal workforce, and though I ran a company the Chairman was kind enough to mention, a very successful company, today employs 40,000 people, and I was one of three young kids out of college who started that company so many years ago. But what I have seen of the public sector, if I can call it that, compared to the private sector is that there is no match, that the habits are the same in the private side. There are not a lot of perfect people around, not even here in the Senate, surprise to many, but the fact is that people who are in the Federal workforce are usually committed to jobs that are not competitive in the pay scales with jobs in the outside world. And if there was a change, we made it. When we took the screeners out of the private sector because we could not get a decent day's work done and never had security, the knowledge that things were safe, we put them on the Federal payroll. That was a huge decision. At the same time we are saying we cannot permit them to have an organized voice.

I am concerned that the plan, as proposed, could be subject to political manipulation. Doing away with the General Schedule system which has served Federal employees and the American people well, probably creates more problems than it solves. The new system would set wages according to the results of annual surveys, salary surveys of private sector workers, but private sector wages vary widely or fluctuate due to market changes. Given the importance of the DHS mission, we need to attract the best and the brightest to work here. Beating people down, taking away their rights to collective bargaining and other union protections is not going to create the DHS workforce with the morale that we need to help keep America safe.

Mr. Chairman, I hope that we can work together to fix the problems with this new plan. I welcome our panels of witnesses, and apologize for not being able to be here during their testimony. I would ask that the record be kept open for any questions that I might submit.

Senator VOINOVICH. Without objection, Senator Lautenberg.

Senator LAUTENBERG. Thank you.

Senator VOINOVICH. If the witnesses would please stand, it is the custom of this Subcommittee to swear in our witnesses. Do you swear that the testimony you are about to give is the truth, the whole truth and nothing but the truth, so help you, God?

Mr. WALKER. I do.

Mr. JAMES. I do.

Dr. SANDERS. I do.

Senator VOINOVICH. Let the record show that the witnesses answered in the affirmative.

As is the custom with this Subcommittee, I would ask the witnesses to limit their testimony to 5 minutes. Your complete written testimony will be printed in the hearing record.

I first would like to welcome David Walker, Comptroller General of the United States. I have worked often and closely with Mr. Walker on issues dealing with human capital. I would like to publicly say that without his help, input, and collaboration, we would not have been able to make the most significant changes in the civil service since 1978.

I remember when I first met you we talked about this. I think we have come a long way since that day. I look forward to your insight today on the Department's final regulations. Mr. Walker.

TESTIMONY OF DAVID M. WALKER,[1] COMPTROLLER GENERAL, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Mr. WALKER. Thank you, Mr. Chairman, and Senator Akaka. It is a pleasure to be here and it is a continuing pleasure to work with both of you in this and other areas of mutual interest and concern. I appreciate the opportunity to provide our preliminary observations on the Department of Homeland Security's final regulations. I might note that it is my understanding that the Department of Defense may issue their proposed regulations as soon as this afternoon, and so this is a momentous day, not only from the standpoint of this important hearing, the DHS regulations, but also I expect there will be a lot of interest in whatever the Department of Defense proposes.

What I would like to do, Mr. Chairman, if I can, is to summarize by commenting on three positive aspects, three areas of concern, and three comments on the way forward, and obviously make myself available for any questions after the other co-panelists have a chance to go.

First from a positive standpoint. We believe that the proposed regulations provide a flexible, contemporary, performance-oriented and marked-based compensation system at least with regard to the theoretical framework. Second, we believe it is important, as the regulations note, to have continued employee, union, and key stakeholder involvement in developing the details—and the details do matter, there are a lot of details that are not addressed here—and also in being active participants during the implementation phases. That involvement must be meaningful, not just pro forma. That is critical in order to achieve credibility and success.

[1] The prepared statement of Mr. Walker appears in the Appendix on page 45.

Third, we believe that the regulations are positive in providing a basis to evaluate the implementation of the regulations and to involve employee representatives in designing the evaluation criteria and reviewing the findings of recommendations that result therefrom. So those are several positive comments.

Areas of concern. Obviously, one major area of concern, which is currently subject to litigation, and therefore I won't get into much detail on it, is the proposed scope of collective bargaining and whether and to what extent collective bargaining should be broader than as proposed under the regulations. But other than that, it is difficult to determine the overall impact of the changes on potential adverse actions, appeals and labor relation processes because there are a lot of details that are yet to be defined.

I think it is very important that they be defined, and how they are defined can have a significant impact on whether or not they are likely to be effective and credible. We believe it is critically important that employees have access to an independent, qualified and adequately resourced external appeal body in appropriate circumstances in order to ensure the consistency, the equity of actions while preventing abuse of employees.

In addition we are concerned that the performance management system does not provide a core set of key competencies that can help to provide reasonable consistency and clearly communicate to employees what is expected of them, which competencies hopefully would be validated by the employees in order to gain acceptance, credibility and minimize adverse actions.

And last, we are concerned that a pass/fail or three-level rating scale system that might be implemented would not provide for meaningful differentiation in performance in order to be able to make the most informed pay and other human capital decisions.

As far as moving forward, we think it is critically important that in order to be successful here, because it is going to take the combined efforts of a number of key parties over an extended period of time, that there be committed and sustained leadership at the top. While we believe that a COO, Chief Management Officer concept is absolutely essential to the Department of Defense, we believe it might have merit at the Department of Homeland Security, not only with regard to human capital issues but also the overall business process transformation and integration.

Second, we believe that there has to be an overall consultation and communication strategy that provides for meaningful two-way communication, creates shared expectations among managers, employees and all key stakeholders, and in fact provides for meaningful and ongoing two-way interaction. Reasonable people will differ. They obviously do in many cases here, but it is important that all sides be heard and considered seriously.

Last, we are very concerned that the necessary infrastructure be in place in order to successfully implement the system. At a minimum that means a clearly-defined strategic human capital plan, and the capabilities to use these new authorities both effectively and fairly. Among other things the need for a modern, effective, credible integrated and hopefully validated performance management system that provides for a clear linkage between institutional, unit and individual performance-oriented outcomes, and also

as appropriate, considers the core values and other aspects of the organization that should not change over a period of time, is a matter of critical importance.

So in summary, Mr. Chairman, we think there are a number of positive things here. We have some areas of concern, and there are a few key points that we think will be critical on the way forward in order to achieve a positive outcome while minimizing the possibility of abuse.

Thank you, Mr. Chairman.

Senator VOINOVICH. Thank you, Mr. Walker.

We also have with us today Ron James, the Chief Human Capital Officer for the Department of Homeland Security, and Ron Sanders, Associate Director for Strategic Human Resources Policy, Office of Personnel Management.

I know both of you have invested an incredible amount of time and energy in developing these regulations. I thank you for all the time and effort that you have put into this task, and I appreciate the cooperation that has existed between the Department of Homeland Security and the Office of Personnel Management. I had some concerns that communication would not be forthcoming. It has been, and I applaud Secretary Tom Ridge and Director Kay Coles James for the job that they have done. Of course, I understand you are the ones who put in all the work.

Mr. James.

TESTIMONY OF RONALD J. JAMES,[1] CHIEF HUMAN CAPITAL OFFICER, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. JAMES. Thank you, Mr. Chairman, and I will pass along your kind words to the people who did the heavy lifting, my staff and OPM's staff.

Senator Akaka, Senator Pryor, it is a privilege to appear before the Subcommittee.

As Congress recognized in creating the Department, we need the ability to act swiftly and decisively in response to critical homeland security threats and our mission needs. We must continue to attract and retain highly-talented and motivated employees who are committed to excellence, the most dedicated and skilled people our country has to offer.

The current human resources system is too cumbersome to achieve this. Following the publications of our proposal almost a year ago, we received over 3,800 comments from the public, our employees, their representatives, and Members of Congress. After taking some time to examine those comments, we followed the congressional direction to "meet and confer" with employee representatives over the summer.

In early September we invited the National Presidents of the NTEU and the AFGE to meet with the Secretary and the Director of OPM to present their remaining concerns. While these discussions further informed the development of final regulations, there remain several areas where we have fundamental disagreement. We believe those issues, such as using performance rather than longevity as the basis for pay increases and providing for increased

[1] The prepared statement of Mr. James appears in the Appendix on page 74.

flexibilities to respond to mission-driven operational needs while balancing our collective bargaining operations go to the very core of what Congress intended.

We are creating open pay bands, pay progression within those bands will be based on performance, not longevity. We are also changing how market conditions impact pay. Under the new system pay may be adjusted differently by job types in each market. We are creating performance pools where all employees who meet performance expectations will receive performance-based increases.

The system will make meaningful distinctions in performance and hold employees and managers accountable at all levels. With some important modifications, as noted below, this is the proposal we made last year.

The unions pressed for a meaningful role in the design of further details in the pay-for-performance system. We provide that through a process called continuing collaboration, and through providing four seats for unions on the Compensation Committee. None of these provisions were in the original regulations. During the meet and confer labor unions voiced strong concerns that the implementation schedule did not allow adequate time to train managers and evaluate its effectiveness. We have significantly modified our schedule. We will have extensive training this summer. Training is the core of what we should be about. We will be introducing our new performance management system this fall. We are converting employees to the new pay system over the next 3 years. We will be making adjustments to their pay based on performance over the next 4 years, not 2 years.

Until employees are converted to the new pay system they will continue to see adjustments to their pay under the GS system. The vast majority of DHS employees will have two to three full cycles under the new performance management system before performance is used to distinguish levels of pay. We hope this will allow greater time to create employee understanding and confidence regarding how pay will be administered fairly going forward.

At the request of the unions we also provided a role for the employees and their representatives in the formal evaluation of whether the new system is having its intended effects. Congress granted the authority to modify our adverse action and appeals procedure. We believe we have done that while still protecting due process. In fact, we have shortened the time frames, minimum notice period has been shortened from 30 days to 15 days, but we have expanded the minimum reply time to 10 days. We have provided one unitary system for dealing with performance and conduct, which will make the appeals process easier to understand, particularly for those employees who are affected.

At the request of labor representatives we have retained the efficiency of the service standard for taking adverse actions. We have also retained the Merit Systems Protection Board to hear the vast majority of cases, and we have worked with them, conferred with them, to get to that decision.

We have changed our proposed regulations to adopt at the union's suggestion the preponderance of the evidence standard for all adverse actions. We are also persuaded by our labor unions to provide bargaining employees the option of grieving and arbitrating

adverse actions. These are significant changes from last year's proposals. Arbitrators and the MSPB will use the same rules and standards, the same burden of proof. We were convinced by the labor organizations that our proposed bar on mitigation should be modified, and it was. At a future date, after consultation with the Department of Justice, the Secretary will identify mandatory removal offenses that have a direct and substantial impact on our ability to perform our mission. We will again, thanks to union input, provide for those offenses, when identified to be published in the *Federal Register* and will ensure they are made known annually to all employees. I think, sir, that the process is a lot better for the union's involvement. I think they brought constructive suggestions. Our regrets are that we could not accommodate all of them.

Our regulations do require in the last area that we confer, not negotiate, with labor unions over the procedures we will follow in taking management actions, such as the critical issues of assignment of work or deployment or personnel. And the final regulations now require bargaining over the adverse impact of management actions on employees when that impact is significant and substantial and the action is expected to exceed 60 days.

We also, lastly, altered our proposed regulations to provide for mid-term bargaining over personal policies, practice and matters affecting working conditions. We also agreed to provide binding resolution of mid-term impasses by the Homeland Security Labor Board. The FLRA will continue to hear matters including bargaining unit determinations, union elections, individual employees, ULPs and exception to arbitration awards.

Mr. Chairman, we developed these regulations with extensive input from our employees and from their representatives. We listened and we will continue to listen. I pledge that to you personally. We made changes as a result of their comments. We believe that we have achieved the right balance between core civil service principles and mission essential flexibilities. Thank you.

Senator VOINOVICH. Dr. Sanders.

TESTIMONY OF RONALD P. SANDERS,[1] ASSOCIATE DIRECTOR FOR STRATEGIC HUMAN RESOURCES POLICY, U.S. OFFICE OF PERSONNEL MANAGEMENT

Dr. SANDERS. Thank you, Mr. Chairman, Senator Akaka, and Senator Pryor. It is my privilege to appear before you today to discuss the final regulations implementing a new human resources (HR) system for the Department of Homeland Security (DHS), a system that we truly believe is as flexible, contemporary and excellent as the President and the Congress envisioned. It is the result of an intensely collaborative process that has taken almost 2 years, and I want to express our appreciation to you for your leadership and that of the Subcommittee in this historic effort. Without that leadership, we wouldn't be here today, and we look forward to it in the future.

Mr. Chairman, with the Homeland Security Act of 2002, you and other Members of Congress gave the Secretary of DHS and the Di-

[1] The prepared statement of Dr. Sanders appears in the Appendix on page 80.

rector of the Office of Personnel Management (OPM) extraordinary authority, and with it a grand trust to establish a 21st Century human resource management system that fully supports the Department's vital mission without compromising the core principles of merit and fitness that ground the Federal civil service. Striking the right balance between transformation and tradition, between operational imperatives and employing union interest is an essential part of that trust, and we believe we have lived up to it in the final regulations.

I would like to address that balance this morning with a particular focus on performance-based pay, employee accountability, and labor relations.

First, pay-for-performance. The new pay system established by the regulations is designed to fundamentally change the way DHS employees are paid, to place far more emphasis on performance and market in setting and adjusting rates.

But will it inevitably lead to politicization, as some have argued? Absolutely not. All Federal employees are "protected against arbitrary action, personal favoritism or coercion for partisan political purposes." Those statutory protections are still in place and still binding on DHS, and they most certainly apply to decisions regarding an employee's pay.

If a DHS employee believes that such decisions have been influenced by political considerations, he or she has the right to raise such allegations with the Office of Special Counsel (OSC), to have OSC investigate and where appropriate prosecute, and to be absolutely protected from reprisal and retaliation in so doing. These rights have not been diminished in DHS in any way whatsoever. The new system also provides for additional protections that guard against any sort of political favoritism in individual pay decisions.

Under the new system, supervisors have no discretion with regard to the actual amount of performance pay an employee receives. That amount is driven strictly by a mathematical formula, an approach recommended by the DHS unions during the meet and confer process. With one exception, the factors in that formula cannot be affected by an employee's supervisor. Rather, they are set at higher headquarters with union input and oversight through a new Compensation Committee, another product of the meet and confer process, that gives them far more say in such matters than they have today. The one exception is the employee's annual performance rating. That is the only element of the system within the direct control of an employee's immediate supervisor, and that is subject to higher-level approval.

The regulations allow an employee to challenge their rating if he or she doesn't believe it is fair, and if it is a unionized employee, all the way to a neutral arbitrator if their union permits. That is another product of the meet and confer process.

Mr. Chairman, with these statutory and regulatory protections providing the necessary balance, as well as intensive training in a phased implementation schedule to make sure DHS gets it right, we are confident that the new pay-for-performance system will reward excellence without compromising merit.

Let us take a similar look at employee accountability and due process. DHS has a special responsibility to American citizens.

Many of its employees have the authority to search, seize, enforce, arrest, even use deadly force in the performance of their duties. Their application of those powers must be beyond question. By its very nature, the DHS mission requires a high level of workplace accountability. We believe the regulations ensure this accountability but without compromising any of the due process protections Congress guaranteed.

In this regard, DHS employees are still guaranteed notice of a proposed adverse action, the right to reply before any final decision is made, and the right to representation. The final regulations continue to guarantee an employee the right to appeal an adverse action to the Merit System Protection Board (MSPB) or to arbitration, except those involving a mandatory removal offense, and I hope we have a chance to talk about that later this morning.

Further, in adjudicating employee appeals, regardless of forum, including the Mandatory Removal Panel, the final regulations place a heavy burden on the Agency to prove its case. Indeed, in another change resulting from the meet and confer process, the regulations actually establish a higher overall burden of proof, a preponderance of evidence standard for all adverse actions, whether based on conduct or performance. While this standard currently applies to conduct-based adverse actions today, it is greater than the substantial evidence presently required in performance-based actions. In DHS, it's now required for both.

Finally, the regulations authorize MSPB, as well as arbitrators, to mitigate penalties in adverse actions. The proposed regulations precluded such mitigation, as does current law, in performance-based adverse actions. However, the final regulations allow mitigation when the Agency proves its case against the employee by a preponderance of evidence. The standard in the regulations is admittedly tougher than those the MSPB and private arbitrators apply, but far more stringent in performance cases where mitigation today is not even permitted.

However, given the extraordinary powers entrusted to the Department and its employees and the potential consequences of poor performance or misconduct to its mission, DHS should be entitled to the benefit of any doubt in determining the most appropriate penalty. That is what the new mitigation standard is intended to do, but it is balanced by the higher standard of proof overall.

Finally, let's look at labor relations. Accountability must be matched by authority, and here the current law governing relations between labor and management is out of balance. Its requirements potentially impede the Department's ability to act, and that cannot be allowed to happen.

Now, you will hear that the current law already allows the Agency to do whatever it needs to do in an emergency. That is true. However, that same law does not allow DHS to prepare or practice for an emergency, to take action to prevent an emergency, or to reassign or deploy personnel and new technology to deter a threat, not without first negotiating with unions over implementation, impact, procedures, and arrangements. On balance, the regulations ensure that the Department can meet its most critical missions, but in a way that still take union and employee interests into account.

Mr. Chairman, if DHS is to be held accountable for homeland security, it must have the authority and flexibility essential to that mission. That is why Congress gave the Department and OPM the ability to create this new system, and that is why we have made the changes that we did. In so doing, we believe we have succeeded in striking an appropriate balance between union and employee interests on one hand and the Department's mission imperatives on the other.

Mr. Chairman, that concludes my statement. I would be happy to answer any questions.

Senator VOINOVICH. Thank you very much. We will have 5 minute rounds of questions by Members of the Subcommittee.

To both Mr. James and Dr. Sanders, are there any Federal agencies successfully using pay-for-performance that you intend to use as benchmarks in going forward with the program?

Dr. SANDERS. Mr. Chairman, you know how much time we spent, not required by law, before we even began drafting the proposed regulations with a joint labor-management design team. That design team went all over the country looking at, among other things, pay-for-performance systems, including those that have been tried and tested in the Federal Government. We looked at all of them, visited many of them. There are benchmarks out there. This is not uncharted territory. There are between 70,000 and 80,000 Federal employees under pay-for-performance systems today. We have learned from them. One of the things we learned, for example, was to build your performance appraisal system first before you apply it to pay-for-performance. That is something that has now been incorporated into the Homeland Security implementation schedule. We have also learned from mistakes, for example, the Federal Aviation Administration's current internal equity problems with its collectively-bargained pay system on one hand and its administratively-established system on the other. I hope we get a chance to talk about that.

But there are benchmarks. There is experience. This is not uncharted territory, and we are confident that we have learned both the good lessons and the bad from others and will be able to proceed and not repeat some of the mistakes.

Senator VOINOVICH. Mr. James, would you like to comment?

Mr. JAMES. I think, Senator, as you know, I am from outside the government, and so I find that we sort of look at this pay-for-performance issue like it is in fact a new issue. In my 25 years of practice I do not personally know of any Fortune 500 company that bases pay on longevity, and the answer is that we do plan to benchmark against what is out there, what is happening at some of the other agencies in government, but we also plan to draw on the experience and expertise of what has happened in the private sector.

I think it is analogous. And I think we are not going to just look at what is going on in the private sector when it comes to, for example, the pay issue. We are going to look at those folks against who we compete, and that could be State Governments who hire law enforcement or local governments that hire law enforcement people or the like.

So we are open to exploring what is the best most effective way to in fact get to pay-for-performance, get to performance management, get to market surveys.

Senator VOINOVICH. Are you planning on implementing this system in an incremental basis or will you try to implement it all at once?

Mr. JAMES. Absolutely and unequivocally we are not going to do this all at once. Our original plan was to roll this out in basically 2 years after the meet and confer. We had push back from the union, and I would suggest appropriately so, that this was a heavy lift, that we were not going to have a chance for input, evaluation, for tinkering, for adjustments, for focus groups with employees, for getting sustained feedback from all of our stakeholders. We have now—our first actual impact in the pay-for-performance arena, which will be for about 8,000 people in 2007. The majority of our employees will not be impacted in terms of having the performance management, that is how they do under the performance management system, impact their pay until 2009.

I think that was an excellent suggestion by the union. We had colleagues who said that is the right way to do it, get it right, take it slow. We clearly are not going to do this quick and fast, and we may have to make other adjustments along the way, sir. I mean I think the data is going to drive, and it should drive, how we make the corrections and how fast we continue to roll this out.

Senator VOINOVICH. Mr. Walker, do you have any comments on the difficulty of implementing an effective pay-for-performance and performance management system? One issue we talked about using a pass/fail rating system.

Mr. WALKER. Right.

Senator VOINOVICH. What is your opinion of a pass/fail system? Do you think that the pass/fail system is appropriate for DHS at the entry-level band?

Mr. WALKER. I do not like pass/fail systems under any scenario. I do not think they can result in meaningful differentiation in performance levels.

I think a three standard system is going to be difficult to create meaningful distinctions in performance. Time will tell, but I have my doubts about that. I think it is important to get it fair rather than fast. I would compliment the Department in recognizing the need to move on an installment basis and to employ a phased implementation approach. I also would compliment them in recognizing that you have to have the infrastructure in place which means a modern, effective, credible, and hopefully validated performance appraisal system, that you go through at least one full cycle before you think about tying it to pay. So I think they clearly have made a number of changes, but as the old saying goes, the devil is in the details and a lot of the details are not known yet. So we look forward to seeing those details.

Mr. JAMES. Senator, if I could just comment on the pass/fail and try to bring some clarity to that issue, we are going to walk at this very slow. As a generic proposition we do not see pass/fail as the right way to go in terms of across the board. We only wanted to preserve the right to talk about pass/fail in the context of entry-level development employees. For example, we have employees who

are in school for 6 to 9 months. We have employees who if they do not pass a certain course in terms of technology have to go back. We have employees who if they do not pass marksmanship, they are not certified to carry a gun, they have to go back. They cannot go forward.

So a lot of what happens, at least in our law enforcement community and our folks at the border in their developmental stages, is in fact benchmarked or determined by a pass/fail. So we wanted to have the option available at that level and at that level only to be able to use that as a mechanism because in some instances individuals will not even have a supervisor for 9 months, and in some instances they may not have a supervisor for a year because if they do not get certified to carry a gun, they may in fact be pass/fail—up or out. That is the limitation.

So when we talk about pass/fail our notion is, and my personal professional judgment is, coming from the private sector, is that we do not want to use pass/fail anywhere beyond the entry level, the training level, and the school level.

Senator VOINOVICH. Thank you for your clarification. Senator Akaka.

Senator AKAKA. Thank you very much, Mr. Chairman.

Mr. James and Dr. Sanders, I would be remiss if I did not thank you and your respective staff for the hard work that was done on these regulations, and I also thank you for your testimony today.

Let me begin my time with an observation. Although the regulations are not specific about the new pay-for-performance system, I believe that given the obvious anxiety employees are feeling in the Administration's proposal to expand DHS like flexibilities to other agencies, it would have been advisable for DHS and OPM to be more specific about pay-for-performance.

Understanding the complexity of the issue, I trust that you will provide detailed information on the new pay-for-performance system to our Committee and this Subcommittee well before implementation, and I look forward to that.

I also would like to say to Mr. Walker that it is always good to have you with us, and I have enjoyed working with you, and you know how much I value your opinion. Throughout your tenure as Comptroller General you have done much to foster accountabilities, transparency and employee involvement in the Federal Government. I know that the Governmental Accountability Office has a great deal of experience in implementing a pay-for-performance program. Would you discuss the amount and the type of training GAO employees have received and will receive on this system?

Mr. WALKER. Thank you, Senator Akaka. First, GAO has had broad banding since the late 1980's, so this is not a new concept to us. We have years of experience dealing with broad banding. We have had some form of pay-for-performance for a significant majority of our workforce since the late 1980's, but as a result of the latest round of legislation that Congress gave us in 2004, we now have the additional flexibility to be decoupled from the Executive Branch and to be able to have a more market based and performance oriented compensation system going forward than we had in the past.

We now have a situation where all but less than 10 of our employees are covered by broad banding. That is out of 3,250. All but about 10 will be covered by pay-for-performance. We are doing this in phases or installments. We are conducting market-based compensation studies in order to be able to ascertain what the appropriate compensation ranges are for the different career streams or occupations and the different levels of responsibility and authority. We have completed that with regard to about 80 percent of our workforce, and we are about to undertake it for the balance of our workforce.

Importantly, before we ended up implementing any new performance based compensation flexibilities we had designed new competency based performance appraisal systems that were developed in conjunction with our employees, that were validated by our employees. We also incorporated a number of safeguards to help assure consistency and protect against abuse as a supplement to the external appeal rights that our employees have though the Personnel Appeals Board, which is an independent body relating to GAO. There was a variety of training that was provided at each of the major key points in time in order to try to help people understand the various elements that were necessary to make it successful.

I guess the last thing I would say on this is I personally spent a tremendous amount of time on this. I personally communicated with our employees through live closed circuit television and other mechanisms on numerous occasions and I will continue to do that. These so-called CG charts are designed to address what we are doing, why we are doing it, how and when we will do it. We also have a GAO Employee Advisory Council lead, which is a democratically elected group that represents our employees. We treat them the same as our top executives as to consultation on key issues. EAC members have and do ask me questions in front of all of our employees on a recurring basis about these and other matters of mutual interest and concern.

But training is critically important, and we have done a lot of it, but you can always do more.

Senator VOINOVICH. Senator Pryor, thank you very much for joining us today.

OPENING STATEMENT OF SENATOR PRYOR

Senator PRYOR. Thank you, Mr. Chairman, and again, thank you for your leadership on this issue. I know you are passionate about trying to make government run more efficiently and make sense, so thank you for your leadership once again.

Let me, if I may, start with Dr. Sanders. I guess I do not have a copy of your statement in my packet, but the last sentence you said during your prepared remarks, you said something about needing to find the appropriate balance between—tell me what you said again.

Dr. SANDERS. The appropriate balance between the Department's mission imperatives and employee and union interests.

Senator PRYOR. You are confident that we found that balance?

Dr. SANDERS. Yes, sir.

Senator PRYOR. Mr. James, you said in your statement a few moments ago that when you look at Fortune 500 companies you are not aware of any company that ties pay to longevity?

Mr. JAMES. Yes, sir. I think I indicated that in my experience of 25 years of litigating and representing Fortune 500 companies, I am not personally aware of any company that is a Fortune 500 company that ties pay to longevity. Yes, that is what I said.

Senator PRYOR. Is it not true in our economy in most instances that the longer a person is with a company the more he or she is paid; is that not generally true?

Mr. JAMES. In the law firm, sir, that is not true. There are people who go up or out, and that is private sector. I think there is sometimes a great correlation between experience and your pay, but when I look at the civil service system, for example, I think it actually discriminates against people who are older, more experienced, because it assumes that your first years that you learn at a faster rate and you will get a pay increase every year. Then when you get to be in your 6th or your 10th year, it assumes that you only get a pay increase based on the longevity of 3 years.

What we are trying to do is, like Dr. Sanders said, is find parity, find a balance. And in the pay area, yes, people tend to get paid more the wiser and more they work. But the way the government system is now, in fact, is to the contrary. It assumes that older people cannot learn or at least it assumes older workers are not going to learn as fast.

Senator PRYOR. Is that not inconsistent with what you said a few moments ago, that you are not aware of any Fortune 500 company where pay is tied to longevity? Is it not in some way at least loosely related to longevity?

Mr. JAMES. Sir, I would respectfully disagree. I would say in the law firm it is related to competencies.

Senator PRYOR. In a law firm?

Mr. JAMES. In the law firm I am saying is related to competencies——

Senator PRYOR. Law firms are not Fortune 500 companies and the government is not a law firm. So you said——

Mr. JAMES. I understand that, but if I could finish.

Senator PRYOR. You said in your statement that you are not aware of any Fortune 500 company that ties pay to longevity.

Mr. JAMES. In my experience, that is correct, sir.

Senator PRYOR. And now the example you are giving is the law firm.

Mr. JAMES. I was going to give some additional examples.

Senator PRYOR. I used to be in a law firm and I know how that works and I know that there are a lot of factors oftentimes that law firms consider in paying their employees and partners, etc. But go ahead.

Mr. JAMES. On the management side, for example, like with freight forwarders or with companies like airlines, managers are paid for delivering the results. It is results oriented business. That is my general observation.

Senator PRYOR. Look, again, in the private sector, oftentimes results mean profitability. And in the government results are not tied by profitability because the government is not there to make a prof-

it. To me there have to be other standards in which you measure results in government. Do you agree with that?

Mr. JAMES. I would agree with that, sir, with the modification that the needs are the same for example. Perhaps such a concern about the retention of employees because if you do not it is expensive. The government should have that same concern. The private sector is concerned about the ability of employees to learn new skills, new competencies, as whatever field they are in changes. The government should have that very same concern. I cannot disagree with your comment that it is nonprofit, but I think that what we need to bring from the private sector is the attitude, is that people in the government are public servants and we need to get better each year. We need to raise the bar. We need to have concern about excellence.

Senator PRYOR. I agree with that 100 percent. I mean I am all about trying to bring the best private sector ideas into government, but I also understand, or I recognize at least that there is a material difference in government service versus working in the private sector.

I am sorry. Mr. Walker, did you want to add something to that?

Mr. WALKER. When you are done, Senator.

Senator PRYOR. I am done, go ahead.

Mr. WALKER. Senator, clearly there are differences between the public sector and the private sector. I have 20 years of experience in the private sector and now about 12 years in the public sector. There are some compensation arrangements in the private sector that are primarily longevity based or heavily longevity based. They typically involve certain types of occupations and many times collective bargaining agreements.

I think what is important is to recognize the fact that for many Executive Branch agencies that are covered by the General Schedule system, 85 percent plus of the annual pay raises that any individual will receive on average has nothing to do with skills, knowledge, or performance.

Senator PRYOR. But is not a lot of that the cost of living adjustment?

Mr. WALKER. It is several things. First, Senator, you are correct in saying that the annual across the board adjustment, which as you know is much more than cost of living because last year it was 3.5 percent, while cost of living was 2.1 to 2.3 percent. But in addition to that you have step increases which are merely the passage of time, and furthermore, you can have merit step increases which should be performance related. However, I would also suggest that because of the poor performance appraisal and management systems in the government they do not always correlate as much with exceptional performance as they should.

So a vast majority of annual compensation increases under the GS system have nothing to do with skills, knowledge and performance, and it needs to be more skills, knowledge and performance oriented while having safeguards to prevent abuse.

Dr. SANDERS. Senator, can I interject?

Senator PRYOR. Sure.

Dr. SANDERS. You may not know this, but today Federal employees whose performance is rated unacceptable still get the across the

board adjustments and locality supplements, even though their performance is rated unacceptable.

Senator PRYOR. In fact, I agree with everything David Walker said a minute ago. I think that the government needs to do a better job—and I know I have heard Chairman Voinovich talk about this as well—the government needs to do a better job of managing itself. I think we all recognize that, and I think that we all have that common goal. I think the question is, what are the appropriate steps to get there?

I think that you talked about, Mr. Walker, in your statement you said something to the effect that it is more important to get it fair rather than fast or something to that effect. I agree with you. I think we just need wisdom here as we pursue this course, to try to make government more efficient and more effective, but also I think that we do need to recognize the inherent difference in government and in business, and we should take the very best ideas that business has to offer, take them from corporate America or world models, whatever they may be, and try to incorporate them into government, but in my mind it is not a one-for-one proposition. We need to take elements of the very best and implant it in government. Thank you, Mr. Chairman.

Senator VOINOVICH. Thank you, Senator.

I would like to have a 3 minute round of questions for each of us. I think there are some other issues on people's minds.

Mr. James, implementing the new personnel system will require a massive investment in training and retraining of the workforce. My question then, is the workforce large enough to participate in the training or will you need to bring in outside help, for example some float group so that front line employees can receive the training they need, without shortchanging the Department's day-to-day mission? Furthermore, do you have enough people in house to conduct the training or are you going to hire assistance? What are your thoughts as to how this will happen?

Finally, the President's budget requested $53 million in fiscal year 2006 for implementation. Is this adequate? Do you have any idea of what the implementation cost will be for future years?

Mr. JAMES. Thank you, Senator. I cannot agree with you more that training and communications are at the very core of what we need to be about if we are going to make this work and if we are going to make it fair and if we are going to make it and get it right. I would like to thank Congress and the Senators who are assuring us that we had $10 million alone for training in our budget in this current fiscal year. We have asked for another $10 million. We are hopeful we will have that money because we do need to change the culture and we need to inform our employees, we need to inform our managers and we need to be able to train the trainers. I am convinced that with the $10 million we have this year and hopefully with the $10 million we will have next year, that we will be able to get the training done. We will have to hire some outside experts. We will have to hire some people who have done this before.

We have also talked, not about a float, sir, but we have talked about some other issues like through the Chief Human Capital Officer's Council, I have offered the opportunity for individuals and other agencies who anticipate they may be going down the same

road as we are in 2 to 3 years, to send people over to work with us, to help us with some of the training, help us with some of what I would describe as getting a fresh set of eyes on this, both as to the training and as to the procedures or the regulations that we are writing.

As to your last question, the $53 million, yes, that is adequate, and the reason it is adequate is because when we originally requested monies, we had anticipated rolling out the pay-for-performance in 2 years. We basically now have elongated that and we believe by elongating that we will in fact have sufficient monies to get this done and get it done right, get it done fair, and get it done with the kind of input that it will take.

Senator VOINOVICH. Senator Akaka.

Senator AKAKA. Thank you very much, Mr. Chairman.

Dr. Sanders, in addition to serving as Ranking Member on this Subcommittee I am proud to be the Ranking Member on the Senate Veterans' Affairs Committee and preserving veterans' preference is very important to me. Would you please explain how veterans' preference is protected under the DHS regulations, and do you know whether there are any changes to current veterans' preference regulations or statutes either in principle or in practice?

Dr. SANDERS. Sir, I can state unequivocally that veterans' preference has not been diminished at all in any way whatsoever in these final rules. In fact, while there were a number of options that considered that, both DHS and OPM said unequivocally, we are not going to touch veterans' preference.

I will give you an example where in fact we have extended the privileges we accord our veterans and which they deserve. In the case of employees who first come to the Department, we have created something called an initial service period that can be up to 2 years, primarily to accommodate extended training and development cycles, some of the occupations that Mr. James mentioned. During that initial service period it is easier to remove those employees. In the case of veterans, we have retained the current 12 months probationary period. Once they complete 12 months they get full due process and hearing rights where non-preference eligibles do not until the conclusion of that initial service period.

We have extended that same right to veterans in excepted service appointments. Where today a veteran, in an excepted service appointment, does not have any rights until after 2 years, we have now given that veteran rights after 12 months, full appeal rights to MSPB if there is any adverse action taken. So we have not only protected what exists, but we have extended it.

Mr. JAMES. Could I just provide, sir, a footnote to that that may be of interest to you?

Senator AKAKA. Yes, Mr. James.

Mr. JAMES. Secretary Ridge and I met with a coalition of about 25 veterans' groups in the month of December, and at that meeting Secretary Ridge committed that he would reinforce his commitment to making sure that veterans' affairs and veterans' preference and veterans' issues were a primary concern to the Department, and he promised that group that he would issue a management directive.

I am pleased to tell you that his very last act on his very last day was to issue a management directive on veterans' affairs and

how important it is to the Department, and suggested some, what I would describe as some review procedures that were mandatory when veterans were being considered for jobs, and if the Subcommittee will permit, I will be happy to either share that with the Subcommittee or provide that to the Senator.

Senator AKAKA. Thank you. As you know, because of the situation today and the deployment of many reservists and National Guard troops, this question has become very important, and I thank you so much for your responses.

Thank you, Mr. Chairman.

Senator VOINOVICH. Senator Pryor.

Senator PRYOR. I will try to keep mine shorter this time because I went a little long last time. Sorry about that.

But if I may, Dr. Sanders, in Washington they call this a "prebuttal" but we are going to have a witness here in a little bit. I think he is on the next panel, John Gage, President of the AFGE, and I have looked through some of his testimony, and in his testimony he talks about actions that employees have taken to try to enhance security and improve how the various agencies have operated, and he goes through some policies that they have challenged and they think that on the grounds they have a better way to do things, etc. We will let him talk about that.

But are you aware of any real concrete examples of where the existing personnel system that we have in place today has left America less protected than it should be?

Dr. SANDERS. I will let others judge whether America is less protected, but let me give you some examples of where we believe the current system, particularly the current collective bargaining system needs to be recalibrated, and that is what we have tried to do in the final regulations.

Under current law, before management can exercise any of its essential operational rights, let us say, for example, the introduction of new search or surveillance technology, it must first bargain with the union over implementation, impact, procedures, and arrangements. It must delay acting until those negotiations are concluded.

Senator PRYOR. So it is too cumbersome, too slow?

Dr. SANDERS. Yes. Here is the balance we have tried to strike in the regulations, and there are examples: The introduction of personal radiation detectors, vehicle and container inspection systems, firearms policy, etc. All of those actions are reserved to management, but the law requires bargaining over implementation before management can institute them.

What we have tried to do in the final regulations is say management can go ahead and institute them. In those cases, the one I have just given you, where there is literally a long-lasting effect—we know those policies or technologies are going to be in place—management has to bargain over the impact of those new changes, and deal with appropriate arrangements for employees, but after they have acted. They do not delay action, but they still bargain afterwards.

Similarly with work assignment and deployment procedures. There are examples, Senator, where the deployment of personnel within a commuting area from a seaport to an airport is delayed because of negotiated work rule procedures, or where those work

rule procedures require you to send the most senior employee when the least senior would do or vice versa.

Here is the balance we have tried to strike. Some procedures remain fully negotiable. Those procedures that deal with so-called personnel management rights, procedures that deal with discipline and promotion and performance management, those remain fully negotiable, as negotiable in the final rules as they are under current law. But those procedures that deal with operational matters, the assignment of personnel, the deployment of personnel, those are no longer subject to collective bargaining, but the final regulations obligate the Department to sit down and confer with the unions over those procedures for 30 days to try to reach agreement, to try to work out their differences, but ultimately they do not make them subject not to just collective bargaining, but resolution by some third party who has no accountability for the Department.

The other thing that we added in the final regulation, Senator, is the ability of employees and the union to enforce whatever rules and regulations management may establish through the negotiated grievance and arbitration procedures. While we may have limited the union's right to negotiate some procedures, those procedures that deal with operational matters, we have retained an employee's right and the union's ability to try to enforce those procedures, make sure management is doing what it said it was going to do, through grievance and arbitration.

So again, we have tried to strike a balance. It has not all gone away as some would allege.

Senator PRYOR. Thank you, Mr. Chairman.

Senator VOINOVICH. I would like to thank the panel. I look forward to future oversight hearings that we will have. Mr. Walker, I appreciate your continued interest in what is happening in Homeland Security.

I would like to add, Mr. James and Dr. Sanders, I am very much impressed with the detail that you have provided. You understand what you are doing, and that is very comforting to me. Often people are not as familiar with some of the details as you are, and I am impressed. I thank you for the time and effort you have put into it.

In the future the Subcommittee will examine specific areas of the new human resources system, such as the transition from the General Schedule to pay banding, the fairness of training, both generally for the DHS workforce and specifically for the new personnel system, and whether employees' voices are heard and responded to as the personnel system is implemented.

In addition we will evaluate the effectiveness of the top leadership of the Department and the thoroughness of DHS's communication strategy. For example, I am very impressed with what Mr. Walker has discussed regarding his involvement in communicating with GAO employees. So often things get started and then employees are not informed. As a result, rumors are circulated and people believe things that are not a fact.

Thorough communication for the new personnel system is extremely important.

Furthermore, the performance management system, including the Department's human capital plan, is something that this Sub-

committee will continue to monitor. I want you to know that I want the new personnel system to be a success. I want it to be a success because we are depending on this Department for our security. I am very concerned about the stress that many Americans feel in terms of the potential of terrorism. I would like for my children and grandchildren to live in an America that they know is secure. I do not want them to have these worries with them every day as they go to and from work or to school. It is a heavy, heavy responsibility that you have.

Another issue as you know, is on whether the similar reforms should be extended to the rest of the government. I have talked to the Chairman of this Committee about this issue. How well the Department of Homeland Security implements this system will heavily influence whether those of us in Congress are going to be receptive to that proposal.

Thank you for being here.

Mr. JAMES. Senator, if I could just on a personal note, thank you, and I promise you personally that I heard your comments about the need to continue the collaboration, and whether it is performance management or labor relations, where we do have significant differences, we will continue. I will personally continue to keep the communication lines open because it is critical that we involve our employee representatives. I will take your advice, not as a criticism but just as a admonishment that I need to do better, that we will do better going forward. I thank you.

Senator VOINOVICH. Thank you.

We will take a 5-minute recess as the next panel comes to the table.

[Recess.]

Senator VOINOVICH. If our second panel will come to the witness table, I appreciate your patience.

Do you swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. PERKINSON. I do.

Ms. KELLEY. I do.

Mr. GAGE. I do.

Mr. BROWN. I do.

Mr. MANN. I do.

Senator VOINOVICH. Let the record show that the witnesses answered in the affirmative.

Our next panel consists of representatives of the employees at the Department of Homeland Security: Darryl Perkinson is the National Vice President for the Federal Managers Association; Colleen Kelley is President of the National Treasury Employees Union; John Gage is the National President of the American Federation of Government Employees; Richard Brown is President of the National Federation of Federal Employees; and Kim Mann is the General Counsel of the National Association of Agriculture Employees.

I want to thank all of you for coming today. I know that you have spent the past 2 years working tirelessly with the Department of Homeland Security and the Office of Personnel Management on developing the new human resources management system. I also know that you have many concerns. Some of you have made them

known to me privately, and we do look forward to hearing your testimony today.

Mr. Perkinson, we will start with you. As I mentioned to the other panel, I would like you to try to limit your remarks to 5 minutes. Your complete statement will be printed in the record. Mr. Perkinson.

TESTIMONY OF DARRYL A. PERKINSON,[1] NATIONAL VICE PRESIDENT, FEDERAL MANAGERS ASSOCIATION

Mr. PERKINSON. Chairman Voinovich, Ranking Member Akaka, and distinguished Members of the Subcommittee, I sit before you today as the National Vice President of the Federal Managers Association, which represents the interests of nearly 200,000 managers, supervisors, and executives in the Federal Government, including those managers in the Department of Homeland Security. I am presently a supervisor training specialist at Norfolk Naval Shipyard in Portsmouth, Virginia, where I have been in management for nearly 20 years. Let me begin by thanking you for allowing me this opportunity to express FMA's views regarding the final personnel regulations at DHS.

I hope that we can continue to have more opportunities in the future to engage in this dialogue about the best way of governing the most efficient and effective workforce to protect American soil. Managers and supervisors are in a unique position under these final regulations. Not only will they be responsible for the implementation of the Department's new personnel system, they will also be subjected to its same requirements. As such, managers and supervisors are pivotal to ensuring the success of this new system.

We at FMA recognize that change does not happen overnight. We remain optimistic that the new personnel system may help bring together the mission and goals of the Department with the on-the-ground functions of the Homeland Security workforce.

Two of the most important components to implementing a successful new personnel system are training and funding. Managers and employees need to see leadership from the Secretary on down that supports a collaborative training program and budget proposals that make room to do so. We also need the consistent oversight and appropriation of proper funding levels from Congress to ensure that both employees and managers receive sufficient training in order to do their jobs most effectively.

As any Federal employee knows, the first item to get cut when budgets are tightened is training. Mr. Chairman, you have been stalwart in your efforts to highlight the importance of training across government. It is crucial that this happens in the implementation of these regulations. Training of managers and employees on their rights, responsibilities, and expectations through a collaborative and transparent process will help to allay concerns and create an environment focused on the mission at hand.

Managers have also been given the authorities under the final regulations in the areas of performance review and pay-for-performance. We must keep in mind that managers will also be reviewed on their performance and hopefully compensated accord-

[1] The prepared statement of Mr. Perkinson appears in the Appendix on page 94.

ingly. As a consequence, if there is not a proper training system in place and budgets that allow for adequate funding, the system is doomed to failure from the start. Our message is this: As managers and supervisors, we cannot do this alone. Collaboration between manager and employee must be encouraged in order to debunk the myths and create the performance- and results-oriented culture that is so desired by these final regulations.

Managers have also been given greater authorities in the performance review process that more directly links employees' pay to their performance. We believe that transparency leads to transportability, as intra-department job transfers could be complicated by the lack of a consistent and uniform methodology for performance reviews.

FMA supports an open and fair labor relations process that protects the rights of the employees and creates a work environment that allows employees and managers to do their jobs without fear of retaliation or abuse.

The new system has relegated the authority for determining collective bargaining rights to the Secretary. Toward this end, the recognition of management organizations such as FMA is a fundamental part of a collaborative and congenial work environment. Title 5 CFR 251/252 allows FMA as an example to come to the table with DHS leadership and discuss issues that affect managers and supervisors. While this process is not binding arbitration, the ability for managers and supervisors to have a voice in the policy development within the Department is crucial to its long-term vitality.

There has also been a commitment on the part of OPM, DHS, and DOD to hold close the Merit System principles, and we cannot stress adherence to those timely standards enough. However, we also believe there needs to be additional guiding principles that link all organizations of the Federal Government within the framework of a unique and single civil service.

We, at FMA, are cautiously optimistic that the new personnel system at DHS will be as dynamic, flexible, and responsive to modern threats as it needs to be. While we remain concerned with some areas at the dawn of the system's rollout, the willingness of OPM and DHS to reach out to employee organizations, such as FMA, is a positive indicator of collaboration and transparency. We look forward to continuing to work closely with Department and Agency officials.

Thank you again, Mr. Chairman, for the opportunity to testify before your Subcommittee and for your time and attention to this most important matter. Should you need additional feedback or have any questions, we would be glad to offer our assistance. Thank you.

Senator VOINOVICH. Thank you, Mr. Perkinson.

Colleen Kelley, welcome back. You have appeared before this Subcommittee on many occasions, and I am grateful for your commitment to open communication on these important issues. I know my staff appreciates the ongoing communication they have with your staff. Thank you for being here today.

TESTIMONY OF COLLEEN M. KELLEY,[1] PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Ms. KELLEY. Thank you very much, Senator. Chairman Voinovich, and Senator Pryor, I really appreciate the opportunity for NTEU to share its views with you on the new DHS personnel system. Fifteen thousand employees in the Department are represented by NTEU and will live under these regulations.

It is unfortunate that after 2 years of collaborating with DHS and OPM on this new system that I come before the Subcommittee today unable to support the final regulations.

Because these regulations fall woefully short on a number of the Homeland Security Act's statutory mandates in the area of collective bargaining and employee appeal rights, NTEU, along with our fellow Federal employee unions, has filed a lawsuit in Federal court. The lawsuit seeks to prevent DHS and OPM from implementing these final regulations related to these areas and would order DHS and OPM to withdraw the regulations and issue new regulations that fully comply with the relevant statutes.

The Homeland Security Act requires that any new human resource management system "ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them." NTEU believes that the final regulations do not meet this statutory requirement in the following ways:

Under the final personnel regulations, the responsibility for deciding collective bargaining disputes will lie with a three-member DHS Labor Relations Board that is appointed by the Secretary with no Senate confirmation. A true system of collective bargaining demands independent, third-party determination of disputes. The final regulations do not provide for that.

Second, under the final regulations, not only will management rights associated with operational matters, such as deployment of personnel, assignment of work, and the use of technology, be non-negotiable, but even the impact and implementation of most management actions will be non-negotiable.

Third, the final regulations further reduce DHS' obligation to collectively bargain over the already narrowed scope of negotiable matters by making department-wide regulations non-negotiable. Bargaining is currently precluded only over government-wide regulations and Agency regulations for which a compelling need exists.

A real-life example of the adverse impact of the negotiability limitations on both employees and the Agency will be in the area of determining work shifts, even when these shifts last for more than 60 days. The current system provides that employees have a transparent and explainable system. After management determines the qualifications needed for employees to staff shifts and assignments, negotiated processes provide opportunities for employees to select shifts that take into consideration important quality-of-life issues of individual employees, such as child care, elder care, the ability to work night shifts or rotating shifts. There will be no such negotiated process under the regulations as issued. The impact of these

[1] The prepared statement of Ms. Kelley appears in the Appendix on page 110.

changes will have a huge impact on employees and be a huge detriment to Homeland Security's recruitment and retention efforts.

One of the core statutory underpinnings of the Homeland Security Act was Congress' determination that DHS employees should be afforded due process in appeals they bring before the Department. The HSA clearly states that the DHS Secretary and OPM Director may modify the current appeals procedures of Title 5 only in order to "further the fair, efficient, and expeditious resolution of matters involving the employees of the department." Instead, the final regulations undermine this statutory provision by eliminating the Merit System Protection Board's current authority to modify unreasonable Agency-imposed penalties. The new regs authorize the MSPB to modify penalties only where they are "wholly unjustified". This "wholly unjustified" is a new standard that will be virtually impossible for DHS employees to meet.

The final regulations also provide the Secretary with unfettered discretion to create a list of mandatory removal offenses that will only be appealable on the merits to an internal DHS Mandatory Removal Panel appointed by the Secretary.

The President's 2006 budget again proposes that a similar proposal that exists in the IRS today should be dropped. It is known as the "10 deadly sins," and the President's budget wants it removed from the IRS to allow the Agency more discretion. This draconian, inflexible provision should also be dropped from the DHS regulations.

The final regulations as they relate to changes in the current pay, performance, and classification systems of DHS employees also remain woefully short on details. Currently, performance evaluations have little credibility among the workforce, but it appears that now these subjective measures will become the determinant of individual pay increases under the new system. This will lead to more recruitment and retention problems at DHS, not less. This kind of a system will be particularly problematic for the tens of thousands of DHS employees, such as CPB officers, who perform law enforcement duties where teamwork is critically important to their successful achievement of the Department's goals.

Based on our serious concerns with regard to these regulations, NTEU urges both Congress and the Administration not to extend them throughout the Federal Government as proposed. As was already noted, the Homeland Security Act provided for these changes based on national security considerations. Those considerations do not apply to the rest of the government.

I appreciate and agree with the comments made by several Senators on this Subcommittee that it would be premature to expand these rules until there is at least some sense of their impact in DHS. I look forward to continuing to work with this Subcommittee to help the Department of Homeland Security meet its critical mission. NTEU wants this Department to be successful, just as every American does, and I look forward to any questions you might have. Thank you.

Senator VOINOVICH. Thank you.

Mr. Gage, I had a fairly good working relationship with your predecessor, Bobby Harnage. Since you have been on board, you and I have not seen that much of each other, and I think that I

would like to see more of you and your staff. As we move through this implementation process, talking about it would be very helpful to me. I just want you to know I would welcome your input, and thank you for being here today.

TESTIMONY OF JOHN GAGE,[1] NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Mr. GAGE. Thank you, Senator Voinovich and Senator Pryor, it is a pleasure to be here.

Mr. Chairman, DHS regulations usurp not only the rights and protections of our members, they also undermine the authority of the Congress to set the standards for a politically independent civil service. The DHS regulations rest upon a false premise: That carefully designed civil service procedures that have stood the test of time are an obstacle to homeland security, and that union representation interferes with the protection of the American public from terrorist threats. Neither of these premises has any validity, but now DHS has put forth a personnel system that undermines the integrity of the civil service, its political neutrality, its merit-based personnel management system, its market-based pay system, its public accountability, and its tolerance for democratically elected unions.

In the year-long process of formal and informal consultation with those who would be directly affected by any new DHS systems, the unions participated in absolute good faith. We offered proposals that I describe in detail in my written statement that conceded the Agency's right to implement any action it considered necessary to protect homeland security. But the Agency's problems were process, and to take care of process problems they took away rights. And that is our objection.

Our offers and our proposals were ignored in their entirety. The DHS internal review panels are also described in detail in my written statement. It is absurd to pretend that a panel consisting solely of management appointees can be a fair or disinterested arbiter of labor-management disputes. In addition, DHS has insulated this inevitably biased panel from outside review or accountability by dictating the MSPB standards for adjudication.

Specifically, DHS has told the MSPB that in its review of the penalties and disciplinary actions taken against DHS employees, the MSPB may no longer consider the Douglas mitigating factors which were developed by the courts and have been successfully used by them for more than 25 years. These factors include the nature and seriousness of the offense, its relation to the worker's duties, position, and responsibilities, whether the offense was intentional or inadvertent, was committed maliciously or for personal gain, or whether it was repeated. By DHS edict, the MSPB or arbitrators can no longer consider a worker's past disciplinary record, work record, length of service, or performance. The MSPB or arbitrators may no longer check the consistency of the penalty with those imposed on others for the same offense.

These are the kinds of considerations DHS has decided are either not modern or not consistent with homeland security, and these are

[1] The prepared statement of Mr. Gage appears in the Appendix on page 122.

the kinds of considerations that we think form the basis of a fair and rational and politically independent civil service system. We simply cannot understand how DHS can interpret its authority to include dictating to the MSPB in this way, and we cannot understand how anyone could connect consideration of these kinds of mitigating factors with exposing our Nation to an increased threat from terrorists.

The DHS regulations narrow the scope of collective bargaining. In practice, neither management nor the affected workforce will be able to negotiate over work schedules, overtime, detailed selection methods, uniforms, dress codes, health and safety procedures, or travel. And the Agency has authorized itself without limitation to issue Agency-wide prohibitions on bargaining over the few issues that remain negotiable.

Finally, DHS gave itself the right to invalidate any provision of an existing collective bargaining agreement. This is not flexible. This is not modern. This is not even credible. In the aftermath of the September 11 attacks, when the INS official line was that our Northern border was entirely safe and protected, two courageous front-line Border Patrol agents from Michigan stepped forward to tell Congress the truth about our Nation's vulnerabilities. As a direct response to these disclosures, the Congress voted to triple the number of Border Patrol agents, immigration inspectors, and Customs Service personnel along the Northern border. The INS management's direct response, however, was to release these Border Patrol agents for speaking out, and it was only through the intervention of their union and eventually the Congress that the retaliatory firings were avoided. Under the DHS regulations, the union will be unable to protect whistle-blowers in cases like these, and all of us will be less secure as a result.

The Agency likes to tout its rules as being mainly about transforming the pay system into one that will reward high performance. We wish that were so. The fact is that it is not a pay system at all. It is unbridled discretion to set salaries on an individual-by-individual basis. There will be no necessary consistencies between salaries of those with identical job duties or between salary adjustments for those subject to the same market forces.

There is no extra funding to avoid having a zero-sum competition that makes anyone's gain someone else's loss, making a mockery of the kind of teamwork and cooperation that is crucial for successful law enforcement. There is nothing in place to hold managers accountable for pay decisions. There is nothing to prevent pay-for-performance from being used to depress overall Federal pay. And there is no doubt that it will be used to drop the bottom out of Federal pay scales. We predict chaos, litigation, and very low morale.

We also predict that you and your colleagues will be hearing a lot from DHS employees. After all, Congress established several chapters of Title 5 so that employee concerns, whether individual or collective, could be raised and resolved in an open, balanced, and fair system. With a statutory system, no one promised that there would never be problems, only that they could be resolved in ways that would allow employees and their supervisors to get on with their work and their lives. Now DHS employees' only recourse will be their Representatives and Senators.

In closing, Mr. Chairman, I would like to urge this Committee to initiate legislation that will restore the scope of collective bargaining for DHS and, in so doing, reinstitute checks and balances that are so necessary. We ask that you ensure that whatever DHS managers do with pay, employees at least be kept on par with the rest of the Federal workforce in terms of funding so that the Agency does not suffer constant turnover and the loss of experienced workers. We also ask you to step in and restore the mitigation power to neutral outside adjudicators and eliminate the internal Labor Relations Review Boards that will have no credibility either within or outside the Agency.

Thank you, Mr. Chairman.

Senator VOINOVICH. Thank you, Mr. Gage. Mr. Brown.

TESTIMONY OF RICHARD N. BROWN,[1] NATIONAL PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Mr. BROWN. Mr. Chairman, Ranking Member Akaka, and Senator Pryor, thank you for allowing this testimony today. Certainly the statement is longer than 5 minutes, but I will shorten that up to something that I believe needs to be stated here publicly.

As you know, the National Federation of Federal Employees is affiliated with the International Association of Machinists and Aerospace Workers, and we have also been designated by the National Association of Government Employees as well as the Metal Trades Department of the AFL-CIO to deal with DHS matters.

One of NFFE's principal DHS bargaining units is the U.S. Coast Guard's Civil Engineering Unit of roughly 50 employees out of Providence, Rhode Island (CEU Providence). The employees at this facility serve the First Coast Guard District, the Northeast, including all of New England and parts of New York and New Jersey.

The employees of CEU Providence, mostly architects, engineers, environmental specialists, planners, real property specialists, and contracting officers, provide facilities management and engineering services for the shore plan in the First District, which covers over 1,500 structures located in seven States. The shore plan consists of a variety of structures that enable the Coast Guard operations, such as piers, fueling facilities, aviation facilities, firing ranges, barracks, communications towers, and aids to navigation. In short, the employees of CEU Providence make sure our Coast Guard has the facilities necessary to protect this country.

CEU Providence is a high-performing facility, with approximately 85 percent of its work being done in-house, using their own design professionals. The CEU Providence has received awards for their efficiency, honoring their ability to save millions in consulting fees and freeing those resources for actual construction projects.

In April 2003, the employee representatives of the CEU Providence bargaining unit from NFFE Local 1164 went into contract negotiations with management. Keep in mind this took place after the establishment of the Department of Homeland Security.

Contrary to what DHS might want you to think is the case, Department officials in contract negotiations had absolutely no proposals whatsoever regarding national security. Now, I would think

[1] The prepared statement of Mr. Brown appears in the Appendix on page 142.

that if labor unions and the work rules spelled out in collective bargaining agreements were truly hampering national security, the Agency certainly would have raised some concerns. The reason they did not raise any concerns is that the unions and the collective bargaining agreements do not impede national security in any way. Under prior law, the Agency had the ability to take "whatever action may be necessary to carry out the Agency mission during emergencies," including the ability to remove an employee on his first offense or make unilateral changes to working conditions if needed by acting first and negotiating later. It is not just the CEU Providence installation that has been unable to come up with any rationale how unions might hamper national security. During the meet and confer process with DHS and OPM staff, management was unable to cite a single case where the union, or a collective bargaining agreement, for that matter, had in any way compromised national security nationwide.

But let me tell you where the overhaul of the personnel system becomes problematic. I was telling you about the contract negotiations at CEU Providence bargaining unit. By July 16, 2003, the contract was agreed upon and signed. It was shortly thereafter approved by the Agency head, who again had no suggestions for changes related to national security. For over a year now, management and bargaining unit employees have lived happily under that contract.

The CEU Providence installation is a good example of effective and productive labor-management relations at DHS. It is evident that the rules under Chapter 71 are working well for the Department. Under the newly issued regulations, I believe labor-management relations at DHS will experience significant breakdown, and success stories such as those at CEU Providence will be hard to come by. I predict moving into a new system will be a disaster for employees at the Department for two main reasons:

One, under the new regulations, extensive questions will emerge as to whether many of the articles and provisions of our contract will be deemed negotiable under DHS rules. The parties will be compelled to go before the DHS Labor Relations Board, a board which does not currently exist, to answer questions under procedures that are currently unwritten. Both sides will spend a considerable amount of time preparing testimony, evidence, and arguments that support its position. Rather than prompt, efficient completion and execution of a collective bargaining agreement, we will be seeking third-party assistance to apply rules which have not been created. I ask you how these frustrations, this delay, and this expenditure enhance homeland security.

Two, DHS employees on the whole are uneasy about the new personnel system. The uncurbed authority to impose severe disciplinary penalties for illegitimate reasons, the ability to significantly reduce the pay of employees without having to provide any justification, and the power to arbitrarily reassign employees anywhere in the country on a temporary or permanent basis will be demoralizing to Federal workers and will reduce the ability to recruit and retain quality employees. This will substantially hurt the Department's ability to carry out its mission.

NFFE greatly appreciates the Subcommittee's decision to hold this hearing and to listen to the views of the DHS employee representatives. It is our opinion that the authorities granted to DHS under the new regulations are overly broad and excessive. More importantly, they are not in compliance with the Homeland Security Act on a number of accounts. The sum total of the new system as proposed is one that will be demoralizing to Department employees. Implementing this personnel system will certainly have harmful influence on the ability of the Department to carry out its mission, as I stated earlier.

This concludes my statement. Once again I thank the Subcommittee for the opportunity to give my testimony.

Senator VOINOVICH. Thank you, Mr. Brown. Mr. Mann.

TESTIMONY OF KIM MANN,[1] ON BEHALF OF THE NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES

Mr. MANN. Mr. Chairman, and Senator Akaka, I represent the National Association of Agriculture Employees, by far the smallest union at the table, and we do appreciate an opportunity to address this Subcommittee. We certainly agree with the specific detailed critique given by Colleen Kelley, John Gage, and Richard Brown, and I am not going to try to repeat their comments here today. But I wanted to give you first a very brief glimpse as to what NAAE is and, more importantly, who we represent. We are unique. We want to express more than the details about the system which we believe is flawed. We want to express how that flawed system will impact the people it is intended to govern. And we believe that impact also is going to have a big impact on the mission of the Department of Homeland Security.

We represent 2,000 bargaining unit positions—and that is the key word, positions—that were transferred to the Department of Homeland Security in March 2002. These 2,000 positions represent employees we call Agricultural Specialists and Agriculture Technicians, and they are unique. They have a unique mission. Their mission, not like these gentlemen, not like Ms. Kelley's people, but their mission is to protect American agriculture. That is one of the stated primary missions of the Department of Homeland Security, according to the Homeland Security Act. The 2,000 positions came over from the U.S. Department of Agriculture, from an Agency within USDA called Animal and Plant Health Inspection Service. The mission of these 2,000 transferred employees really is to protect American agriculture. They do that by performing agriculture quarantine inspection services, or what we call AQI services. No one else in CBP, Customs and Border Protection, has the education, the training, or the expertise to perform those services. NAAE, like NTEU and AFGE, participated actively in the DHS process that led to these regulations.

We have a very simple, straightforward message that we would like to deliver to this Subcommittee this morning, and that is, if these regulations are allowed to go into effect as written, they will jeopardize American agriculture. Count on it.

[1] The prepared statement of Mr. Mann appears in the Appendix on page 152.

During the past 2 years, CBP has watched its cadre of Legacy Agriculture employees—that is what we call our Agriculture Specialists and Technicians—dwindle from 2,000-plus positions, transferred in March 2003, to approximately 1,300 people today. That is about a 40-percent decline in personnel. These are the trained, highly educated professionals who are charged with protecting American agriculture. The how and the why behind this dangerous decline is really the key to understanding why NAAE is so concerned about the adverse impact of these regulations upon U.S. agriculture.

How has CBP precipitated this 40-percent decline? Well, it has consciously ignored the agriculture mission component of its overall mission. This is the principal mission of the Agriculture Specialists and Technicians. It has also done so by consciously disregarding the rights of Agriculture Specialists as valued employees. Unlike the Legacy Customs and Legacy Immigration colleagues with whom they work, the CBP Agriculture Specialists are college graduates with degrees in the biological sciences. Many have graduate degrees in the sciences. They are trained and experienced in detecting and eradicating plant and animal pests and diseases that threaten American agriculture. They are not law enforcement officers. They do not have arrest powers. They do not carry a gun. They are simply trained to detect pests and diseases that are likely to enter this country. And yet CBP in a proceeding pending before FLRA is challenging the status of these employees as professional employees. Why the decline has occurred in the past 2 years? Morale has been driven to a breaking point. And these CBP Agriculture Specialists in particular have responded by walking. They have bailed out of CBP at an alarming rate, quitting. Many of them have gone back to USDA and Animal and Plant Health Inspection Service where the agriculture mission is alive and well.

The new DHS regulations codify in effect this unilateral power that CBP management already exercises over the Legacy Agriculture employees' rights and conditions of employment. These regulations as a practical matter eliminate negotiation rights and deprive third-party review boards of the power to mitigate. They install pay-for-performance schemes in which top performers are not assured of appropriate rewards for excellent performance.

The regs virtually promise to widen the gap between the CBP staffing levels needed to protect American agriculture and those achievable under the personnel system. This threat to American agriculture is not theoretical. It has already led to unprecedented recalls of commodities found to have contained agriculture infested pests, primarily the long-horned beetle. I have detailed those recalls in my written testimony, and yet today—yesterday an APHIS newsletter reported another major outbreak of the Asian longhorned beetle in New Jersey. This comes from the solid wood packing material from China, and basically CBP has almost stopped inspecting for that particular commodity.

My time is up, and I thank you very much for listening to our concerns, and we would be happy to answer any questions.

Senator VOINOVICH. Thank you very much.

All of you have been very critical of these regulations. Is there anything good? If you are not willing to share any thoughts on

what is good, please discuss where the Department has been responsive to your concerns. There have been some changes in the regulations, and I mentioned several of them in my opening statement. The most important thing that I am interested in is whether there is any consensus on two or three reforms that could really make a significant difference for the new personnel system? I have heard from all sides concerns about retention and recruiting. Second, I have heard concerns that once people are hired, we may lose them because of reduced collective bargaining rights.

Ms. Kelley, I would like to start out with you.

Ms. KELLEY. I would definitely say and acknowledge, as I have, that there are changes that were made as a result of the 2 years we spent working with the Department and with OPM. You listed some of those. Some of them were listed by DHS and OPM. And we have acknowledged those.

The problem is that at the core of the collective bargaining issue, that language has been gutted and just precludes union involvement on issues critical to the employees who we represent.

I would say that there definitely were changes made that were positive as a result of our involvement, and if for no other reason, that was definitely worth it. It is very disappointing, though, that they did not listen to the very real solutions that we provided.

For example, even in the comments that you made, Mr. Chairman, about if anything was going to last more than 60 days, they had an obligation to bargain. That will rarely be the case because things as I described about shift assignments and selecting shifts and work assignments that today employees have a process that has rhyme and reason to it because of the negotiated system, that will not be required to be negotiated, even though it will last more than 60 days because the regulations define it as routine operational matters. And if the Department says it is a routine operational matter, they have no obligation to bargain regardless of how long it lasts. And we believe that the language in these regulations was written as it was in order to ensure that there are very narrow and limited situations where they have to engage the unions at all. That is the clear intent of the language of these regulations, and it should not be that way.

Senator VOINOVICH. In terms of shift assignments, is that in the collective bargaining agreement?

Ms. KELLEY. It is.

Senator VOINOVICH. For example, the longer you work for an agency, the more flexibility you have in terms of picking the shifts?

Ms. KELLEY. It would abrogate it. It would eliminate any negotiations of a process, and it would be up to management to unilaterally decide who would work and when, with no expectation on the part of employees that there will ever be an opportunity for that to change or for them to raise their hand and say I need to do this, I have a working spouse, I am a single parent, whatever. And there are processes today that allow employees to have that volunteer process. They were all negotiated and they work. For the Department to say that they get in the way of them delivering on their mission is just disingenuous.

Senator VOINOVICH. Any other comments on changes to regulation would make a difference? I have got to be frank with you.

Passing legislation is not going to be easy because the Administration will object to it. Furthermore for Congress, this is a political issue over which two campaigns were fought.

Is it possible for you to get together and develop changes you think will make a difference for us to evaluate. The issue is what can we do that will make a difference for your membership and allow the Department to move forward? You have a lawsuit filed and I do not know how long it will take for that to be resolved. Has the Court granted an injunction preventing implementation?

Ms. KELLEY. We are asking for that, but I would say the issue of pay, Chairman Voinovich, is one where a lot of the decisions have not been made. I know no more about the pay system they want to put in place today than I did a year ago, even though there have been constant communications about——

Senator VOINOVICH. You are talking about the pay-for-performance?

Ms. KELLEY. Yes, pay-for-performance, performance management system, the whole compensation system. The last conversation I had with Secretary Ridge on his last day as the Secretary was on the issue of our future involvement in helping to develop a system that is fair, credible, and transparent. So that opportunity is still there before us, and NTEU is looking forward to the opportunity to really have——

Senator VOINOVICH. So that is an action management may take.

Ms. KELLEY. Yes.

Senator VOINOVICH. There are a series of things that management could do to respond to many of your concerns without additional legislation. It is important for us to know what those things are as well so that we can bring to bear on them through oversight things that facilitate participation. Next, there are areas where we need to continue with strong oversight to make sure the new personnel system is implemented successfully.

Mr. GAGE. Senator, one of the things that I liked that we convinced them to do was to go slow on the pay. The Agency is still—"growing pains" is saying it——

Senator VOINOVICH. Yes, the challenge is merging 180,000 people. Mr. Mann, I am going to check into what you are saying. I am very concerned about losing good people. One of the most important people in this whole process—who I met her out in the hall—is retiring after 37 years. I became involved with Federal workforce issues 6 years ago because I was concerned about the looming human capital crisis. This was the year that 70 percent of our Senior Executive Service would be eligible to retire.

Mr. Gage, I am sorry. I interrupted you.

Mr. GAGE. Well, I was just going to make the point that I think that dropping this new personnel system and new pay on the Department of Homeland Security of all departments is really going to be a challenge. I have just great apprehension about what this type of system will do in law enforcement. It has never been shown to work in law enforcement. And I hear the human resource types talk about how they are going to be able to make this thing so far and objective, and I have been hearing that for years. But I am really concerned on that side that so many resources are going to go into the development of this system and into these personnel

changes, and they would be much better spent for front-line employees and more people out there doing the job of homeland security.

Senator VOINOVICH. Thank you. I want to make one point. I am beyond my 3 minutes here, but, Mr. Perkinson, I was really interested in your comments. You are more open than some of the other panelists here about this new system. To me that is important because it is your people who are going to be really involved in this.

Mr. PERKINSON. Exactly.

Senator VOINOVICH. I really want you to know that I want to hear from you. I have been through this. I did this when I was mayor. I did this when I was Governor, and this is not easy. So you are very important here. Your members must be trained because they will influence how the system works.

Would anybody like to comment? I have taken more time than I should.

Mr. MANN. Mr. Chairman, if I could just follow up, I agree with Colleen Kelley and John Gage that pay is probably the most important ingredient, the one thing that we could do something about. Obviously, our people would like to be treated as the professionals they are, but I do not think we can legislate or regulate that to happen. But that is part of our problem. Pay is the other part.

If they do not have a pay system that is fair and transparent—and by transparent, what I mean is one that is easy to understand by the employees it is intended to compensate the overall system is bound to fail. I have listened to the explanations that OPM and DHS staff have given as to what this pay system might look like. And I do not understand it myself, and I listened over and over again, and I think they had some rocket scientists in there trying to explain it to us, and they could not either. I am afraid that at the end of the day, that system is not going to be comprehended by the average person.

I am also concerned that the Agriculture Specialists and Technicians who are excellent performers are not going to be assured of any meaningful reward for that top performance.

Senator VOINOVICH. Well, can I make a suggestion to you?

Mr. MANN. Yes.

Senator VOINOVICH. If I were you, I would get a hold of David Walker and see what he has done in the Government Accountability Office. Their system is working, so it may provide a benchmark.

Mr. MANN. I heard his remarks, and I took note of that as well.

Senator VOINOVICH. What we are looking for here are benchmarks, exisiting systems for us to consider. They said there are 70,000 Federal employees that are involved in alternative personnel systems. I think maybe we need to talk to them.

Again, thank you very much for your testimony here today. Senator Akaka.

Senator AKAKA. Thank you very much, Mr. Chairman.

Taking it from the Chairman here, when he mentioned the lawsuit, in thinking back I think believe this is the first time unions have coordinated their efforts and filed a lawsuit against the government. And so I would like to ask a question to all of you about

the lawsuit that was filed to stop the implementation of the DHS personnel regulations.

I am interested in several of the issues raised in the filing, and I know there are many details that we can touch on, but I think your filing of the lawsuit and the reasons you did it are the basis of the problem. So I would ask each of you to elaborate just on the arguments made in the lawsuit, especially discussing judicial review and the limitations of independent, quasi-judicial agencies mandated by the regulations. I think these are important issues that will give us an idea of where you are and why you are doing this.

Let's start with Mr. Perkinson on this. Will you elaborate on your arguments?

Mr. PERKINSON. I cannot elaborate on the lawsuit for you, Senator, but I will go to Ms. Kelley for that.

Ms. KELLEY. The lawsuit is focused on the collective bargaining and on the appeals issues. I would note that there is no subject in the lawsuit that affects the pay-for-performance or compensation system today, perhaps in large part because we do not know a lot about it yet, but the lawsuit is only aimed at where we see the shortfalls in the collective bargaining and the appeals. And we believe they are in conflict with other statutes.

On the appeals issues, I guess the way I would explain it is that everything that the Department has set up in these regulations allows for internal review by the Department rather than outside review, as exists today for other Federal employees. And we believe that is wrong, first and foremost.

Second of all, it incorporates the FLRA and the MSPB into their regulatory processes, but defines their roles differently than those organizations. Those agencies have their own roles today defined by statute. The FLRA has its authority under statute. The MSPB has its authority. And these regulations choose to take those two agencies and narrow what it is they can do in the realm of the Department of Homeland Security. And we believe that they don't have the authority to do that. So that is what that part of the lawsuit is about.

And as to collective bargaining, this Congress, the Congress that passed the Homeland Security Act, made it very clear that its intent was that collective bargaining would continue and those rights would continue for employees within the Department. And if you look at the language in these regulations, that does not comply with the intent of Congress, in our opinion, because it so narrowly restricts and in many cases eliminates those rights, that it is not collective bargaining as is defined in the law today.

Senator AKAKA. Mr. Gage.

Mr. GAGE. I would just like to make two points. The mitigation of penalties is over the top where an arbitrator or an MSPB examiner cannot mitigate a penalty.

The second thing is on collective bargaining, and I heard Dr. Sanders here talk about how the union could stop implementation of a management initiative or a management exercise, and that is just not true. But the objections of the agencies to collective bargaining were on process, and we should have addressed it on how fast we can do bargaining, how management can set up a date

when they had to act and they could complete their obligations to talk to employees before then. But to say that, well, sometimes this process went on too long and even though the unions have put up proposals to really shorten it, we think we will just take the right away altogether, and that is what we are concerned about, and that is why we are pursuing this in the courts as well as every other forum. It is just wrong to take away rights when the process could be fixed.

Senator AKAKA. Mr. Brown.

Mr. BROWN. Yes, my esteemed colleagues here stated it quite clearly. I am not going to go on about that. But you have to understand that our membership lives by a collective bargaining agreement. It defines their work rules, or part of them, anyway, a good majority of them. And one of the previous panel members stated, well, what if we had to have practice to defend the homeland, we had to do this, we had to do that? What would make better sense than regulations, i.e., a collective bargaining agreement where verbiage is such that everyone knows what they have to live by, that it would not impede the implementation because it would have already been dealt with and everyone would have known the parameters which they would work under and how that would affect them on the job?

If you lose your voice in the workplace and do it because I said so and no other rationale, you will never have an employee workforce in any part of this country with the commitment that you have today. Thank you.

Senator AKAKA. Mr. Mann.

Mr. MANN. Senator Akaka, NAAE was not a primary architect of that complaint. We fully support it and we support its objectives. But as a lawyer, one of the things that intrigued me personally about the complaint is the attack upon the impermissible delegation of authority that DHS made in those regulations to MSPB and to FLRA. DHS does not have the authority to do that. It not only attempted to delegate authority, it also attempted to control the procedures and the protocol by which that authority would be used. So that delegation provision in the DHS regulations is something that I think really deserves to be reversed.

Senator AKAKA. Mr. Chairman, if you would permit me, may I ask a question of Mr. Perkinson?

Senator VOINOVICH. Yes.

Senator AKAKA. I strongly believe that for there to be any degree of success in carrying out the regulations, there must be continuous training—and the Chairman alluded to training—on the implementation of the new human resources system at DHS. Will you please describe the training Federal Managers members routinely receive on measuring performance and disciplining employees under the current system?

Mr. PERKINSON. One of our concerns, Senator, has been that under the current system, when it comes to grading performance, of course, with us going to the pass/fail system of performance, there is not extensive training on how we approach that type of system. Most of our agencies that we deal with have gone to pass/fail so there is not an extensive effort.

Where our concerns come from the Federal Managers Association is that with the move to pay-for-performance, we have to have transparency in some form of set pre-standards that the employee as well as the manager know what they are being measured against. That is going to be the difficulty. And when we look at Department of Homeland Security alone, we are looking at 22 disparate agencies that came together under one roof, and they all do not do the same type of work. So those measured performance levels that we would go measure people by in order to ensure that we are fair when we do pay-for-performance on the manager level is going to be very difficult, and it will take a lot more extensive training in the pay-for-performance area than we presently receive.

Senator AKAKA. If costs were not the issue, what further training would benefit managers?

Mr. PERKINSON. I think managers would need to have some type of understanding on how to rate personnel on an equitable basis, that we have to have a system in place and we have to have the measures in place, performance-based standards set for an employee when we sit down at the beginning of the year and say these are our expectations, not to steal a line from Mr. Covey, but win-win agreements or those types of things where you sit down with an employee. At our senior management level at some agencies, we have gone to win-win agreements where you know what your expectations are, and if you achieve them, those things will get you to the point where you receive your pay.

Now, I think when we go to pay banding and those type of things, it is going to be even more complicated to the point of how you determine your No. 10 player versus your No. 1 player. And those are the things—that is going to be a difficult and challenging task for a first-line manager to have to execute in the workplace.

Senator AKAKA. Thank you, everyone. Thank you, Mr. Chairman.

Senator VOINOVICH. Thank you.

Again, I want to thank all of you. I assure you that this is not the last of our oversight hearings on the implementation of these regulations. I would like you to collectively get together and come back with a consensus on what changes would make the biggest difference for the new personnel system.

Again, I want to emphasize that this is really important. The biggest threat we have in our country today will be tackled by this Department. We have to work together to make sure that we are secure.

Thank you.

[Whereupon, at 12:32 p.m., the Subcommittee was adjourned.]

APPENDIX

TITLE 5--GOVERNMENT ORGANIZATION AND EMPLOYEES

PART III--EMPLOYEES

Subpart A--General Provisions

CHAPTER 23--**MERIT SYSTEM PRINCIPLES**

Sec. 2301. **Merit system principles**

(a) This section shall apply to--
(1) an Executive agency; and
(2) the Government Printing Office.

(b) Federal personnel management should be implemented consistent with the following **merit system principles**:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be--

(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably

believe evidences--

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) In administering the provisions of this chapter--

(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority otherwise available under this title, take any action, including the issuance of rules, regulations, or directives; and

(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules, regulations, or directives;

which is consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the **merit system principles**.

(Added Pub. L. 95-454, title I, Sec. 101(a), Oct. 13, 1978, 92 Stat. 1113; amended Pub. L. 101-474, Sec. 5(c), Oct. 30, 1990, 104 Stat. 1099.)

Amendments

1990--Subsec. (a). Pub. L. 101-474 redesignated par. (3) as (2) and struck out former par. (2) which provided that this section is applicable to Administrative Office of United States Courts.

Effective Date

Chapter effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95-454, set out as an Effective Date of 1978 Amendment note under section 1101 of this title.

Section Referred to in Other Sections

This section is referred to in sections 2302, 4107, 4313, 5379 of this title; title 10 sections 1612, 1722; title 22 section 3902; title 31 section 732; title 41 section 433.

United States Government Accountability Office

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Testimony

Before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Committee on Homeland Security, and Governmental Affairs, U.S. Senate

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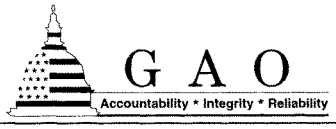
HUMAN CAPITAL

Preliminary Observations on Final Department of Homeland Security Human Capital Regulations

Statement of David M. Walker
Comptroller General of the United States



GAO-05-320T

February 10, 2005

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Highlights

Highlights of GAO-05-320T, a testimony before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Committee on Homeland Security and Governmental Affairs, U.S. Senate

HUMAN CAPITAL

Preliminary Observations on Final Department of Homeland Security Human Capital Regulations

Why GAO Did This Study

At the center of any agency transformation, such as the one envisioned for the Department of Homeland Security (DHS), are the people who will make it happen. Thus, strategic human capital management at DHS can help it marshal, manage, and maintain the people and skills needed to meet its critical mission. Congress provided DHS with significant flexibility to design a modern human capital management system. DHS and the Office of Personnel Management (OPM) have now jointly released the final regulations on DHS's new human capital system.

Last year, with the release of the proposed regulations, GAO observed that many of the basic principles underlying the regulations were consistent with proven approaches to strategic human capital management and deserved serious consideration. However, some parts of the human capital system raised questions for DHS, OPM, and Congress to consider in the areas of pay and performance management, adverse actions and appeals, and labor management relations. GAO also identified multiple implementation challenges for DHS once the final regulations for the new system were issued.

This testimony provides preliminary observations on selected provisions of the final regulations.

www.gao.gov/cgi-bin/getrpt?GAO-05-320T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Eileen Larence at (202) 512-6806 or larencee@gao.gov.

What GAO Found

GAO believes that the regulations contain many of the basic principles that are consistent with proven approaches to strategic human capital management. For example, many elements for a modern compensation system—such as occupational clusters, pay bands, and pay ranges that take into account factors such as labor market conditions—are to be incorporated into DHS's new system. However, these final regulations are intended to provide an outline and not a detailed, comprehensive presentation of how the new system will be implemented. Thus, DHS has considerable work ahead to define the details of the implementation of its system and understanding these details is important in assessing the overall system.

The implementation challenges we identified last year are still critical to the success of the new system. Also, DHS appears to be committed to continue to involve employees, including unions, throughout the implementation process. Specifically, according to the regulations, employee representatives or union officials are to have opportunities to participate in developing the implementing directives, hold four membership seats on the Homeland Security Compensation Committee, and help in the design and review the results of evaluations of the new system. Further, GAO believes that to help ensure the quality of that involvement, DHS will need to

- *Ensure sustained and committed leadership.* A Chief Operating Officer/Chief Management Officer or similar position at DHS would serve to elevate, integrate, and institutionalize responsibility for this critical endeavor and help ensure its success by providing the continuing, focused attention needed to successfully complete the multiyear conversion to the new human capital system.

- *Establish an overall communication strategy.* According to DHS, its planned communication strategy for its new human capital system will include global e-mails, satellite broadcasts, Web pages, and an internal DHS weekly newsletter. A key implementation step for DHS is to assure an effective and on-going two-way communication effort that creates shared expectations among managers, employees, customers, and stakeholders.

While GAO strongly supports human capital reform in the federal government, how it is done, when it is done, and the basis on which it is done can make all the difference in whether such efforts are successful. GAO's implementation of its own human capital authorities, such as pay bands and pay for performance, could help inform other organizations as they design systems to address their human capital needs. The final regulations for DHS's new system are especially critical because of the potential implications for related governmentwide reforms.

Chairman Voinovich and Members of the Subcommittee:

I appreciate the opportunity to be here today to provide our preliminary observations on the Department of Homeland Security's (DHS) final regulations on its new human capital system, which were published last week jointly by the Secretary of DHS and the Director of the Office of Personnel Management (OPM). As the title of this hearing suggests—"Unlocking the Potential within Homeland Security: The New Human Resources System"—at the center of any agency transformation, such as the one envisioned for DHS, are the people who make it happen. Thus, strategic human capital management at DHS can help it marshal, manage, and maintain the people and skills needed to meet its critical mission.

As we recently reported in our High-Risk Series, significant changes in how the federal workforce is managed, such as DHS's new human capital system, are underway.[1] Consequently, there is general recognition that the government needs a framework to guide this human capital reform, one that Congress and the administration can implement to enhance performance, ensure accountability, and position the nation for the future. These final regulations, which according to DHS will affect about 110,000 federal employees, are especially critical because of their implications for governmentwide reforms. My statement today makes three overall points.

First, DHS has considerable work ahead to define the details of the implementation of its system and understanding these details is important in assessing the overall system. Nonetheless, similar to the observations we made a year ago on the proposed DHS human capital regulations, we find that the final regulations contain many of the basic principles that are consistent with proven approaches to strategic human capital management, including several approaches used by GAO.[2] However, these final regulations are intended to provide an outline and not a detailed, comprehensive presentation of how the new system will be implemented. DHS is to issue implementing directives to carry out any policy or

[1]GAO, *High-Risk Series: An Update*, GAO-05-207 (Washington, D.C.: January 2005).

[2]GAO, *Human Capital: Preliminary Observations on Proposed DHS Human Capital Regulations*, GAO-04-479T (Washington, D.C.: Feb. 25, 2004); *Posthearing Questions Related to Proposed Department of Homeland Security (DHS) Human Capital Regulations*, GAO-04-570R (Washington, D.C.: Mar. 22, 2004); and *Additional Posthearing Questions Related to Proposed Department of Homeland Security (DHS) Human Capital Regulations*, GAO-04-617R (Washington, D.C.: Apr. 30, 2004).

procedure under the new system. Thus, how it is done, when it is done, and the basis on which it is done can make all the difference in whether DHS's human capital system will be successful.

Going forward, DHS and other agencies must ensure they have the institutional infrastructure in place to make effective use of their new authorities. This institutional infrastructure includes, at a minimum, a human capital planning process that integrates the agency's human capital policies, strategies, and programs with its program goals, mission, and desired outcomes; the capabilities to effectively develop and implement a new human capital system; and importantly, the existence of a modern, effective, and credible performance management system that includes adequate safeguards to ensure fair, effective, non-discriminatory, and credible implementation of the new system.

Second, DHS appears to be committed to continue to involve employees, including union officials, throughout the implementation process, another critical ingredient for success. Specifically, under the DHS final regulations, employee representatives or union officials are to have opportunities to participate in developing the implementing directives, as outlined under the "continuing collaboration" provisions; are to hold four membership seats on the Homeland Security Compensation Committee; and are to help in the design and review the results of evaluations of the new system. We believe that sustained and committed leadership can provide the continuing, focused attention needed to successfully complete this multiyear conversion to the new human capital system and an ongoing two-way communication strategy can help ensure the quality of that involvement.

Third, and finally, recent actions, as evidenced by these DHS final regulations, have significant, precedent-setting implications for the rest of government. They represent both progress and opportunities, but also raise legitimate concerns. We are fast approaching the point where "standard governmentwide" human capital policies and processes are neither standard nor governmentwide. Human capital reform should avoid further fragmentation within the civil service, ensure reasonable consistency within the overall civilian workforce, and help maintain a reasonably level playing field among federal agencies when competing for talent. Further, human capital reform should maintain key merit principles and appropriate safeguards against discrimination and other prohibited personnel practices.

This morning I would like to provide some observations on the final DHS regulations, discuss the multiple challenges that DHS confronts as it moves towards implementation of its new human capital system, and then suggest a governmentwide framework that can serve as a starting point to advance human capital reform. Lastly, I will highlight some of GAO's recent experiences in implementing a performance-based and market-oriented pay system since we believe that other agencies can benefit from our experiences.

Preliminary Observations on the Final DHS Human Capital Regulations

The final regulations establish a new human capital system for DHS that is intended to assure its ability to attract, retain, and reward a workforce that is able to meet its critical mission. Further, the human capital system is to provide for greater flexibility and accountability in the way employees are to be paid, developed, evaluated, afforded due process, and represented by labor organizations while reflecting the principles of merit and fairness embodied in the statutory merit systems principles.

Predictable with any change management initiative, the DHS regulations have raised some concerns among employee groups, unions, and other stakeholders because they do not have all the details of how the system will be implemented and impact them. We have reported that individuals inevitably worry during any change management initiative because of uncertainty over new policies and procedures.[3] A key practice to address this worry is to involve employees and their representatives to obtain their ideas and gain their ownership for the initiative. Thus, a significant improvement from the proposed regulations is that now employee representatives are to be provided with an opportunity to remain involved. Specifically, they can discuss their views with DHS officials and/or submit written comments as implementing directives are developed, as outlined under the "continuing collaboration" provisions. This collaboration is consistent with DHS's statutory authority to establish a new human capital system, which requires such continuing collaboration. Under the regulations, nothing in the continuing collaboration process is to affect the right of the Secretary to determine the content of implementing directives and to make them effective at any time.

[3]GAO, *Results-Oriented Cultures: Implementation Steps to Assist Mergers and Organizational Transformations*, GAO-03-669 (Washington, D.C.: July 2, 2003) and *Highlights of a GAO Forum: Lessons Learned for a Department of Homeland Security and Other Federal Agencies*, GAO-03-293SP (Washington, D.C.: Nov. 14, 2002).

In addition, the final regulations state that DHS is to establish procedures for evaluating the implementation of its human capital system. High-performing organizations continually review and revise their human capital management systems based on data-driven lessons learned and changing needs in the environment. Collecting and analyzing data is the fundamental building block for measuring the effectiveness of these systems in support of the mission and goals of the agency.

We continue to believe that many of the basic principles underlying the DHS regulations are generally consistent with proven approaches to strategic human capital management. Today, I will provide our preliminary observations on the following elements of DHS's human capital system as outlined in the final regulations—pay and performance management, adverse actions and appeals, and labor-management relations.

Pay and Performance Management

Last year, we testified that the DHS proposal reflects a growing understanding that the federal government needs to fundamentally rethink its current approach to pay and better link pay to individual and organizational performance.[4] To this end, the DHS proposal takes another valuable step towards modern performance management. Among the key provisions is a performance-based and market-oriented pay system.

We have observed that a competitive compensation system can help organizations attract and retain a quality workforce.[5] To begin to develop such a system, organizations assess the skills and knowledge they need; compare compensation against other public, private, or nonprofit entities competing for the same talent in a given locality; and classify positions along levels of responsibility. While one size does not fit all, organizations generally structure their competitive compensation systems to separate base salary—which all employees receive—from other special incentives, such as merit increases, performance awards, or bonuses, which are provided based on performance and contributions to organizational results.

According to the final regulations, DHS is to establish occupational clusters and pay bands that replace the current General Schedule (GS) system now

[4]GAO-04-479T.

[5]GAO-04-617R.

in place for much of the civil service. DHS may, after coordination with OPM, establish occupational clusters based on factors such as mission or function, nature of work, qualifications or competencies, career or pay progression patterns, relevant labor-market features, and other characteristics of those occupations or positions. DHS is to document in implementing directives the criteria and rationale for grouping occupations or positions into clusters as well as the definitions for each band's range of difficulty and responsibility, qualifications, competencies, or other characteristics of the work.

As we testified last year, pay banding and movement to broader occupational clusters can both facilitate DHS's movement to a pay for performance system and help DHS to better define occupations, which can improve the hiring process. We have reported that the current GS system as defined in the Classification Act of 1949 is a key barrier to comprehensive human capital reform and the creation of broader occupational job clusters and pay bands would aid other agencies as they seek to modernize their personnel systems.[6] Today's jobs in knowledge-based organizations require a much broader array of tasks that may cross over the narrow and rigid boundaries of job classifications of the GS system.

Under the final regulations, DHS is to convert employees from the GS system to the new system without a reduction in their current pay. According to DHS, when employees are converted from the GS system to a pay band, their base pay is to be adjusted to include a percentage of their next within-grade increase, based on the time spent in their current step and the waiting period for the next step. DHS stated that most employees would receive a slight increase in salary upon conversion to a pay band. This approach is consistent with how several of OPM's personnel demonstration projects converted employees from the GS system.

The final DHS regulations include other elements of a modern compensation system. For example, the regulations provide that DHS may, after coordination with OPM, set and adjust the pay ranges for each pay band taking into account mission requirements, labor market conditions, availability of funds, pay adjustments received by other federal employees, and any other relevant factors. In addition, DHS may, after coordination with OPM, establish locality rate supplements for different occupational

[6]GAO, *Human Capital: Opportunities to Improve Executive Agencies' Hiring Processes*, GAO-03-450 (Washington, D.C.: May 30, 2003).

clusters or for different bands within the same cluster in the same locality pay area. According to DHS, these locality rates would be based on the cost of labor rather than cost of living factors. The regulations state that DHS would use recruitment or retention bonuses if it experiences such problems due to living costs in a particular geographic area.

Especially when developing a new performance management system, high-performing organizations have found that actively involving employees and key stakeholders, such as unions or other employee associations, helps gain ownership of the system and improves employees' confidence and belief in the fairness of the system.[7] DHS recognized that the system must be designed and implemented in a transparent and credible manner that involves employees and employee representatives. A new and positive addition to the final regulations is a Homeland Security Compensation Committee that is to provide oversight and transparency to the compensation process. The committee—consisting of 14 members, including four officials of labor organizations—is to develop recommendations and options for the Secretary's consideration on compensation and performance management matters, including the annual allocation of funds between market and performance pay adjustments.

While the DHS regulations contain many elements of a performance-based and market-oriented pay system, there are several issues that we identified last year that DHS will need to continue to address as it moves forward with the implementation of the system. These issues include linking organizational goals to individual performance, using competencies to provide a fuller assessment of performance, making meaningful distinctions in employee performance, and continuing to incorporate adequate safeguards to ensure fairness and guard against abuse.

[7]GAO, *Results-Oriented Cultures: Creating a Clear Linkage between Individual Performance and Organizational Success*, GAO-03-488 (Washington, D.C.: Mar. 14, 2003).

Linking Organizational Goals to Individual Performance

Consistent with leading practice, the DHS performance management system is to align individual performance expectations with the mission, strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance. DHS's performance management system can be a vital tool for aligning the organization with desired results and creating a "line of sight" showing how team, unit, and individual performance can contribute to overall organizational results.[8] However, as we testified last year, agencies struggle to create this line of sight.

Using Competencies to Provide a Fuller Assessment of Performance

DHS appropriately recognizes that given its vast diversity of work, managers and employees need flexibility in crafting specific performance expectations for their employees. These expectations may take the form of competencies an employee is expected to demonstrate on the job, among other things. However, as DHS develops its implementing directives, the experiences of leading organizations suggest that DHS should reconsider its position to merely allow, rather than require, the use of core competencies that employees must demonstrate as a central feature of its performance management system. Based on our review of others' efforts and our own experience at GAO, core competencies can help reinforce employee behaviors and actions that support the department's mission, goals, and values and can provide a consistent message to employees about how they are expected to achieve results.[9] For example, an OPM personnel demonstration project—the Civilian Acquisition Workforce Personnel Demonstration Project—covers various organizational units within the Department of Defense and applies core competencies for all employees, such as teamwork/cooperation, customer relations, leadership/supervision, and communication.

Similarly, as we testified last year, DHS could use competencies—such as achieving results, change management, cultural sensitivity, teamwork and collaboration, and information sharing—to reinforce employee behaviors and actions that support its mission, goals, and values and to set expectations for individuals' roles in DHS's transformation. By including such competencies throughout its performance management system, DHS

[8]GAO-03-488.

[9]GAO, *Human Capital: Implementing Pay for Performance at Selected Personnel Demonstration Projects*, GAO-04-83 (Washington, D.C.: Jan. 23, 2004).

could create a shared responsibility for organizational success and help assure accountability for change.

Making Meaningful Distinctions in Employee Performance

High-performing organizations seek to create pay, incentive, and reward systems that clearly link employee knowledge, skills, and contributions to organizational results. These organizations make meaningful distinctions between acceptable and outstanding performance of individuals and appropriately reward those who perform at the highest level.[10] The final regulations state that DHS supervisors and managers are to be held accountable for making meaningful distinctions among employees based on performance, fostering and rewarding excellent performance, and addressing poor performance. While DHS states that as a general matter, pass/fail ratings are incompatible with pay for performance, it is to permit use of pass/fail ratings for employees in the "Entry/Developmental" band or in other pay bands under extraordinary circumstances as determined by the Secretary.

DHS is to require the use of a least three summary rating levels for other employee groups. We urge DHS to consider using at least four summary rating levels to allow for greater performance rating and pay differentiation. This approach is in the spirit of the new governmentwide performance-based pay system for the Senior Executive Service (SES), which requires at least four levels to provide a clear and direct link between SES performance and pay as well as to make meaningful distinctions based on relative performance.[11] Cascading this approach to other levels of employees can help DHS recognize and reward employee contributions and achieve the highest levels of individual performance.

Providing Adequate Safeguards to Ensure Fairness and Guard Against Abuse

As DHS develops its implementing directives, it also needs to continue to build safeguards into its performance management system. A concern that employees often express about any pay for performance system is supervisors' ability to assess performance fairly. Using safeguards, such as having an independent body to conduct reasonableness reviews of performance management decisions, can help to allay these concerns and build a fair, credible, and transparent system.

[10]GAO-03-488.

[11]For more information, see GAO, *Human Capital: Senior Executive Performance Management Can Be Significantly Strengthened to Achieve Results*, GAO-04-614 (Washington, D.C.: May 26, 2004).

It should be noted that the final regulations no longer provide for a Performance Review Board (PRB) to review ratings in order to promote consistency, provide general oversight of the performance management system, and ensure it is administered in a fair, credible, and transparent manner. According to the final regulations, participating labor organizations expressed concern that the PRBs could delay pay decisions and give the appearance of unwarranted interference in the performance rating process. However, in the final regulations, DHS states that it continues to believe that an oversight mechanism is important to the credibility of the department's pay for performance system and that the Compensation Committee, in place of PRBs, is to conduct an annual review of performance payout summary data. While much remains to be determined about how the Compensation Committee is to operate, we believe that the effective implementation of such a committee is important to assuring that predecisional internal safeguards exist to help achieve consistency and equity, and assure non-discrimination and non-politicization of the performance management process.

We have also reported that agencies need to assure reasonable transparency and provide appropriate accountability mechanisms in connection with the results of the performance management process.[12] For DHS, this can include publishing internally the overall results of performance management and individual pay decisions while protecting individual confidentiality and reporting periodically on internal assessments and employee survey results relating to the performance management system. Publishing this information can provide employees with the information they need to better understand the performance management system and to generally compare their individual performance with their peers. We found that several of OPM's personnel demonstration projects publish information for employees on internal Web sites that include the overall results of performance appraisal and pay decisions, such as the average performance rating, the average pay increase, and the average award for the organization and for each individual unit.

Adverse Actions and Appeals

DHS's final regulations are intended to simplify and streamline the employee adverse action process to provide greater flexibility for the

[12]GAO-04-83.

department and to minimize delays, while also ensuring due process protections. It is too early to tell what impact, if any, these regulations would have on DHS's operations and employees or other entities, such as the Merit Systems Protection Board (MSPB). Close monitoring of any unintended consequences, such as on MSPB and its ability to manage cases from DHS and other federal agencies, is warranted.

In terms of adverse actions, the regulations modify the current federal system in that the DHS Secretary will have the authority to identify specific offenses for which removal is mandatory. In our previous testimony on the proposed regulations, we expressed some caution about this new authority and pointed out that the process for determining and communicating which types of offenses require mandatory removal should be explicit and transparent. We noted that such a process should include an employee notice and comment period before implementation and collaboration with relevant congressional stakeholders and employee representatives. The final DHS regulations explicitly provide for publishing a list of the mandatory removal offenses in the *Federal Register* and in DHS's implementing directives and making these offenses known to employees annually.

In last year's testimony, we also suggested that DHS exercise caution when identifying specific removable offenses and the specific punishment. When developing and implementing the regulations, DHS might learn from the experience of the Internal Revenue Service's (IRS) implementation of its mandatory removal provisions.[13] We reported that IRS officials believed this provision had a negative impact on employee morale and effectiveness and had a "chilling effect" on IRS frontline enforcement employees who were afraid to take certain appropriate enforcement actions.[14] Careful drafting of each removable offense is critical to ensure that the provision does not have unintended consequences.

Under the DHS regulations, employees alleged to have committed these mandatory removal offenses are to have the right to a review by a newly created panel. DHS regulations provide for judicial review of the panel's decisions. Members of this three-person panel are to be appointed by the

[13]Section 1203 of the IRS Restructuring and Reform Act of 1998 outlines conditions for the firing of IRS employees for any of ten acts of misconduct.

[14]GAO, *Tax Administration: IRS and TIGTA Should Evaluate Their Processing of Employee Misconduct Under Section 1203*, GAO-03-394 (Washington, D.C.: Feb. 14, 2003).

Secretary for three-year terms. In last year's testimony, we noted that the independence of the panel that is to hear appeals of mandatory removal actions deserved further consideration. The final regulations address the issue of independence by prescribing additional qualification requirements which emphasize integrity and impartiality and requiring the Secretary to consider any lists of candidates submitted by union representatives for panel positions other than the chair. Employee perception concerning the independence of this panel is critical to the mandatory removal process.

Regarding the appeal of adverse actions other than mandatory removals, the DHS regulations generally preserve the employee's basic right to appeal decisions to an independent body—MSPB—but with procedures different from those applicable to other federal employees.[15] However, in a change from the proposed regulations in taking actions against employees for performance or conduct issues, DHS is to meet a higher standard of evidence—a "preponderance of evidence" instead of "substantial evidence." For performance issues, while this higher standard of evidence means that DHS would face a greater burden of proof than most agencies to pursue these actions, DHS managers are not required to provide employees performance improvement periods, as is the case for other federal employees. For conduct issues, DHS would face the same burden of proof as most agencies.

The regulations shorten the notification period before an adverse action can become effective and provide an accelerated MSPB adjudication process. In addition, MSPB may no longer modify a penalty for a conduct-based adverse action that is imposed on an employee by DHS unless such penalty was "wholly without justification." The DHS regulations also stipulate that MSPB can no longer require that parties enter into settlement discussions, although either party may propose doing so. DHS expressed concerns that settlement should be a completely voluntary decision made by parties on their own. However, settling cases has been an important tool in the past at MSPB, and promotion of settlement at this stage should be encouraged.

[15]Employees under collective bargaining agreements can choose to grieve and arbitrate adverse actions other than mandatory removals through negotiated grievance procedures or take these actions to MSPB.

The final regulations continue to support a commitment to the use of Alternative Dispute Resolution (ADR), which we previously noted was a positive development. To resolve disputes in a more efficient, timely, and less adversarial manner, federal agencies have been expanding their human capital programs to include ADR approaches, including the use of ombudsmen as an informal alternative to addressing conflicts.[16] ADR is a tool for supervisors and employees alike to facilitate communication and resolve conflicts. As we have reported, ADR helps lessen the time and the cost burdens associated with the federal redress system and has the advantage of employing techniques that focus on understanding the disputants' underlying interests over techniques that focus on the validity of their positions.[17] For these and other reasons, we believe that it is important to continue to promote ADR throughout the process.

Labor-Management Relations

Under the DHS regulations, the scope and method of labor union involvement in human capital issues are to change. DHS management is no longer required to engage in collective bargaining and negotiations on as many human capital policies and processes as in the past. For example, certain actions that DHS has determined are critical to the mission and operations of the department, such as deploying staff and introducing new technologies, are now considered management rights and are not subject to collective bargaining and negotiation. DHS, however, is to confer with employees and unions in developing the procedures it will use to take these actions. Other human capital policies and processes that DHS characterizes as "non-operational," such as selecting, promoting, and disciplining employees, are also not subject to collective bargaining, but DHS must negotiate the procedures it will use to take these actions. Finally, certain other policies and processes, such as how DHS will reimburse employees for any "significant and substantial" adverse impacts resulting from an action, such as a rapid change in deployment, must be negotiated.

[16]GAO, *Human Capital: The Role of Ombudsmen in Dispute Resolution*, GAO-01-466 (Washington, D.C.: Apr. 13, 2001).

[17]GAO, *Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace*, GAO/GGD-97-157 (Washington D.C.: Aug. 12, 1997).

In addition, DHS is to establish its own internal labor relations board—the Homeland Security Labor Relations Board—to deal with most agencywide labor relations policies and disputes rather than submit them to the Federal Labor Relations Authority. DHS stated that the unique nature of its mission—homeland protection—demands that management have the flexibility to make quick resource decisions without having to negotiate them, and that its own internal board would better understand its mission and, therefore, be better able to address disputes. Labor organizations are to nominate names of individuals to serve on the Board and the regulations established some general qualifications for the board members. However, the Secretary is to retain the authority to both appoint and remove any member. Similar to the mandatory removal panel, employee perception concerning the independence of this board is critical to the resolution of the issues raised over labor relations policies and disputes. These changes have not been without controversy, and four federal employee unions have filed suit alleging that DHS has exceeded its authority under the statute establishing the DHS human capital system.[18]

Our previous work on individual agencies' human capital systems has not directly addressed the scope of specific issues that should or should not be subject to collective bargaining and negotiations. At a forum we co-hosted exploring the concept of a governmentwide framework for human capital reform, which I will discuss later, participants generally agreed that the ability to organize, bargain collectively, and participate in labor organizations is an important principle to be retained in any framework for reform. It was also suggested at the forum that unions must be both willing and able to actively collaborate and coordinate with management if unions are to be effective representatives of their members and real participants in any human capital reform.

[18]*National Treasury Employees Union v. Ridge*, No. 1:05cv201 (D.D.C. filed Jan. 27, 2005).

DHS Confronts Many Challenges to Successful Implementation

With the issuance of the final regulations, DHS faces multiple challenges to the successful implementation of its new human capital system. We identified multiple implementation challenges at last year's hearing. Subsequently, we reported that DHS's actions to date in designing its human capital system and its stated plans for future work on its system are helping to position the department for successful implementation.[19] Nevertheless, DHS was in the early stages of developing the infrastructure needed for implementing its new system. For more information on these challenges, as well as on related human capital topics, see the "Highlights" pages attached to this statement.

We believe that these challenges are still critical to the success of the new human capital system. In many cases, DHS has acknowledged these challenges and made a commitment to address them in regulations. Today I would like to focus on two additional implementation challenges—ensuring sustained and committed leadership and establishing an overall communication strategy—and then reiterate challenges we previously identified, including providing adequate resources for implementing the new system and involving employees and other stakeholders in implementing the system.

Ensuring Sustained and Committed Leadership

As DHS and other agencies across the federal government embark on large-scale organizational change initiatives, such as the new human capital system DHS is implementing, there is a compelling need to elevate, integrate, and institutionalize responsibility for such key functional management initiatives to help ensure their success.[20] A Chief Operating Officer/Chief Management Officer (COO/CMO) or similar position can effectively provide the continuing, focused attention essential to successfully completing these multiyear transformations.

[19]GAO, *Human Capital: DHS Faces Challenges in Implementing Its New Personnel System*, GAO-04-790 (Washington, D.C.: June 18, 2004).

[20]GAO, *The Chief Operating Officer Concept and Its Potential Use as a Strategy to Improve Management at the Department of Homeland Security*, GAO-04-876R (Washington, D.C.: June 28, 2004) and *Highlights of a GAO Roundtable: The Chief Operating Officer Concept: A Potential Strategy To Address Federal Governance Challenges*, GAO-03-192SP (Washington, D.C.: Oct. 4, 2002).

Especially for such an endeavor as critical as DHS's new human capital system, such a position would serve to

- elevate attention that is essential to overcome an organization's natural resistance to change, marshal the resources needed to implement change, and build and maintain the organizationwide commitment to new ways of doing business;
- integrate this new system with various management responsibilities so they are no longer "stovepiped" and fit it into other organizational transformation efforts in a comprehensive, ongoing, and integrated manner; and
- institutionalize accountability for the system so that the implementation of this critical human capital initiative can be sustained.

We have work underway at the request of Congress to assess DHS's management integration efforts, including the role of existing senior leadership positions as compared to a COO/CMO position, and expect to issue a report on this work next month.

Establishing an Overall Communication Strategy

Another significant challenge for DHS is to assure an effective and ongoing two-way communication strategy that creates shared expectations about, and reports related progress on, the implementation of the new system. GAO has reported this is a key practice of a change management initiative.[21] DHS's final regulations recognize that all parties will need to make a significant investment in communication in order to achieve successful implementation of its new human capital system. According to DHS, its communication strategy will include global e-mails, satellite broadcasts, Web pages, and an internal DHS weekly newsletter. DHS stated that its leaders will be provided tool kits and other aids to facilitate discussions and interactions between management and employees on program changes.

Given the attention over the regulations, a critical implementation step is for DHS to assure a communication strategy. Communication is not about just "pushing the message out." Rather, it should facilitate a two-way

[21]GAO-03-669.

honest exchange with, and allow for feedback from, employees, customers, and key stakeholders. This communication is central to forming the effective internal and external partnerships that are vital to the success of any organization. Creating opportunities for employees to communicate concerns and experiences about any change management initiative allows employees to feel that their experiences are acknowledged and important to management during the implementation of any change management initiative. Once this feedback is received, it is important to consider and use this solicited employee feedback to make any appropriate changes to its implementation. In addition, closing the loop by providing information on why key recommendations were not adopted is also important.

Providing Adequate Resources for Implementing the New System

OPM reports that the increased costs of implementing alternative personnel systems should be acknowledged and budgeted for up front.[22] DHS estimates the overall costs associated with implementing the new DHS system—including the development and implementation of a new pay and performance system, the conversion of current employees to that system, and the creation of its new labor relations board—will be approximately $130 million through fiscal year 2007 (i.e., over a 4-year period) and less than $100 million will be spent in any 12-month period.

We found that based on the data provided by selected OPM personnel demonstration projects, direct costs associated with salaries and training were among the major cost drivers of implementing their pay for performance systems. Certain costs, such as those for initial training on the new system, are one-time in nature and should not be built into the base of DHS's budget. Other costs, such as employees' salaries, are recurring and thus would be built into the base of DHS's budget for future years.

We found that approaches the demonstration projects used to manage salary costs were to consider fiscal conditions and the labor market and to provide a mix of one-time awards and permanent pay increases. For example, rewarding an employee's performance with an award instead of an equivalent increase to base pay can reduce salary costs in the long run because the agency only has to pay the amount of the award one time, rather than annually. However, one approach that the demonstration projects used to manage costs that is not included in the final regulations is

[22]U.S. Office of Personnel Management, *Demonstration Projects and Alternative Personnel Systems: HR Flexibilities and Lessons Learned* (Washington, D.C.: September 2001).

the use of "control points." We found that the demonstration projects used such a mechanism—sometimes called speed bumps—to manage progression through the bands to help ensure that employees' performance coincides with their salaries and prevent all employees from eventually migrating to the top of the band and thus increase costs.

According to the DHS regulations, its performance management system is designed to incorporate adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the system. Each of OPM's personnel demonstration projects trained employees on the performance management system prior to implementation to make employees aware of the new approach, as well as periodically after implementation to refresh employee familiarity with the system. The training was designed to help employees understand their applicable competencies and performance standards; develop performance plans; write self-appraisals; become familiar with how performance is evaluated and how pay increases and awards decisions are made; and know the roles and responsibilities of managers, supervisors, and employees in the appraisal and payout processes.

Involving Employees and Other Stakeholders in Implementing the System

We reported in September 2003 that DHS's and OPM's effort to design a new human capital system was collaborative and facilitated participation of employees from all levels of the department.[23] We recommended that the Secretary of DHS build on the progress that had been made and ensure that the communication strategy used to support the human capital system maximize opportunities for employee and key stakeholder involvement through the completion of design and implementation of the new system, with special emphasis on seeking the feedback and buy-in of frontline employees. In implementing this system, DHS should continue to recognize the importance of employee and key stakeholder involvement. Leading organizations involve employee unions, as well as involve employees directly, and consider their input in formulating proposals and before finalizing any related decisions.[24]

[23]GAO, *Human Capital: DHS Personnel System Design Effort Provides for Collaboration and Employee Participation*, GAO-03-1099 (Washington, D.C.: Sept. 30, 2003).

[24]GAO, *Human Capital: Practices that Empowered and Involved Employees*, GAO-01-1070 (Washington, D.C.: Sept. 14, 2001).

To this end, DHS's revised regulations have attempted to recognize the importance of employee involvement in implementing the new personnel system. As we discussed earlier, the final DHS regulations provide for continuing collaboration in further development of the implementing directives and participation on the Compensation Committee. The regulations also provide that DHS is to involve employees in evaluations of the human capital system. Specifically, DHS is to provide designated employee representatives with the opportunity to be briefed and a specified timeframe to provide comments on the design and results of program evaluation. Further, employee representatives are to be involved at the identification of the scope, objectives, and methodology to be used in the program evaluation and in the review of draft findings and recommendations.

Framework for Governmentwide Human Capital Reform

DHS has recently joined some other federal departments and agencies, such as the Department of Defense, GAO, National Aeronautics and Space Administration, and the Federal Aviation Administration, in receiving authorities intended to help them manage their human capital strategically to achieve results. To help advance the discussion concerning how governmentwide human capital reform should proceed, GAO and the National Commission on the Public Service Implementation Initiative hosted a forum in April 2004 on whether there should be a governmentwide framework for human capital reform and, if so, what this framework should include.[25] While there was widespread recognition among the forum participants that a one-size-fits-all approach to human capital management is not appropriate for the challenges and demands government faces, there was equally broad agreement that there should be a governmentwide framework to guide human capital reform. Further, a governmentwide framework should balance the need for consistency across the federal government with the desire for flexibility so that individual agencies can tailor human capital systems to best meet their needs. Striking this balance is not easy to achieve, but is necessary to maintain a governmentwide system that is responsive enough to adapt to agencies' diverse missions, cultures, and workforces.

[25]GAO and the National Commission on the Public Service Implementation Initiative, *Highlights of a Forum: Human Capital: Principles, Criteria, and Processes for Governmentwide Federal Human Capital Reform*, GAO-05-69SP (Washington, D.C.: Dec. 1, 2004).

While there were divergent views among the forum participants, there was general agreement on a set of principles, criteria, and processes that would serve as a starting point for further discussion in developing a governmentwide framework in advancing human capital reform, as shown in figure 1.

Figure 1: Principles, Criteria, and Processes

Principles that the government should retain in a framework for reform because of their inherent, enduring qualities:

- Merit principles that balance organizational mission, goals, and performance objectives with individual rights and responsibilities
- Ability to organize, bargain collectively, and participate through labor organizations
- Certain prohibited personnel practices

Guaranteed due process that is fair, fast, and final

Criteria that agencies should have in place as they plan for and manage their new human capital authorities:

- Demonstrated business case or readiness for use of targeted authorities
- An integrated approach to results-oriented strategic planning and human capital planning and management
- Adequate resources for planning, implementation, training, and evaluation
- A modern, effective, credible, and integrated performance management system that includes adequate safeguards to ensure equity and prevent discrimination

Processes that agencies should follow as they implement new human capital authorities:

- Prescribing regulations in consultation or jointly with the Office of Personnel Management
- Establishing appeals processes in consultation with the Merit Systems Protection Board
- Involving employees and stakeholders in the design and implementation of new human capital systems
- Phasing in implementation of new human capital systems
- Committing to transparency, reporting, and evaluation
- Establishing a communications strategy
- Assuring adequate training

Source: GAO.

As the momentum accelerates for human capital reform, GAO is continuing to work with others to address issues of mutual interest and concern. For example, to follow up on the April forum, the National Academy of Public Administration and the National Commission on the Public Service Implementation Initiative convened a group of human capital stakeholders to continue the discussion of a governmentwide framework.[26]

GAO's Experiences with Human Capital Reform

As GAO has worked to support Congress in meeting its constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government for the benefit of the American people, this subcommittee and others in Congress have continually provided us with the tools and authorities we need to carry out these responsibilities. We believe that it is vitally important to GAO's future that we continue modernizing and updating our human capital policies and practices in light of the changing environment and anticipated challenges ahead. Given our human capital infrastructure and our unique role in leading by example in major management areas, including human capital management, we believe that the federal government will benefit from GAO's experience with pay bands, pay for performance and other human capital reforms.

[26]See The National Commission on the Public Service Implementation Initiative and The National Academy of Public Administration, *A Governmentwide Framework for Federal Personnel Reform: A Proposal* (Washington, D.C.: November 2004).

Unlike many executive branch agencies, which have either recently received or are just requesting new broad-based human capital tools and flexibilities, GAO has had certain human capital tools and flexibilities for over two decades. As a result of your continued support, GAO has been able to establish a successful track record with the implementation of pay banding, pay for performance, and other human capital authorities that have helped to ensure that GAO remains a world class, professional services organization. In July 2004, the President signed into law the GAO Human Capital Reform Act of 2004 (Human Capital II), which, as you know, combines diverse initiatives that, collectively, should further GAO's ability to enhance our performance; assure our accountability; and help ensure that we can attract, retain, motivate, and reward a top-quality and high-performing workforce currently and in future years.[27] It is our vision that these initiatives not only ensure a high-performing workforce at GAO, but also serve as guide to other agencies in their human capital transformation efforts.

A key provision of Human Capital II is to allow the Comptroller General to adjust the rates of basic pay of GAO employees on a separate basis from the annual adjustments authorized for employees of the executive branch. GAO is implementing a compensation system that places greater emphasis on job performance while, at a minimum, protecting the purchasing power of employees who are performing acceptably and are paid within competitive compensation ranges. Since we testified before your subcommittee last summer, GAO has taken steps that will enable it to implement the pay adjustment provision. With the help of a human resources consulting firm, GAO developed new market-based compensation pay ranges for analysts, attorneys, and specialists that is already in the first phase of implementation. With the new market-based pay system, employee compensation will now consider current salary and allocate individual performance-based compensation amounts between a merit increase (i.e., salary increase) and a performance bonus (i.e., cash). This year, I provided all analysts, attorneys, and specialists performing at the "meets expectations" level or above the across-the-board pay adjustment applicable to the executive branch. Later this year, GAO plans to conduct a similar study of market-based pay for the remainder of GAO's workforce, who began the transition to performance-based compensation

[27]For more information, see Public Law 108-271, July 7, 2004, and GAO, *GAO: Additional Human Capital Flexibilities Are Needed*, GAO-03-1024T (Washington, D.C.: July 16, 2003).

in 2004 with the introduction of pay banding and a new competency-based performance appraisal system.

In addition, I and other GAO senior executives have continued to engage in a broad range of outreach and consultation activities with GAO staff before and during the implementation of the new market-based pay system. For example, I met with senior executives and employee representatives to obtain input about a new market-based approach and held two televised chats to inform staff of the results of the review and our plans for implementation. In addition, links from the GAO internal home page were established that allowed employees to review a series of fact sheets and explanatory charts, and to access copies of the presentations.

Summary Observations

The final regulations that DHS has issued represent a positive step towards a more strategic human capital management approach for both DHS and the overall government, a step we have called for in our recent High-Risk Series. Consistent with our observations last year, DHS's regulations make progress towards a modern compensation system. DHS's overall efforts in designing and implementing its human capital system can be particularly instructive for future human capital reform. Nevertheless, regarding the implementation of the DHS system, how it is done, when it is done, and the basis on which it is done can make all the difference in whether it will be successful. That is why it is important to recognize that DHS still has to fill in many of the details on how it will implement these reforms. These details do matter and they need to be disclosed and analyzed in order to fully assess DHS's proposed reforms. We have made a number of suggestions for improvements the agency should consider in this process. It is equally important for the agency to ensure it has the necessary infrastructure in place to implement the system, not only an effective performance management system, but also the capabilities to effectively use the new human capital authorities and a strategic human capital planning process. Without this infrastructure, DHS will not succeed in its related reform efforts.

DHS appears to be committed to continue to involve employees, including unions, throughout the implementation process, another critical ingredient for success. Specifically, under DHS's final regulations, employee representatives or union officials are to have opportunities to participate in developing the implementing directives, as outlined under the "continuing collaboration" provisions; hold four membership seats on the Homeland Security Compensation Committee; and help in evaluations of the human

capital system. A continued commitment to a two-way communication strategy that allows for ongoing feedback from employees, customers, and key stakeholders is central to forming the effective internal and external partnerships that are vital to the success of DHS's human capital system. Finally, to help ensure the quality of that involvement, sustained leadership in a position such as a COO/CMO would serve to elevate, integrate, and institutionalize responsibility for the success of DHS's human capital system and other key business transformation initiatives.

Mr. Chairman and Members of the Subcommittee, this concludes my prepared statement. I would be pleased to respond to any questions that you may have.

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"Highlights" from Selected GAO Human Capital Reports

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Highlights

Highlights of GAO-04-479T, testimony before subcommittees of the Senate Committee on Governmental Affairs and the House Committee on Government Reform

February 25, 2004

HUMAN CAPITAL

Preliminary Observations on Proposed DHS Human Capital Regulations

Why GAO Did This Study

The creation of the Department of Homeland Security (DHS) almost one year ago represents an historic moment for the federal government to fundamentally transform how the nation will protect itself from terrorism. DHS is continuing to transform and integrate a disparate group of agencies with multiple missions, values, and cultures into a strong and effective cabinet department. Together with this unique opportunity, however, also comes significant risk to the nation that could occur if this transformation is not implemented successfully. In fact, GAO designated this implementation and transformation as high risk in January 2003.

Congress provided DHS with significant flexibility to design a modern human capital management system. GAO reported in September 2003 that the design effort to develop the system was collaborative and consistent with positive elements of transformation. Last Friday, the Secretary of DHS and the Director of the Office of Personnel Management (OPM) released for public comment draft regulations for DHS's new human capital system. This testimony provides preliminary observations on selected major provisions of the proposed system. The subcommittees are also releasing *Human Capital: Implementing Pay for Performance at Selected Personnel Demonstration Projects* (GAO-04-83) at today's hearing.

www.gao.gov/cgi-bin/getrpt?GAO-04-479T.

To view the full testimony statement, click on the link above. For more information, contact J. Christopher Mihm at (202) 512-6806 or mihmj@gao.gov.

What GAO Found

The proposed human capital system is designed to be aligned with the department's mission requirements and is intended to protect the civil service rights of DHS employees. Many of the basic principles underlying the DHS regulations are consistent with proven approaches to strategic human capital management, including several approaches pioneered by GAO, and deserve serious consideration. However, some parts of the system raise questions that DHS, OPM, and Congress should consider.

- Pay and performance management: The proposal takes another valuable step towards results-oriented pay reform and modern performance management. For effective performance management, DHS should use validated core competencies as a key part of evaluating individual contributions to departmental results and transformation efforts.
- Adverse actions and appeals: The proposal would retain an avenue for employees to appeal adverse actions to an independent third party. However, the process to identify mandatory removal offenses must be collaborative and transparent. DHS needs to be cautious about defining specific actions requiring employee removal and learn from the Internal Revenue Service's implementation of its mandatory removal provisions.
- Labor relations: The regulations recognize employees' right to organize and bargain collectively, but reduce areas subject to bargaining. Continuing to involve employees in a meaningful manner is critical to the successful operations of the department.

Once DHS issues final regulations for the human capital system, it will be faced with multiple implementation challenges:

- DHS plans to implement the system using a phased approach, however, nearly half of DHS civilian employees are not covered by these regulations, including more than 50,000 Transportation Security Administration screeners. To help build a unified culture, DHS should consider moving all of its employees under a single performance management system framework.
- DHS noted that it estimates that about $110 million will be needed to implement the new system in its first year. While adequate resources for program implementation are critical to program success, DHS is requesting a substantial amount of funding that warrants close scrutiny by Congress.
- The proposed regulations call for comprehensive, ongoing evaluations. Continued evaluation and adjustments will help to ensure an effective and credible human capital system.
- DHS has begun to develop a strategic workforce plan. Such a plan can be used as a tool for identifying core competencies for staff for attracting, developing, evaluating, and rewarding contributions to mission accomplishment.

The analysis of DHS's effort to develop a strategic human capital management system can be instructive as other agencies request and implement new strategic human capital management authorities.

United States General Accounting Office

GAO
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Highlights

Highlights of GAO-04-790, a report to congressional requesters

June 2004

HUMAN CAPITAL

DHS Faces Challenges in Implementing Its New Personnel System

Why GAO Did This Study

DHS was provided with significant flexibility to design a modern human capital management system. Its proposed system has both precedent-setting implications for the executive branch and far-reaching implications on how the department is managed. GAO reported in September 2003 that the effort to design the system was collaborative and consistent with positive elements of transformation. In February, March, and April 2004 we provided preliminary observations on the proposed human capital regulations.

Congressional requesters asked GAO to describe the infrastructure necessary for strategic human capital management and to assess the degree to which DHS has that infrastructure in place, which includes an analysis of the progress DHS has made in implementing the recommendations from our September 2003 report.

DHS generally agreed with the findings of our report and provided more current information that we incorporated. However, DHS was concerned about our use of results from a governmentwide survey gathered prior to the formation of the department. We use this data because it is the most current information available on the perceptions of employees currently in DHS and helps to illustrate the challenges facing DHS.

www.gao.gov/cgi-bin/getrpt?GAO-04-790.

To view the full product, including the scope and methodology, click on the link above. For more information, contact J. Christopher Mihm at (202) 512-6806 or mihmj@gao.gov.

What GAO Found

To date, DHS's actions in designing its human capital management system and its stated plans for future work on the system are helping to position the department for successful implementation. Nonetheless, the department is in the early stages of developing the infrastructure needed for implementing its new human capital management system.

DHS has begun strategic human capital planning efforts at the headquarters level since the release of the department's overall strategic plan and the publication of proposed regulations for its new human capital management system. Strategic human capital planning efforts can enable DHS to remain aware of and be prepared for current and future needs as an organization. However, this will be more difficult because DHS has not yet been systematic or consistent in gathering relevant data on the successes or shortcomings of legacy component human capital approaches or current and future workforce challenges. Efforts are now under way to collect detailed human capital information and design a centralized information system so that such data can be gathered and reported at the departmentwide level.

DHS and Office of Personnel Management leaders have consistently underscored their personal commitment to the design process. Continued leadership is necessary to marshal the capabilities required for the successful implementation of the department's new human capital management system. Sustained and committed leadership is required on multiple levels: securing appropriate resources for the design, implementation, and evaluation of the human capital management system; communicating with employees and their representatives about the new system and providing opportunities for feedback; training employees on the details of the new system; and continuing opportunities for employees and their representatives to participate in the design and implementation of the system.

In its proposed regulations, DHS outlines its intention to implement key safeguards. For example, the DHS performance management system must comply with the merit system principles and avoid prohibited personnel practices; provide a means for employee involvement in the design and implementation of the system; and overall, be fair, credible, and transparent. The department also plans to align individual performance management with organizational goals and provide for reasonableness reviews of performance management decisions through its Performance Review Boards.

United States General Accounting Office

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Highlights

Highlights of GAO-03-488, a report to congressional requesters

March 2003

RESULTS-ORIENTED CULTURES

Creating a Clear Linkage between Individual Performance and Organizational Success

Why GAO Did This Study

The federal government is in a period of profound transition and faces an array of challenges and opportunities to enhance performance, ensure accountability, and position the nation for the future. High-performing organizations have found that to successfully transform themselves, they must often fundamentally change their cultures so that they are more results-oriented, customer-focused, and collaborative in nature. To foster such cultures, these organizations recognize that an effective performance management system can be a strategic tool to drive internal change and achieve desired results.

Based on previously issued reports on public sector organizations' approaches to reinforce individual accountability for results, GAO identified key practices that federal agencies can consider as they develop modern, effective, and credible performance management systems.

www.gao.gov/cgi-bin/getrpt?GAO-03-488.

To view the full report, including the scope and methodology, click on the link above. For more information, contact J. Christopher Mihm at (202) 512-6806 or mihmj@gao.gov.

What GAO Found

Public sector organizations both in the United States and abroad have implemented a selected, generally consistent set of key practices for effective performance management that collectively create a clear linkage—"line of sight"—between individual performance and organizational success. These key practices include the following.

1. Align individual performance expectations with organizational goals. An explicit alignment helps individuals see the connection between their daily activities and organizational goals.

2. Connect performance expectations to crosscutting goals. Placing an emphasis on collaboration, interaction, and teamwork across organizational boundaries helps strengthen accountability for results.

3. Provide and routinely use performance information to track organizational priorities. Individuals use performance information to manage during the year, identify performance gaps, and pinpoint improvement opportunities.

4. Require follow-up actions to address organizational priorities. By requiring and tracking follow-up actions on performance gaps, organizations underscore the importance of holding individuals accountable for making progress on their priorities.

5. Use competencies to provide a fuller assessment of performance. Competencies define the skills and supporting behaviors that individuals need to effectively contribute to organizational results.

6. Link pay to individual and organizational performance. Pay, incentive, and reward systems that link employee knowledge, skills, and contributions to organizational results are based on valid, reliable, and transparent performance management systems with adequate safeguards.

7. Make meaningful distinctions in performance. Effective performance management systems strive to provide candid and constructive feedback and the necessary objective information and documentation to reward top performers and deal with poor performers.

8. Involve employees and stakeholders to gain ownership of performance management systems. Early and direct involvement helps increase employees' and stakeholders' understanding and ownership of the system and belief in its fairness.

9. Maintain continuity during transitions. Because cultural transformations take time, performance management systems reinforce accountability for change management and other organizational goals.

United States General Accounting Office

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Highlights

Highlights of GAO-05-69SP

Why GAO Convened This Forum

There is widespread agreement that the federal government faces a range of challenges in the 21st century that it must confront to enhance performance, ensure accountability, and position the nation for the future. Federal agencies will need the most effective human capital systems to address these challenges and succeed in their transformation efforts during a period of likely sustained budget constraints.

More progress in addressing human capital challenges was made in the last 3 years than in the last 20, and significant changes in how the federal workforce is managed are underway.

On April 14, 2004, GAO and the National Commission on the Public Service Implementation Initiative hosted a forum with selected executive branch officials, key stakeholders, and other experts to help advance the discussion concerning how governmentwide human capital reform should proceed.

www.gao.gov/cgi-bin/getrpt?GAO-05-69SP

To view the full product, including the scope and methodology, click on the link above. For more information, contact J. Christopher Mihm at (202) 512-6806 or mihmj@gao.gov.

December 2004

HIGHLIGHTS OF A FORUM

Human Capital: Principles, Criteria, and Processes for Governmentwide Federal Human Capital Reform

What Participants Said

Forum participants discussed (1) Should there be a governmentwide framework for human capital reform? and (2) If yes, what should a governmentwide framework include?

There was widespread recognition that a "one size fits all" approach to human capital management is not appropriate for the challenges and demands government faces. However, there was equally broad agreement that there should be a governmentwide framework to guide human capital reform built on a set of beliefs that entail fundamental principles and boundaries that include criteria and processes that establish the checks and limitations when agencies seek and implement their authorities. While there were divergent views among the participants, there was general agreement that the following served as a starting point for further discussion in developing a governmentwide framework to advance needed human capital reform.

Principles

- Merit principles that balance organizational mission, goals, and performance objectives with individual rights and responsibilities
- Ability to organize, bargain collectively, and participate through labor organizations
- Certain prohibited personnel practices
- Guaranteed due process that is fair, fast, and final

Criteria

- Demonstrated business case or readiness for use of targeted authorities
- An integrated approach to results-oriented strategic planning and human capital planning and management
- Adequate resources for planning, implementation, training, and evaluation
- A modern, effective, credible, and integrated performance management system that includes adequate safeguards to ensure equity and prevent discrimination

Processes

- Prescribing regulations in consultation or jointly with the Office of Personnel Management
- Establishing appeals processes in consultation with the Merit Systems Protection Board
- Involving employees and stakeholders in the design and implementation of new human capital systems
- Phasing in implementation of new human capital systems
- Committing to transparency, reporting, and evaluation
- Establishing a communications strategy
- Assuring adequate training

United States Government Accountability Office

Statement of

Ron James

Chief Human Capital Officer

U.S. Department of Homeland Security

Before the

Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia

Committee on Homeland Security and Governmental Affairs

United States Senate

On

"Unlocking the Potential within Homeland Security: The New Human Resources System"

Mr. Chairman. It is a privilege to appear before this subcommittee today to discuss the final regulations implementing the new human resource management system in the Department of Homeland Security (DHS). I am Ron James, Chief Human Capital Officer for the Department.

As the Congress recognized in creating the Department, we can't afford to fail in our mission to protect the country from terrorists and keep terrorists' weapons from entering the country. We need the ability to act swiftly and decisively in response to critical homeland security threats and other mission needs. To achieve this it is essential that we continue to attract and retain highly talented and motivated employees who are committed to excellence -- the most dedicated and skilled people our country has to offer. The current human resource system is too cumbersome to achieve this.

Almost a year ago, we issued proposed regulations for this new system – and sought input from the public at large, our employees and their representatives, and members of Congress. The open comment period drew over 3,800 responses. After taking some time to examine those responses, we followed the Congressional direction in the Homeland Security Act to "meet and confer" with employee representatives. Following several pre-meetings with union leaders, we officially began the meet and confer process on June 14th and continued through August 6th. Meetings were conducted at and facilitated by the Federal Mediation and Conciliation Service and resulted in DHS' adoption of many proposals made by the employee representatives. There were, however, major areas where we could not resolve our differences in the meet and confer sessions. As a result, in early September, we invited the National Presidents of

NTEU and AFGE to meet with the Secretary and the Director of OPM to present their concerns. While these discussions further informed the development of the final regulations, there remain several areas where we have fundamental disagreement with union leadership on aspects of the new human resources system. We believe these issues, such as using performance rather than longevity as the basis for pay increases and providing for increased flexibilities to respond to mission-driven operational needs while balancing our collective bargaining obligations, go to the very core of what the Congress intended in granting DHS these flexibilities.

Through this collaborative process, we have continued to follow a set of guiding principals that were adopted from the outset of our design process. Those principles state that the Department of Homeland Security must ensure, first and foremost, that its human resource management system is mission-centered, is performance-focused, and is based on the principles of merit and fairness embodied in the statutory merit system principles. We believe that we have achieved that balance in our final regulations.

These final regulations have a strong correlation between performance and pay and greater consideration of local market conditions. There are three major changes to the current General Schedule pay structure. We are replacing the General Schedule with open pay ranges and have eliminated the "steps" in the current system which is tied largely to longevity. We are changing how market conditions impact pay. Currently, all job types in a market receive the same increase. Under our new system, pay may be adjusted differently by job type in each market. And finally, we are creating performance pay pools where all employees who meet performance expectations will receive performance based increases.

The system will make meaningful distinctions in performance and hold employees accountable at all levels. Current systems, which provide a general across the board increase and rarely denied within-grade-increases, do little to encourage or reward excellence in the workforce. Similarly, absent a market-based system we have no basis to ensure DHS' ability to compete for top talent for our important mission.

I know that movement to a pay-for-performance model is a big change for our employees and supervisors and there is a high level of internal/external interest in the more detailed aspects of how we plan to define and administer a pay-for-performance program at DHS. As a result of comments on the proposed regulations, and discussions during the meet and confer process we have made significant additions to the regulations to provide employees and their representatives a meaningful role in the design of further details in the pay-for-performance system – through a process of "continuing collaboration" in the development of implementing directives. In addition, we have created a Compensation Committee which will include representatives from the major DHS

labor organizations to address strategic compensation matters such as the annual allocation of funds between market and performance pay adjustments and the annual adjustment of rate ranges.

Additionally, during meet and confer, the labor organizations voiced strong concerns about the implementation schedule we proposed last year. Specifically, that it did not allow adequate time to train managers and to evaluate system effectiveness. As a result of those concerns, we have significantly modified our schedule for implementing pay-for-performance. We will be introducing the new performance management system this fall, with extensive training over the summer months for all covered employees. New compensation programs, by contrast, will be phased in over the next 3 years, allowing ample time for training and program evaluation.

Approximately 8,000 DHS employees at Headquarters, Information Analysis and Infrastructure Protection, Science and Technology, Emergency Preparedness and Response, and the Federal Law Enforcement Training Center will be converted to our new pay systems in early 2006 and will not have their pay impacted by performance until early 2007 – some fifteen months after starting new performance management provisions. The balance of employees covered by these regulations will continue to see adjustments to their pay under the current GS system.

In 2007, another 10,000 employees at the Secret Service and the Coast Guard will be converted to new compensation systems, with their first performance-based adjustments not occurring until 2008. Finally, in 2008, the remaining 66,000 employees – namely those in Customs and Border Protection, Immigration and Customs Enforcement, and Citizenship and Immigration Services will be converted from the General Schedule, with their first performance-based adjustments occurring in 2009.

Through this phased approach, the vast majority of DHS employees will have two to three full cycles under new performance management provisions prior to performance being used to distinguish levels of pay. This approach is prudent in ensuring that the organization has time to internalize key aspects of the new system and in ensuring that we have time to build greater employee understanding and confidence in how the compensation systems will be administered.

In addition to this change in the implementation schedule, at the request of the unions during meet and confer we have provided a formal role for employees and their representatives in helping us to gauge whether the program is having the intended effects both in the short and long term. They will be asked to provide comments on the design and the results of the program evaluation.

Congress also granted us authority to modify the adverse actions and appeals procedures. We have streamlined the adverse action and appeals process while ensuring fairness and due process. We pledged at the beginning of this process to preserve fundamental merit principles, to prevent prohibited personnel practices, and to honor and promote veterans preference and we have honored that commitment. These are core values of public service which we will not abandon.

We have retained the current definition of adverse actions, and have at the request of labor representatives retained the "efficiency of the service standard" for taking adverse actions. The minimum notice period has been shortened from 30 days in the current system to 15 days, but we have extended the minimum reply period from seven days to 10 days. In addition, we have established one process for dealing with both performance and conduct issues in place of the separate processes under current title 5. These changes are needed to ensure that DHS supervisors are able to take administrative action when it is warranted. Standardized processes will make the appeals process easier to understand for those employees that are affected and to bring fair and efficient resolution for all parties. I am confident that the American public expects this level of accountability from the men and women that are charged with protecting our Homeland.

Additionally, we have created a category of offenses that have direct and substantial impact on the ability of the Department to protect homeland security. These offenses would be so egregious that supervisors have no choice but to recommend removal. Although we have not specified these offenses in the final regulations, we do suggest that accepting or soliciting a bribe that would compromise border security or willfully disclosing classified information are offenses that could reach this threshold. We would not propose to use this authority lightly or frequently and employees will know in advance the offenses that would warrant mandatory removal. Only the Secretary could identify these offenses, after consultation with the Department of Justice, and only the Secretary or his designee could mitigate the removal. Employees alleged to have committed these offenses will have the right to advance notice, an opportunity to respond, a written decision, and a further appeal to an independent DHS panel. At the request of DHS labor unions, we agreed that these offenses would be published in the Federal Register and made known annually to all employees.

The Merit Systems Protection Board will continue to hear the vast majority of our cases. Working with the Board, we have made significant procedural modifications to gain greater efficiency in decision making and provide deference to our DHS mission. These modifications – including limited discovery, summary judgment, and expedited timelines – to MSPB procedures will further DHS mission without impairing fair treatment and due process protections. In

response to comments, we have adopted the "preponderance of evidence" standard for all adverse actions whether conduct or performance based. And, we were persuaded by the DHS labor organizations to provide bargaining unit employees the option of grieving and arbitrating adverse actions – an option we had not included in the proposed regulations. Arbitrators and MSPB will use the same rules and standards governing such things as burden of proof and mitigation. In that regard, the Secretary and the Director were convinced by the labor organizations that our proposed bar on any mitigation should be modified – the final regulations provide for mitigation of a penalty only if the penalty is "so disproportionate to the offense as to be wholly without justification".

On the labor management front, the final regulations on labor relations meet our operational needs while ensuring that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them. One of the most significant changes from current law is the change to the DHS obligation to negotiate procedures and impact of the exercise of management rights.

In the face of a committed and unpredictable enemy, the Department must have the authority to move employees quickly when circumstances demand; it must be able to develop and rapidly deploy new technology to confront threats to national security; and it must be able to act without delay to properly secure the Nation's borders and ports of entry. In the proposed regulations issued last year, the Department was not required to bargain over the exercise of these rights nor over the procedures or impact. This was one of the primary issues raised by NTEU and AFGE both during intense discussions at meet and confer and in their meeting with the Secretary in early September. While they offered proposals to meet exceptional mission needs, those proposals did not go far enough. In today's operational environment, the exceptional has become the rule. Our final regulations require that we confer – not negotiate – with labor unions over the procedures we will follow in taking management actions such as assignment of work or deployment of personnel. And, the final regulations require bargaining over the adverse impact of management actions on employees when that impact is significant and substantial and the action is expected to exceed or has exceeded 60 days. Neither the confer process nor the obligation to bargain impact can delay our taking the action.

In addition, we have altered our proposed regulations to provide for mid-term bargaining over personnel policies, practices and matters affecting working conditions. The standard for triggering this obligation is that the changes must be foreseeable, substantial and significant in terms of impact and duration. The "substantial and significant" test is consistent with current FLRA and private sector case law. In response to additional union comments, we have provided for binding resolution of mid-term impasses by the Homeland Security Labor Relations Board. We made several other changes from the proposed regulations as a result of the meet and confer sessions, including restoring Weingarten rights

and reinstating the union's right to be present at formal discussions except when the purpose is to discuss operational matters.

In order to ensure that those who adjudicate the most critical labor disputes in the Department do so quickly and with an understanding and appreciation of the unique challenges that DHS faces, we have established the Homeland Security Labor Relations Board. In response to Union concerns, we have provided a formal opportunity for labor organization participation in the nomination process for Board members. Board members, who will be appointed by the Secretary, should be known for their integrity and impartiality as well as their expertise in labor relations, law enforcement, or national/homeland and other security matters. The HSLRB will have jurisdiction over disputes concerning the duty to bargain, the scope of bargaining, negotiation impasses, and exceptions to arbitration awards involving disputes over the exercise of management rights. We retain the FLRA for all other matters including bargaining unit determinations, union elections, individual employee ULPs, and resolving exceptions to other arbitration awards. FLRA may also be called on to review the record of an HSLRB decision in order to gain access to judicial review of HSLRB decisions.

We recognize that these are significant changes. They are necessary for the Department to carry out its mission and will unlocking the potential of DHS to retain, attract and reward some of the finest civilian employees serving our country today. These final regulations fulfill the requirements of the Homeland Security Act to create a 21st century human resource system that is flexible and contemporary while protecting fundamental employee rights. We have developed these regulations with extensive input from our employees and their representatives, we have listened and made changes as a result of their comments. We believe we have achieved the right balance required between core civil service principles and mission essential flexibility.

That concludes my remarks. I welcome any questions.

Statement of

Dr. Ronald P. Sanders

Associate Director for Strategic Human Resources Policy

U.S. Office of Personnel Management

Before the

Subcommittee on Oversight of

Government Management, the Federal Workforce, and the District of Columbia

Committee on Homeland Security and Governmental Affairs

United States Senate

On

"Unlocking the Potential within Homeland Security:

the New Human Resources System"

February 10, 2005

I. Introduction

Mr. Chairman, I am Dr. Ronald P. Sanders, the Associate Director for Strategic Human Resources Policy at the Office of Personnel Management (OPM). On behalf of OPM, it is my privilege to appear before you today to discuss the final regulations implementing a new human resources (HR) management system in the Department of Homeland Security (DHS) – a system that we truly believe is as flexible, contemporary, and excellent as the President and the Congress envisioned. It has been an honor for

OPM (and for me personally) to work with the dedicated men and women of DHS, including its senior leaders, employees and union representatives, other stakeholders, and the Congress, to develop this system. It is the result of an intensely collaborative process that has taken almost two years -- and we are all quite proud of it. However, it is not the end, but only the end of the beginning, and the Department must now embark upon the challenge of implementation. As it does, I want to express our appreciation to you for your leadership, and that of this Subcommittee, in this historic effort. Without it, we would not be here today, and we look forward to it in the future.

Mr. Chairman, with the Homeland Security Act of 2002, you and other Members of Congress gave the Secretary of Homeland Security and the Director of the Office of Personnel Management extraordinary authority, and with it a grand trust: to work together with the Department's employees and their union representatives to establish a "21st century human resources management system" that fully supports the Department's vital mission without compromising the core principles of merit and fairness that ground the Federal civil service. Striking the right balance, between transformation on one hand and tradition on the other, is an essential part of that trust, and we believe we have lived up to it in these final regulations.

I would like to address the question of balance this morning, with a particular focus on three of the most vital components of the new HR system established by the final regulations: performance-based pay, employee accountability, and labor-management relations. In each case, I will discuss the careful and critical balance we have struck between operational imperatives and employee interests, without compromising on either mission or merit. The final result achieves that balance, and in

so doing, what we have accomplished may very well serve as a model for the rest of the Federal Government.

II. Pay, Performance, and "Politicization"

The new pay system established by the regulations was designed to fundamentally change the way DHS employees are paid, to place far more emphasis on performance and market in setting and adjusting rates of pay. Instead of a "one size fits all" pay system based on tenure, we have established one that bases all individual pay increases on performance. No longer will employees who are rated as unacceptable performers receive annual across-the-board pay adjustments, as they do today. Instead, only those who meet or exceed performance expectations will receive any such adjustments. No longer will those annual pay adjustments apply to all occupations and levels of responsibility, regardless of market or mission value. Instead, those adjustments will be based on national and local labor market trends, budget, recruiting and retention patterns, and other factors – as well as substantial and substantive union input. And no longer will employees who merely meet time-in-grade receive virtually automatic pay increases, as they do today. Instead, individual pay raises will be determined by an employee's annual performance rating.

This system is entirely consistent with the merit system principles that are so fundamental to our civil service. One of those principles states that Federal employees should be compensated ". . . with appropriate consideration for both national and local rates paid by employers . . . and appropriate incentives and recognition . . . for excellence

in performance." See 5 U.S.C. 2301(b)(3). However, some have argued that by placing so much emphasis on performance, we risk "politicizing" DHS and its employees. This is a most serious charge. Such a result, if true, would constitute a prohibited personnel practice, something expressly forbidden by the Congress in giving DHS and OPM authority to jointly prescribe these regulations. Moreover, it would tear at the very fabric of our civil service system. Fortunately, nothing could be further from the truth.

The merit system principles provide that Federal employees should be ". . . protected against arbitrary action, personal favoritism, or coercion for partisan political purposes." See 5 U.S.C. 2301(b)(8)(A). And they are. Section 2302(b)(3) of title 5, United States Code, makes it a prohibited personnel practice to "coerce the political activity of any person . . . or take any action against any employee" for such activity. This law is still in place and binding on DHS. The law forbids any political influence in taking any personnel action with respect to covered positions, and it most certainly applies to making individual pay determinations. The DHS regulations did not dilute these prohibitions in any way; indeed, they could not . . . and we would not. This is no hollow promise. A close examination of the DHS regulations reveals that they include considerable protection against such practices – and no less than every other Federal employee enjoys today.

For example, if a DHS employee believes that decisions regarding his or her pay have been influenced by political considerations, he or she has a right to raise such allegations with the Office of Special Counsel (OSC), to have OSC investigate and where appropriate, prosecute them, and to be absolutely protected from reprisal and retaliation in so doing. These rights have not been diminished in any way whatsoever. Moreover,

supervisors have no discretion with regard to the actual amount of performance pay an employee receives. That amount is driven strictly by mathematical formula -- an approach recommended by the DHS unions during the meet-and-confer process. Of the four variables in that formula -- the employee's annual performance rating; the "value" of that rating, expressed as a number of points or shares; the amount of money in the performance pay pool and the distribution of ratings -- only the annual rating is determined by an employee's immediate supervisor, and it is subject to review and approval by the employee's second-level manager.

Once that rating is approved, an employee can still challenge it if he or she doesn't think it is fair – indeed, employees represented by a union will even be able to contest their performance ratings all the way to a neutral arbitrator, if their union permits. And if it gets to arbitration, the arbitrator will review the grievance according to specific standards set forth in the regulations, standards based directly on union input provided during the meet-and-confer process. Finally, the other factors governing performance pay are also shielded from any sort of manipulation. Individual managers will have no say in how many points or shares a rating is worth, or how much money is in the pool; that will be determined at the headquarters level -- with union input and oversight through a new Compensation Committee (another product of the meet-and-confer process) that gives them far more say in such matters than they have today. And as far as the distribution of ratings is concerned, the regulations ban any sort of quota or forced distribution. Period.

Of course, DHS managers will receive intensive training in the new system, a further safeguard against abuse. And they too will be covered by it, with their pay

determined by how effectively they administer this system. The same is true of their executives, now covered by the new Senior Executive Service pay-for-performance system – indeed, OPM regulations governing that system establish clear chain-of-command accountability in this regard. With these considerable protections in place, we believe that there is no danger whatsoever that the pay of individual DHS employees will become "politicized" just because it will be more performance-based. To the contrary, we believe that the American people expect and demand that performance determine the pay of "their" employees. That is exactly what the DHS pay system is intended to do.

III. Accountability and Due Process

Public trust is essential to the success of the Department's homeland security mission. DHS has a special responsibility to American citizens; many of its employees have the authority to search, seize, enforce, arrest, and even use deadly force in the performance of their duties, and their application of these powers must be beyond question. By its very nature, the DHS mission requires a high level of workplace accountability, and Congress recognized this fact when it gave DHS and OPM the authority to waive those chapters of title 5, United States Code, that deal with adverse actions and appeals. However, in so doing, Congress also assured DHS employees that they would continue to be afforded the protections of due process. We believe that the regulations strike this balance. They assure far greater individual accountability, but without compromising the protections Congress guaranteed.

In this regard, DHS employees are still guaranteed notice of a proposed adverse action. While the regulations provide for a shorter, 15-day minimum notice period, (compared to a 30-day notice under current law), this fundamental element of due process is preserved. Employees also have a right to be heard before a proposed adverse action is taken against them. This too is a fundamental element of due process, and the regulations also provide an employee a minimum of 10 days to respond to the charges specified in that notice – compared to 7 days today. In addition, the final regulations continue to guarantee an employee the right to appeal an adverse action to the Merit Systems Protection Board (MSPB), except those involving a Mandatory Removal Offense (MRO; see below). And as a result of the meet-and-confer process with DHS unions, the regulations also provide bargaining unit employees the option of contesting a non-MRO adverse action through a negotiated grievance procedure . . . all the way to a neutral private arbitrator, if their union permits. The proposed rules had only provided for adverse action appeals to MSPB.

The final regulations continue to authorize the Secretary to establish a number of MROs that he or she determines will ". . . have a direct and substantial adverse impact on the ability of the Department to carry out its homeland security mission" – like accepting a bribe to compromise border security, or aiding and abetting a potential act of terrorism. And, we have provided examples of potential MROs in the supplementary information accompanying the final regulations, as you had requested, Mr. Chairman. At the same time, the regulations provide a number of checks and balances on the use of this authority: MROs must be published in the *Federal Register* after consultation with the Justice Department, and they must be communicated to all employees on an annual basis;

in addition, the regulations require case-by-case Department-level approval before an employee is charged with one. The final regulations also provide full due process to employees charged with a Mandatory Removal Offense. An employee is still entitled to a notice of proposed adverse action, the right to reply to the charges set forth in that notice, and the right to representation.

The regulations also permit an employee to appeal an MRO to an independent Mandatory Removal Panel, comprising three individuals appointed by the Secretary for their "impartiality and integrity," as well as their expertise in the Department's mission. Some have charged that this Panel somehow is unlawful because it lacks independent outside review, but nothing could be further from the truth. First, once appointed, the Panel will operate outside the DHS chain of command– its members do not report to the Secretary or any other management official and are every bit as independent as an agency's administrative law judges (ALJs). And just as ALJ rulings are binding on the agency that appoints them, so too are the Panel's determinations binding on DHS with respect to MROs – subject to appeal by either party to the MSPB and the Federal Circuit Court of Appeals. The Panel's independence is further guaranteed by special protections against removal of its members – protections that are patterned after those that shield members of the MSPB. Second, the Panel's decisions are in fact subject to outside review – indeed, at least *two levels* of such review. An employee can appeal a Panel decision to MSPB, under the very same standards that the Federal Circuit employs in reconsidering MSPB decisions. And once the Board has ruled on the matter, the employee is entitled to seek judicial review with the Federal Circuit Court of Appeals.

Further, in adjudicating employee appeals, regardless of forum, the final regulations place a heavy burden on the agency to prove its case against an employee. Indeed, in another major change resulting from the meet-and-confer process, the regulations actually establish a *higher* burden of proof: a "preponderance of the evidence" standard for all adverse actions, whether based on conduct or performance. While this is the standard that applies to conduct-based adverse actions under current law, it is greater than the "substantial" evidence standard presently required to sustain a performance-based adverse action.

Finally, the regulations authorize MSPB (as well as arbitrators) to mitigate penalties in adverse action cases. The proposed regulations precluded such mitigation, as does current law in performance-based adverse actions. However, mitigation may occur, but only under limited circumstances. Thus, the final regulations provide that *when the agency proves its case against an employee by a preponderance of the evidence,* MSPB (or a private arbitrator) may reduce the penalty involved *only* when it is "so disproportionate to the basis for the action that it is wholly without justification." Much has been made of this standard. Although it is admittedly tougher than the standards MSPB and private arbitrators apply to penalties in conduct cases today, it provides those adjudicators considerably more authority than they presently have in performance cases – current law literally precludes them from mitigating a penalty in a performance-based adverse action. Moreover, MSPB's current mitigation standards basically allow it (and private arbitrators) to second-guess the reasonableness of the agency's penalty in a misconduct case, without giving any special deference or dispensation to an agency's mission. That is untenable.

The President, the Congress, and the American public all hold the Department accountable for accomplishing its homeland security mission. MSPB is not accountable for that mission, nor are private arbitrators. Given the extraordinary powers entrusted to the Department and its employees, and the potential consequences of poor performance or misconduct to that mission, DHS should be entitled to the benefit of any doubt in determining the most appropriate penalty for misconduct or poor performance on the job. There is a presumption that DHS officials will exercise that judgment in good faith. If they do not, however, providing MSPB (and private arbitrators) with limited authority to mitigate is a significant check on the Department's imposition of penalties. That is what the new mitigation standard is intended to do, and it is balanced by the higher standard of proof that must first be met.

IV. Mission Imperatives and Employee Interests

The Department has a covenant of accountability with the American people, and it goes to the heart of another of the most controversial – and critical – provisions of the regulations: labor relations. Accountability must be matched by authority, and here, the current law governing relations between labor and management is out of balance. Its requirements potentially impede the Department's ability to act, and that cannot be allowed to happen. The regulations ensure that the Department can meet its mission, but in a way that still takes union and employee interests into account.

For example, today, in trying to bring about the most extensive reorganization of the Federal Government since the 1940s, the Secretary of Homeland Security cannot

issue personnel rules and regulations that are binding on his subordinate organizational units. Instead, those rules must be negotiated in all of the 70-odd bargaining units currently recognized by DHS (covering only about 25 percent of the Department's workforce) – many of which bear no resemblance to the Department's organizational structure or chain of command. Congress created DHS to assure unity of effort in the war on terror, but how can that possibly happen if the Secretary cannot even issue regulations that bind together the disparate mission elements that are comprised in that merger? The final rules give him, but only him, the authority to do so. Therein lies the balance: personnel policies, practices, and working conditions are still subject to collective bargaining below the Departmental level, but now, when the Secretary speaks, his organizational components and their patchwork of bargaining units must listen.

Today, if the Department wants to introduce new security or search technology, it cannot – not without first negotiating with the Department's various unions, at their various sub-Department levels of recognition, over the implementation and impact of that new technology on bargaining unit employees . . . and it cannot act until those negotiations have been concluded. How can we hold the Department accountable for homeland security if it cannot act swiftly to take full advantage of new technology in the war on terror? The final regulations give the Department the authority to do so. DHS now will be able to introduce new technology when and as it sees fit. However, that right is balanced by a requirement to negotiate over appropriate arrangements for employees adversely impacted by that new technology...*after the fact* – a recommendation you had made, Mr. Chairman. Thus, new technology cannot be delayed by collective bargaining,

but as is the case today, negotiations will still be required over appropriate arrangements for employees adversely affected by it.

Today, the Department cannot assign or temporarily deploy its front-line employees without following complicated, seniority-based procedures governing who, when, and how such assignments and deployments will take place – procedures that have been negotiated with unions. And if there is an operational exigency that those procedures did not anticipate, they cannot be modified without further negotiations. These procedures can force the Department to assign the least senior employee to a particular task, when the situation may call for the most seasoned. Or they can require the Department to assign volunteers from one unit to meet a critical operational need, and in so doing, leave that unit understaffed. These are real situations, with real operational impact, all the result of current law. The final regulations prohibit negotiations over these operational procedures. However, the regulations do require that managers "confer" with unions over them, and they also permit employees to grieve alleged violations -- all the way to arbitration, if their union permits; in addition, the regulations continue to require full collective bargaining over non-operational procedures governing such important subjects as promotion rules, discipline and layoff procedures, overtime, etc.
You will hear much about what is wrong with these changes.

You will hear that current law already allows the agency to do whatever it needs to do in an emergency. However, that statement, while true, explains why the current law is inadequate when it comes to national security matters. The Department needs the ability to move quickly on matters before they become an emergency, and the current law does not allow DHS to take action quickly to prevent an emergency, to prepare or

practice for dealing with an emergency, to deploy personnel or new technology to deter a potential threat, or do any of the things I have described above. Rather, the current law requires agencies to first negotiate with union over the implementation, impact, procedures and arrangements before it can take any of those actions. By the time an 'emergency' has arisen it is literally too late. On balance, that simply cannot continue.

You will also hear that the Homeland Security Labor Relations Board (HSLRB), to be appointed by the Secretary to resolve collective bargaining disputes in the Department, will not be independent, and that its decisions will not be impartial because they are not subject to "outside review." The HSLRB is expressly designed to ensure that those who adjudicate labor disputes in the Department have expertise in its mission, and its members are every bit as independent as those of the Department's Mandatory Removal Panel...or an agency's ALJs. Just as an agency's ALJs operate outside the chain of command, so too will HSLRB's members. Just as ALJ decisions are binding on the agency that employs them, so too will HSLRB's decisions be binding – subject to appeal by either party to the FLRA and the Federal Courts of Appeal. Thus, assertions to the contrary notwithstanding, the regulations make it patently clear that the HSLRB's decisions will be subject to at least *two levels* of outside review.

V. Conclusion

If DHS is to be held accountable for homeland security, it must have the authority and flexibility essential to that mission. That is why Congress gave the Department and OPM approval to waive and revise the laws governing classification, pay, performance

management, labor relations, adverse actions, and appeals. And that is why we have made the changes that we did. However, in so doing we believe that we have succeeded in striking a better balance – between union and employee interests on one hand, and the Department's mission imperatives on the other.

Mr. Chairman, that concludes my statement. I would be pleased to respond to any questions you and members of the Subcommittee may have.

Testimony
Before the United States Senate
Senate Homeland Security and Governmental Affairs Committee
Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia
Thursday, February 10, 2005

Unlocking the Potential within Homeland Security: the New Human Resources System

Department of Homeland Security Final Personnel Regulations: Managers' Cautious Optimism

Statement of
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Chairman Voinovich, Ranking Member Akaka and Members of the Senate Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia:

My name is Darryl Perkinson and I am the National Vice President of the Federal Managers Association (FMA). I am presently a Supervisory Training Specialist at Norfolk Naval Shipyard in Portsmouth, VA, where I have been in management for nearly 20 years. On behalf of the nearly 200,000 managers, supervisors, and executives in the Federal Government whose interests are represented by FMA, I would like to thank you for allowing us to express our views regarding the final personnel regulations that have been released for the Department of Homeland Security (DHS).

Established in 1913, FMA is the largest and oldest Association of managers and supervisors in the Federal Government. FMA has representation in some 35 different Federal departments and agencies. We are a non-profit advocacy organization dedicated to promoting excellence in government. As those who will be responsible for the implementation of the Department's new personnel system and subjected to its changes, managers and supervisors are pivotal to ensuring its success. I am here today to speak on behalf of those managers with respect to the rollout of the new system.

The Department of Homeland Security is still facing many challenges as it continues to coalesce the 22 disparate agencies under one parent department. As the Government Accountability Office (GAO) has explained in a number of recent reports[1], there are barriers from the standpoints of both creating a new culture and delineating the different responsibilities of each agency. As we move towards the implementation phase, we already know that there will be:

- no jobs eliminated as a result of the transition to the new system;
- no reduction in current pay or benefits for employees as a result of the transition to the new system;
- no changes in the rules regarding retirement, health or life insurance benefits, or leave entitlements;
- no changes in current overtime policies and practices; and
- merit principles will be maintained, preventing prohibited personnel practices, and honoring and promoting veterans' preference.

[1] Government Accountability Office Report GAO-04-790, Human Capital: DHS Faces Challenges In Implementing Its New Personnel System, June 18, 2004

We at FMA recognize that change does not happen overnight. However, we are optimistic that the new personnel system known as MAX^{HR} may help bring together the mission and goals of the Department with the on-the-ground functions of the homeland security workforce.

TRAINING AND FUNDING

Two key components to the successful implementation of MAX^{HR} and any other major personnel system reforms across the Federal government will be the proper development and funding for training of managers and employees, as well as overall funding of the new system. As any Federal employee knows, the first item to get cut when budgets are tightened is training. Mr. Chairman, you have been stalwart in your efforts to highlight the importance of training across government. It is crucial that this not happen in the implementation of MAX^{HR}. Training of managers and employees on their rights, responsibilities and expectations through a collaborative and transparent process will help to allay concerns and create an environment focused on the mission at hand.

Managers have been given additional authorities under the final regulations in the areas of performance review and "pay-for-performance". We must keep in mind that managers will also be reviewed on their performance, and hopefully compensated accordingly. A manager or supervisor cannot effectively assign duties to an employee, track, review and rate performance, and then designate compensation for that employee without proper training. As a corollary, if there is not a proper training system in place and budgets that allow for adequate raining, the system is doomed for failure from the start. The better we equip managers to supervise their workforce, the more likely we are to ensure the accountability of the new system – and the stronger the likelihood that managers will be able to carry out their non-supervisory responsibilities in support of the Department's mission.

For employees, they will now be subject in a much more direct way to their manager's objective determination of their performance. Employees would be justified in having concerns about their manager's perception of their work product in any performance review if they felt that the manager was not adequately trained. Conversely, if employees have not been properly trained on their rights, responsibilities and expectations under the new human resources requirements, they are more apt to misunderstand the appraisal process.

Our message is this: As managers and supervisors, we cannot do this alone. Collaboration between manager and employee must be encouraged in order to debunk myths and create the

performance and results oriented culture that is so desired by the final regulations. Training is the first step in opening the door to such a deliberate and massive change in the way the government manages its human capital assets. We need the support of the Department's leadership, from the Secretary on down, in stressing that training across the board is a top priority. We also need the consistent oversight and input of Congress to ensure that both employees and managers are receiving the proper levels of training in order to do their jobs most effectively.

The Secretary and Congress must also play a role in proposing and appropriating budgets that reflect these priorities. The President's fiscal year 2006 budget proposal includes a line that money has been set aside for "training supervisory personnel to administer a performance-based pay system and to create the information technology framework for the new system."[2] A similar item was included in the fiscal year 2005 budget proposal.[3] However, the final funding levels for the implementation of the new system were well below the proposed figure. This precedent, as we prepare for even larger budget deficits that the President hopes to cut into by holding discretionary spending below the level of inflation, presents a major hurdle to the overall success of MAX^{HR} and any future personnel reform efforts at other departments and agencies.

Agencies must also be prepared to invest in their employees by offering skill training throughout their career. This prudent commitment, however, will also necessitate significant technological upgrades. OPM has already developed pilot Individual Learning Account (ILA) programs. An ILA is a specified amount of resources such as dollars, hours, learning technology tools, or a combination of the three, that is established for an individual employee to use for his/her learning and development. The ILA is an excellent tool that agencies can utilize to enhance the skills and career development of their employees.

We'd also like to inform Congress of our own efforts to promote managerial development. FMA recently joined with Management Concepts to offer *The Federal Managers Practicum* — a targeted certificate program for Federal managers. As the official development program for FMA, *The Federal Managers Practicum* helps FMA members develop critical skills to meet new workplace demands and enhance their managerial capabilities.

[2] The White House Office of Management and Budget, Budget of the United States Government, Fiscal Year 2006
[3] The White House Office of Management and Budget, Budget of the United States Government, Fiscal Year 2005

FMA has long recognized the need to prepare career-minded Federal employees to manage the demands of the 21st century workplace through its establishment of The Federal Management Institute, FMA's educational arm, which sponsors valuable professional development seminars and workshops. *The Federal Managers Practicum* is a unique, integrated development program that links professional training and higher education – specifically created for the Federal career professional. Developed and taught by management experts, this comprehensive practicum integrates core program management skills including planning, analysis, budgeting, communication, evaluation, and leadership with functional skills and knowledge – providing a balance between theory and practice. We at FMA believe that the practicum will pave the way for the creation of much-needed development programs for Federal employees.

Clearly agency budgets should allow for the appropriate funding of the ILA as an example. However, history has shown that training dollars have been a low priority for many agency budgets. In fact, in the rare event that training funds are available, they are quickly usurped to pay for other agency "priorities." Toward this end, we at FMA support including a separate line item on training in agency budgets to allow Congress to better identify the allocation of training funds each year.

Neither the Office of Management and Budget (OMB) nor OPM collects information on agency training budgets and activities. This has only served to further diminish the minimal and almost cursory attention on training matters. Many agencies do not even have dedicated employee "training" budgets. Training funds are often dispersed through other accounts. It is no surprise that budget cuts inevitably target training funds, which is why FMA continues to advocate for the establishment of a training officer position within each Federal agency. This would allow for better management and recognition of training needs and resources, in addition to placing increased emphasis on critical training concerns.

The Federal government must, once and for all, take the issue of continuous learning seriously. FMA advocated for the existing Chief Human Capital Officers Council, which both you, Mr. Chairman and Senator Akaka, were instrumental in bringing about as part of the Homeland Security Act of 2002. While we applaud the Council's creation of two needed subcommittees to examine performance management as well as leadership development and succession planning, we would urge the Council to add another subcommittee to evaluate training programs across government. Without proper training, and funding for training, we cannot hope to effectuate expansive human resources changes and fully achieve them.

PAY FOR PERFORMANCE

There has been much discussion about the creation of a pay-for-performance system at DHS. We believe that a deliberate process that takes into account both an internal and independent review mechanism for the implementation of a pay-for-performance system is crucial to its success at DHS and elsewhere in the Federal government.

The replacement of the standard General Schedule pay system with a proposed pay banding system creates a devastating problem should insufficient funds be appropriated by Congress. As it stands, the regulations will have employees competing with one another for the same pool of money, all of which is based on their performance review. If this pool of money is inadequate, the performance of some deserving Federal employees will go unrecognized, causing the new system to fail in meeting its objective, in addition to creating dissension in the workplace. In short, the integrity of "pay-for-performance" will be severely hindered if ALL high performers are not rewarded accordingly. We believe that DHS should continue to allocate at least the annual average pay raise that is authorized and appropriated by Congress for General Schedule employees to DHS employees who are "fully successful" (or the equivalent rating), in addition to other rewards based on "outstanding" performance (or equivalent rating).

The performance appraisal process is key to this new personnel system. The review determines the employee's pay raise, promotion, demotion or dismissal in a far more uninhibited way than is currently established in the General Schedule. We support the premise of holding Federal employees accountable for performing their jobs effectively and efficiently. More specifically, the removal of a pass/fail performance rating system is a step in the right direction.

We are concerned, however, that within any review system there must be a uniform approach that takes into account the clear goals and expectations of an employee and a system that accurately measures the performance of that employee, with as little subjectivity on the manager's part as possible. As such, it is essential that within the review process, the methodology for assessment is unmistakable and objective in order to reduce the negative effects of an overly critical or overly lenient manager. The most important component in ensuring a uniform and accepted approach is proper training, and funding thereof, that will generate performance reviews reflective of employee performance. We would like to submit the following necessary elements for executing a pay-for-performance system that has a chance to succeed:

- adequate funding of "performance funds" for managers to appropriately reward employees based on performance;
- development of a performance rating system that reflects the mission of the agency, the overall goals of the agency, and the individual goals of the employee, while removing as much bias from the review process as possible;
- a transparent process that holds both the employee being reviewed and the manager making the decision accountable for performance as well as pay linked to that performance;
- a well-conceived training program that is funded properly and reviewed by an independent body (we recommend the Government Accountability Office as an auditor) which clearly lays out the expectations and guidelines for both managers and employees regarding the performance appraisal process.

We believe that *transparency* leads to *transportability*, as intra-Department job transfers could be complicated by the lack of a consistent and uniform methodology for performance reviews. While we need training and training dollars, we should allocate those funds towards a program that takes into account all 22 disparate agencies within DHS. If we are to empower managers with the responsibility and accountability of making challenging performance-based decisions, we must arm them with the tools to do so successfully. Without proper funding of "performance funds" and training, we will be back where we started – with a fiscally restricted HR system that handcuffs managers and encourages them to distribute limited dollars in an equitable fashion.

COLLECTIVE BARGAINING AND LABOR RELATIONS

FMA supports an open and fair labor-relations process that protects the rights of employees and creates a work environment that allows employees and managers to do their jobs without fear of retaliation or abuse.

Under the new system, various components of the collective bargaining process are no longer subject to the same rules. There is also a move away from the Federal Labor Relations Authority (FLRA) as an independent negotiating body to an internal labor relations board made up of members appointed by the Department's Secretary. This immediately calls into question the integrity, objectivity and accountability of such an important entity. Impartiality is key to this process, and it is derived from

independence in the adjudication process. The workforce must feel assured that such decisions are made free of bias and politics.

The appointments for the new Homeland Security Labor Relations Board (HSLRB) are made solely by the Secretary, with nominations and input allowed by employee organizations for two of the three positions. Submitting nominations from employee groups to the Secretary on whom we believe to be qualified candidates for this internal board must not be taken as perfunctory. They should be given serious consideration by the Department and where appropriate appointed to the board.

We are pleased to see in the final regulations that there are some checks and balances in regards to our concerns with the HSLRB. For instance, there will still be an appeals process available for employees to go to the FLRA and Federal court if necessary on certain collective bargaining issues. However, we would like to see defined guidelines or criteria on who may be appointed to the board, as opposed to just term limits.

The new system has relegated the authority for determining collective bargaining rights to the Secretary. Towards this end, the recognition of management organizations such as FMA is a fundamental part of maintaining a collaborative and congenial work environment. Of the provisions in Title 5 that have been waived under the new Department of Homeland Security personnel system, the modification of collective bargaining rights that gives the Secretary sole discretion on when to recognize the unions places into question such recognition of the Federal Managers Association by DHS.
Title 5 CFR 251/252 grants non-union employee groups the formal recognition of the Department by ensuring a regular dialogue between agency leadership and management organizations. Specifically, these provisions stipulate that:

- such organizations can provide information, views, and services which will contribute to improved agency operations, personnel management, and employee effectiveness;
- as part of agency management, supervisors and managers should be included in the decision-making process and notified of executive-level decisions on a timely basis;
- each agency must establish and maintain a system for intra-management communication and consultation with its supervisors and managers;
- agencies must establish consultative relationships with associations whose membership is primarily composed of Federal supervisory and/or managerial personnel, provided that such

associations are not affiliated with any labor organization and that they have sufficient agency membership to assure a worthwhile dialogue with executive management; and

- an agency may provide support services to an organization when the agency determines that such action would benefit the agency's programs or would be warranted as a service to employees who are members of the organization and complies with applicable statutes and regulations.

In summary, Title 5 CFR 251/252 allows FMA, as an example, to come to the table with DHS leadership and discuss issues that affect managers, supervisors, and executives. While this process is not binding arbitration, the ability for managers and supervisors to have a voice in the policy development within the Department is crucial to its long-term vitality. Such consultation should be supported by all agencies and departments, thus we strongly urge the inclusion of CFR 251/252 into the final regulations in order to maintain the strong tradition of a collaborative work environment that values the input of Federal managers.

In fact, we strongly encourage the Department to make good on its call for "continuing collaboration" with management and employee groups during the implementation process by inserting language mirroring 5 CFR 251/252 in its regulations. Currently "continuing collaboration" is not more narrowly defined in the regulations, rather a blanket statement that the Department intends to do so. We would ask that the Secretary and DHS leadership set up regular meetings (monthly or bi-monthly), depending on the status of the implementation, in order to ensure this important dialogue that has been so critical to the design process continues.

ADVERSE ACTIONS AND APPEALS

As managers, we take comfort in knowing that there is an independent appeals process for employees to dispute adverse actions. We are concerned that within the new system the internal process that will be established might again call into question the integrity and accountability of the appeals process. As the Department of Homeland Security and the Office of Personnel Management felt it ultimately necessary to bypass the Merit Systems Protection Board (MSPB), we are pleased that there is still the ability for employees to ultimately appeal to the MSPB.

The MSPB system was established twenty-five years ago to allow Federal employees to appeal adverse agency actions to a third-party, independent review board. Since its inception, the MSPB has

maintained a reputation of efficiency and fairness. MSPB decisions uphold agency disciplinary actions 75 to 80 percent of the time, which is evidence of the Board's broad support of agency adverse action decisions. In performance cases, the percentage is even higher in support of agency management. Decisions are also typically reached in 90 days or fewer.

Moreover, the current model has been successful because it is a uniform system for the entire Federal government. Establishing disparate appeals processes might create unnecessary confusion for the Federal workforce, which will lengthen, instead of streamline, the process while potentially making the system more prone to abuse. While we recognize the desire to streamline the appeals process, we believe that implementing an internal review board as proposed could create a lack of trust that will pervade the system, which will likely serve to lengthen and complicate the process.

In fact, in 1995, Congress took away Federal Aviation Administration (FAA) employees' MSPB appeals rights as part of a personnel reform effort that freed the FAA from most government-wide personnel rules. The FAA subsequently replaced the MSPB appeals process with an internal system – as is being proposed in the House version of the Defense Authorization bill – called the "Guarantee Fair Treatment" program consisting of a three-person review panel. Critics complained that the Guaranteed Fair Treatment program did not give employees access to an independent administrative review body. After numerous incidents and reports of abuse, Congress in 2000 reinstated full MSPB appeal rights to FAA employees as part of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21).

Based on its track record of fairness and credibility within the Federal community, we support incorporating the Merit Systems Protection Board in the appeals process. Given the MSPB's strong reputation for swiftness and fairness in the eyes of agency management and employees – as well as the FAA's failed experiment with utilizing an internal appeals process – we at FMA believe that not doing so would create more problems than it solves.

The mission of the Department of Homeland Security demands high performance and the utmost integrity from its employees. As the adage goes, one bad apple can spoil the rest. DHS does not have that luxury. So, it is understandable that certain egregious offenses should never be tolerated, and therefore result in immediate and decisive action.

The Mandatory Removal Offenses (MRO) authority that has been given to the Secretary is a good way to aid in creating a culture that adheres to the sensitive nature of the work being done by the

Department, and reminds employees that they must be on top of their game at all times. Certain acts such as leaking classified materials, deliberately abetting a terrorist, or committing serious fraud certainly warrant the removal of an employee. These along with a few other offenses could be justified in the creation of a MRO list.

We are nevertheless concerned that Pandora's Box could be opened, and caution restraint on the part of the Secretary in establishing specific MRO's. As was seen within the "10 Deadly Sins" at the Internal Revenue Service, overwhelming fear of violating an MRO slowed the actions of employees and impeded their work. This could be a serious detriment to an agency that needs as much creativity in battling 21st century terrorists who will use any means in any context to attack our homeland. Managers and employees working in DHS are fully aware of the sensitivity of their position and mission, so we urge the Department to exercise this authority with great care for potential side-effects.

PAY BANDING, COMPENSATION AND JOB CLASSIFICATION

Pay banding is not a new concept to the private and public sector industries. It is currently underway in a few government agencies, notably in the Federal Aviation Administration as well as in the Internal Revenue Service – where FMA has a large number of members. The job classification and pay system was developed in the late 1980s, and has seen varying levels of success across private industry and in the public sector.

Under the final regulations for DHS MAX^{HR}, applicable employees will no longer be governed by the traditional General Schedule (GS) pay system, which is made up of 15 levels and within level steps. The GS system is based on the premise that an employee who commits themselves to public service will be rewarded for longevity of service and tenure in the system through regular pay raises and promotions as long as the employee is "fully performing" the duties assigned. Under the pay banding system within pay for performance, the employee will be lumped into one of 12-15 job clusters that combine like job functions, and then placed in one of four pay bands: Entry Level, Full Performance, Senior Expert, and Supervisory (with the potential for more senior-level management bands).

While the exact determination of the pay range for each pay band has yet to be determined, it is our understanding that the GS salary structure will act as the baseline for moving an employee into the new band as well as act as a guide for determining the low and high ends of each band. Furthermore, we

also have received assurances that current employees will not see any reduction in their current pay, and in fact qualified employees could receive higher salaries from this transition. We at FMA believe that this is a sound move on the part of DHS and OPM. The GS system is familiar to Federal managers and employees, and moving into a new pay banding system in and of itself creates some consternation. Using the GS system as the foundation will allay concerns that pay rates will be significantly reduced.

Pay bands also offer a number of benefits to the employee and manager that should be examined. The General Schedule places its emphasis on longevity, and the new system will place more emphasis on job performance than duration of employment. Pay bands provide the opportunity to have accelerated salary progression for top performers. As in the IRS pay-band system, managers are eligible for a performance bonus each year. Those managers with "Outstanding" summary ratings will receive a mandatory performance bonus. Managers with "Exceeded" summary ratings are eligible for performance bonuses.

In the area of job classification, determinations are made which place positions in different pay categories where the distinctions that led to the classification are small. Pay-banding provides the opportunity to place greater weight on performance and personal contributions.

Pay bands can also be designed to provide a longer look at performance beyond a one-year snapshot. Many occupations have tasks that take considerable lengths of time. Pay bands can be designed to recognize performance beyond one year. Arbitrary grade classifications in the GS system inhibit non-competitive reassignments. Broader bands allow non-competitive reassignments. This enhances management flexibility and developmental opportunities.

Of course, there remain challenges with any proposed pay-band system for that matter. First, pay-for-performance systems are only as good as the appraisal systems they use. Since performance is the determining factor in pay-band movement, if there is no confidence in the appraisal system, there will be no confidence in the pay system.

Moreover, pay-for-performance systems can be problematic where there is an aging workforce. Experienced employees tend to converge towards the top of the pay band. This provides them little room for growth. This is particularly true for those employees whose GS grade is the highest grade in the new band. (Example: Grade 13 employee placed in an 11-13 band. S/he will be towards the top and

now will need the higher grades to continue to move ahead. Previously s/he only needed time in grade and a "fully successful" rating to progress).

Finally, pay-band performance requirements can discourage non-banded employees from applying for banded positions. If the employee is converted in the upper range of a band s/he may not have confidence s/he can achieve the higher ratings requirements.

Compounding the critical mission of DHS and its new personnel system are the myriad of problems associated with the recruitment and retention of Federal employees. One piece in particular is the significant pay gap between the public and private sectors. According to a survey of college graduates, Federal and non-Federal employees conducted by the Partnership for Public Service[4], the Federal government is not considered an employer of choice for the majority of graduating college seniors. In the survey, nearly 90 percent said that offering salaries more competitive with those paid by the private sector would be an "effective" way to improve Federal recruitment. Eighty-one percent of college graduates said higher pay would be "very effective" in getting people to seek Federal employment. When Federal employees were asked to rank the effectiveness of 20 proposals for attracting talented people to government, the second-most popular choice was offering more competitive salaries (92 percent). The public sector simply has not been able to compete with private companies to secure the talents of top-notch workers because of cash-strapped agency budgets and an unwillingness to address pay comparability issues.

Closing the pay gap between public and private-sector salaries is critical if we are to successfully recruit and retain the "best and brightest." In this regard, we are pleased to see a shift in the determination of "locality" pay from strictly geographical to occupational. Locality pay adjustments based on regions across the country did not take into account the technical skills needed for a given occupation. The new regulations allow for a look nationwide at a given occupation within the labor market that more accurately ties the rate of pay to job function, which could overcome geographic impediments in the past in closing the gap between public- and private-sector salaries.

[4] Survey conducted by Hart-Teeter for the Partnership for Public Service and the Council for Excellence in Government, Oct. 23, 2001, p. 1-3.

GOVERNMENT-WIDE STANDARDS

The passage of the Department of Homeland Security Act of 2002 (P.L. 107-296) marked the first step in what has led to the largest civil service reform effort in over a quarter-of-a-century. Included in the legislation that modified the way we approach protecting our homeland, it authorized major changes to the pay, labor relations, collective bargaining, adverse actions, appeals process and performance review systems governed by Title 5 of the U.S. Code. The justification was made based on the critical and urgent need to have a flexible and dynamic human resources system that would allow the 22 disparate agencies of the new Department to prevent any threats to our national security and react quickly if need be. While this justification has come under fire, we agree that the needs of national security and protecting America's infrastructure and citizens may require greater latitude within the personnel systems of appropriate Federal agencies. But striking the right balance is what we collectively should be aiming to accomplish with respect to the implementation of the new MAX^{HR} human resources transformation at the Department of Homeland Security (DHS) and the new National Security Personnel System (NSPS) at the Department of Defense (DOD.

The White House has recently announced that it will be pushing forward an initiative to adopt similar civil service reform efforts across the Federal government and allow each agency to create its own personnel reforms that reflect the mission and needs of the agency. It is clear that the with so many changes in the Federal government over the past few decades – significantly reduced workforce size, changes to retirement systems, higher attrition rates, and increased external factors such as terrorism and the issue of trust in government and its relationship to recruitment and retention – a modernization movement in personnel systems is justifiable. While we support the general effort to modernize and transform the civil service to reflect the current needs and resources of each agency, hastiness and the absence of an overarching government-wide framework for these reforms could create a Balkanization of the Federal government that diminishes the uniqueness of the Civil Service.

MAX^{HR} and the NSPS are still in their infancy. Outside of a few demonstration projects that sample much smaller workforce numbers, there is no significant track record of the effectiveness and success of such large-scale reforms. It makes little sense to create massive personnel changes across the Federal government without first seeing the successes, and failures, of the new systems at DHS and DOD.

There has also been a commitment on the part of the Office of Personnel Management, DHS and DOD to hold close the Merit System Principles, and we cannot stress adherence to these timely standards enough. However, we also believe that there needs to be even further guiding principles that maintain a system of integrity, transparency and accountability for managers and supervisors. The Office of Personnel Management should take the current systems being implemented at DHS and create a set of public principles that can guide future agencies in their efforts to develop new systems.

CONCLUSION

The final regulations on the new personnel system being issued by the Department of Homeland Security and the Office of Personnel Management are the first in what is expected to be a broader effort to transform the Civil Service as we know it. There is great hope that within these precedent-setting regulations lies the understanding that managers and employees can work together in creating an efficient and effective Federal workforce that meets the missions of each agency. We at FMA share in this hope, but it is our responsibility – and that of all the stakeholders – to do what we can in eliminating the seeds that will reap setbacks or disasters.

A shift in the culture of any organization cannot come without an integral training process that brings together the managers responsible for implementing the new personnel system and the employees they supervise. The leadership of DHS must work in tandem with Congress, managers and employees in creating a training program that is properly funded and leaves little question in the minds of those it affects of their rights, responsibilities and expectations.

A total overhaul of the GS pay system to reflect a more modern approach to performance-based pay must be funded properly in order for it to succeed. As we have explained, the lack of proper funding for "pay for performance" will work contrary to its intended results. The mission of the agency is too critical to America to create a system that is hamstrung from the start.

Furthermore, employee morale is also crucial to the successful implementation of MAX^{HR}. Ensuring that employees feel their rights are protected and safeguards are in place to prevent abuse or adverse actions derives in part from independent and effective collective bargaining, labor relations, and appeals processes. The Secretary and the HSLRB should do all in their power to create an open and fair working environment. At the same time, DHS must continue to engage in the important consultative relationship with management organizations such as FMA.

There are additional challenges that face a new pay-banding system. We are confident that the Department, in conjunction with OPM, is looking to the current GS system as a baseline for the job clusters and pay bands. This will go a long way towards easing some concerns for current managers and employees that their pay will be unfairly compromised.

We at FMA cannot stress enough the need to take a cautious and deliberate path for implementing the new regulations. It appears that DHS and OPM are committed to this approach. We recommend continued collaboration with management and employee groups as well as independent review and auditing by the Government Accountability Office, with the oversight of Congress. Through these checks and balances, we are hopeful that a set of guiding principles will emerge to assist other agencies in their expected personnel reform efforts.

We at FMA are cautiously optimistic that the new personnel system will be as dynamic, flexible and responsive to modern threats as it needs to be. While we remain concerned with some areas at the dawn of the system's rollout, the willingness of the Office of Personnel Management and the Department of Homeland Security to reach out to employee organizations such as FMA is a positive indicator of collaboration and transparency. We look forward to continuing to work closely with Department and Agency officials.

Thank you again, Mr. Chairman, for the opportunity to testify before your committee and for your time and attention to this important matter. Should you need any additional feedback or questions, we would be glad to offer our assistance.

National Treasury Employees Union

TESTIMONY OF NTEU NATIONAL PRESIDENT
COLLEEN M. KELLEY

ON

"UNLOCKING THE POTENTIAL WITHIN HOMELAND SECURITY: THE NEW HUMAN RESOURCES SYSTEM"

BEFORE THE

THE SENATE HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS COMMITTEE SUBCOMMITTEE ON OVERSIGHT AND GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA

THURSDAY, FEBRUARY 10, 2005, 10 A.M.
342 DIRKSEN SENATE OFFICE BUILDING
WASHINGTON, D.C.

Chairman Voinovich, Ranking Member Akaka, I would like to thank the subcommittee for the opportunity to testify on the final human resources management regulations for the Department of Homeland Security (DHS) that were published on February 1 in the Federal Register.

As President of the National Treasury Employees Union (NTEU), I have the honor of representing over 150,000 federal employees, 15,000 of whom are part of the Department of Homeland Security (DHS). I was also pleased to have served as the representative of NTEU on the DHS Senior Review Committee (SRC) that was tasked with presenting to DHS Secretary Tom Ridge and OPM Director Kay Coles James, options for a new human resources (HR) system for all DHS employees. NTEU was also a part of the statutorily mandated "meet and confer" process with DHS and OPM from June through August 2004.

It is unfortunate that after two years of "collaborating" with DHS and OPM on a new personnel system for DHS employees that I come before the subcommittee unable to support the final regulations. While some positive changes were made because of the collaboration between the federal employee representatives and DHS and OPM during the meet and confer process, NTEU is extremely disappointed that the final regulations fall woefully short on a number of the Homeland Security Act's (HSA) statutory mandates. The most important being the mandates that DHS employees may, "organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them,"(5 U.S.C. 9701 (b)(4)) as well as the mandate that any

changes to the current adverse action procedures must "further the fair, efficient and expeditious resolutions of matters involving the employees of the Department." (5 U.S.C. 9701 (f)(2)(C)).

Because the final personnel regulations failed to meet the statutory requirements of the HSA in the areas of collective bargaining, and appeal rights, NTEU, along with fellow federal employee unions AFGE, NFFE and NAAE has filed a lawsuit in Federal court. The lawsuit seeks to prevent DHS and OPM from implementing the final regulations related to these areas and would order DHS and OPM to withdraw the regulations and issue new regulations, after appropriate collaboration with the unions, that fully comply with the relevant statutes.

NTEU and other employee unions put in countless hours over the last two years offering numerous common sense proposals in the areas of collective bargaining, streamlining employee appeals and modernizing the current GS pay system, aimed at giving DHS the flexibility it believes it needs to fulfill its new missions while preserving the rights of employees. NTEU believes there was a unique opportunity lost by the decision of DHS and Office of Personnel Management (OPM) officials to reject these common sense proposals that would have preserved employees' rights and enabled DHS to act swiftly in order to protect homeland security. Instead, the final personnel regulations will create an environment of mistrust and uncertainty for the over 110,000 DHS employees that the regulations will cover.

As the subcommittee is aware, the HSA allowed the DHS Secretary and the OPM Director to make changes in certain sections of Title 5 that have governed the employment rights of federal employees for over 20 years. I will focus my comments on three areas of the final personnel regulations that fall short of protecting federal employees' rights: labor relations/collective bargaining, due process rights, and the pay for performance system.

LABOR RELATIONS

The Homeland Security Act requires that any new human resource management system "ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them." NTEU believes that the final regulations do not meet this statutory requirement in the following ways.

No Independent Third Party Review of Collective Bargaining Disputes

Under the final personnel regulations, the responsibility for deciding collective bargaining disputes will lie with a three-member DHS Labor Relations Board appointed by the Secretary of the Department of Homeland Security. Senate confirmation will not be required, nor is political diversity required among the Board members. Currently, throughout the federal government, collective bargaining disputes are decided by the Federal Labor Relations Authority (FLRA), an independent body appointed by the President and confirmed by the Senate. A true system of collective bargaining demands independent third party determination of disputes. The final regulations do not provide

for that, instead creating an internal system in which people appointed by the Secretary will be charged with deciding matters directly impacting the Secretary's actions.

Drastic Reductions in Negotiability Rights

Under the final regulations, not only will management rights associated with operational matters (subjects that include deployment of personnel, assignment of work, and the use of technology) be non-negotiable, but even the impact and implementation of most management actions will be non-negotiable. In other words, employee representatives will no longer be able to bargain on behalf of employees concerning the procedures that will be followed when DHS management changes basic conditions of work, such as employees' rotation between different shifts or posts of duty, or scheduling of days off.

Non-Negotiability Over Department-Wide Regulations

The final regulations further reduce DHS' obligation to collectively bargain over the already narrowed scope of negotiable matters by making department-wide regulations non negotiable. Bargaining is currently precluded only over government-wide regulations and agency regulations for which a "compelling need" exists. The new DHS personnel system would allow management to void existing collective bargaining agreements, and render matters non-negotiable, simply by issuing a department-wide regulation.

A real life example of the adverse effect of the negotiability limitations on both employees and the agency will be in the area of determining work shifts. Currently, the agency has the ability to determine what the shift hours will be at a particular port of entry, the number of people on the shift, and the job qualifications of the personnel on that shift. The union representing the employees has the ability to negotiate with the agency, once the shift specifications are determined, as to which eligible employees will work which shift. This can be determined by such criteria as seniority, expertise, volunteers, or a number of other factors.

CBP Officers around the country have overwhelmingly supported this method for determining their work schedules for a number of reasons. One, it provides employees with a transparent and credible system for determining how they will be chosen for a shift. They may not like management's decision that they have to work the midnight shift but the process is credible and both sides can agree to its implementation. Two, it takes into consideration lifestyle issues of individual officers, such as single parents with day care needs, employees taking care of sick family members or officers who prefer to work night shifts. The new personnel system's elimination of employee input into this type of routine workplace decision-making will have a negative impact on morale.

Based on the elimination of independent third party review of disputes described above, coupled with the drastic limitations to collective bargaining rights, NTEU does not believe these proposed regulations meet the statutory requirement that any new human resource management system "ensure that employees may organize, bargain collectively,

and participate through labor organizations of their own choosing in decisions which affect them," which is why NTEU strongly opposes the final regulations and urges Congress to make changes to ensure that the statutory directives of the HSA are met.

MSPB APPEALS PROCESS DRASTICALLY CHANGED

One of the core statutory underpinnings of the HSA was Congress' determination that DHS employees be afforded due process and that they be treated in a fair manner in appeals they bring before the agency. In fact, the HSA clearly states that the DHS Secretary and OPM Director may modify the current appeals procedures of Title 5, Chapter 77, only in order to, "further the fair, efficient, and expeditious resolution of matters involving the employees of the Department." (5U.S.C. 9701 (f)(2)(C)). Instead the final regulations undermine this statutory provision in a number of ways.

The final regulations undercut the fairness of the appeals process for DHS employees by eliminating the Merit Systems Protection Board's (MSPB) current authority to modify agency-imposed penalties. The result is that DHS employees will no longer be able to challenge the reasonableness of penalties imposed against them, and the MSPB will now only be authorized to modify agency-imposed penalties under very limited circumstances where the penalty is "wholly unjustified," a standard that will be virtually impossible for DHS employee to meet.

FLRA AND MSPB GIVEN NEW AUTHORITY NOT AUTHORIZED BY LAW

The final regulations exceed the authority given in the HSA to the Secretary and OPM Director, by giving the FLRA and the MSPB new duties and rules of operation not set by statute.

The FLRA and the MSPB are independent agencies, and DHS and OPM are not authorized to impose obligations on either independent agency, or dictate how they will exercise their jurisdiction over collective bargaining and other personnel matters. In the final regulations, the FLRA is assigned new duties to act as an adjudicator of disputes that arise under the new labor relations system and the regulations also dictate which disputes the FLRA will address and how they will address them.

In addition, the final regulations conscript the Merit System Protection Board as an appellate body to review, on a deferential basis, findings of the new Mandatory Removal Panel (MRP). Chapter 12 of Title 5, which sets out MSPB's jurisdiction, does not authorize this kind of action by the Board and the DHS Secretary and OPM Director are not empowered to authorize it through regulation. A similar appellate role is given to the FLRA. It is tasked with reviewing decisions of the Homeland Security Labor Relations Board (HSLRB) on a deferential basis. There is no authority for assigning such a role to the FLRA.

ADDITIONAL PROBLEMS WITH FINAL REGULATIONS

Mandatory Removal Offenses

The final regulations provide the Secretary with unfettered discretion to create a list of Mandatory Removal Offenses (MRO) that will only be appealable on the merits to an internal DHS Mandatory Removal Panel (MRP) appointed by the Secretary.

The final regulations include a preliminary list of seven potential mandatory removal offenses but are not the exclusive list of offenses. The final regulations also

provide that the Secretary can add or subtract MRO's by the use of the Department's implementing directive mechanism and that the Secretary has the sole, exclusive, and unreviewable discretion to mitigate a removal penalty.

The President's FY 2006 budget again includes a proposal to drop the mandatory removal provisions known as the "10 deadly sins" applicable to IRS employees. This similar provision should also be dropped.

By going far beyond the statutory parameters of the HSA, and drastically altering the collective bargaining, due process and appeal rights of DHS personnel, these regulations will leave employees with little or no confidence that they will be treated fairly by the agency, which is why NTEU strongly opposes the final regulations and urges Congress to make changes to protect the rights of federal employees in DHS.

Pay:

While not a part of the lawsuit filed by NTEU and other federal employee representatives, the final regulations as they relate to changes in the current pay, performance and classification systems of DHS employees must be brought to the attention of this subcommittee. While the final regulations lay out the general concepts of the new base pay system, they remain woefully short on details. While NTEU was heartened to see that employee representatives will be able to provide minimal "consultation" as part of the agency's Compensation Committee that will formulate the

implementing pay directives, we believe that there is a greater role for employee representatives to play in the areas of pay, classification and performance appraisals.

Too many of the key features of the new system have yet to be determined. The final regulations make clear that the agency will be fleshing out the system's details in management-issued implementing directives while using an expensive outside contractor that will cost the agency tens of millions of dollars that could be used for additional front line personnel. Among the important features yet to be determined by the agency are the grouping of jobs into occupational clusters, the establishment of pay bands for each cluster, the establishment of how market surveys will be used to set pay bands, how locality pay will be set for each locality and occupation, and how different rates of performance-based pay will be determined for the varying levels of performance.

As part of the design and meet and confer processes, DHS conducted a number of town hall and focus group meetings around the country to obtain input from employees on their views of any problems with the current HR management systems and changes they would like to see made. DHS employees were overwhelmingly opposed to changing the General Schedule (GS) system. In addition, when the proposed regulations were released in early 2004, over 3,800 comments were submitted in response to the proposed pay for performance system and the vast majority strongly urged the Department not to abandon the GS basic pay system.

NTEU is especially mindful of the fact that the more radical the change, the greater the potential for disruption and loss of mission focus, at a time when the country can ill-afford DHS and its employees being distracted from protecting the security of our homeland. However, before any changes are made to tie employees' pay to performance ratings, DHS must implement, evaluate, and possibly modify a fair and effective performance system. The linking of basic pay increases to annual performance ratings will be particularly problematic for the tens of thousands of DHS employees who perform law enforcement duties. To date, no information has ever been produced to show that the new "pay band" system will enhance the efficiency of the department's operations particularly in a law enforcement setting.

Finally, any new pay for performance system must be adequately funded. Performance based pay and other types of new pay supplements described in the final regulations must not be funded with money that would have been used to provide GS increases for all DHS employees. By not properly funding any new pay for performance system, Congress in conjunction with DHS, runs the very real risk of rewarding a select few, based on the new pay system, at the expense of the majority of employees who do a solid job, thereby creating an atmosphere of distrust among the workforce.

Conclusion:

While NTEU would have preferred to be able to support the final regulations, we will continue to fully support the mission and personnel of the Department of Homeland Security. NTEU was pleased to have a voice at the table during the public dialogue

concerning the new HR system for DHS employees. Clearly, we are very disappointed with the results. It is unfortunate that the final regulations place excessive limits on employees' collective bargaining rights, drastically alter the appeals process for DHS employees, and provide too few details for a major overhaul of employee pay, performance and classification systems. NTEU strongly believes that changes are needed in these regulations if the agency's goal is to build a DHS workforce that feels both valued and respected. NTEU looks forward to continuing to work with Congress and the Administration to achieve this goal.

NTEU would also like to strongly caution both Congress and the Administration against extending throughout the federal government, the new DHS personnel regulations. Congress approved the creation of the Homeland Security Act under the principle that a new human resources system was required for the Department of Homeland Security because of its national security missions. While we disagree with that proposition, it simply does not apply to the rest of the federal government. To extend the provisions of the DHS personnel system that severely curtails employees' collective bargaining rights, denies employees fair treatment in their appeals, and moves hundreds of thousands of employees from the GS schedule to an unproven and undefined pay, performance and classification system would be ill-advised, and NTEU will vigorously oppose any efforts by the Administration to do so.

Again, I would like to thank the committee for the opportunity to be here today on behalf of the 150,000 employees represented by NTEU to discuss these extremely important federal employee issues as part of the final DHS regulations.

STATEMENT BY

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

BEFORE

THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT
MANAGEMENT, THE FEDERAL WORKFORCE,
AND THE DISTRICT OF COLUMBIA

REGARDING

SENATE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS

ON

FEBRUARY 10, 2005

American Federation of Government Employees, AFL-CIO
80 F Street, NW, Washington, D.C. 20001 * (202) 737-8700 * www.afge.org

Mr. Chairman and Members of the Subcommittee: 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 55,000 federal employees in the Department of Homeland Security represented by our union, I thank you for the opportunity to testify today.

Members of the Committee may be aware that AFGE has filed suit in U.S. District Court to block implementation of the "final" regulations DHS has issued regarding its new personnel system. There is no question that these rules go far beyond the authorities Congress gave the DHS Secretary to design a personnel system that would grant "flexibility" to DHS management to meet unique domestic security contingencies that the agency might face. Indeed, there is nothing in the new personnel system explicitly linked to domestic security concerns. On the contrary, the expansion in management power and corresponding reduction in employee rights and protections are put forth in the context of management jargon completely removed and apart from domestic security triggers.

It would be a grave mistake to view the new Department of Homeland Security human resources system regulations simply as an arcane set of rules governing such mundane issues as pay rates and collective bargaining rights for employees. To do so greatly diminishes the import of these changes on the readiness of the Nation to prevent another terrorist attack. Unlike most other Federal agencies, the core mission of the Department of Homeland Security is

the safety of the American public, and any fundamental changes to its personnel regulations must be viewed through that prism.

Without a doubt, dedicated and experienced personnel are America's most invaluable resource in the war on terror. No technology can replace their perseverance, expertise, and ingenuity. Keeping these employees motivated to remain in the service of our country is not simply a matter of fairness to them, but is also absolutely essential to the protection of our Nation against the threat of terrorism. To the extent that the new Department of Homeland Security human resources system fails to achieve that goal, it must be modified in the interest of homeland security.

The proponents of the new personnel regulations argue that they are necessary in order to provide the flexibility and speed necessary to respond to immediate and long-term terrorist threats. At no time during the debate on the Homeland Security Act or since has anyone been able to point to a single concrete example of where collective bargaining or employee rights in any way hampered the Government's ability to immediately respond to any potential threat. In fact, they have actually made significant contributions to the efficiency of our Government and the safety of our Nation:

- In the aftermath of the September 11, 2001 terrorist attacks, I&NS managers engaged in a campaign of deception to lull the public and Congress into a false sense of well-being about the security of our northern border. Two courageous front-line Border Patrol agents from Detroit, Michigan, Mark Hall and Robert Lindemann, spoke out and provided a truthful assessment of our vulnerabilities. As a direct result of

these disclosures, Congress authorized and funded a tripling of the number of Border Patrol agents, Immigration Inspectors, and Customs personnel along the northern border. The I&NS attempted to fire these two employees, and it took Congressional intervention to stop this retaliatory action.

- In 2003, the Bureau of Customs and Border Protection implemented a program to train all employees in the detection of terrorist weapons by distributing a computer disk to all employees. The union expressed concerns about the adequacy of that approach, and proposed a more comprehensive curriculum utilizing classroom instruction. After private and public urging, the Bureau eventually adopted the union's suggestion.

- In 1998, the Border Patrol proposed that all of its agents wear body armor at all times while on duty. Through collective bargaining, the union was able to convince management that such a policy would have resulted in numerous agents falling prey to heat stroke in the harsh desert climate of the southwestern United States, and jointly developed a much more sensible policy.

- In 1997, the I&NS unilaterally implemented a policy that prohibited its law enforcement employees from asking any detainee to remove any article of clothing, including hats and coats, unless they had supervisory approval and filled out cumbersome reports to justify the action. This policy totally compromised public and officer safety, as Border Patrol agents routinely encounter large groups of illegal aliens wearing multiple layers of clothing that render pat-down searches completely unreliable in the discovery of hidden weapons. The union filed an unfair labor practice charge and forced management to rescind the policy until the parties bargained over a more reasonable replacement.

- In 1993, five Border Patrol agents in San Diego, California were wrongfully accused of violating the civil rights of an illegal alien. The Border Patrol proposed terminating the employment of all five employees. An impartial arbitrator ruled that the agents were not guilty of the alleged misconduct and that the agency would have known that if it had conducted a proper investigation. All five employees were ordered reinstated with backpay.

Distressingly, the outcome of all the aforementioned examples would have been the exact opposite under the provisions of the new human resources system.

The Union Proposals DHS Ignored

None of this was necessary or inevitable. The unions representing DHS employees have not questioned the fact that the unique homeland security responsibilities of the agency would from time to time require management to act unilaterally, without regard to the provisions of a collective bargaining agreement. We put forth detailed proposals that gave management extraordinary flexibility to achieve its stated goal of being able to act unilaterally when security considerations justified it.

Our proposal was as follows: Whenever management determined that it had a need to act quickly to protect homeland security, it could do so. If any "pre-implementation procedure" or "appropriate arrangement bargaining" or even the application of the provisions of an existing collective bargaining might impede the ability to act, these impediments could be ignored for up to ten days. The agency, a component, or even a single bureau would have, at its sole discretion, the right to deploy, reassign, or transfer employees for up to ten days without either bargaining or observing the provisions of a collective bargaining agreement.

The unions only asked that these management determinations be "good faith" exercises of judgement. We did not ask to be able to come back afterward and question the judgements' validity. We asked only that the assignments be based upon reasonable assessments of factors known at the time, including reasonable determinations that any pre-implementation bargaining or the

application of collective bargaining agreement, would somehow adversely affect the accomplishment of the action.

Only after implementation of the unilateral action; that is, only 10 days after the assignments had been made would management be asked to come back and talk to the union about arrangements for workers who might have been adversely affected by the assignment (for example, if an employee were deployed at the last minute and incurred parking expenses at the airport, arrangements would be made after-the-fact for reimbursement). Our proposal was that this "post-implementation" bargaining should occur as soon as was practical, with plenty of leeway for management to decide it could occur.

The goal of the post-implementation bargaining was not to prevent similar unilateral decisions in the future or to constrain management's prerogatives regarding its judgements of when a homeland security situation justified the exercise of discretion. DHS clearly understood this. Indeed, the only goal was to make sure that employees who incurred reasonable out-of-pocket expenses or other harm as a result of the deployment, reassignment, or transfer would be reimbursed or recognized in some way.

This proposal was ignored in its entirety. In essence, the regulations say that even though Congress granted DHS the authority to act unilaterally because of the unique exigencies of protecting the homeland, the Department intend to act unilaterally at all times, the Department will at all times refuse to engage in

collective bargaining on routine workplace issues, and the Department will void permanently any provisions of collective bargaining agreements at will. AFGE knows that this was not the intent of Congress when it granted DHS the authority to "modernize" its personnel system. After all, there is nothing at all modern or new about management by fiat, management refusal to bargain, or management by fear and intimidation, and if Congress had intended to have such a system imposed upon DHS, it would have written the law in that fashion.

The New DHS Regulations

The regulations that set forth the new DHS personnel system strip the agency's employees of longstanding statutory rights involving the scope of collective bargaining. In place of those rights, the DHS regulations impose a regime of unilateral management decree over almost all important conditions of employment. No longer will DHS employees who have elected union representation and have enjoyed a voice in decisions affecting their worklives be able to negotiate over even the impact or implementation of most of management's unilateral changes in conditions of employment.

What this means in practice is that under the new regulations, neither DHS management nor the union representing DHS workers will be permitted to bargain over the procedures to be followed when management makes changes in key conditions of employment, including the assignment or location of work. This is true even if both management and the union agree that a negotiated agreement would improve or ease the impact and implementation of the new

regime. For example, if DHS decided it needed to transfer an agent from Florida to Montana and it had several qualified volunteers, the agency could still decide to send a single head of household, or someone with a chronic illness or condition that cannot be treated in Montana.

In addition, under the new regulations, top agency management is authorized, without limitation, to issue agency-wide directives to prohibit collective bargaining on the few matters that remain negotiable. They have also given themselves the right to invalidate provisions of existing collective bargaining agreements. To further undermine the integrity of collective bargaining, the regulations establish an internal DHS board appointed solely by the Secretary with the authority to adjudicate any and all claims by employees and unions that management has violated the meager bargaining obligations that the new regulations permit to continue.

Another extremely problematic aspect of the DHS regulations has to do with the agency's attempt to dictate to the Federal Labor Relations Authority (FLRA) and the Merit Systems Protection Board (MSPB) which DHS labor relations and employee disputes they will address and exactly how they should address them. In essence, the regulations tell both the FLRA and the MSPB to rubber-stamp decisions of the internal DHS "kangaroo court" (the Homeland Security Labor Relations Board). Indeed, MSPB is instructed to uphold the kangaroo court's decisions on penalties even if they are unreasonable and disproportionate to the alleged offense; the only time the MSPB would be permitted to alter a penalty is if

the employee were able to show that it is "wholly without justification" – a high legal standard no one is likely to ever meet. In particular, these new regulations will, for all practical purposes, render the Douglas Factors null and void. The Douglas Factors are:

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 supervisors' confidence in the employee's ability to perform assigned duties;

6. consistency of the penalty with those imposed upon other employees for the same or similar offenses;

7. consistency of the penalty with the applicable agency table of penalties; (The Board mused in footnotes that these tables are not to be applied mechanically so that other factors are ignored. A penalty may be excessive in a particular case even if within the range permitted by statute or regulation. A penalty grossly exceeding that provided by an agency's standard table of penalties may for that reason alone be arbitrary and capricious, even though a table provides only suggested guidelines.)

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. potential for employee's rehabilitation;

11. 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; and

12. the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

The DHS regulations also curtail the MSPB's jurisdiction by shortening the time a DHS employee has to file appeals, limiting his discovery, and providing for summary adjudication of an employee challenge to adverse actions. These limitations effectively deprive DHS employees of their day in court, a right which all other federal employees enjoy as provided in the MSPB's own regulations.

What follows are some of the most egregious examples of the ways the new DHS rules violate Congress' intent that the new DHS system "ensure that employees may exercise the right to organize, bargain collectively, and participate through their exclusive bargaining representatives in decisions which affect them subject to any exclusion from coverage or limitation on negotiability established by law." 5 U.S.C. § 9701 (b) (4).

Negotiation Over Department-Wide Regulations

Under current law and regulation, a federal agency has a duty to bargain over otherwise negotiable changes in conditions of employment that are promulgated through department-wide regulations. Only by demonstrating a "compelling need," can an agency legitimately evade its duty to bargain. Over the years, the FLRA has set a high standard for finding that a compelling need does indeed exist. As a result, there are very few cases in which agencies have

been able to avoid bargaining over a change in conditions of employment solely because it was issued department-wide.

Under the DHS regulations, however, DHS will not be required to show any reason, let alone a compelling need, to avoid dealing with the exclusive representatives of its employees concerning department-wide changes in conditions of employment. DHS has told us this would be true even if a regulation were not department-wide, but merely covered more than one component, such as Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE).

There is a range of matters that employees, through their unions, negotiate to ensure fair and equitable treatment, protection from favoritism or reprisal, mitigation of adverse impact, etc. Under the proposed regulations, DHS can avoid dealing with its employees' concerns by issuing the changes department-wide. These could include such items as alternative work schedules, methods for choosing who will work overtime or be sent on a detail, issues regarding uniforms or dress codes, health and safety, travel arrangements, and many other matters. Unions play a valuable role in helping to develop the details and protections that make these changes work better for the agency and the employees. DHS had decided that "modern" management means dispensing with such niceties.

Negotiating Procedures and Appropriate Arrangements

Federal agency managers have a wide range of changes they can make in the workplace without union consent. These include the agency budget, the organizational structure, the assignment of work, the direction of employees, internal security, and other issues. Under current law, if unions make a request to bargain, agencies must negotiate over items such as the procedures that will be used and appropriate arrangements for employees who are adversely affected by the management action. This is an important safeguard that promotes workplace harmony and efficiency, and restrains abusive workplace practices.

For example, an agency may decide to deploy workers from their usual duty station to another location. The new location may be in the same general commuting area or hundreds of miles away. It may be for a day or for weeks or months. Under current rules, the agency is free to select only from those employees who have the knowledge, skills and abilities it determines are necessary to do the job. But the employees and their union have an important interest in ensuring that the procedures used are fair and respect the personal and family responsibilities of the workforce.

It is common for negotiated agreements to include procedures for setting up rosters or other processes that help to distribute fairly the assignments among qualified employees. This helps prevent managers from giving coveted assignments to their cronies and denying opportunities to other workers who may

be even more proficient. It also helps prevent managers from giving unpopular assignments as reprisals or because of their animosity towards the race, gender, religion, or political party of the employee. Unions and managers also frequently negotiate procedures that call for as much notice as possible before employees have their regular duty station changed so that they and their families can prepare for the change.

If the assignment will require the employee to travel and be away from his or her family for some time, there are other important procedures and arrangements that unions and managers commonly negotiate. These include such things as travel procedures that keep employees from having to go into their own pockets for work-related expenses and arrangements that allow them to call home regularly and travel home for visits during long assignments. If the assignment is closer to home, but not at the employee's regular duty station, these negotiated matters could include such things as covering extra commuting fees if an employee is detailed to a location where parking costs more than the regular duty station or where the employee has to use a different mode of transportation than is available at the regular duty station. These are just reasonable and rational workplace transactions that current law requires of federal managers and federal union representatives to keep their agencies running smoothly.

Before fair shift and overtime rotations were negotiated, for example, employee morale suffered and numerous grievances were always being filed.

Negotiating these matters has led to higher morale, stability, and virtually no litigation. But DHS apparently has forgotten history and wants to turn back the clock. Its final rules preclude bargaining over procedures for most changes and greatly reduce the obligation to bargain over appropriate arrangements for employees who are adversely affected by a management action (for example, DHS will not have to bargain over harm done to its employees unless it was as the result of a management action that lasted 60 or more days).

This is true even if a hardship exists for a particular employee and qualified volunteers are willing to be deployed. Under DHS' new scheme, lacking union involvement, single heads of households or women with pregnancy complications or employees with serious illnesses could be deployed for periods of up to 59 days despite willing and qualified volunteers being available. Under current law, the union can protect employees from hardship and safety concerns.

DHS has chosen to severely limit its use of a vital mechanism to help make effective workplace changes that respect the needs of its workers, even though the federal unions agreed to a radical change from past practice that would have allowed DHS, in any and all cases, to act first and negotiate later in situations that could not wait for even expedited negotiations.

Bargaining Limited to Changes that Have a "Foreseeable, Substantial, and Significant Impact" Affecting Multiple Employees in the Bargaining Unit

In addition to limiting bargaining over changes in conditions of employment and restricting bargaining over procedures and appropriate

arrangements, the final regulations remove management's duty to bargain over *any* proposal unless it would have a "foreseeable, substantial, and significant impact" on multiple employees in the bargaining unit. The phrase, "foreseeable, substantial, and significant impact" is not defined and is certain to lead to disputes and litigation. Will each management official be able to decide for him or herself what has a foreseeable, substantial, and significant impact on the employees?

There are many ideas and concerns that bargaining unit employees will want to share that might not be either momentous or urgent, but that, nevertheless, could make a management initiative work better and enhance, rather than harm, productivity and workplace harmony. But DHS regulations prohibit interaction of this nature with employees.

The treatment of issues that may affect a single worker is also problematic under the DHS regulations. Why should "foreseeable, substantial, and significant" harm to one employee in a workplace be labeled either unimportant or justifiable? This exclusion from bargaining is a license to pick on, harass, discriminate, and take reprisals against individual employees. Further, as an organization that not only must recruit members on an individual-by-individual basis but that also has a legal duty to represent each individual in a bargaining unit, our union finds the "individuals don't count" approach confusing. Finally, it is clear that although actions with indisputably foreseeable, substantial, and significant harm cannot be imposed on groups in one fell swoop without

negotiation, management will be able to accomplish the same goal by taking the same action separately against individual after individual, and in spite of our legal – and moral – responsibility to represent each member of our bargaining unit, we will be prevented from doing so. The principle that is at the heart of unionism – "an injury to one is an injury to all," is a principle that the DHS regulations forbid our union to uphold in the context of collective bargaining.

At the current historical moment, when American have let it be known that safeguarding domestic security is one of their highest priorities, we cannot understand why DHS policy should be to undermine the federal employees charged with that vital task by removing their voice in the workplace. Why tell them, in effect, to shut up and follow instructions from above? And if DHS makes a change that it unilaterally thinks will have a less than substantial or significant effect on them, they don't deserve to be able to speak up about their own interests in the workplace.

Loss of Managers' Right to Bargain Formerly Permissive Subjects

The Civil Service Reform Act of 1978 codified the federal labor relations procedures, and divided issues into three major categories. The categories described issues from the perspective of how agency managers should proceed in the context of collective bargaining when federal employees had elected union representation. The categories were a) issues over which managers were forbidden to bargain, b) issues over which managers were permitted, but not required, to bargain, and c) issues over which managers were required to

bargain. The new regulations eliminate the flexibility of DHS managers to bargain over "permissible, but not required" subjects of bargaining. These issues include the numbers, types and grades of employees performing a specific job, and the methods, means and technology used to accomplish the task.

Not only has DHS told its frontline employees that they don't matter, but its new regulations tell its managers that they and their judgment don't matter either. No longer will managers at a border facility or DHS office be able to decide for themselves that it is in the interest of their Directorate or the Department to work out and customize some of these details of getting the job done at their facility with their workers and their union. The new regulations forbid them from doing so. The Homeland Security Act required flexible and contemporary new systems. DHS' action here is just the opposite.

Loss of Neutral, External Board for Bargaining Disputes

Under current law, negotiability disputes, unfair labor practice charges and bargaining impasses are heard and decided by independent boards and authorities whose charge is to be neutral, and which are external to the agencies and unions involved. DHS' regulations allow the agency to exempt itself from these standards. Instead of being held accountable by an external, independent, and neutral body, DHS will set up its own Homeland Security Labor Relations Board (HSLRB), which will be internal to the Department and made up of members selected solely by the Secretary. The HSLRB will replace the FLRA in deciding negotiability disputes and unfair labor practice charges and the Federal

Services Impasses Panel (FSIP) in resolving bargaining impasses. The right to go to a "Company Board" makes a mockery of Congress' instruction in the Homeland Security Act's requirement of an independent adjudicator.

Pay and Performance Management

Under the new regulations, DHS employees will lose their current market-based pay system that affords fairness, objectivity, predictability, credibility, and most important, Congressional oversight. Base pay and pay adjustments now are determined by the Executive and Legislative branches of government, which offers employees checks and balances. Under these new DHS regulations, the Executive Branch alone will determine pay.

DHS lists a number of factors that should guide pay increases such as recruitment and retention needs, budgets, performance, local labor market conditions, and others. Read together, DHS can choose from among any of these factors to justify whatever it does. DHS can, and likely will, use these factors variously to justify inconsistent decisions by region or occupation, and, of course, by individual. For example, DHS may deny a pay raise in San Diego, despite high performance, a tight labor market, and adequate budget authority by citing stable recruitment. At the same time, it could lavish high salary adjustments on those working in Brownsville, Texas despite lower performance and retention difficulties. And no one will be able to challenge the decision. Will politics affect these allocation decisions? Will union animus affect these allocation decisions?

There is every reason to believe that such unbridled discretion will lead to chaos, inconsistency, and a huge morale problem. It also promises to lead to enormous increases in EEO filings and other litigation, since other avenues to voice dissent or bring forth evidence of wrongdoing have been eliminated. Employees will have no faith or respect for a system that exposes them to random variation in pay, and subjects them to the whims of supervisors or higher-ranking political appointees. Since DHS has made it impossible for an employee's union to address problems through collective bargaining, litigation and complaining to members of Congress will be the order of the day.

Finally, it is inescapable that for pay for performance to have any opportunity to have any positive impact on DHS, it must be adequately funded. A zero-sum reallocation of salaries and salary adjustments will guarantee failure. The President's budget gave no indication that the Administration intends to provide the necessary level of funding to avoid a ruinous competition within DHS where anyone's gain will be someone else's loss. I urge the Congress to recognize how crucial adequate funding is to any hope of success for the DHS pay scheme.

Conclusion

In conclusion, AFGE strongly urges the Committee to pass legislation to:

- Restore the scope of collective bargaining to its current state. The new restrictions are wholly unjustified, and will jeopardize public safety by allowing unsound decisions to be implemented without checks and balances.

- Ensure that the new pay system keeps DHS employees at least on par with the rest of the Federal workforce. Otherwise, the Department will be unable to attract and keep employees in its critical occupations.

- Restore mitigation power to neutral adjudicators. Without this important check and balance mechanism, managers will be encouraged to act arbitrarily and capriciously, discouraging dedicated from people serving in the Department.

- Eliminate the internal Labor Relations Board or revise it so that it truly has credibility with employees and their representatives.

It is not too late to change the human resources system now. Once it is implemented and experienced employees start heading for the exit doors, however, it will be impossible to replace their expertise. Even if the necessary corrections are made at that point, it would take years to regain the lost levels of experience. The employees of the Department of Homeland Security will not engage in public demonstrations. Quietly, one by one, they will leave to pursue careers in other agencies that will treat them with the dignity and fairness that they deserve. The real losers in this ill-advised experiment will be the citizens of this country who are looking to their Government for protection. The Department of Homeland Security has already let them down by issuing personnel regulations that will chase away the best and the brightest employees. It is now up to Congress to step up and force the Department to modify the regulations to conform to the spirit of the Homeland Security Act calling for a modern personnel system that treats employees fairly and values their expertise.

This concludes my statement. I would be happy to answer any questions the Members of the Subcommittee may have.

STATEMENT BY

RICHARD N. BROWN

NATIONAL PRESIDENT
OF
NATIONAL FEDERATION OF FEDERAL EMPLOYEES

BEFORE

THE SENATE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA

REGARDING

THE IMPACT OF NEW DHS REGULATIONS ON DEPARTMENT OF HOMELAND SECURITY EMPLOYEES

ON

FEBRUARY 10, 2005

Chairman Voinovich, Ranking Member Akaka, distinguished members of the Subcommittee; I would like to thank you for the opportunity to testify on the recently released regulations for a new personnel system at the Department of Homeland Security (DHS).

I am the National President of the National Federation of Federal Employees (NFFE). We are an affiliate of the International Association of Machinists and Aerospace Workers. As national president of the oldest union representing non-postal federal employees, I have the honor of speaking for 90,000 federal employees, 240 of whom are directly impacted by the changes to the personnel system at DHS.

From late June to early August our union collaborated with other employee representatives and staff from the Office of Personnel Management (OPM) and DHS for the official meet and confer period. During this period our union was designated to speak on behalf of two other unions not included in that process; the National Association of Government Employees and the Metal Trades Department of the AFL-CIO, who collectively represent over 1000 DHS employees. In reviewing the proposed regulations released just a few days ago, it is clear to me that the meet and confer process was merely a formality, being that many of the concerns raised by the employee representatives have gone unaddressed. Further, agreements made with the unions by DHS and OPM during the meet and confer process were substantively altered in the final

regulations, particularly in the area of the DHS Labor Relations Board. It is the opinion of this union that the administration has severely overstepped its authority to form a new personnel system at DHS as directed by Congress in the Homeland Security Act (2002). I would further contend that the proposed regulations, if implemented, would seriously diminish the Department's ability to carry out its core mission.

Here are just a few examples of the major problems with the final regulations:

1. The final regulations do not ensure that employees may, "organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them," a statutory requirement of the Homeland Security Act. Under the new regulations, the union would no longer be able to bargain on behalf of employees when management alters key conditions of employment. The one-sided system proposed simply can not fairly be described as one that ensures the rights of employees to collectively bargain by any reasonable definition.

2. The regulations do not provide independent review of collective bargaining disputes. The final regulations call for the adjudicating of collective bargaining agreements, currently handled by the Federal Labor Relations Authority (FLRA), to be carried out by an internal DHS Labor Relations

Board, whose members are hand-picked by the DHS Secretary with no Senate approval. These individuals will be on the DHS payroll, sitting in judgment of DHS decisions, based on standards that DHS creates. It is inconceivable that this board could ever truly be impartial due to the fact that board members would ultimately answer to the Secretary.

3. The final regulations do not provide employees with a reasonable system to challenge excessive penalties imposed on them. The regulations hold that the Merit System Protection Board's (MSPB) authority to alter agency-imposed penalties will be limited to situations where the penalty is "wholly unjustified," a virtually impossible new standard to meet. Management's decision to discipline an employee will be sustained no matter how egregious. Fairness and consistency of penalties, currently ensured by the Douglas factors, will be a thing of the past.

4. The final regulations give the Secretary the discretion to create a list of "mandatory removal offenses" that can only be appealed to a Mandatory Removal Panel appointed by the Secretary. It stands to reason that the greater the penalty, the more important it is to have a truly independent party reviewing the merits of the case. Department employees would certainly view the system as unfair since this concept does not provide what most would characterize as due process.

5. The final regulations call for a shift to a pay for performance system that is widely unpopular among department employees and has little chance of being administered fairly. Although the details of the pay for performance system are not clear in the final regulations, we can be sure that it will be extremely costly to develop and difficult to administer. Numerous scholarly experts have demonstrated that pay for performance pay systems do not work well in the public and federal sectors due to fixed budgets and the absence of clear links between employee performance and increased revenues, as often exists in the private sector. The likely scenario in DHS is that discretionary pay increases will be limited within each department, and the system will likely cause resentment among employees that will outweigh any hypothetical motivational benefits. If DHS' goal is to tailor occupationally grouped positions to labor market conditions, any funding for this concept must also be market based. We understand however, in the world of congressionally appropriated funding, in which DHS exists, funding is driven by budgetary concerns, not the market. For these reasons, we believe the underlying premise of this concept is deeply flawed.

Now that I have described some of the major problems with the final regulations as recently issued, I would like to take this opportunity to demonstrate how the previous personnel system was markedly better than the one going into effect.

One of NFFE's principal DHS bargaining units is a U.S. Coast Guard, Civil Engineering Unit of roughly 50 employees out of Providence, Rhode Island (CEU Providence). Employees at this facility serve the First Coast Guard District (D1), the Northeast, including all of New England and parts of New York and New Jersey.

The employees at CEU Providence, mostly architects, engineers, environmental specialists, planners, real property specialists, and contracting officers, provide facilities management and engineering services for the shore plan in the First District, which includes over 1,500 structures located in 7 states. The shore plan consists of a variety of structures that enable Coast Guard operations, such as piers, electrical shore ties, boat maintenance facilities, fueling facilities, aviation facilities, firing ranges, barracks, communications towers, and aids to navigation such as lighthouses. In short, it is the employees of CEU Providence that make sure our Coast Guard has the facilities necessary to protect this country.

CEU Providence is a high-performing facility, with approximately 85% of its work being performed in-house, using their own design professionals. CEU Providence has received awards for their efficiency, honoring their ability to save millions on consulting fees and freeing those resources for actual construction projects.

In April of 2003, employee representatives of the CEU Providence bargaining unit from NFFE Local 1164 went into contract negotiations with management. Keep in mind this took place after the establishment of the Department of Homeland Security.

Contrary to what DHS might want you to think is the case, department officials in this contract negotiation had absolutely no proposals whatsoever regarding national security. Now I would think that if labor unions and the work rules spelled out in collective bargaining agreements were truly hampering national security, the agency certainly would have raised some concerns. The reason they did not raise any concerns is that unions and collective bargaining agreements do not impede national security in any way. Under prior law, the agency had the ability to take "whatever action may be necessary to carry out the agency mission during emergencies," including the ability remove an employee on his first offense or make unilateral changes to working conditions if needed by acting first and negotiating later. It is not just the CEU Providence installation that has been unable to come up with a rationale for how unions might hamper

national security. During the meet and confer period with DHS and OPM staff, management was unable cite a single case where the union had in any way compromised national security nation wide.

But let me tell you where this overhaul of the personnel system really becomes problematic. I was telling you about the contract negotiation for the CEU Providence bargaining unit. By July 16th of 2003 the contract was agreed upon and signed. It was shortly there-after approved by the agency head, who again had no suggestions for changes related to national security. For over a year now, management and bargaining unit employees have lived happily under the contract.

The CEU Providence installation is a good example of effective and productive labor/management relations at DHS. It is evidence that the rules under Chapter 71 are working well for the department. Under the newly issued regulations, I believe labor/management relations at DHS will experience a significant breakdown, and success stories such as those at CEU Providence will be hard to come by. I predict moving to a new system will be a disaster for employees at the department for two main reasons:

1. Under the new regulations, extensive questions will emerge as to whether many of the articles and provisions in our contract will be deemed negotiable under DHS rules. The parties will be compelled to go before the DHS Labor Relations Board, a board which does not currently exist, to answer our questions under procedures which are

currently unwritten. Both sides will spend considerable time preparing testimony, evidence, and arguments that support its position. Rather than prompt, efficient completion, and execution of a collective bargaining agreement, we will be seeking third-party assistance to apply rules which have not yet been created. I ask you, how these added frustrations, this delay, and this expenditure enhances homeland security.

2. DHS employees on the whole are uneasy about the new personnel system. The uncurbed authority to impose severe disciplinary penalties for illegitimate reasons, the ability to significantly reduce the pay of employees without having to provide any justification, and the power to arbitrarily reassign employees anywhere in the country on a temporary or permanent basis will be demoralizing to federal workers and will reduce the ability to recruit and retain quality employees. This will substantially hurt the department's ability to carry out its mission.

NFFE greatly appreciates the Subcommittee's decision to hold this hearing and listen to the views of DHS employee representatives. It is our opinion that the authorities granted to DHS under the new regulations are overly-broad and excessive. More importantly, they are not in compliance with the Homeland Security Act on a number of accounts. The sum total of the new system as proposed is one that will be demoralizing to department employees.

Implementing this personnel system will certainly have a harmful influence on the ability of the department to carry out its mission.

This concludes my statement. Once again I thank the Subcommittee for the opportunity to give my testimony. I will be happy to answer any questions the members of the Subcommittee may have.

TESTIMONY OF THE NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES BEFORE THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA OF THE U.S. SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS

The National Association of Agriculture Employees ("NAAE") appreciates the opportunity to testify before this Subcommittee regarding the new personnel system regulations ("HR Regs") of the U.S. Department of Homeland Security ("DHS"), published in the *Federal Register* of February 1, 2005.

NAAE is a federal union that, until March 2003, represented approximately 3,000 Plant Protection and Quarantine ("PPQ") Officers and Technicians within the U.S. Department of Agriculture's Animal and Plant Health Inspection Service ("APHIS"). Roughly 2,100 of these PPQ Officers and Technicians performed what is referred to as Agriculture Quarantine Inspection ("AQI") functions. They inspected foreign-arriving passengers, baggage, and cargo, denying entry to, destroying, or treating potentially harmful or prohibited animals, fruits, vegetables, and plant materials. Their mission was to safeguard American agriculture against plant and animal pests and diseases entering the United States on foreign-arriving vessels, airplanes, trains, and automobiles.

When DHS came into existence two years ago, Congress in the Homeland Security Act of 2002 transferred most but not all of the APHIS AQI functions and that part of the APHIS mission to DHS, assigning these functions to the newly formed DHS component, U.S. Customs and Border Protection ("CBP"). Along with the transfer of functions, Congress transferred the approximately 2,100 positions previously held by the 2,100 PPQ Officers and Technicians who

were performing the AQI functions within APHIS. These 2,100 PPQ Officers and Technicians also were, in effect, forcibly "transferred" to DHS/CBP and relegated to carrying out their old AQI duties under the DHS/CBP mantle. NAAE continued and continues today to represent these "Legacy Agriculture" employees, denominated "CBP Agriculture Specialists" and "CBP Agriculture Technicians" within the CBP nomenclature.

NAAE's testimony today is limited to informing the Subcommittee about the impact of DHS's HR Regs upon CBP's Legacy Agriculture employees, a unique, important, but largely ignored step-child of the multi-agency amalgamation that gave birth to DHS. NAAE is, by far, the smallest of the three principal unions representing bargaining unit employees within CBP. NAAE, along with AFGE and NTEU, participated on or in the DHS/OPM Design Team, "town hall" meetings, focus groups, Senior Review Committee, and "Meet-and-Confer" sessions with DHS and CBP management, culminating in the HR Regs. NAAE leaves to AFGE and NTEU the task of addressing in their testimony the details of the common concerns of the major unions representing CBP employees about the new DHS personnel system. NAAE adopts by reference and fully endorses their remarks before this Committee.

The CBP Legacy Agriculture employees who NAAE represents are unique. They have distinct mission obligations and concerns and unique employee needs that must be addressed in order for them to work as productive professionals tasked with safeguarding American agriculture. Section 101(b)(1) of the Homeland Security Act states that,

> The primary mission of the Department is to . . . (D) carry out all functions of entities transferred to the Department [and] . . . (E) ensure that the functions of the agencies and subdivisions within the Department that are not related directly to securing the homeland are not diminished or neglected except by a specific explicit Act of Congress.

Despite the clear, unequivocal Congressional mandate, CBP has consciously ignored this dual "primary" mission, and the DHS HR Regs ensure it will be able to continue to do so with impunity.

The Agriculture Specialists and Technicians who moved over to CBP from APHIS have sole responsibility for performing the AQI functions transferred from USDA/APHIS. No one else in CBP or DHS has the training, experience, or expertise necessary to protect American agriculture. That is their mission. Unlike their CBP co-workers, the CBP Agriculture Specialists are professional employees: they are college graduates with degrees in the biological sciences, many earning graduate degrees; they bring to CBP many years of on-the-job experience in detecting harmful pests and diseases and thwarting infestations that could severely harm American agriculture and our food supply; and they work independently, routinely making regulatory decisions necessary to carry out their unique mission without express supervisory knowledge or approval. CBP inherited from USDA/APHIS a mission-driven cadre of dedicated, highly educated, self-motivated employees.

Regrettably, under the auspices of CBP, primarily former U.S. Customs managers who now dominate and control CBP, the mission of Legacy Agriculture employees, safeguarding American agriculture, has been given short shrift. It has become only a secondary concern at best in many ports of entry, and of zero importance in others. Agriculture Specialists' principal tool, agriculture risk analysis, on which the success of the AQI mission depends has been shelved in favor of a U.S. Customs computer-driven model focusing on detecting drug-smugglers and potential terrorists. CBP Agriculture Specialists have been deprived of their independent decision-making powers. High-risk cargo today routinely enters the U.S. without inspection under the supervision

and tacit approval of CBP managers (former U.S. Customs supervisors and managers). When such serious mission "omissions" are brought to the attention of CBP management, the Legacy Agriculture employees are told the CBP anti-terrorism mission, not the agriculture mission, is paramount, and the limited CBP resources are not sufficient to carry out full "agriculture" inspections, particularly on overtime.

Faced with overt neglect of the CBP mission to protect American agriculture, the morale of Legacy Agriculture employees has rapidly deteriorated. Exacerbating this deterioration has been the loss of employee "rights" and the respect formerly accorded these valued professional employees. CBP routinely announces changes in conditions of their employment on very short notice and then implements without according NAAE the opportunity to negotiate, not even the procedures for implementation, a clear violation of the collective bargaining agreement to which CBP is legally bound. Even NAAE's contract-based demands to negotiate post-implementation are routinely ignored. CBP management simply does not care about the legal consequences, knowing it can always claim "national security" entitling the Agency to a free "get-out-of-jail" card. They thumb their collective noses at the Legacy Agriculture employees, their union, NAAE, and even the Federal Labor Relations Authority when it takes steps to reign in the contract-flaunting actions of CBP through filing of unfair labor practice charges.

Agriculture Specialists and, to some extent, Agriculture Technicians can not take it any longer. They have been leaving the CBP in droves, and CBP management has not filled and probably can not fill these rapidly increasing vacancies. Of the approximately 2,100 AQI positions transferred to CBP, today only about 1,300 Legacy Agriculture positions are filled. Hundreds and hundreds of the best and brightest have simply quit and taken other jobs,

many moving back to USDA/APHIS, where the remaining agriculture mission is still alive and well, as jobs open up in their former agency.

NAAE understands that CBP has not attempted to fill these growing vacancies in Agriculture Specialist positions, at least not until very recently, leaving the Agency seriously under-staffed. CBP has declined to release exact staffing shortage figures, but NAAE believes the number of vacancies in Agriculture Specialist/Technician staffing is now well in excess of 400 agencywide and increasing daily.[11] Recent Agency efforts to fill these vacancies have been largely unsuccessful. For example, CBP announced 35 Agriculture positions ostensibly intended to fill some vacancies at JFK International Airport in New York, but could find only four qualified applicants willing to accept the job. NAAE believes the worsening morale problems within the Legacy Agriculture rank-and-file and the unprofessional treatment to which this distinct segment of CBP has been subjected have become well known inside and outside the Agency and have helped create this barrier to recruitment. NAAE is convinced the new DHS HR Regs, unless substantially revised, will prove to be a major additional disincentive for highly educated professionals with degrees in the sciences to apply for Agriculture Specialist positions within CBP.

Because of the Agency's total disregard for the terms and conditions of the extant collective bargaining agreement with NAAE, CBP, including its cadre of Legacy Agriculture employees, has been transformed into a paramilitary organization where employees rights are routinely trampled on and selectively

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[11] Ports throughout the country, large and small, have experienced major staffing shortages. By way of example, at Los Angeles, of the 95 PPQ Officer positions at LAX transferred to CBP, 14 are now unfilled. (There would have been 18 vacancies except that four Agriculture Technician converted to Agriculture Specialists.) At Seattle airport, of the 15 PPQ Officer and nine Technician positions transferred, only six Agriculture Specialist and two Technician positions are now filled. At the Tacoma seaport, the same pattern: six Officer positions transferred, but only three are now occupied.

ignored and where dissent and even constructive criticism are not tolerated. An effective science-based pest exclusion program depends upon the free flow of accurate, timely feedback from the field, detailing findings, results, and conditions. Perpetuating an atmosphere of fear induced silence among intimidated Legacy Agriculture employees, afraid to speak out, is a recipe for a pest-outbreak disaster.

The HR Regs codify and strengthen the paramilitary structure of CBP. The removal of any legal authority for MSPB or any independent third-party to mitigate unwarranted penalties, including suspensions and removals, leaves Agriculture Specialists and Technicians exposed to arbitrary and excessive discipline. They will be at the mercy of their CBP managers (formerly U.S. Customs supervisors) who know little or nothing about the jobs these employees perform. Ignorance, personal bias, cronyism, and discrimination at the management level will be left unchecked and thus indirectly fostered.

Negotiations at the national level will be available only to address the most benign matters. There will be none at the local level where Agriculture Specialists' unique issues have, in the past, been addressed through local negotiations. Fair and equitable distribution of overtime assignments for qualified employees, procedures for selection to lengthy temporary duty assignments away from home that take into account considerations of family and health, and shift rotations structured to meet the unique family obligations and other personal needs of each individual without jeopardizing the Agency's mission are just examples of the many operational issues NAAE has successfully negotiated at the local level with APHIS on behalf of its PPQ Officer bargaining unit, now Agriculture Specialists and Technicians. The HR Regs preclude these negotiations at any level. Decisions in these areas will be left to the unilateral actions of CBP managers who neither understand the Agriculture

mission nor care about it and who have no incentive or ability to learn about it. The Legacy Agriculture employee is shut out.

Present and future Agriculture Specialists expect to be highly compensated for their special expertise and training when they perform outstanding work. The ability to attract and retain qualified, motivated Agriculture Specialists is dependent upon this "carrot." The HR Regs, as amorphous as they are in sketching out the pay-for-performance component of the new system, provide no assurances the top performers will be appropriately rewarded. The pool of money available to pay top performers will be totally dependent upon two factors bearing no relationship to the marketplace -- the Congressional budget process and the decisions of a management dominated DHS Compensation Committee. Moreover, at the end of the day, the more top performers there are in the employee pool, the smaller each employee's share of the performance-based pool of money will be. This counter-intuitive byproduct dooms the system to become the very antithesis of "teamwork" oriented, one principal objective of the new HR Regs.

The adage, the "devil is in the detail," aptly fits the HR Regs' pay-for-performance scheme. The HR Regs offer only a faint outline of how the new pay system will work. The heart and soul of the system does not yet exist and has been left to an outside consulting firm and the whim of DHS management to create. It will emerge through unchallengeable "DHS Directives" in which employees will have little or no meaningful say. For Agriculture Specialists and Technicians, it will be 2008 before they will know whether the new pay system is fair and how it impacts them. Why would any skilled, competent scientist in the private sector want to risk employment with CBP under such a speculative pay system, one offering no guarantee of meaningful compensation for excellent performance?

The convergence of these interrelated factors -- conscious disregard of CBP's agriculture mission, chronic mounting shortages in Agriculture Specialist staffing, declining morale of Legacy Agriculture employees, and the imminent implementation of the ill-conceived DHS Regs -- will lock in place a readily accessible pathway for serious infestations to enter the United States potentially crippling American agriculture. During the past year under the aegis of CBP, CBP and USDA/APHIS have had to institute four major national emergency recalls of foreign imported commodities subsequently found infested with agriculture-threatening disease or pests not detected upon entry into the country: (1) November 2004, a nationwide recall of holiday pine cones from India found to contain long-horned beetles (*Cerambycidae*), a serious threat to our forests and urban trees; (2) December 2004, a nationwide recall of Ya pears from China found to contain *Alternaria* spp. Disease, a serious threat to our domestic fruit tree industry; (3) June 2004, a nationwide recall of "rustic twig towers," trellises made of natural branches, from China found to contain two *Cerambycid* species of exotic long-horned beetle, a serious threat to hardwood and softwood trees; and (4) November 2004, a nationwide recall of artificial Christmas trees with natural wood trunks from China also found to contain long-horned beetle, feared tree-eating pests.

Four nationwide recalls within one six-month period is unprecedented and a cause for concern if Congress continues to place a priority upon protecting American agriculture.[27] NAAE Agriculture Specialists and PPQ Officers strongly suspect most of these pests were able to go undetected at entry because CBP currently relies upon automatic ship-manifest reviews by computers rather than visual reviews of the manifests by trained Agriculture

[27] In addition to the four major nationwide infestation-dictated recalls, CBP and APHIS had to institute several smaller, targeted recalls in 2004, such as of Manzano peppers and guavas from Mexico.

Specialists as in the past, followed by visual inspection of the suspect commodity. Given these demonstrated failings and the likely chilling effect of the new HR Regs upon communications from rank-and-file Legacy Agriculture employees, it is far more likely this country will experience a serious outbreak of disease and massive infestation resulting from undetected foreign pests and disease entering the United States and establishing themselves within our agriculture environment than it is we will experience another "9/11" style terrorist attack.

These proven "holes" in the country's defenses against potential devastation of our agriculture are not going to be easily fixed under the new DHS HR Regs and may, in fact, widen. Chronic staffing shortages will continue unabated under a personnel system that promotes a paramilitary environment, that insulates management from accountability when dealing with professional employees, and holds out only an elusive hope, a leap of faith, of appropriate compensation for top performance. The architects of the HR Regs will undoubtedly counter that the pay-for-performance scheme contemplates paying retention bonuses for hard-to-fill positions such as Agriculture Specialists. The false premise of this response is that CBP management will expend such funds, if available, to fill these positions. NAAE seriously questions whether CBP has any such assumed intention if its past conduct is a reliable predictor of its future actions.

In the face of a growing number of unfilled positions within CBP for Agriculture Specialists and Technicians, NAAE queried USDA/APHIS as to the suspected reason for or source of this short-staffing. APHIS continues to fund all AQI positions at CBP through collection of AQI user fees, transferring its fee collections to DHS/CBP to cover virtually all costs of carrying out the AQI functions, including the salaries of all employees performing AQI duties.

APHIS advises that its transferred user fees are and have been sufficient for CBP to fully fund the 2,100+ APHIS-transferred positions. Clearly, then, CBP has elected not to fill a significant percentage of these CBP "Agriculture" vacant positions, choosing instead to spend these available user-fee funds to finance other Agency activities.

NAAE calls upon Congress to restore the protection of American agriculture to the forefront of the "primary mission" DHS is expected to accomplish and to do whatever is necessary to recruit, train, deploy, and retain the full complement of Agriculture Specialists and Technicians necessary to succeed. Without a significant, selective revision of DHS's February 1, 2005 HR Regs, a high vacancy level coupled with an even higher departure rate will continue to plague CBP and prevent DHS from succeeding in safeguarding American agriculture.

Respectfully submitted,

NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES

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Dated: February 7, 2005

Statement for the Hearing Record

Submitted by

Neil A. G. McPhie, Chairman

U. S. Merit Systems Protection Board

"Unlocking the Potential within Homeland Security: The New Human Resources System"

Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia

Committee on Homeland Security and Governmental Affairs

United States Senate

Senator George V. Voinovich
Chairman

Senator Daniel K. Akaka
Ranking

February 10, 2005

Dear Mr. Chairman,

Thank you for the opportunity to submit this statement for the hearing record to describe the Board's views on the regulations developed by the Department of Homeland Security (DHS) and the Office of Personnel Management (OPM) to implement the employee appeals process under the DHS Human Resources Management System. The Merit Systems Protection Board (MSPB or Board) participated in the consultative process with DHS and OPM for developing these regulations as mandated by statute. I am happy to see that the regulations which resulted from this process incorporate the "preponderance of the evidence" standard for proof of adverse action charges, grant the Board authority (albeit limited) to mitigate penalties, and contain several additional revisions that were suggested by the Board and others after review of earlier drafts of the regulations. Furthermore, I believe that the adverse action procedures established under these regulations provide due process to DHS employees.

Nonetheless, two provisions in the DHS regulations are problematic. Section 9701.707(c)(2) requires the Board to render a decision on appeals in mandatory removal cases within 30 days of receipt of a response to a request for MSPB review, or OPM's intervention brief, whichever is later. Under certain circumstances, the Board may extend the deadline by 15 days. MSPB has commented previously regarding the advisability of placing a limit on the amount of time the Board may take to issue a decision on these cases. In earlier draft regulations, the specified time limit was 20 days for the issuance of a Board decision. The current version provides that such decisions must be issued in 30 or 45 days. It is not clear that this revision provides adequate time for the Board to conduct a thorough review.

Section 9701.706(k)(8) provides that the Board "must state the reasons for its decision" to deny an OPM motion for reconsideration of a final MSPB decision. MSPB understands DHS's need for information about the bases for the MSPB's denial, and would of course take steps to ensure that this information is made known in our decisions. Not all OPM requests for reconsideration present new arguments, however, and as a result, in some cases, the rule appears to require MSPB to repeat information already set forth in its earlier decision. The need to do so could require unnecessary work that might delay issuance of the reconsideration decision. For these reasons, I respectfully submit that the MSPB should be able to issue a decision whose length and scope are appropriate to the circumstances of each specific case.

I would also like to comment on two statements made by Dr. Ronald P. Sanders, OPM Associate Director for Strategic Human Resources Policy, in his testimony before this panel on February 10, 2005. First, Dr. Sanders stated that "MSPB's current mitigation standards basically allow it (and private arbitrators) to second-guess the reasonableness of the agency's penalty in a misconduct case, without giving any special deference or dispensation to an agency's mission."

In fact, the Board considers a number of relevant factors in determining whether a penalty should be sustained, including whether it is within the range of penalties allowed for the offense in the agency's table of penalties. The MSPB only mitigates a penalty if it finds that the penalty clearly exceeds the maximum reasonable penalty. The MSPB's decision in *Casteel v. Department of Treasury*, 97 M.S.P.R. 521 (2004), illustrates this policy and practice. In that

case, the MSPB held that in deciding whether to mitigate an agency's penalty, "the [MSPB] must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the [MSPB]'s function is not to displace management's responsibility but to ensure that managerial judgment has been properly exercised." *Id.* at 524. Thus, the MSPB does not take lightly an agency's mission or the discretion of its managers to determine the appropriate penalty for employee misconduct.

Dr. Sanders' testimony also addressed the appeal rights for employees charged with mandatory removal offenses. The testimony points out that "an employee can appeal a [Mandatory Removal] Panel decision to MSPB," and "once the Board has ruled on the matter, the employee is entitled to seek judicial review with the Federal Circuit Court of Appeals." I would add that the DHS regulations appear to attempt to confer jurisdiction on the Federal Circuit when the MSPB has not ruled on a mandatory removal matter. Section 9701.707(c)(4) of the DHS regulations provides that "If MSPB does not issue a final decision within the mandatory time limit [30 or 45 days], MSPB will be considered to have denied the request for review of the MRP's decision, which will constitute a final decision of MSPB and is subject to judicial review in accordance with 5 U.S.C. 7703."

This provision is not consistent with the law. The Homeland Security Act of 2002 does not authorize DHS to confer jurisdiction on the Federal Circuit over appeals from DHS decisions. When the MSPB fails to act on a petition for review of an MRP decision within a stated time, that MRP decision does not constitute the decision of the MSPB. It is unlikely that the Federal Circuit would take jurisdiction over an appeal when there has not been a final MSPB decision, although that determination is for the court to make. *See* 5 U.S.C. § 7703(a) ("[a]ny employee or applicant for employment adversely affected or aggrieved by *a final order or decision of the Merit Systems Protection Board* may obtain judicial review of the order or decision") (emphasis supplied).

Mr. Chairman, again, I appreciate the opportunity to share my views on these important regulations. I hope that this information will be helpful to you and your committee members.

U.S. Merit Systems Protection Board
Neil A.G. McPhie, Chairman

POST-HEARING COMMENTS FROM

UNITED DOD WORKERS' COALITION

REGARDING
THE NATIONAL SECURITY PERSONNEL SYSTEM OF THE DEPARTMENT OF DEFENSE HEARING ON FEBRUARY 10, 2005

BEFORE

THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA

SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

STATEMENT PREPARED BY:

JOHN GAGE
NATIONAL PRESIDENT
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I. INTRODUCTION

Introduction to Comments and Recommendations

We are extremely disappointed by the progress of our discussions during the last year. At times, the Coalition sensed that many of the concerns we voiced fell on deaf ears as the Agencies (Department of Defense, hereinafter DOD or the Department and Office of Personnel Management, hereinafter OPM) had a predisposition toward a human resources system that substantially mirrored the system proposed by the Department of Homeland Security. As such, we believe that many of the concepts advanced by the Agencies fail to advance the public's interest in protecting national security and defense.

The Coalition offered several "options" during the past year and here again in these comments. These options will change and enhance current procedures without sacrificing important employee rights intended to be safeguarded by the law. We continue to hope that these options will be included in the final regulations.

For example, we have a mutual interest in improving the discipline and adverse action process. While we have very strong concerns about a pay for performance system, we have offered to negotiate over pay and a new pay system that would provide for 1) a nationwide component to keep all employees comparable with the private sector; 2) a locality component to keep all employees comparable with the private sector and living costs; and 3) a performance component with fixed percentages tied to performance levels and 4) collective bargaining for bargaining unit employees over ongoing decisions that must be made once the system is in place. We have

offered to speed up the timeframes for bargaining, consider the new concept of post-implementation bargaining when necessary to protect national security and defense, and the introduction of quick mediation-arbitration processes by mutually selected independent arbitrators 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.

Through a process which includes collaboration and collective bargaining, employee representatives expect to work with the Agencies to create a personnel system described in the statute. Once the system is developed and implemented, the new personnel system will be subject to the collective bargaining process. In submitting the following recommendations, we do not waive any right(s) concerning procedural and/or substantive violations by the Department and/or OPM in the planning, development, and drafting of the proposed National Security Personnel System (NSPS) Regulations to implement 5 U.S.C. Chapter 99.

A. Labor Relations

In addition to the substantive arguments made in the body of this document, the Coalition believes that the procedures for generating changes in the Labor Management Relations system have, thus far, been contrary to the statutory scheme described in 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 has not been followed. The law requires that employee representatives participate in, not simply be notified of, the development of the system.

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, the Coalition has reiterated that we believe NSPS preserves the protections of Title 5, Chapter 71, which your proposals attempt to eliminate. Despite this congressional mandate, the proposed regulations will:

1. Restrict bargaining over procedures and appropriate arrangements for employees adversely affected by the exercise of core operational management rights.

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

3. Unduly restrict a union's right to participate in formal discussions between bargaining unit employees and managers.

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

5. Eliminate the requirement to preserve the status quo pending completion of bargaining and impasse resolution.

6. Set and change conditions of employment and void collectively bargained provisions through the issuance of non-negotiable departmental and component wide regulations.

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.

9. Mandate non-reviewable national level bargaining without consideration of the hundreds of local and regional certifications by the Federal Labor Relations Authority.

If there is any doubt, we herein restate our objection to your total abandonment of Chapter 71 as well as the law associated with the statute's interpretation. Chapter 71 should be the "floor" of any labor relations system you design. The apparent design of your plan is to minimize the influence of collective bargaining so as to undermine the statutory right of employees to organize and bargain collectively. When it enacted provisions to protect collective bargaining rights, Congress did not intend those rights to be eviscerated in the manner that your concepts envision. Congress expressly specified only two modifications to Chapter 71 – bargaining above the level of unit recognition and independent third party review of decisions. All Chapter 71 provisions not directly inconsistent with these two changes remain fully applicable to DOD. Any regulation reflecting any of the issues listed above is unacceptable and unfounded in the legislation and the law.

B. Performance Management

The law requires any new system to be "contemporary." Your labor relations and performance management concepts are, however, remarkably regressive. By proposing to silence frontline employees and the unions that represent them, the Agencies appear to have decided that employees and their unions can make no contributions to the accomplishment of the essential mission of protecting the national security and defense. This approach is at odds with contemporary concepts of labor relations. As the General Accountability Office recognized in congressional testimony

concerning the Department of Homeland Security's proposed regulations on human capital:

> [L]eading organizations involve unions and incorporate their input into proposals before finalizing decisions. Engaging employee unions in major changes, such as redesigning work processes, changing work rules, or developing new job descriptions, can help achieve consensus on the planned changes, avoid misunderstandings, speed implementation, and more expeditiously resolve problems that occur. These organizations engaged employee unions by developing and maintaining an ongoing working relationship with the unions, documenting formal agreements, building trust over time, and participating jointly in making decisions.

The performance management system breaks no new ground. Except for the elimination of employee procedural safeguards, the proposed system repeats many of the current system's themes, such as providing on-going employee feedback regarding performance and consistent and continual acknowledgment and reward of high performance and good conduct. Federal agencies have been struggling to attain credible performance systems for decades. Nothing in this proposal suggests that DOD will be able to avoid the credibility problems that have plagued federal employers. These problems are even more pronounced in view of the proposal to link employee pay more closely to their performance ratings.

We expect to engage in the full statutory collaboration process mandated by Congress to develop a new and improved performance management system. We recommend that it use collective bargaining for bargaining unit employees over the ongoing decisions that must be made once the system is in place.

C. Employee Appeals

Public Law 108-13 also reflects Congress's 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, 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 your proposed regulations set forth.

No significant statistical evidence shows that current employee due process protections or the decisions of arbitrators or the MSPB jeopardize national security and defense. While we believe in an expeditious process for employee appeals, we cannot support biasing the process in favor of management or otherwise reducing the likelihood of fair and accurate decisions. You have provided no research that shows that the drastic changes proposed to Chapters 75 and 77 of Title 5 will further the agency mission.

Ideally, a new human resource management system would promote esprit-de-corps so as to enhance the effectiveness of the workforce. These proposed regulations fall far short of that ideal. Instead, they will result in a demoralized workforce composed of employees who feel as if they have been relegated to second-class citizenship. This system will encourage experienced employees to seek employment elsewhere and will deter qualified candidates from considering a career at DOD. It will put DOD at a competitive disadvantage.

We expect to engage in the full statutory collaboration process mandated by Congress to develop a new and improved employee appeals process. We recommend

that this include negotiated grievance and appeals processes for bargaining unit employees.

D. Pay and Classification

Your proposed regulations indicate that you desire radical change to the pay and classification systems, and, as the law requires, creating a pay-for-performance system "to better link individual pay to performance, and provide an equitable method for appraising and compensating employees." No reliable information exists to show that this proposed system will enhance the efficiency of DOD operations and 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 your concept would be complex and costly. A new bureaucracy would be created, and it would be dedicated to making the myriad, and yet-to-be identified, pay-related decisions that the new system would require. 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.

As we stated to you during our meetings last year, 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. The unions are now forced to exercise their statutory collaboration rights on vague outlines, with no fair opportunity to consult on the "real" features of the new classification, pay and performance system. This

circumvents the congressional intent for union involvement in the development of any new systems, as expressed in Public Law 108-136.

Accordingly, we recommend that the pay, performance, 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 wide-spread basis. We simply cannot 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.

Regardless of the ultimate configuration of the pay proposal, we believe that any system must contain the transparency and objectivity of the General Schedule. We expect to engage in the full statutory collaboration process mandated by Congress to develop a new and improved pay and pay administration system. We believe the resulting system must contain the transparency and objectivity of the General Schedule, which includes involvement of Congress and the Federal Salary Council.

We recommend that the ongoing decisions, such as pay rates for each band, annual increases for employees in these bands and locality pay supplements be made through collective bargaining for bargaining unit employees. We object to these decisions being made behind closed doors by a group of DOD managers (sometimes in coordination with OPM) and their consultants.

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. We are concerned that these decisions would 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 is today.

If the system DOD/OPM has proposed is implemented, employees will have no basis to accurately 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 proposal will pit employees against each other for performance-based increases.[2] Making DOD employees compete against each other 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 available for performance based increases, a fact that has many DOD employees concerned about this proposal. As a practical matter, the Coalition has voiced its concern that your

[2] 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.

ambitious goal to link pay for occupational clusters to market conditions fails to address the reality that pay for DOD employees is tied to Congressional funding, not market conditions.

E. Conversion

As of this date, the unions have had little or no discussion with the agencies on how DOD will convert from the current pay, performance, appeals and labor relations system into NSPS. With respect to the new pay and classification systems, employees' conversion should include pay adjustments for time already accrued toward a within grade increase or career ladder promotion. With respect to appeals, any grievances, complaints, cases, etc. already filed in the current system must retain the protections of the current system until final adjudication under the current system.

II. SUBPART A: GENERAL PROVISIONS

§ 9901.101 - Purpose

"This part contains regulations governing the establishment of a new human resources management system within the Department of Defense, as authorized by 5 U.S.C. 9902... These regulations are prescribed jointly by the Secretary of Defense and the Director of the Office of Personnel Management (OPM)."

In fact, the proposal does **not** contain regulations governing the establishment of a new pay, performance management, and classification system. These proposed regulations merely lay out some extremely broad parameters and note that the

Secretary "may" actually develop the systems in the future with or without OPM, and with an undefined process to involve employees and their representatives.

In § 9902(a) of the National Security Personnel System (NSPS) Law, Congress explicitly allowed the new personnel system to be established by "...regulations prescribed jointly with the Director [of OPM]." § 9902(f) requires the Secretary and Director to provide employee representatives with a written description of the proposed new or modified HR system. The employee representatives then must be given 30 calendar days to review and make recommendations regarding the proposal. If the Secretary and Director do not accept one or more recommendations, they must notify Congress of the disagreement and then meet and confer with employee representatives for at least 30 calendar days in an effort to reach agreement.

Congress allowed DOD to have a personnel system that deviated from certain chapters of 5 U.S.C., but only if the systems would be jointly created and promulgated by DOD and OPM, and the systems would be created through a specific collaboration process with employee representatives that was mandated by Congress. Contrary to the NSPS law, DOD has made it clear that it does not intend to develop these systems through the process mandated by Congress. Instead, DOD intends to develop these systems at its sole and exclusive discretion, perhaps in coordination with OPM, at some time in the future.

<u>§ 9901.102 – Eligibility and coverage</u>

§ 9901.102 (b)(1) says that the Secretary, at his sole discretion, may establish the effective date for applying subpart I (Labor Relations) to all eligible employees. This

is in direct conflict with 5 U.S.C. 9902(l)(1), which prohibits the application of NSPS to more than 300,000 civilian employees until the conditions in § 9902(l)(2) are met, namely that the Secretary must first determine that the Department has in place a performance management system that meets criteria spelled out in subsection (b) of the law. We recommend that this section be stricken from the regulations as it is contrary to law.

§9901.102(f) provides that the DOD Secretary may apply one or more subparts of NSPS to employees not covered by Title 5 of the Code. We object to this section and to the supplemental information under "Eligibility and Coverage" on page 7557 which states, "Other categories of employees, including those covered by other systems outside of title 5, will be phased in as appropriate." There is no statutory authority in the NSPS law that allows DOD to apply NSPS to employees covered by anything other than the waivable or modifiable chapters of Title 5. This is an unlawful overreach on the part of DOD.

§ 9901.103 – Definitions

We object to many of the definitions in this section because there are too few details or descriptions of the actual system DOD intends to establish for us to adequately assess and comment on their meanings. This includes such words and phrases as "Career group," "Competencies," "Pay band," and others. We especially object to "Implementing issuances," and "Mandatory removal offense." Our objection to "Implementing issuances" is described below. By relegating the development of the NSPS to internal issuances, DOD has delegated to itself far more power than Congress

intended. Our objection to the whole concept of mandatory removal offenses is described in our comments to subpart G. We recommend that both of these definitions be removed.

§ 9901.105 - Coordination with OPM

"Coordination" has a special meaning in these proposed regulations. It is described in §9901.105 as follows:

> ...The Secretary will advise and/or coordinate with OPM in advance, as applicable, regarding the proposed promulgation of certain DOD implementing issuances and certain other actions related to the ongoing operation of the NSPS where such actions could have a significant impact on other Federal agencies and the Federal civil service as a whole. Such pre-decisional coordination is intended as an internal DOD/OPM matter to recognize the Secretary's special authority to direct the operations of the Department of Defense pursuant to title 10, U.S. Code, as well as the Director's institutional responsibility to oversee the Federal civil service system.

In other words, DOD is saying that the actual design of the system will not be done jointly with OPM but through a process in which DOD unilaterally designs the details, notifies OPM, and OPM intervenes only if it believes that what DOD wants to do could have a significant impact on other Federal agencies or the Federal civil service as a whole. This is not the new personnel system established by regulations jointly prescribed by DOD and OPM that Congress intended.

Similarly, DOD is signaling the start of the statutory collaboration process while providing the employee representatives with far too little detail to make meaningful comments and recommendations. We have been told that our 30 days to comment on the new personnel system has started, yet we have never received the "written

description of the proposed system" required by §9902(f)(1)(a). It is hard to imagine a productive mediation process over what the Secretary might decide to do in the future, but is not going to tell us now. How do we "meet and confer in an effort to reach agreement" about details DOD has not revealed to us and plans to develop unilaterally outside of the statutory process?

Rather, the proposed regulations repeat, over and over again, that the actual details of the systems may be determined in the future through "implementing issuances" developed internally, outside of both the public's right to comment and the statutory collaboration process required by the NSPS Law. "Implementing issuances, as defined in §9901.103, means:

> [D]ocuments issued at the Departmental level by the Secretary to carry out any policy or procedure established in accordance with this part. These issuances may apply Department-wide or to any part of DOD as determined by the Secretary at his or her sole and exclusive discretion.

In other words, DOD merely has to produce a document, not necessarily a directive or regulation, that the Secretary deems to be an "implementing issuance," and thereby relegate the union to the position of merely being allowed to comment and only if invited by the Secretary, as described in § 9901.106.

This falls far short of the statutory mandate that the personnel system be designed in collaboration with the unions. The statutory collaboration process was to include the provision of a written description of the proposed system, a 30-day opportunity for the unions to review and make recommendations, notification to Congress of the unions' recommendations including which ones DOD chooses not to accept, and a period of at least 30 days to meet and confer, with FMCS assistance if

requested, in order to attempt to reach agreement on whether or how to proceed with those parts of the proposal. We have not yet received a written description of the proposed system, but are being asked to squander our collaboration efforts on speculation about what the actual systems might be.

§ 9901.106 - Continuing collaboration

In this section, DOD spells out how it is actually going to involve its employees' exclusive representatives in the planning, development, and implementation of NSPS as required by law. It will not subject the actual development of the system to the statutory procedure described above, but rather, it proposes that the Secretary, entirely at his discretion, will decide how many union representatives to involve and how much time to give them to submit written comments and discuss final draft implementing issuances.

If the Secretary thinks it is necessary, he may involve the employees' exclusive representatives in commenting and discussing these issuances before they have become "final" drafts. There will be no meet and confer process with an outside mediator. There will be no public or congressional scrutiny of the process. The Secretary will decide who to involve, how much time to give them, and whether or not to involve them before it is essentially a "done deal." This is nothing like what Congress intended when it required union participation in the planning, development, and implementation of the NSPS and spelled out specific steps in that participation.

We expect to engage in the full statutory collaboration process mandated by Congress to develop a new and improved human resource system. DOD is required to

engage in collective bargaining for bargaining unit employees over the ongoing decisions that must be made once the system is implemented.

§9901.108 - Program evaluation

The NSPS law calls for the involvement of employee representatives in evaluating the regulations and implementation of the program. The proposed regulations say that DOD will establish procedures for this evaluation, and that designated employee representatives will be given an opportunity to be briefed and to comment on the design and results of program evaluation. We believe that it is not enough for certain employee representatives to be designated by DOD to sit through a briefing of what DOD wants us to know about the program. DOD employees' representatives must have access to information, the ability to meet with and survey employees, and other means to conduct an independent evaluation of the success of NSPS.

III. SUBPART B: CLASSIFICATION

General

The classification system described in Subpart B of this proposed regulation contains very few specific details about the career groups, pay schedules, pay bands, and other classification structures and rules that will apply to DOD employees under this regulation, if implemented. There is not enough detailed information provided in this section to allow for meaningful comments, beyond those provided below. Much more

detail is needed to allow for a meaningful and thorough review and discussion of this regulation, as required by the statute.

The preamble states that the Department "may" phase in coverage of "specific categories" of employees, or it "may" use OPM-approved occupational series and titles to identify and assign positions to a particular career group. See 70 Fed. Reg. at 7558. Yet no guidance is provided as to the process of the phase-in, where it may occur, and the criteria for establishing occupational series other than those approved and established by OPM. Also left out is any detail whatsoever as to how the Department plans to group any particular occupations or positions, or how it plans to assign certain pay bands to groups or subgroups.

Abandoning objective standards with established criteria, as the Department appears committed to doing, defies the core principles of fairness and uniformity inherent in a true merit and civil service system. Without using objective criteria, established across agencies, the opportunity for employees to receive disparate pay or job responsibilities increases, and the quality of working life for employees suffers. The Department will simply trade one perceived problem (inflexibility in occupational groupings or classifications) for another, more concrete one (a haphazard classification system lacking transparency and even the appearance of fairness).

A better approach is to focus more closely on how the Department's mission differs from other federal entities and tailor individual occupational series accordingly. Such a process would rest first and foremost on the painstaking work already accomplished by OPM in establishing government-wide classifications, but allow the Department to tailor an occupational series to the Department's specific needs.

Such an approach has the benefit of allowing the Department to make specific improvements to the personnel system by targeting concrete inadequacies without having to reinvent the wheel. We would note that OPM appears to believe that its present classification standards largely accomplish the same goals touted by the Department in this proposed rule. In its "Introduction to the Position Classification Standards", OPM stated that its standards program

> has been oriented toward a broad concept of job structure that aims to: (1) broaden the range of backgrounds for initial entry into occupations; (2) remove ***artificial barriers between related occupations***; (3) increase ***responsiveness to needs of management and of career patterns***; (4) facilitate coordination or integration of classification and qualification practices; and (5) ***improve and encourage greater use of different methods for evaluating the impact of individual contributions to the job***. The objective is to provide a classification system which permits agency managers to develop and use employee talents as fully as possible.

Office of Personnel Management, Workforce Compensation and Performance Service, Introduction to the Position Classification Standards, at 10 (August 2002).

The Department's dismissal of "lengthy" classification standards flies in the face of the gathered wisdom of OPM, which has concluded that classification standards, even "lengthy" ones, have the very fairness and consistency benefits which employees demand:

> Position classification standards encourage ***uniformity and equity*** in the classification of positions by providing an established standard for reference and use in different organizations, locations, or agencies. This "sorting out" and recording of like duties and responsibilities provides a basis for managing essential Federal personnel management programs, such as those for recruiting, placing, compensating, training, reassigning, promoting, and separating employees.

Introduction to the Position Classification Standards, at 7 (emphasis added).

With proper training and oversight by OPM, the Department can accomplish the goals it has set forth in the preamble to the proposed regulation, without sacrificing employee rights. Obviously, OPM's Workforce Compensation and Performance Service think so too. If the Department disagrees, we hope that before promulgating new regulations on the matter it would provide evidence and reasoning as to why it cannot accomplish its goals within the existing classification system. Since the Department has failed to explain, beyond generalities, why it wishes to introduce an entirely new classification system and abandon the existing one, we object to this proposed subpart in its entirety.

We recommend that no changes be made to the classification systems used by DOD agencies until the full statutory collaboration process has been completed. DOD is required to engage in collective bargaining for bargaining unit employees for the ongoing decisions that must be made once the new system is implemented.

A personnel system without fair and appropriate classification structures and rules will be rejected by employees, and will result in distrust of management, decreased morale, and lower productivity, ultimately harming national security.

§9901.201 - Purpose

The language setting forth the purpose of this Subpart largely emulates that stated in the Civil Service Reform Act, except for the very important principle stated in 5 U.S.C. § 5101(2). That provision states that positions are to be classified and graded according to their duties, responsibilities, and qualification requirements and so described in published standards.

Fairness requires that, as far as is feasible, positions be grouped uniformly throughout the Department, and that the process and applied standards be transparent and uniform. As will be discussed below, § 9901.211 does not preserve this principle because it does not require that the classifications and grades be "published," and uses the permissive word "may," presumably so that the Department may exclude one or more, or all, factors as it alone deems appropriate.

In accordance with the NSPS law, the actual planning, development, and implementation of, or future adjustments to the NSPS must be done through the collaboration process described in §9902(f), not through internal, unilateral issuances. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

A crucial element of any civil service system is that personnel decisions be made with reference to general standards that all parties can feel are fair and uniform in light of the mission and function of the employer. We recommend that the Department demonstrate that these regulations are not solely intended to undermine employee rights by crafting regulations that actually inform employees of their own rights and establish bona fide limitations on management action. Language in the regulations should be mandatory, not permissive, and should include specific standards by which management action may be held accountable. At present, the Department's proposed regulations do not even closely resemble those of a true "merit system".

We also object, for reasons stated in our comments to § 9901.202, to establishment of any new classification system "in conjunction" with the pay system set forth in subpart C. Our recommendation, as described below, is to implement subparts

of the system (after sufficient changes have been made to correct the various severe defects in those subparts) in a cumulative fashion so that employees have an opportunity to adjust to the new system.

§9901.202 - Coverage

The Department has apparently reserved for itself the power to apply this new classification system to the entirety of the civilian workforce. We note, however, that managers and supervisors have not been provided with training nor has the Department apparently devised a system by which to transition employees from the old to the new system. The likelihood of confusion and mistake is unnecessarily heightened by the Department's urge to rush into an untested system that is a radical departure from the existing one.

Moreover, as is implied in § 9901.102(b)(2), none of the subparts B, C, E, F, G, or H should be applied to employees without first being covered by subpart D (pertaining to performance management). Employees should be subject *only* to the new performance management system for several evaluation cycles before the radical changes in this and other subparts are imposed.

Such an approach will allow employees the opportunity to adjust to the new performance management system with a lessened possibility that the inevitable confusion and mistakes caused by transitioning to a new system would cause irreparable and unjust harm to an employee.

The approach will also allow for a more efficient adjustment period once the other subparts are imposed. Similar efficiency gains would arise from imposition of this

subpart for several evaluation cycles *before* imposition of the other subparts C, E, F, G, or H. We therefore recommend that the Department not impose those subparts C, E, F, G, or H, with modifications, on "specific category or categories of eligible civilian employees" until first imposing subparts B and D, as modified, for several evaluation cycles. We recommend that the appraisal system be tested for several cycles before being certified as a proper system.

Finally, we recommend that, as in chapter 51, the decision of applicability of this subpart (and all other subparts) to an employee or category of employees be at any time grievable for bargaining unit members.

§9901.203 – Waivers

We have set forth elsewhere in these comments why we believe the Department has exceeded its statutory authority and Congress' intent by waiving rights of Department employees. We object to the waivers of chapter 51 and replacement of that chapter with unspecified, vague regulatory language as found in this subpart. We object to the waiver of that chapter in light of the fact that the Department has chosen to do so while reserving for itself the power to "document in implementing issuances" a replacement to that statutory system. Even assuming *arguendo* that Congress wished for the Department to abandon in whole the principles of uniformity and fairness to employees (as the Department clearly has done in the subpart) in establishing a new classification system, it plainly did not intend that the Department would do so through as yet unpublished "implementing issuances." Any "waiver" truly and lawfully authorized

by 5 U.S.C. § 9902 would, at the very least, require that it be replaced with standards or rules of substance, not self-aggrandizing promises to fill in the gaps later.

The Department is required, furthermore, to provide a "written description of the proposed system or adjustment" under collaboration provisions of the statute. It is hard to believe that Congress intended or expected that the Department's proposed subpart B would fit any reasonable interpretation of 5 U.S.C. § 9902(f). The Department has proposed language that only comically resembles "regulations" by any common understanding of the term: they are replete with "may," but never "shall," aggrandize the fullest possible authority to the Department, offer only platitudes to employee rights, and repeatedly inform the reader that the Department "will document in implementing issuances" various critical features of its new classification system. The Department has overreached and should revise its approach.

We strongly recommend that the Department not waive any measure without first proposing, through the regulatory and meet-and-confer process prescribed by applicable statutes, a specific and detailed written description of the system the Department wishes to impose on its employees. That description should include the actual proposals for applicable standards and procedures and substantially inform the reader as to the nature of the Department's proposed system.

§9901.204 - Definitions

Other than to reiterate our objections set forth as recommendations to this subpart, we have no comments for this section.

§9901.211 - Career Groups

The Department reserves for itself the power to establish career groups but does not commit even to general principles of how it will establish those groups. The language suggests that the Department may pick and choose what "factors" will be applied to any single career group. We strongly recommend that the regulation be re-written so that the Department *shall be obligated* to apply the factors as agreed through the collective bargaining process.

We add one further comment regarding the stated factors. Although the Department makes no promises, it does list "relevant labor-market features" as one factor of many in establishing career groups. It is impossible to know precisely the Department's meaning given the overall lack of definition or clarity in the section. Notably absent in this section is any reference to OPM and its own expertise in developing classification structures for this Department and other federal agencies. The Department avoids accountability for its actions in devising new classifications. For employees to have confidence that positions have been grouped properly, the Department should commit to objective, uniform, and fair standards.

The contrast between this section and chapter 51 of Title 5, which the Department presumes to replace, is striking. For example, section 5106 sets forth objective criteria guiding and informing the establishment of classifications:

> § 5106. Basis for classifying positions
>
> (a) Each position ***shall*** be placed in its appropriate class. The basis for determining the appropriate class ***is the duties and responsibilities of the position and the qualifications required by the duties and responsibilities***.
> (b) Each class ***shall*** be placed in its appropriate grade. The basis for determining the appropriate grade ***is the level of difficulty,***

> ***responsibility, and qualification requirements of the work of the class.***
> (c) Appropriated funds ***may not*** be used to pay an employee who places a supervisory position in a class and grade solely on the basis of the size of the organization unit or the number of subordinates supervised. These factors may be given effect ***only*** to the extent warranted by the work load of the organization unit and then ***only*** in combination with other factors, such as the kind, difficulty, and complexity of work supervised, the degree and scope of responsibility delegated to the supervisor, and the kind, degree, and character of the supervision exercised.

5 U.S.C. §5106 (emphasis added). Absent from this statute, which was originally drafted in 1949 and remained largely unchanged since then, is any of the vague, self-aggrandizing language of § 9901.211. (This is to say nothing of the contrast, in terms at least of specificity, detail, and clarity, between OPM's own classification regulations, in 5 C.F.R. Part 511, and the Department's proposed ones.) It is entirely unclear why the Department feels that abandoning specific, concrete and well-established standards for vague and undefined ones serves the nation's security. It is clear, however, that doing so severely impacts employee rights. A personnel system without fair and appropriate classification structures and rules will be rejected by employees, and will result in distrust of management, decreased morale, and lower productivity, ultimately harming national security.

The grouping of positions is a key first step in establishing the new pay system, and employees must have full confidence that positions have been grouped properly. We recommend that the career groups are published and that they are subject to the collaborative process of 5 U.S.C. § 9902(f) and collective bargaining before implementation.

§9901.212 - Pay Schedules and Pay Bands

We object to the Department's failure to provide sufficient detail for the public or employee representatives to comment on the new classification system and request that the Department provide that detail in its proposed regulations. At a minimum, we recommend that the Department clarify that the establishment of pay schedules and pay bands are subject to the collaborative process of 5 U.S.C. § 9902(f) and that collective bargaining is used for the ongoing decisions for bargaining unit employees once the system is in place. The establishment of these pay schedules and bands, and the distinctions between them, are key elements of the new pay system, and the involvement of employee representatives through collective bargaining is essential to provide credibility, transparency and accountability for these determinations.

As with section 9901.211 above, this section does not mention oversight by OPM. We recommend that this section require that newly-established or modified pay schedules be reviewed and approved by OPM before going into effect.

Moreover, although our comments on the proposed pay banding system can be found elsewhere, we do object to allowing the Department to set forth different pay schedules for similar career groups. This flies in the face of the statutory requirement that the new personnel system uphold the merit system principle of "equal pay for equal work" as required in 5 U.S.C. § 9902(b)(3). There is an enormous potential for claims by employees alleging violation of the equal pay requirements of 5 U.S.C. section 2301(b)(3), if employees do not believe that those in similar jobs are treated fairly with respect to the establishment of career groups, pay schedules and pay bands.

In paragraph (d), the Department's reference to § 9901.514 is confusing. The paragraph states that the Department will designate standards for each group, series, pay schedule, and/or pay band, "as provided in § 9901.514." That section of the Department's proposed regulations pertains to "Non-citizen hiring." It may be that the Department intended to reference § 9901.513 (which addresses "Qualification Standards").

§9901.221 - Classification requirements

We object to the Department's failure to provide sufficient detail for the public or employee representatives to comment on the classification requirements and request that the Department provide that detail in its proposed regulations. Subparagraph (b)(2) obligates the Department to apply the criteria and definitions "required by §§ 9901.211 and 9901.212" in assigning jobs to career groups, pay schedules and pay bands. Unfortunately, the Department expressly avoided listing *any requirements* in establishing career groups, pay schedules, or pay bands in § 9901.211 and .212. Reiterating our objections and recommendations set forth above, we strongly urge that the Department take the time to establish uniform, objective, and fair standards for assigning jobs to career groups, pay schedules and pay bands.

We recommend that subsection (b)(2) be modified to indicate that the assignment of positions to appropriate career groups, pay schedules and pay bands, using the criteria of 9901.211 and 9901.212, would be accomplished as part of the collective bargaining process. This will ensure credibility, transparency and

accountability for these determinations, which will be lacking if these decisions are made unilaterally by management representatives.

§9901.222 - Reconsideration of classification decisions

As with most other portions of these regulations, this section is wholly without detail or specificity, therefore, it is impossible to comment knowledgeably on the procedure for reconsideration of classification decisions. This section does not provide time periods for different appeals, or whether employees may seek retroactive lost pay or merely a prospective adjustment. It is unclear who within the Department is authorized to consider classification appeals, the format for conducting them, the procedures for performing a desk audit, the ability of an employee to obtain a representative to assist in conducting the appeal, or the right of an employee to information concerning the status of his or her appeal.

It is unstated what issues may be appealed and what issues may not be appealed. It is further impossible to comment on appeals because, as stated above, the criteria used to establish a classification system or category are not published in these regulations. We recommend that the Department incorporate directly the well-established regulations in 5 C.F.R. Part 511 for conducting classification appeals. Under any system, employees should be allowed to grieve classification decisions.

Paragraph (a) only proposes that an employee "may request" either the Department or OPM reconsider a classification. Notably absent is any guarantee that the request shall be considered, as is found in OPM regulations. See 5 C.F.R. § 511.603 (entitled "Right to appeal").

Also in contrast to OPM regulations, employees are apparently not entitled to prompt written notification of a reclassification decision or an explanation of the reasons for the reclassification, so that employees may learn of a reclassification after the fact, on receipt of a reduced paycheck. See 5 C.F.R. § 511.602 (Notification of classification decision). Since they do not have a guarantee of a written notification, it appears that employees will not even be informed of a right to appeal a reclassification decision. Employees should have a right to appeal a classification or reclassification.

The absence of an independent review and appeal procedure will undermine the credibility and accountability of such determinations for affected employees. Employees should be notified of their right to appeal both to the employing agency and to OPM, and the procedures and time limits for doing so. In addition, we recommend that this section be modified to provide that bargaining unit employees may elect to challenge any classification determination through the negotiated grievance procedure. This is consistent with our recommendation that the definition of "conditions of employment" be expanded, which would also make these matters grievable.

OPM has created an Office of Classification Appeals so employees can turn to an objective body with expertise and thorough knowledge of classification standards. See 5 C.F.R. § 511.613 ("Classification Appeals Office"). We strongly recommend that the Department's regulations create, in conjunction with OPM, a similar central office. We also recommend that the regulations provide that if a decision has been reached that is favorable to an employee; a personnel action implementing the decision must take place within a reasonable period of time following the decision but shall be effective as of the date of the decision. See 5 C.F.R. § 511.701(a).

In addition, 9901.222(e) states that reconsideration determinations made under this section will be based on criteria issued by DOD, unless DOD has adopted an applicable OPM classification standard. The use of criteria issued solely by DOD in lieu of an OPM standard or criteria will likely be considered unfair by employees. We recommend that only criteria and standards issued by OPM be used in reconsideration determinations made by DOD under this section.

§9901.231 - Conversion of positions and employees to the NSPS classification system.

We recommend that this section be modified to provide that the policies and procedures for converting bargaining unit positions to a career group, occupational series, pay system, pay schedule or pay band, upon initial implementation of the new NSPS classification system, are subject to collective bargaining. This will ensure credibility, transparency and accountability for these policies and procedures.

We recommend that where an employee is transferred or reassigned from a non-covered position to a position already covered by the NSPS system, that employee be provided with a copy of the new classification, position or series description, occupational group or subgroup, and pay schedule, and any other relevant documentation *before* entering service in the position.

Relationship to other Sections

§9901.903 - Definitions

We are recommending that the definition of "Conditions of employment" in 9901.903 be modified, so that matters pertaining to classification (among other things)

would not be excluded. In order for the new classification program to have any credibility with employees, and to maximize transparency and accountability, it is crucial that employee representatives be directly involved in designing this new system. Collective bargaining of job evaluation systems is common throughout the private sector, and should occur in the DOD as well.

IV. SUBPART C: PAY AND PAY ADMINISTRATION

§ 9901.301 - Purpose

The subsection states, "This subpart contains regulations establishing pay structures and pay administration rules for covered DOD employees to replace the pay structures and pay administration rules established under 5 U.S.C. chapter 53 and 5 U.S.C. chapter 55, subchapter V, as authorized by 5 U.S.C. 9902." In fact, this subpart does not contain regulations establishing pay structures and pay administration rules – those are left to the Secretary to develop unilaterally in the future. In accordance with the NSPS law, the actual planning, development, and implementation of, or future adjustments to the NSPS must be done through the collaboration process described in §9902(f), not through internal, unilateral issuances.

A pay system such as this, which takes DOD out of the government wide system and leaves to its sole discretion determinations as vital to employees as their annual increases, their locality adjustments, and other pay setting decisions must have oversight.

We recommend that the pay system developed through collaboration, inasmuch as it will take DOD out of the government-wide system and give it discretion for determinations as vital to employees as their annual increases, their locality supplements, and other pay setting decisions, be a system that uses collective bargaining for pay and pay administration decisions for bargaining unit employees.

§9901.304 - Definitions

Even the definitions in § 9901.304 are difficult to comment about effectively because they depend upon policies that are not revealed to us. For example, take the definition of "Local market supplement." It states, "Local market supplement means a geographic- and occupation-based supplement to basic pay, as described in §9901.332." §9901.332 says, "For each band rate range, DOD may establish local market supplements that apply in specified local market areas." In other words, the promise of a description of "local market supplements" instead turns out to be a statement that DOD may actually establish them, presumably with internal rules and procedures, at some point in the future. When DOD does provide us with the descriptions necessary to comment on the definitions in this section, the statutory collaboration process should begin.

§ 9901.311 - Major features

This subsection tells us, "Through the issuance of implementing issuances, DOD will establish a pay system that governs the setting and adjusting of covered employees'

rates of pay and the setting of covered employees' rates of premium pay." It goes on to say that the system will include the following features:

(a) "A structure of rate ranges linked to various pay bands for each career group, in alignment with the classification structure described in subpart B of this part..." Subpart B does not lay out the structure of rate ranges or the classification structure, but merely states that DOD will do it in the future. This is circular logic at its best (or worst).

(b) Policies regarding the setting and adjusting of band rate ranges based on mission requirements, labor market conditions, and other factors, as described in §§ 9901.321 and 9901.322..." As we have seen before, these sections referred to merely say that DOD may or will do these things at some time, but do not contain descriptions. We are not actually given the details that would allow us to comment or collaborate effectively.

(c) Policies regarding the setting and adjusting of local market supplements to basic pay based on local labor market conditions and other factors, as described in §§ 9901.331 through 9901.333..." Once again, these subsections do not actually describe the policies; they say that DOD will unilaterally develop them.

(d) Policies regarding employees' eligibility for pay increases based on adjustments in rate ranges and supplements, as described in §§ 9901.323 and 9901.334. These sections of the proposed regulations do set out some details of the system DOD has in mind, for example that employees with a current rating above "unacceptable" will receive increases, but leave most to be determined by DOD at a later date.

(e) Policies regarding performance-based pay increases, as described in §§ 9901.341 through 9901.34. Once again, these sections do not actually describe the performance-based pay system, just mention certain elements the system may contain, and leave it to DOD to develop the system unilaterally in the future.

(f) Policies on basic pay administration, including movement between career groups, as described in §§9901.351 through 9901.356. Those sections do not describe these policies but say they may be developed in the future.

(g) Linkages to employees' performance ratings of record, as described in subpart D of this part; and

(h) Policies regarding the setting of and limitations on premium payments, as described in §9901.361. This section merely states that DOD will issue implementing issuances regarding premium pay.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. DOD is required to engage in collective bargaining for ongoing decisions addressed in this section.

§ 9901.312 - Maximum rates

The Secretary will establish limitations on maximum rates of basic pay and aggregate pay for covered employees. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

§ 9901.313 - National security compensation comparability

As required by §9902(e)(4) of the NSPS law, DOD says that for fiscal years 2004 through 2008 it will try to prevent slippage in, "...the overall amount allocated for compensation of the DOD civilian employees who are included in the NSPS..." so that it does not fall to "...less than the amount that would have been allocated for compensation of such employees for such fiscal years if they had not been converted to the NSPS...." This is to be based at a minimum on the number and mix of employees in the pre-NSPS organizations and the pre-NSPS expected adjustments for step increases and promotions.

§ 9902(e)(5) of the NSPS law requires that, to the maximum extent practicable, the regulations implementing the NSPS provide a formula for calculating the overall amount to be allocated after FY 2008 for compensating civilian employees, so that, in the aggregate, such employees are not disadvantaged by the conversion to NSPS, while allowing the Department to accommodate changed circumstances that might impact pay levels. Yet, the proposed regulations do not contain any formula for calculating the overall amount for compensating employees after FY 2008. Instead, DOD says in § 9901.312(b) that it will, to the maximum extent practicable, provide such a formula in its later implementing issuances, after and outside of the regulatory process.

This lies at the heart of DOD employees' deep concerns about their future employment and compensation under NSPS. DOD reserves to itself the right to lower overall payroll costs and divert such funds elsewhere if it unilaterally decides to do so. Under NSPS, DOD civilian employee compensation is left to the Executive branch to

decide. It no longer will be worked out in negotiations between the Executive and Legislative branches of government.

This takes away an important right DOD workers have now – to influence their members of Congress to take into consideration their needs and their value in determining annual pay increases. NSPS would remove that. And, by making this formula something DOD does through implementing issuances in the future, DOD would effectively keep the employees' exclusive representatives from having any meaningful role in ensuring that their bargaining unit members are respected and protected. We do not believe that Congress intended DOD to go behind closed doors to develop policies so important to employee morale and the ability to recruit talent in the future.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

§9901.321 - Structure

This subsection states that DOD may establish ranges of basic pay for pay bands and will establish a common rate range for each pay band within a career group that applies in all locations. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

§9901.322 - Setting and adjusting rate ranges

Within its sole discretion, DOD, after coordination with OPM, may set and adjust the rate ranges established under §9901.321 and may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and any other relevant factors. The rate ranges and adjustments may be different for different pay bands. The adjustment of the maximum rate may be a different percentage than the minimum.

We are concerned that the ability of DOD to raise the maximum rate of a band by an amount different from the minimum rate could allow the Department to benefit a few favorite employees at the expense of the rest of the good employees in a particular band. In a situation in which a few favorites are at the top of their band, DOD could raise the maximum rate by, for example, 6%. This would give room for managers to give those few employees, large performance increases to their basic pay rather than cash bonuses. In order to afford this, DOD might raise the minimum rate of the band by a much smaller amount, say 2% or even zero%, thereby giving the good employees in that band a very small annual increase or even no increase, in accordance with §9901.323. We believe that the ability to manipulate the annual increase that all good employees would get adds to the insecurity, confusion and real or perceived unfairness in the system.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system.

Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

§9901.323 - Eligibility for pay increases associated with a rate range adjustment

(a) As stated above, we believe there is too much opportunity for manipulation, confusion, and inequity in allowing DOD to adjust the minimum and maximum rates of a band by different amounts.

(b) We object to withholding the annual increase from an employee who receives an unacceptable rating. This is especially unconscionable if employees are denied the ability to grieve or appeal the rating to an external, neutral adjudicator who is able to overturn the rating based on the facts.

(c). We oppose the idea that an employee, who for whatever reason does not have a rating of record at the time the annual increase is given, will have his or her pay increase determined by future unilateral issuances. If management has not fulfilled its obligation to provide the employee with a rating of record, or other circumstances preclude issuing a rating, the employee should at least be credited with the modal rating for the purpose of receiving the annual increase received by other employees in the band.

DOD has been telling employees and others that all acceptable employees will get the annual increase. This is not exactly true. DOD leaves to its sole discretion the determination of the minimum and maximum rate ranges of the clusters and bands. (See §§ 9901.321 through 9901.322). The determination of the minimum rate range increase governs what will be the annual increase for acceptable employees in a

particular band. So, for example, employees in one band could get an annual increase of 1 percent, or even no percent even though Congress and the President approved an increase of 4.1 percent for non-DOD employees. At the same time, employees in another band could get a 6 percent increase. This could happen because DOD might, based on as yet unrevealed issuances, determine, for example, that the first band is being paid more than the labor market requires while the second band is being paid under market, or because one career group is considered to be more important than another at a particular point in time.

We object to this unfettered authority by DOD. We also object to DOD and OPM misleading employees into thinking that all good workers will get an annual increase. In reality, DOD has retained for itself the right to give no increase or a smaller increase than non-DOD employees are getting to a particular band, while giving another band an amount higher than other federal employees are getting. This decision would have nothing to do with the relative performance of individual employees.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

<u>§9901.331 - General</u>

This subsection says that the pay ranges may be supplemented by local market supplements as described in §§9901.332 through 9901.334. Those subsections do not actually describe or set out the regulations and policies governing these

supplements. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9701.332 - Locality pay supplements

(a) DOD may establish local market supplements for employees whose official duty station is located in the given area. The supplements may be different for different career groups, occupations, or different pay bands within the same career group. There is a great potential for errors and inequities to develop over time.

(b) This subsection says that DOD may set the boundaries of locality pay areas. If it decides to use locality pay areas established by the President's Pay Agent under 5 U.S.C. 5304, no regulations are required and the decision is not subject to judicial review. If DOD establishes locality areas different from those established under 5 U.S.C. 5304, DOD may make boundary changes by regulation. Judicial review of any regulation on boundary changes is limited to whether or not any regulation was promulgated in accordance with 5 U.S.C. 553.

(c) We believe local market supplements should be basic pay for at least all of the purposes locality pay under the GS System is considered basic pay.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.333 - Setting and adjusting local market supplements

Within its sole discretion, DOD may set and adjust local market supplements and determine their effective dates. DOD says it will base these determinations on mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, allowances and differentials under 5 U.S.C., chapter 59, and any other relevant factors. The labor market is notoriously volatile – the skills that are in demand today are a dime a dozen tomorrow. Witness the pay incentives to attract Information Technology workers a few years ago and the relative surplus today. The ups and downs of market-based decisions will be hard for employees to understand or trust.

This will be even worse unless DOD makes the major investment of money, people, and time to do the ongoing studies, analyses, and validations necessary to keep up with the labor market. And remember, decisions would have to be made about adjustments for each locality and each band within each career group within that locality. DOD says it will review these supplements at least annually. Is this the best use of time and resources in the dangerous world we face? We support and want to help in doing strategic and long-range planning to anticipate the skills needs of the future and prepare current and future employees to meet those needs. We do not support the notion that time and resources should be spent plotting the variations in pay from one year to the next for every occupation and withholding or granting small increases based on these fluctuations.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the

decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.334 - Eligibility for pay increase associated with a supplement adjustment

(a) We are concerned that the decisions to vary the local market supplements from one career band to another, and from one pay band to another within a career band, is subject to error and inequity. We believe that employees will begin to see a confusing array of different pay rates that will be neither understandable nor credible to them.

(b) We object to withholding the local market supplement from an employee who receives an unacceptable rating. This is especially unconscionable if employees are denied the ability to grieve or appeal the rating to an external, neutral adjudicator who is able to overturn the rating based on the facts.

(c) We oppose the idea that an employee, who for whatever reason does not have a rating of record at the time the local market supplement is given, will have his or her pay increase determined by future unilateral issuances. If management has not fulfilled its obligation to provide the employee with a rating of record, or other circumstances preclude issuing a rating, the employee should at least receive the modal rating for the purpose of receiving the supplement received by other employees in the band.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the

decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.341 – General

This section says that §§ 9901.342 through 9701.345 describe the performance-based pay system that is part of the pay system established under this subpart. In fact, once again, these sections merely mention some concepts and state that DOD may or will issue issuances actually describing them in the future. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§ 9901.342 - Performance payouts

(a)(1) gives a broad overview of the system, saying that NSPS will be a pay-for-performance system that will distribute available performance pay funds based upon individual performance, individual contribution, organizational performance, or a combination of these. The proposed regulations further state that DOD will use a pay pool concept to manage, control, and distribute performance-based pay increases and bonuses. The actual performance payout any employee might receive will depend on how much money was put into his or her particular pay pool and how many performance shares were given to employees in that pool.

(2) DOD says it will use the rating of record for the most recent rating period for making payout decisions. But even here, DOD wants to give itself the option to pull the rug out from under an employee at any time. The proposed regulations allow the Department to substitute another rating that will determine the employee's pay if an appropriate rating official believes that an employee's current performance is inconsistent with that rating. What are we talking about here? Do we really want to create an environment in which employees fear every time they have a bad day? We object to giving managers this excessive power to manipulate ratings and payout decisions. Employees should have a reasonable expectation that their rating, which will affect their pay, will be based on their performance over an entire rating cycle and not on their performance at any current moment.

Performance appraisal systems are notoriously bad at accurately and objectively evaluating performance. This becomes a crucial weakness when pay-for-performance is involved. If DOD is not even willing to stand behind the ratings managers give employees under its new NSPS performance management system, but reserves the right to change that rating when it comes time for the payout, there is no possibility for credibility, trust or stability in the proposed system.

(b) Performance pay pools. (1) DOD says it will issue implementing issuances for the establishment and management of pay pools for performance payouts; and that

(2) it may determine a percentage of pay to be included in pay pools and paid out in accordance with future issuances as performance-based pay increases, bonuses or a combination of the two. The supplemental information, under "Performance Pay Pools" on page 7560, states that each pay pool will have a pay pool manager, who will manage

"in concert with appropriate management officials," as a pay pool panel. The supplemental information goes on to say that the pay pool manager, "...is the individual charged with the overall responsibility for rating determinations and distribution of the payout funds in a given pay pool."

If the NSPS performance management system is working as DOD says it should, all year long employees would be getting feedback about what their performance expectations are and how well they are meeting them. Maybe a supervisor thinks an employee is doing a great job and making that extra contribution to the mission. The supervisor may have laid out various assignments or directions to make the best use of that employee's skills and contribution to the mission. At the end of the rating period, the supervisor may have given the employee a high rating and a high number of performance shares. What happens when the supervisor's recommendation comes to the pay pool manager and pay pool panel?

The pay pool panel and manager may disagree with the supervisor. In fact, they may actually agree with the supervisor's assessment, but believe that the finite amount of money in the pay pool would be better used elsewhere. Pay pool managers and pay pool panels, in reality, are additional layers between an employee's supervisor and the actual payout the employee receives.

According to the supplemental information, the pay pool manager is charged with the overall responsibility for rating determinations and distribution of the payout funds in a given pay pool. What will go into deciding whose supervisor's rating and share determination will win out? Some supervisors are more assertive and persuasive than others. Some are better liked. In some cases, pay pool managers and panels have

had to make hard decisions about who, among equally outstanding employees, should get higher performance-based pay and who should not. Setting aside the very real potential for discrimination and favoritism in such decisions, there are other reasons that one employee might get more than another equally qualified employee.

A pay pool manager might decide that one outstanding employee is more likely to leave than another and therefore needs a higher payout as an incentive to stay. Maybe one outstanding employee is in her forties and is considered not likely to leave for another job, while another is young and is believed to have other options. Maybe one employee is in a job that is easy to fill, while another is in a job considered hard to fill in the market at this moment. Perhaps there are two equally outstanding and valuable employees, but one recently was promoted to a higher band while the other hasn't had a large increase for a while.

The pay pool manager, who has the overall responsibility for rating determinations and distribution of the payout funds in a given pay pool, might decide to give one employee a lower number of shares (or even a lower rating) in order to give more money to another employee. We object to the concept and legality of pay pool panels and pay pool managers with authority to manipulate the system. These concepts should be eliminated.

(c) Performance shares. The proposed regulations say that; (1) DOD will issue implementing issuances setting up a range of shares that supervisors (and later pay pool managers) will be able to assign for the various performance ratings that may be assigned to employees. Once again, DOD is expecting employees' exclusive representatives to go through the statutory collaboration process, in an area vital to our

bargaining unit members, strictly on speculation without any actual details. In this case, it is about how much leeway DOD will give supervisors and pay pool managers to pay different performance payouts to employees with the same performance rating in the same pay pool.

The current GS system allows managers to reward employees for superior performance. For many reasons, including funding, management training, and an unwillingness to spend the time necessary on performance management, the Federal government does a terrible job of rewarding performance now. We are deeply concerned about the amount of discretion given to supervisors to affect their employees' pay under NSPS. They will not only assign performance ratings, but will decide how much that rating will be worth for one employee and how much the same rating will be worth for another employee. Now supervisors will be able not only to reward exemplary performance, but to cause the pay of good employees to drop below what it would have been without NSPS. We have no confidence that the managers operating under NSPS will be so different from the managers operating under the GS system that they will do a good job of carrying out these increased responsibilities. We have no confidence that NSPS will receive the funding necessary for there to be even a chance of a successful performance-based pay system.

(2) We can accept the idea that an employee who receives an unacceptable rating does not get a performance increase, but only if that employee has the ability to appeal or grieve the rating to an external, neutral adjudicator who is able to overturn the rating based on the facts.

(d) Performance payouts. The proposed regulations say (1) that DOD will establish a methodology that authorized officials will use to determine the value of a performance share, which may be expressed either as a percentage of an employee's rate of basic pay (exclusive of local market supplements under § 9901.332) or as a fixed dollar amount, or both.

(2) DOD will determine an individual employee's performance payout by multiplying the share value by the number of performance shares assigned to the employee.

DOD offers no written description of the methodology it says it will establish in the future that would allow us to participate in the statutory collaboration process as envisioned by Congress. The supplemental information ("Performance-Based Pay" page 7560) says, "The performance payout is a function of the amount of money in the performance pay pool and the number of shares assigned to individual employees."

This appears to be describing a system in which the amount of money in the pay pool is divided by the number of shares assigned to employees in that pool to arrive at the value of each share. That value is then multiplied by the number of shares assigned to an individual employee to determine the performance payout amount.

This type of performance share process would set up a dysfunctional system in which one employee does better if more of his or her co-workers do poorly. The more ratings given out in a pay pool that exceed acceptable, the lower the value of each performance share. The more ratings of acceptable or lower given out in a pay pool, the more valuable is each performance share. The lower the performance of the employees in the pay pool as a whole, the bigger the raise an employee judged to be a

high performer will receive. Someone motivated to work hard for the promise of a big raise will only achieve the goal if management judges the majority of his or her coworkers to be losers. Of course, we are only guessing that this is the method of determining a share value that DOD is planning to use.

There are many unanswered questions that make it impossible to comment adequately. For example, is it expected that all of the money assigned to a pay pool will be paid out, or will managers be able to divert some to other uses or save some for the following year? If the share value is derived as described above, by dividing the total number of shares into the amount of money in the pay pool, then it only makes sense that the entire pool is distributed. Our objection to a system that makes the value of a share dependent upon how many superior employees are in a pay pool is described above. But we also strongly oppose any system that would allow managers to withhold or divert any of the money budgeted for performance pay pools.

(3) The proposed regulations say that DOD may provide for the establishment of control points within a band that limit increases in the rate of basic pay. It goes on to say that DOD may require that certain criteria be met for increases above a control point.

Control points are like invisible barriers that prevent most employees from ever reaching the top of their band. DOD could require, for example, that employees have at least two "Outstanding" ratings in order to get beyond the control point. It could set other criteria, including retention needs or hard to define and communicate "contributions," or "competencies," that might keep employees from reaching the rate in the band they thought "pay-for-performance" would let them attain as long as they were

high performers. In fact, the regulations would allow DOD to establish control points that could prevent or make it more difficult for good DOD employees to reach the levels they would have reached had NSPS not been created.

We oppose the use of control points. There is no need and no justification for them. Control points are cost control devices. Pay pools are cost control devices. It makes no sense to have both. We believe that so-called "pay-for-performance" is the wrong system for most organizations, and certainly for DOD, whose mission requires employees to support each other rather than try to grandstand each other. Experience has shown time and time again that pay-for-performance without enough investment of time, money and resources is doomed to failure.

If we are correct in our guess at how DOD intends to determine the value of shares and performance payouts, management will only be responsible for paying out what is in the pay pool. If DOD manages properly, it will budget only what it can afford and believes is appropriate for performance pay. If it has a large number of high performers, the value of each share will be lower – the total amount will never be more than DOD budgeted for that purpose. Control points are an unnecessary and confusing addition to an already confusing system. They also add the potential for manipulation and abuse by managers and frustration for employees.

(4) The proposed regulations say that performance pay may be in the form of an increase to basic pay, a cash bonus, or a combination of the two. An employee's basic pay may not exceed the maximum rate of the band or applicable control point. Once again, we believe that control points are redundant – there are enough cost control

issuances, we cannot comment adequately.

(5) DOD says it will determine the effective dates of increases in basic pay made under this section.

(6) DOD says it will issue implementing issuances addressing retained rates.

(e) Proration of performance payouts. DOD says it will issue implementing issuances regarding proration of performance payouts for employees who were hired or reassigned during the rating period, were in a leave without pay status, or for other circumstances.

(f) Adjustments for employees returning after performing honorable service in the uniformed services. Once again, DOD says it will issue implementing issuances with the details. The proposed regulations do say that the returning employee will be credited with his or her last DOD rating of record or the modal rating, whichever is more advantageous to the employee. We agree that every effort should be made to ensure that employees who return from performing honorable service on their nation's behalf should not be disadvantaged in any way, and certainly not in their pay. We do note, however, that the proposed regulations do not address the flexibility managers will have to assign a returning service member the low end or the high end of the share range allowed for the rating.

(g) Adjustments for employees returning to duty after being in workers' compensation status. Once again, DOD says it will issue implementing issuances with the details. The proposed regulations do say that the returning employee will be credited with his or her last DOD rating of record or the modal rating, whichever is more

advantageous to the employee. We agree that every effort should be made to ensure that employees who return after recovering from an injury suffered on the job should not be disadvantaged in any way, and certainly not in their pay. We do note, however, that the proposed regulations do not address the flexibility managers will have to assign a returning employee the low end or the high end of the share range allowed for the rating.

In NSPS, DOD makes no promise to employees that they can expect a particular performance reward if they receive a certain performance rating. Instead, DOD may decide to put less money in one pay pool and more in another, thus affecting the size of the payout. An employee's rating will not translate into a fixed number of performance shares – there will be a range and the supervisor will decide the number.

The value of a performance share cannot be determined until the ratings have been assigned, and the distribution of ratings will cause the value to be higher or lower. This could be a small amount of actual money, hardly worth the disruption and demoralization the research shows that pay-for-performance systems create when they tell some good and valuable employees that they are losers while failing to give top performers enough to make a difference. We do not want to create a system in which some people are supposed to feel rewarded by feeling superior to their co-workers, and other good employees are supposed to feel inferior.

We believe that pay-for-performance has more problems than benefits. We believe that a dedicated work force of employees committed to keeping this country safe can be demoralized by attempts to fulfill misguided political agendas to impose pay-for-performance. We believe that DOD cannot promise that it will adequately fund

a pay-for-performance system into the future because it does not control its budgets. DOD, like other federal agencies, depends upon Congress for its appropriations. Even if it wanted to, today's Congress cannot bind future Congresses to adequately fund a pay-for-performance system. An inadequately funded pay-for-performance system is almost guaranteed to create work place tensions, disruptions, and inequities that this nation simply cannot afford in these dangerous times.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.343 - Pay reduction based on unacceptable performance and/or conduct

The proposed regulations say that a pay reduction for unacceptable performance or conduct, essentially a demotion, may be no more than 10% for a within-band reduction. The proposal does allow for a greater reduction if the employee is being demoted to a lower band and the maximum rate of that band is more than 10% lower than the employee's current rate of pay. We agree that there must be limits to a reduction in pay. We would have less concern if we believed that the adverse action procedures and methods for challenging performance ratings that are proposed in these regulations were adequate. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.344 Other performance payments.

(a) The proposed regulations say that there will be implementing issuances describing how authorized officials can give some employees or teams extraordinary performance increases (EPI).

(b) These payments will be in addition to performance payouts under §9901.342 and the future performance of the employee will be expected to continue at an extraordinarily high level. Or what? We assume that an EPI is an increase to basic pay, but the regulations don't say that.

We do not fully understand the need for these special increases. Employees are eligible for performance increases and management could ensure that the extraordinary employee gets the highest possible rating and shares. Where will the money for these additional increases be? Will they come out of the performance pay pool or be separately funded? We fear that this could be a license to siphon money from high-performing employees to pay favorites, or cronies, or management "lap dogs" large increases.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.345 - Treatment of developmental positions

The proposed regulations say that DOD may issue implementing issuances regarding pay increases for developmental positions. We agree that it can make sense to link progression through the Entry and Developmental band to the demonstration of the required competencies, skills and knowledge necessary to advance to the full performance level. This is very similar to the current career ladder system. We also believe that it is very important to set standard timeframes, perhaps call them "Opportunity Points," that move an employee through the band at a pace similar to what a GS employee might expect in a career ladder. Our members have expressed concern that favoritism and cronyism could result in one employee getting the training and assignments needed to demonstrate competency while another is denied or delayed.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.351 - Setting an employee's starting pay

This section says that, subject to DOD implementing issuances, DOD may set the starting rate of pay for individuals who are newly appointed or reappointed anywhere within the assigned pay band. We believe that any Government employee entering a new DOD pay system, either from another agency or from a non-covered DOD position into a covered position, should receive no reduction in basic pay. When

DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.352 - Setting pay upon reassignment.

This proposed section says that DOD may set pay anywhere within an assigned band when an employee is reassigned voluntarily or involuntarily to a comparable pay band. If the reassignment results in a reduction in pay, that reduction may be no more than 10% and is subject to the adverse action procedures. We agree that there must be limits to a reduction in pay. We would have less concern if we believed that the adverse action procedures and methods for challenging performance ratings that are proposed in these regulations were adequate. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.353 - Setting Pay Upon Promotion

This section says that, subject to DOD implementing issuances, DOD may set pay anywhere within the assigned pay band when an employee is promoted to a position in a higher pay band. The supplemental information ("Pay Administration" page 7561) states:

> Promotion pay increases (from a lower band to a higher band in the same cluster or to a higher band in a different cluster) will be a fixed percent of

> the employee's rate of basic pay or the amount necessary to reach the minimum rate of the higher band, whichever is greater. This amount is roughly equivalent to the value of a promotion to a higher grade within the GS system.

First, what is the magic percent of an employee's pay that will be roughly equivalent to a higher grade within the GS system? It is impossible for us to comment without this most basic of facts. Second, what is a "cluster"? We assume you mean "career group." In order to be credible and acceptable to employees, the new DOD pay system must leave employees at least as well off as they would have been had the NSPS not been created.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

<u>§9701.354 - Setting pay upon reduction in band.</u>

(a) The proposed regulations say that DOD may set pay anywhere within the band when an employee is reduced in band, either voluntarily or involuntarily, subject to pay retention provisions.

(b) Subject to adverse action procedures, DOD may assign an employee to a lower pay band and reduce his or her pay for unacceptable performance or conduct. The reduction may not be more than 10% unless more is required to bring the employee to the top of the lower band.

(c) DOD will issue issuances covering reductions in pay for employees involuntarily reduced for other than adverse actions, such as terminations or temporary promotions.

We agree that there must be limits to a reduction in pay. We would have less concern if we believed that the adverse action procedures and methods for challenging performance ratings that are proposed in these regulations were adequate.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.355 - Pay retention

The proposed regulations say that DOD will issue issuances regarding pay retention. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.356 - Miscellaneous

While we have no specific objections to any of these provisions, we recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin.

§ 9901.361 - General

This section says that DOD will issue implementing issuances regarding additional payments for several categories of work and employees that currently receive premium pay. Employees under NSPS should receive at least as much in the way of premium pay as non-NSPS employees – they should not be disadvantaged by their coverage under NSPS. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.371 - General

While it is essential that provisions such as those in §§ 9901.372-373 be part of any set of regulations governing the DOD pay system, without the significant details such as the rate ranges, pay bands, and career groups, it is impossible to make complete comments. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.372 - Creating Initial Pay Ranges

This section merely states that DOD will set the initial band rate ranges for the NSPS pay system. When DOD does develop regulations and policies for the matters

discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.373 - Conversion of Employees to the NSPS Pay System

We agree that employees who are converted to NSPS should suffer no reduction in their rate of pay. We also believe that employees, who have already served some portion of their waiting period for their next within-grade increase or career ladder promotion, should receive prorated amounts of these increases as part of basic pay. This should not be left to the Secretary's discretion. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

The proposed regulations suggest elements of a system that promises to be complex, confusing, constantly fluctuating, and lacking in credibility for employees. DOD employees have been told this will be a system that will reward them for their performance. In reality, the system sketched out in the proposed regulations might give an employee, let's say even an outstanding performer, a small or large performance payout depending upon how much money is in that employee's pay pool, how many shares his or her supervisor assigns, how many other superior ratings are given employees in the pay pool, and what the pay pool manager and panel ultimately determine. That same employee may be in a band that gets little or no annual increase because DOD determines that the minimum rate of the band should have little or no

adjustment. Our outstanding employee might be in a career group, or pay band in a career group that DOD determines is overpaid in the local market and so gets no local market supplement, while other co-workers in the same local area might get those supplements.

Our outstanding employee may get a small or large performance payout due to circumstances beyond his or her control. That employee may get little or no annual increase due to circumstances beyond his or her control. And, that employee may or may not get a local market supplement due to circumstances beyond his or her control. NSPS will demoralize employees, create instability in their compensation that makes it difficult for them to plan for their future, foster inequities, and make it hard to attract and keep the talent this nation needs for its defense.

In its rhetoric, DOD paints NSPS as a "modern, flexible and agile human resource system that can be more responsive to the national security environment, while enhancing employee involvement, protections and benefits." We believe the proposed NSPS is regressive, rather than modern, and so complex as to call into question how flexible and agile it can be. And, in almost every section of these proposed regulations, employees lose – they lose pay stability; employment stability; protections from erroneous, discriminatory, or vengeful management actions; and a meaningful voice in their work place through collective bargaining.

V. SUBPART D: PERFORMANCE MANAGEMENT

Performance and Behavior Accountability - Representational Matters

We are concerned that the broad discretion provided supervisors and other management officials under Subpart D of the proposed regulations, particularly as it pertains to evaluating employee behavior, may result in retaliatory actions taken against Department employees who form or participate in labor organizations. As set forth in the preamble of the proposed rule:

> Typically, poor behavior or misconduct has been addressed only through the disciplinary process. Little attention has been paid to the impact of behavior, good or bad, on performance outcomes of the employee and the organization. DOD has determined that conduct and behavior affecting performance outcomes (actions, *attitude*, manner of completion, and/or *conduct or professional demeanor*) should be a tracked and measured aspect of an employee's performance. . . By providing supervisors and managers realistic alternatives for setting employee expectations, and assessing behavior and performance against those expectations, DOD will be better able to hold its employees accountable . . .

70 Fed. Reg. at 7562 (emphasis Added).

The Federal Labor Relations Authority has long acknowledged that the freedom of union representatives and activists to speak freely in the workplace and to engage in robust debate with management officials and supervisors is central to the effective representation of employees. *See Veterans Administration Medical Center, Bath, New York and American Fed'n. of Gov't. Employees Local 491*, 12 FLRA 552, 576 (1983) (noting that "when an employee who is also a Union official is acting in an official capacity as a union official, he is entitled to greater latitude in speech and action"); see also *Internal Revenue Service and Nat'l Treasury Employees Union*, 6 FLRA 96, 106 (1981) (finding that an employee's right to engage in protected activity permits leeway for impulsive behavior, balanced against the employer's right to maintain order and respect for its supervisory staff on the job site, and that to remove conduct from the ambit of protected activity, the employee must have engaged in flagrant misconduct);

Internal Revenue Service, North Atlantic Service Center, and Nat'l Treasury Employees Union, Local 69, 7 FLRA 596, 603 - 604 (1982) (finding that inclusion of insulting and derogatory references to management officials in the context of specific complaints does not remove union literature from protection); *Dep't of Air Force, Grissom Air Force Base and American Fed'n of Gov't Employees,* 51 FLRA 7 (1995) (holding that management improperly suspended a union official who used vulgar language toward a management representative after the union representative was angered by what he thought was an unjustified change in management's negotiating tactics); *Dep't of Navy, Naval Facilities Engineering Command, San Bruno, CA and Nat'l Fed'n of Fed'l Employees, Local 2096*, 45 FLRA 138, 155 (1992) (holding that a union representative has the right to use "intemperate, abusive, or insulting language without fear of restraint or penalty" if he or she believes such rhetoric to be an effective means to make the union's point).

The proposed regulations fail to address what constitutes acceptable employee behavior and conduct for purposes of performance management, instead providing supervisors and other management officials with unfettered discretion to make *ad hoc* determinations without specific guidance from objective regulations and without allowing employees to hold managers accountable for abuse of the new system. We therefore recommend that the introduction to Subpart D, "Performance and Behavior Accountability," be revised to include the following language: "Union representatives and bargaining unit employees shall not be negatively appraised for 'poor behavior or misconduct' to the extent that the behavior or conduct appraised is related to the

exercise of their rights to organize, bargain collectively, participate in a labor organization of their choosing, and engage in other representational activities."

§9901.403 - Waivers

We object to the waiver of 5 U.S.C. chapter 43 and 5 CFR part 430, which provide important criteria, standards and procedures governing the performance management system. DOD has provided no evidence that there is a compelling need to "waive" these provisions, which have long protected employees from arbitrary and unfair treatment in the evaluation of their job performance. Waiving the standards and criteria set forth in 5 U.S.C. chapter 43 and 5 CFR part 430 will not promote greater "flexibility" and efficiency, as intended by the drafters of the proposed regulations. Rather, the proposed performance management system will lead to greater uncertainty among DOD employees about supervisor and management performance expectations, which will result in workplace disruptions, confusion, lowered employee morale and, ultimately, organizational inefficiencies and performance deficiencies.

The Department asserts that its proposed rule "builds in the flexibility to modify, amend, and change performance and behavioral expectations during the course of a performance year . . . "70 Fed. Reg. at 7561. Such *ad hoc* modifications, amendments and changes to performance and behavioral expectations during the course of a performance year will make it difficult for employees to understand the criteria upon which they are being rated. As a result, fewer employees will be able to meet the performance and behavioral expectations of their supervisors and other management officials.

The Merit Systems Protection Board and the federal courts have long recognized the importance of objectivity and foreseeability in the application of performance standards, to enable affected employees to understand the criteria upon which they are to be evaluated. See, e.g., *Melnick v. Dep't of Housing and Urban Development*, 42 MSPR 93, 98 (1989) ("standards may be more or less objective depending upon the job measured, but must be sufficiently specific to provide a firm benchmark toward which the employee must aim her performance"); *Smith v. Dep't of Energy*, 49 MSPR 110 (1991) (finding that the agency failed to properly explain a performance standard that was inappropriately vague and that therefore the agency failed to present substantial evidence that, in practice and/or by the agency instruction, the employee was on notice as to what performance was required to achieve the marginal level); *O'Neal v. Dep't of Army*, 47 MSPR 433 (1991) (holding agency's performance standard was impermissibly vague and that the agency failed to prove that it had given content and specificity to the standard in its communications with appellant); *Callaway v. Dep't of Army*, 23 MSPR 592, 601 (1984) (discouraging the use of performance standards to measure traits such as dependability, interest, reliability, and initiative, unless such traits are clearly job-related and capable of being documented and measured).

In accordance with the NSPS law, the actual planning, development, and implementation of, or future adjustments to the NSPS must be done through the collaboration process described in §9902(f), not through internal, unilateral issuances. We recommend that the performance management system developed through collaboration, inasmuch as it will take DOD out of the government-wide system and give it discretion for determinations vital to employees, be a system that uses collective bargaining for ongoing performance decisions for bargaining unit employees.

§9901.405 - Performance management system requirements

The performance management system proposed in this section has not been defined, so there is no way to determine if it will be a fair, effective and credible process. This process should have been defined in these regulations.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

A system without a fair and credible performance management procedure will be rejected by employees, and will result in distrust of management, decreased morale, and lower productivity, ultimately harming national security.

§9901.406 - Setting and communicating performance expectations

We recommend that subsection (a) be modified to add the following: "Performance expectations must, to the maximum extent feasible, permit the accurate evaluation of job performance based on objective criteria." This recommendation incorporates a current requirement for performance standards under 5 U.S.C. 4302(b)(1).

We recommend that the first sentence of subsection (b) be modified to read as follows: "Performance expectations will be provided to employees in writing and discussed with employees at the beginning of the rating period. When performance expectations are amended, modified or clarified, such additions, modifications or clarifications must be captured in writing and provided to affected employees within a reasonable time period."

The proposed regulations are seriously flawed in that they do not appear to require that performance expectations be provided to employees in writing. While it may be true that performance expectations can take many forms, some of which may already be set forth in existing standard operating procedures, regulations or manuals, there should never be a need to rely on performance expectations that are not provided in writing.

To the extent that performance expectations are only conveyed orally, and not provided in writing, this loose process will likely lead to a great number of misunderstandings and disputes between supervisors and employees as to how the expectation was expressed or understood, or whether it was even expressed as a performance expectation. If only as a means of self-protection, employees are likely to want to memorialize these conversations in a written document, and seek the supervisors' confirmation of the accuracy of this account, so there is not likely to be a reduction in paperwork or an increase in efficiency through adoption of these more "flexible" performance standards. Supervisors should be trained to expect these inquiries, and to understand the importance of timely responding to them.

Fairness requires that all performance expectations be clearly communicated to employees in advance, and some form of written document or instruction is the most efficient and effective way to convey these expectations. To the greatest extent possible, we should try to keep performance management (and pay determinations based on performance) from being a game of "he said/she said." Subsection (b), unless modified, will only foster such disputes. We expect to negotiate over procedures that communicate performance expectations for bargaining unit employees.

We recommend that subsection (c) be modified to add the following: "Supervisor and managers are always accountable for demonstrating professionalism and standards of appropriate conduct and behavior, such as civility and respect for others. Supervisors and managers must set the standard of behavior for employees to follow. Therefore, professionalism, civility, respect for others, and similar exemplary behavior will be an absolute requirement for management, and will directly impact their performance ratings and pay."

This language is necessary to ensure that the language set forth in subsection (b) specifying these behavioral and conduct requirements for employees is clearly applied to supervisors and managers as well, recognizing the need for management to set the standard for conduct in the workplace.

We recommend that subsection (e) be modified to read as follows: "Supervisors must involve employees, and their exclusive representatives, insofar as practicable, in the development of their performance expectations. In this regard, supervisors shall solicit input and feedback from employees as to the appropriate performance expectations for each position, and shall fully consider such input and discuss it with the affected employee(s). However, final decisions regarding performance expectations are within the discretion of the agency, subject to the requirement that performance expectations for employees in the same occupational series and pay band will be equivalent or comparable. Employees will not be held responsible for performance expectations unless and until they have been clearly and expressly communicated by management."

These recommended changes will provide an appropriate level of employee involvement in developing performance expectations. The change in the last quoted sentence recognizes the agency's authority to assign work and identify associated performance expectations, while at the same time ensuring fairness and eliminating possible favoritism in the development and application of performance expectations. This is especially important if/when evaluation of employee performance against these expectations is used as a determining factor in providing pay increases. To ensure fairness and credibility, the bar needs to be set at the same level for all employees in the same occupational group and pay band, so that all employees have an equal chance to earn performance-based pay increases.

We recommend that supervisors be required to meet with the employees they supervise at the beginning of the appraisal period and at scheduled times thereafter during the appraisal period. At these meetings, performance expectations must be communicated. We also recommend that, should priorities or expectations change during the appraisal year, such new priorities and expectations be communicated to employees pursuant to collectively bargained procedures.

§9901.407 – Monitoring performance and providing feedback

We recommend that subsection (b) be modified to read as follows: "Provide regular, ongoing, and timely feedback to employees on their actual performance with respect to their performance expectations, including one or more formal interim performance reviews during each appraisal period."

"Periodic" feedback, as proposed in the regulations, is not sufficient, as it is too amorphous and allows large gaps of time and numerous instances of performance between periodic updates. Regular, ongoing, and timely feedback on performance is not only the most effective way to properly manage employee performance, but it is the only fair and credible way to do so when the results are being used as a central component of the Department's pay system. Procedures for monitoring performance should be negotiated with the unions.

§9901.408 - Developing performance and addressing poor performance

The procedures that supervisors will use to develop employee performance and address poor performance have not been defined, so there is no way to determine if they will be fair, effective and credible to employees. This process should have been defined in these regulations to allow for a meaningful review and comment period, as required by law.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

A system without a fair and credible performance management procedure will be rejected by employees, and will result in distrust of management, decreased morale, and lower productivity, ultimately harming national security.

We recommend that a subsection (b)(3) be added, which would read as follows: "An employee will be provided a reasonable opportunity to improve performance before an adverse action is proposed or initiated, except in the most extreme case of a performance deficiency which endangers national security or the safety of personnel." Adopting this language preserves the protections afforded employees under 5 U.S.C. chapter 43 and Merit Systems Protection Board precedent. See, e.g., *Betters v. Federal Emergency Management Agency*, 57 MSPR 405 (1993) (reversing a removal action on the basis of the agency's failure to provide the employee with a reasonable opportunity to improve); *Gromley v. Dep't of Navy*, 48 MSPR 181 (1991) (same).

Giving supervisors the authority to take actions ranging from remedial training to such drastic measures as adverse actions and demotions, without providing specific criteria to make such decisions, is unfair to employees and supervisors. Only fair and effective rules prescribing appropriate actions to be taken by management to address poor performance will be accepted by employees. Otherwise, the resulting distrust of management and decreased morale and productivity will harm national security.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

§9901.409 - Rating and rewarding performance

The multi-level rating system proposed in this subsection has not been defined, so there is no way to determine if it will be an effective and appropriate process to rate

employees. This rating system should have been defined in these regulations to allow for a meaningful review and comment period, as required by law.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

A process without a fair and credible rating system will be rejected by employees, and will result in distrust of management, decreased morale, and lower productivity, ultimately harming national security.

9901.409(b) states (in part): "A rating of record will be used as a basis for - (3) Such other action that DOD considers appropriate, as specified in DOD implementing issuances."

These "other actions" have not been defined, so there is no way to determine if they will be appropriate, fair or credible to employees. All proposed uses of ratings of record should have been defined in these regulations to allow for a meaningful review and comment period, as required by law.

We recommend that no additional uses for ratings of record be implemented by DOD with respect to bargaining unit employees until a full comment and review period is completed, followed by a full collective bargaining process with the unions representing DOD employees. Otherwise, the rating system will be rejected by employees, and will result in distrust of management, decreased morale, and lower productivity, ultimately harming national security.

The reconsideration process proposed in section 9901.409(g) has not been defined, so there is no way to determine if it will be a fair and credible process for employees. This process should have been defined in these regulations to allow for a meaningful review and comment period, as required by law.

However, unless there is an independent third party available to impartially review and make reconsideration decisions, no such process will be considered fair or credible by employees. Therefore, we recommend that the negotiated grievance and arbitration procedures currently available to employees under 5 USC Chapter 7121 be used to challenge ratings of record.

A system without a fair and credible reconsideration process will be rejected by employees, and will result in distrust of management, decreased morale, and lower productivity, ultimately harming national security.

9901.409(g) states: "A payout determination will not be subject to reconsideration procedures."

A payout process without a fair and credible reconsideration procedure will be rejected by employees, and will result in distrust of management, decreased morale, and lower productivity, ultimately harming national security.

Therefore, we recommend that the negotiated grievance and arbitration procedures set forth in 5 USC Chapter 7121 be available to employees to challenge payout determinations.

VI. SUBPART E: STAFFING AND EMPLOYMENT

§9901.501

As described in the explanatory section of the Federal Register, the proposed regulations on staffing and employment seek to expand the ". . . set of flexible hiring tools to respond effectively to continuing mission changes and priorities." While DOD purports to retain the merit principles and veterans' preference of existing law, it fails to reiterate compliance with its collective bargaining obligations under 5 U.S.C. Chapter 71. The final version of the NSPS regulations needs to be corrected for this glaring omission.

§9901.502

In Subpart E and elsewhere throughout the proposed regulations, only general concepts have been presented, thereby making it virtually impossible to offer specific comments regarding the manner in which these staffing flexibilities will be exercised. Moreover, as stated in the Federal Register, DOD intends to administer its authority through implementing issuances, which neither will be open for comment nor within the limited scope of issues subject to collective bargaining with democratically-elected representatives of DOD civilian employees.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

§9901.504

As proposed, longstanding civil service definitions—including such important terms as "promotion" and "reassignment"- will be modified to fit the NSPS scheme. If DOD believes there to be a mission-related reason to change terminology, the revised meanings and the manner in which DOD managers will exercise their authority to affect such actions should be subject to discussions and negotiations with democratically-elected representatives of DOD civilian employees.

§9901.511, 512 and 516

Under NSPS, DOD suggests that there be only two general categories of employees: 1.) career; and, 2.) time-limited. The regulations, however, offer no explanation as to how employees currently serving under career-conditional status will be treated.

While DOD commits to following certain appointing authorities of existing law (5 U.S.C. Chapters 31 and 33), there is expected to be greater use of noncompetitive appointments. In some instances, DOD will publish a notice in the Federal Register and request comment. When there is a "critical mission requirement," however, DOD would be free to exercise noncompetitive appointment authority and publish a notice in the Federal Register without a comment period. Such an arbitrary system will be subject to all kinds of abuse within the huge DOD management hierarchy, and render time-honored federal employment principles of merit and fair competition nonexistent under NSPS. Agreeing to publish an annual *list of appointing authorities* with details prescribed in implementing issuances allows for no prior input, comment, or collective

bargaining. As designed, the process shuts out Congress, the taxpaying public, and democratically-elected representatives of DOD civilian employees.

The exercise of direct hire authority and the conversion of time-limited appointments, with the right to assign, reassign, reinstate, detail, and transfer employees, will also be prone to arbitrary acts and mismanagement if the proposed regulations are put into effect. DOD will be able to avoid proper disclosure and accountability, as well as the development of a fair and objective system, by using its internal issuance process. Congress did not intend for DOD to unilaterally devise a new human resource system under NSPS through implementing issuances. Our lawmakers required collaboration, collective bargaining, and public comment. The proposed regulations miss these key aspects on all counts.

The opportunities for abuse will be especially ripe in connection with the establishment of varying probationary periods (of undisclosed lengths) for those who are newly-appointed into positions, including current career employees. Furthermore, through its implementing issuances, DOD intends to mandate that experienced federal employees with career status serve multiple probationary periods under NSPS. Such broad discretion will not attract and retain high performing workers; rather, it will expand a subjective at-will employment relationship, which will demoralize the current workforce and impede future hiring.

§9901.513

DOD should not be granted the exclusive authority to establish qualification standards for positions covered by NSPS. The final regulations should require the

substantive involvement of the democratically-elected representatives of DOD employees in creating any new or revising any existing qualification standards.

§9901.514

The proposed regulations allow for appointing *non-citizens to positions* within NSPS. When Congress passed the law authorizing DOD to explore new human resource systems, they never intended to permit the hiring of non-citizens for such critical security-related positions. This flexibility should be removed.

§9901.515

Before DOD establishes any new procedures for the examination of applicants for entry into the competitive or excepted service, it should first publish its proposals (with sufficient specificity) in the Federal Register for advance comment. Moreover, DOD should be mandated to use traditional numerical rating and ranking procedures, when establishing examination procedures for appointing employees in the competitive service.

VII. SUBPART F: WORKFORCE SHAPING

§9901.601

Under the proposed regulations, DOD will have total flexibility to reduce in numbers (RIF) the size of its workforce. In addition, it will be able to realign staff and reorganize work units within any department. Through the use of surgical workforce shaping actions, managers within DOD will have new power to reassign or remove staff

with whom they disagree. Clearly, these were not the types of personnel flexibilities that Congress envisioned under NSPS.

In accordance with the NSPS law, the actual planning, development, and implementation of, or future adjustments to the NSPS must be done through the collaboration process described in §9902(f), not through internal, unilateral issuances.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

§9901.602

DOD has failed to provide a sufficient explanation for how this subpart will be administered. Relying on implementing issuances is unacceptable, and denies Congress, the taxpaying public, and democratically-elected representatives of DOD civilian employees with a legal opportunity to offer comments as to how such authority should be exercised.

§9901.603 through §9901.608

In contrast to existing government-wide regulations, DOD will have the ability to create *competitive groups* using a variety of criteria when conducting targeted RIF's. This will result in staffing reductions within DOD based on different factors, which will make it impossible for an adversely impacted employee to get a fair hearing when challenging an action.

In essence, DOD wants the ability to customize its RIF actions without regard to civil service rules, which were originally instituted to balance the interests of affected workers with the legitimate mission requirements of agencies. Under NSPS, the scales will be tipped completely in favor of DOD.

Maximum flexibility under NSPS will permit departmental issuances to be frequently modified to justify whatever staffing reductions or realignments management desires. The Merit Systems Protection Board will be ill-equipped to judge any RIF cases, because there will not be a consistent set of rules in which to determine whether the proper procedures were followed and/or whether the rights of those subject to the RIF were violated.

Employees with many years of service and satisfactory performance will be more susceptible to a RIF, since the proposed regulations place maximum reliance on employee performance ratings. Under this new NSPS RIF arrangement, a DOD civilian worker with three years on the job who has been rated as highly acceptable or outstanding will be retained, whereby a 30-year professional with a satisfactory rating will be removed. These revised rules will cause DOD to lose many of its experienced workforce when RIF actions are implemented, because performance will be placed ahead of length of service.

Even veterans may have their priority employment rights taken away, since DOD will be able to carry out surgical RIF's within pre-determined competitive groups. While DOD's explanation in the Federal Register claims to retain existing veterans' preference protections, the operation of the new rules (if implemented in its current form) would cause serious harm to veterans. With NSPS, there will be no immunity for veterans.

VIII. SUBPART G: ADVERSE ACTIONS

§9901.701 - Purpose and §9901.703 - Definitions

Although a later Subpart specifically addresses the definition of adverse actions, it is unclear from these sections whether or not DOD intends to retain the current definition of adverse actions. We recommend however, that the definition of adverse actions include any type of suspension, even if such suspension is less than 14 days in order to preserve the procedural protections promulgated in this Subpart.

Although only suspensions exceeding 14 days may be appealed to the MSPB, this amendment would provide such due process, which the law requires, to any employee who is facing loss of pay as a result of a proposed suspension. We also recommend that the definition of adverse action include "reduction of pay band or other similar reduction" in addition to reduction in grade. Again, we believe employees should be provided procedural protections when pay is adversely impacted. DOD/OPM have not demonstrated that the Agency's ability to suspend individuals and/or reduce pay with due process as required by the law, impedes national security or is somehow 'inflexible', 'not contemporary', or as the Supplementary Information claims, "restrictive."

9901.704 - Coverage

As stated above, we recommend that the definition of "Actions covered" in Subsection (a) remain consistent with Chapter 75.

With respect to "Actions excluded", we recommend that the proposal be rewritten to clarify that employees who are serving an "in-service" probationary period be covered for the purposes of this Subpart.

§9901.711 - Standard for Action

We agree with the retention of the current standard of "such cause as will promote the efficiency of the service". This statutory standard, intended to protect employees from unjust personnel actions, has been in place for nearly a century and is well understood.

§9901.712 - Mandatory Removal Offenses

We object to the establishment of the mandatory removal offense scheme in its entirety and recommend that this section be deleted from the regulations. It is not possible to evaluate the impact of this proposal fully because the offenses are not listed. Instead, the Secretary is given unfettered discretion to identify offenses, subject only to the vague and overly broad requirement that they have a direct or substantial impact on homeland security. This could cover virtually anything and could result in a list containing offenses for which removal is, as judged by any impartial reviewer, too harsh a penalty.

The inability of an employee to have the penalty mitigated upon review by an independent reviewer and the uncertain availability of judicial review further undermines the process' credibility. Employees will have no confidence that their due process rights will be protected in this process. It appears that the outcome of appeals hearings will be

pre-determined. An impartial and disinterested tribunal will not hear their cases. Instead, as proposed in §9901.808, a panel hand-picked by the same employer that imposed the penalty will decide these cases.

Despite any claim to the contrary, this proposed panel will never be accepted by employees as being fair and independent. It is unacceptable to have the idea of judge, jury and prosecutor rolled into one entity. This is true, whatever the nature of the charges against the accused. It is even more critical when the charges allege harm to our national security.

Additionally, the proposal does not specify the type of judicial review that could follow a panel decision. This approach is particularly inappropriate for the types of serious offenses contemplated by these sections. The more serious the offense, the more important it is for employees to have access to a fair and impartial appellate process, including impartial judicial review.

The concept of Mandatory Removal Offenses originates from a 1998 statute Congress passed pertaining to the Internal Revenue Service, specifically Public Law 105-206, section 1203, which the Supplemental Information references at page 7565. Since Congress delegated the authority to the Internal Revenue Service (IRS), but elected not to provide the same authority to DOD; any attempt by DOD/OPM to include this concept clearly overreaches the public law providing for personnel reform at DOD. Stated another way, we believe that DOD/OPM are attempting to "legislate" through the regulation and obtain what they did not obtain under the statute.

Without waiving our objection to the establishment of Mandatory Removal Offenses, we specifically recommend that subsection (c), which prohibits the MSPB

from penalty mitigation, be deleted in its entirety since this portion of the proposal violates 5 U.S.C. § 9902(h)(5), which authorizes the MSPB to "order such corrective action as the Board considers appropriate" when an adverse action is "arbitrary, capricious, (or), an abuse of discretion."

§9901.714 - Proposal notice

We recommend that the current notice and reply requirements (30 days written notice and not less than 7 days to answer for serious adverse actions and advance written notice and a reasonable time to answer proposed suspensions of 14 days or less) be retained. Having adequate notice and a reasonable chance to answer are essential components of due process.

By proposing to reduce the notice and reply periods in subsection (a), DOD/OPM seek to deprive DOD employees of precious time that is required to consider the charges against them, obtain representation, gather information, and prepare their answers. The modest acceleration of the disciplinary process that DOD would realize from this change is outweighed by the harm that would be done to the employees' opportunity to defend themselves fully and fairly.

§9901.715 - Opportunity to Reply

We recommend that the current periods for response to the proposed notice be retained (30 days to provide a written response and not less than 7 days to answer for serious adverse actions and advance written notice and a reasonable time to answer proposed suspensions of 14 days or less). The modest acceleration of the disciplinary

process that DOD would realize from this change is outweighed by the harm that would be done to the employees' opportunity to defend themselves fully and fairly through obtaining representation, gathering and reviewing information authorized in (c), and preparing their answers.

The shortened reply time is exacerbated by DOD's ability to limit an employee's choice of representative in (f) by merely alleging that the release of the representative "would give rise to unreasonable costs"' or when his/her "work assignments preclude his or her release." Such an overbroad basis to prevent DOD employees from choosing their representative allows DOD to unreasonably restrict and employee's choice of representatives without meaningful standards. Indeed, any work assignment, no matter how small or insignificant, may preclude release under this standard. We recommend that (f) be deleted in its entirety.

§9901.717 - Department Record

We recommend that this section be amended to require DOD to retain, in addition to the information in Subsection (a), such information which the employee requests that the Department retain as part of the official record of any adverse action.

IX. SUBPART H: APPEALS

We object to all of the sections contained in Subpart H with the exception of section 9901.806 and recommend that they be deleted. We recommend that any appeals system include a process which will be perceived as credible and will allow the MSPB to perform its functions independently. As proposed, this system allows

DOD/OPM to opt out of the appeals system or override MSPB decision makers and substitute their own judgment during much of the appellate process outlined in this section.

DOD/OPM note there will be conducting ongoing evaluations of the DOD HR System paying special attention to the adverse action and appeals process'. We recommend that if this process is included in the final regulations that DOD provide the information it gathers to employee representatives and allow the Unions to have a role in the review process.

§9901.801 – Purpose

Other than to reiterate our objections set forth as recommendations to this subpart, we have no comments for this section.

§9901.802 - Applicable legal standards and precedents

Other than to reiterate our objections set forth as recommendations to this subpart, we have no comments for this section.

§9901.803 - Waivers

In this section, DOD/OPM purport to supersede MSPB appellate procedures that are inconsistent with these regulations. DOD/OPM also purport to direct MSPB to follow these regulations until MSPB issues its own conforming regulations. Nothing in the Act or any other law gives DOD/OPM such authority over the MSPB. Accordingly, we recommend that this proposal be deleted from the regulations.

§9901.804 - Definitions

Other than to reiterate our objections set forth as recommendations to this subpart, we have no comments for this section.

§9901.805 - Coverage

Other than to reiterate our objections set forth as recommendations to this subpart, we have no comments for this section.

§9901.806 - Alternative Dispute Resolution

We endorse the concept of alternative dispute resolution (ADR) in disciplinary matters. We recommend that ADR procedures, including those contained in negotiated grievance/arbitration procedures, continue to be subject to collective bargaining.

§9901.807 - Appellate Procedures

We recommend that this entire section be deleted as DOD/OPM do not have the authority to make the changes set forth in this section.

§ 9901.807(b)(1)

There is no indication that there is a need to improve the efficiency of the appeals process before the MSPB. MSPB statistics contained in its annual report demonstrate that its process is an efficient one.[1] Despite DOD's push for efficiency, in some cases

[1] According to the Board's Performance and Accountability Report for Fiscal Year 2004 (November 15, 2004), the MSPB has met all of its GPRA goals for timely processing cases at both the regional and Board levels. For the last four years, the average processing time for initial decisions at regional offices ranged from 89 to 96 days – always below the MSPB goal of 100 days. During the same period, the

parties have a legitimate need to delay the proceedings. There are some categories of cases, for instance adverse actions which include a whistle blower component that involve multiple issues of law and are factually complicated matters. It does not promote fairness to rush these cases through an expedited process.

We believe that DOD has not done the sufficient fact finding necessary to indicate that appeals procedures are in fact too slow. The most important consideration in any case is for an independent third party reviewer to move cases in a manner that not only provides for rapid resolution but ensures above all that the processes are fair and are perceived as fair. The system proposed by DOD will not be perceived as credible and will not accomplish the goals set forth by DOD/OPM.

§9901.807 (c)

The proposed regulations take away the authority of the AJ to grant interim relief. We recommend that this proposal be deleted. However, should DOD/OPM reject this option, we recommend that the AJ be allowed to offer the parties an interlocutory appeal, allowing the decision to be stayed until the Board hears the full case.

§9901.807(c)(1)

DOD has noted that it will unilaterally decide whether employees who have been reinstated by the full MSPB will be allowed to return to their positions. DOD asserts

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average age of pending PFRs at Board headquarters ranged from 141 days to 164 days. This latter high mark occurred in FY 2003, when for a two month period, the full Board was unable to issue decisions at all because it had only one Board member and lacked a statutory quorum. The Board has reduced the time periods for processing cases at the Board level for FY 2005.

unreviewable discretion over this matter. DOD may select an alternative position or the employee may be placed on excused absence pending the final disposition of the appeal. This proposal undermines the MSPB's authority to take corrective action as it sees fit. Moreover, DOD/OPM does not specify the pay status of the employee if he/she should be placed in excused leave.

§9901.807(c)(2)

We object to the fact that DOD has proposed that attorney fees will not be paid before an award becomes final. We recommend that this section be deleted. There is well established case law about when attorney fees are due and this change negates these precedents.

§9901.807 (h)

We object to the proposal to reduce an employee's current right to recover reasonable attorney fees in MSPB cases. Currently, reasonable fees can be ordered if the employees is the prevailing party and the MSPB determines that payment of fees by the agency is in the interest of justice, including any case in which a prohibited personnel practice was committed or any case in which the agency action was clearly without merit.

DOD/OPM propose to limit an employee's ability to recover fees to cases where MSPB determines the action constituted a prohibited personnel practice, was taken in bad faith, or the Department's action was clearly without merit based upon facts known to management when the action was taken.

Through this proposed regulation, DOD provides itself with an ever present excuse that there were facts it was not aware of to avoid payment of reasonable attorney fees. DOD reserves great authority to itself under these proposed regulations and if there are facts not known to management in an investigation it will most likely be because DOD representatives failed to take the time to fully investigate. As a national security agency DOD has unfettered access to information and detailed procedures and extensive resources to collect the information.

The proposal's effect will be to chill the willingness of employees to exercise their rights to appeal unjust agency decisions. It will also serve as a disincentive for representatives to initiate meritorious class actions or multi-employee consolidated actions. The result will be uneconomical, piecemeal litigation before the MSPB.

§9901.807 (k)(1)

DOD/OPM propose an appeal filing deadline which reduces the time from 30 to 20 days. This will present a hardship, especially for DOD employees stationed abroad.

§ 9901.807 (k)(2)

DOD has provided no reason as to the necessity for the proposal that either party may file a motion to disqualify a party's representative during appellate proceedings. This is highly unusual and no standard has been provided as to when such a motion should be approved. Unless there is some conflict of interest argument which can be described, this provision is unnecessary, highly objectionable and we recommend that it be deleted.

§ 9901.807 (k)(3)

We recommend that the proposed regulations concerning discovery be deleted. Currently, the Agency must provide to the Board the full file upon which it based its decision. It is the first thing the Agency has to do in a response. This is not reiterated any place in the proposed regulations. DOD appears to be introducing new limitations on discovery. It can limit the discovery response if it believes that a request is "privileged, not relevant .....or the information can be secured from some other source that is more convenient, less burdensome, or less expensive." This, along with the proposal that "discovery can also be limited through a motion if the burden or expense of providing a response outweighs the benefit is unnecessary", is too limiting and may be easily abused.

The proposed regulations regarding depositions are also unnecessary and should be deleted. Depositions are very expensive to conduct and parties will not usually hold them unless they are truly necessary. Two depositions is an arbitrary cut off number. Fact patterns can be complicated and a party may need more than two depositions to obtain an accurate understanding of the matter at issue. Discovery is also helpful to develop settlement options.

§ 9901.807(k)(5)

If the material facts are in dispute and there is a credibility question at hand, the AJ should have to hear the conflicting evidence to ensure a fair hearing and a just result.

§ 9901.807 (k)(6)

DOD/OPM stress the need for deference to adverse actions taken by DOD. There is no indication from statistical analysis, anecdotal explanations or any other information that it is necessary for MSPB to provide any greater deference to DOD than it does to any other Agency. The MSPB has developed legal standards and precedents which have been in effect for more than 25 years. Independent Board members have developed objective legal analyses and a credible appeals process to protect fundamental personnel practices. Changing the process by incorporating DOD internal reviews and new standards only takes away from the credibility of this process.

This proposal provides that neither an arbitrator, AJ or the full MSPB may modify a penalty unless such penalty is so disproportionate to the basis for the action as to be wholly without justification.

We believe that this proposal is so disproportionate as to be wholly without justification. The MSPB has always had the authority to mitigate penalties. Statistics do not show that the MSPB has even a minor effect on DOD's ability to permanently remove employees from their position through mitigation of discipline penalties. [2]

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[2]For example, in FY 2003, of 1450 cases adjudicated by MSPB AJs, 68 involved the Department of Defense. Of those 2.9% were mitigated or modified in some way at the AJ level. This indicates that fewer than 2 cases were mitigated. MSPB Annual Report, FY 2003 (August 2004) at p. 23. In the same year, the Board itself heard 54 cases from the Department of Defense. The Board's annual report does not state how many of these cases involved adverse actions (as opposed to Reductions-in-Force, retirement, performance appeals, etc.) However, the report does show that it handled a total of 469 adverse cases from all agencies. The statistical analysis shows that none of those adverse actions were mitigated. Id at 24.

The MSPB has consistently held that it is precluded from, or lacks the authority to, adjudicate the merits of the denial or suspension of a security clearance. *Egan v. Department of Navy,* 28 MSPR 509 , vacated and remanded by 802 F. 2d 1563 (Fed. Cir. 1986), writ of certiorari granted, *Department of Navy v. Egan*, 481 U.S. 1068 (1987), (Federal Circuit) reversed by Department of *Navy v. Egan*, 484 U.S. 518 (1988) and subsequent Board cases citing thereto. It has maintained that position even after Congress reconsidered the issue in 1994 amendments to the Whistleblower Protection Act and granted the Board broader authority. *Roach v. Department of the Army*, 82 MSPR 464 (1999) ; see also *Hesse v.*

DOD currently has the authority to pull an employee's security clearance to address any concern that an employee threatens national security. If it chooses to remove someone for misconduct, DOD has effectively determined that there is no security risk underlying the disciplinary/removal action.

MSPB review in its current form is already severely limited. This proposal does DOD employees an even greater disservice by providing the Board less latitude in modifying decisions that will help to level the playing field, protect the limited rights DOD employees now enjoy and help employees and their advocates believe that there is a credible appeals system still available to them.

§9901.807(k)(8)

There is no statutory authority for DOD to perform this type of review. While maintaining that DOD is using the services of MSPB, essentially, DOD is setting up a duplicative and parallel review structure. This allows DOD to second guess the MSPB at every turn. With another layer of review, we anticipate that the entire process will be delayed. We believe that an internal DOD review process will be very expensive and will waste tax payer money.

The proposed regulations address the Request for Review (RFR) process and how decisions will become final or "precedential". We recommend that DOD/OPM delete the language concerning this entire process. The language involving the DOD

Department of State, 82 MSPR 489 (1999), affirmed by 217 F. 3d 1372 (Fed. Cir. 2000), cert. denied , 531 U.S. 1154 (2001). Indeed, the Board specifically solicited amici briefs on the issue. The Department of Defense, Office of Personnel Management, Department of Justice, and the Central Intelligence Agency all filed briefs in support of the agency and the Office of Special Counsel filed a brief in support of the Board's authority to consider the withdrawal or suspension of a security clearance in the context of a whistleblowing case.

designation of precedential decisions is confusing and beyond the scope of authority granted to DOD/OPM by the statute. DOD has not specified the significance of cases being deemed precedential. Additionally, no details have been supplied as to whether these decisions will be published and whether they will be made available. Transparency of decisions is crucial to the fairness of an appeals system and this section lacks transparency.

DOD/OPM take the opportunity in the proposed regulations to change the standards used in the administrative review of an adverse actions because DOD/OPM believe the standards are too high. To say the standards are too high is inaccurate. The APA standards are the widely recognized and traditionally used standards. Established Supreme Court case law provides a deferential consideration to administrative agencies with an expertise in making these types of decisions. Additionally, DOD does not say what standard will be applied. DOD/OPM are obliged to set forth a clear understandable statement of such standards.

DOD/OPM maintain that these regulations should not give DOD unlimited authority, despite DOD's need for review authority over MSPB AJ decisions. These regulations however do give DOD unlimited authority because it can file a request for review in any case, with no articulated standard as a basis of review. These actions can be totally subjective and arbitrary and undermine the credibility of the MSPB.

<u>§9901.808 - Appeals of mandatory removal actions</u>

The provisions of this section that prohibit the MSPB from mitigating the penalty in cases involving "mandatory removal offenses" should be deleted because they violate

5 U.S.C. §9902 (h)(5), which authorizes the MSPB to "order such corrective action as the Board considers appropriate" when an adverse action is "arbitrary, capricious, an abuse of discretion" or otherwise subject to being overturned.

§ 808(d) allows DOD to have a second opportunity to bring an adverse action against an employee even if the MSPB AJ or full Board sustains an employee's appeal. This is highly objectionable. DOD should not be allowed to reprocess a removal or suspension on the same set of facts because it failed to properly investigate or prepare the case initially.

§9901.809 - Actions Involving Discrimination

Other than to reiterate our objections set forth as recommendations to this subpart, we have no comments for this section.

§9901.810 - Savings Provision

Other than to reiterate our objections set forth as recommendations to this subpart, we have no comments for this section.

X. SUBPART I: LABOR-MANAGEMENT RELATIONS

A. General Comments

We recommend that Subpart I be deleted from the final regulation in its entirety. We make this recommendation for three reasons.

First, the process by which the Department developed Subpart I violated 5 U.S.C. § 9902(m). *See AFGE v. Rumsfeld*, Civ. A. No. 05-367 (EGS) (U.S. Dist. Ct. D.C. complaint filed February 23, 2005).

Second, each provision of proposed Subpart I is either contrary to law or unnecessary. The provisions that are contrary to law are those that (1) purport to modify or replace the provisions of 5 U.S.C. §§ 7101 through 7135 other than by providing for bargaining above the level of bargaining unit recognition or new independent third-party review of decisions, or (2) violate 5 U.S.C. § 9902 in other ways. The unnecessary provisions are those that (1) though not contrary to law themselves, have no use or purpose besides introduction or implementation of other provisions that are contrary to law; (2) merely repeat statutory provisions; or (3) are unnecessary for other reasons stated below.

Third, the goal that the Department says it seeks to accomplish, the "ability to carry out its mission swiftly and authoritatively," can be accomplished, as it always has been, by continued adherence to the provisions of chapter 71. The Department has not pointed to a single instance in which the Department ever has failed to carry out its mission swiftly and authoritatively due to the existence of a chapter 71 requirement. Congress provided the Department two new tools to increase efficiency—bargaining above the level of bargaining unit recognition and new independent third-party review of decisions. To act with requisite swiftness and authority and to achieve increased efficiency, the Department need only use these new tools properly and train its managers and supervisors properly to use the authority that current law provides.

DOD erroneously asserts that the current labor relations system is "inefficien[t]" and "detract[s] from the potential effectiveness of the total force" because it "encourages a dispute-oriented, adversarial relationship between management and labor." DOD offers no evidence to support this assertion and Congress has found that the opposite is true. Congress has determined that "statutory protection of the right of employees to . . . bargain collectively and participate through labor organizations . . . in decisions which affect them safeguards the public interest" and "contributes to the effective conduct of public business" because it "facilitates and encourages the *amicable settlement of disputes* between employees and their employers involving conditions of employment." 5 U.S.C. § 7101(a)(1). (Emphasis added.)

B. The Department Developed Subpart I by an Unlawful Process

The court complaint in *AFGE v. Rumsfeld*, Civ. A. No. 05-367 (EGS) (U.S. Dist. Ct. D.C. complaint filed February 23, 2005) states the unlawful process by which the Department developed Subpart I:

> 15. The National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, 117 Stat. 139 (2003), which includes 5 U.S.C. § 9902(m), became law on November 24, 2003. In § 9902(m)(1) Congress authorized "the Secretary, together with the Director," to "establish and from time to time adjust a labor relations system for the Department of Defense."
>
> 16. In § 9902(m)(3), Congress directed that the Secretary and the Director "ensure the that the authority of this section is exercised in collaboration with, and in a manner that ensure the participation of, employee representatives in the development and implementation of the labor management system. . . ." Congress specified that the "process for collaborating with employee representatives . . . shall begin no later than 60 days after the date of enactment of this subsection." § 9902(m)(3)(D). In § 9902(m)(3)(A) Congress specified additional requirements of the collaboration process:

(A) The Secretary and the Director shall, with respect to any proposed system or adjustment-
  (i) afford employee representatives and management the opportunity to have meaningful discussions concerning the development of the new system;
  (ii) give such representatives at least 30 calendar days (unless extraordinary circumstances require earlier action) to review the proposal for the system and make recommendations with respect to it; and
  (iii) give any recommendations received from such representatives under clause (ii) full and fair consideration.

17. After enactment of the law, defendants over the course of more than a year developed their proposed labor relations system—to the point of publication in the Federal Register—using secret working groups. During this time, despite plaintiffs' repeated requests, defendants denied plaintiffs opportunity to collaborate with, participate in, or have discussions with the secret groups, and refused to reveal to plaintiffs any of defendants' instructions to the groups, or any of the groups' preliminary draft proposals or other work products.

18. While the secret groups developed the labor relations system behind closed doors, defendants' representatives gave plaintiffs "concept" papers and engaged plaintiffs in meaningless discussions, in which defendants presented no proposals. Defendants did not even claim that these papers and discussions were the "meaningful discussions" required by § 9902(m)(3); rather, they expressly said that these papers were not proposals and that the discussions were "pre-statutory."

19. Defendants announced that they would establish DOD's labor relations system through formal, notice-and-comment rulemaking. Defendants then asserted that this formal rulemaking process prohibited DOD from revealing to or discussing with plaintiffs (or anyone else outside the agency) any preliminary or the final draft of the proposed labor relations system regulation before publication of the proposed final regulation in the Federal Register. Based on this assertion, defendants rejected plaintiffs' requests to collaborate with, participate in, or have discussions with defendants' secret working groups; and denied plaintiffs' requests to review defendants' instructions to the groups, the groups' preliminary draft proposals, and the final proposed regulation, before its publication in the Federal Register.

C. Claim

20. Defendants Secretary and Director have failed to ensure that the authority of § 9902(m) was exercised in collaboration with, and in a manner that ensured the participation of, employee representatives in the development of the

> labor management relations system for the DOD, in violation of 5 U.S.C. § 9902(m)(3). In particular, defendants have breached their § 9902(m)(3) duty not to develop a "labor relations system" without "afford[ing] employee representatives . . . the opportunity to have meaningful discussions concerning [its] development." Congress required that "collaboration with, and . . . participation of, employee representatives in the development . . . of the labor management relations system," including "meaningful discussions," start "no later than 60 calendar days after the date of enactment." In imposing this requirement, Congress required collaboration with, participation of, and meaningful discussions with employee representatives in the *early* development of the system. Defendants' use of secret working groups over the course of more than a year to develop to the point of publication in the Federal Register DOD's proposed labor relations system; defendants' denial of the opportunity for plaintiffs and other employee representatives to collaborate with, participate in, or have discussions with the secret groups; and defendants' refusal to reveal to plaintiffs and other employee representatives any of defendants' instructions to the groups; any of the groups' preliminary draft proposals or other work products; or the final proposed regulation, before publication in the Federal Register violated plaintiffs' rights under § 9902(m)(3).

Because of the unlawful process used by the Department to develop Subpart I, this subpart should be deleted from the final regulation. A new Subpart I, developed in accordance with § 9902(m), should be substituted in its place.

D. Each Provision of Subpart I is Contrary to Law or Unnecessary

In the National Defense Authorization Act for Fiscal Year 2004, P. L. 108-136, enacted November 24, 2003; Congress rejected the Defense Secretary's request for authority to waive all provisions of chapter 71. 5 U.S.C. § 9902(b)(3)(D) and (d)(2). Congress prohibited the Department of Defense from waiving, modifying or otherwise affecting chapter 71 except "to the extent . . . otherwise specified" in the new law. §§ 9902(b)(3) and (d).

Congress specified only two permissible modifications of chapter 71. First, Congress authorized bargaining "at a level above the level of exclusive recognition." 5 U.S.C. § 9902(m)(5). This is commonly called national level bargaining. *See* § 9902(g). Second, Congress authorized the Secretary to "provide for independent third party review of decisions." § 9902(m)(6).

The legislative history of the Authorization Act confirms these points. The Secretary sought and the House of Representatives passed a bill that would have granted the Secretary authority to waive all provisions of chapter 71. The Senate authorization bill contained no provisions on labor relations; but at a hearing held by the Senate Committee on Governmental Affairs, both Republican and Democratic Senators expressed disapproval of the Secretary's request for authority to waive chapter 71. The Senate Committee, by a 10-1 vote, passed S. 1166, which authorized only two modifications of chapter 71—national level bargaining and time limits on Federal Labor Relations Authority (FLRA) processing of Defense Department cases.

The Senators who served on the Conference Committee brought S. 1166 to the conference. The Conference Committee rejected the House bill's waiver of chapter 71; authorized national level bargaining; and, as a substitute for S. 1166's time limits on the FLRA, authorized the Secretary to provide for new independent third party review of decisions.

Speaking on the Senate floor November 12, 2003, Senator Lieberman, a member of the Conference Committee and the ranking Democrat on the Senate Committee on Governmental Affairs, confirmed that the new law "overrides chapter 71 only where" the new law "and chapter 71 are directly inconsistent with each other" and

"that the Secretary of Defense has no authority" to depart from chapter 71 in any other area:

> [I]n the area of collective bargaining, the conference agreement included the provision of S. 1166 stating that the Secretary of Defense has no authority to waive chapter 71 of civil service law, which governs labor-management relations. . . . However, the conferees also agreed to a new provision authorizing the Secretary . . . to establish a "labor relations system" for . . . the Department's civilian workforce. As the conference report makes chapter 71 non-waivable, this new provision overrides chapter 71 only where the new provision and chapter 71 are directly inconsistent with each other.

149 Cong. Rec. S14490 (November 12, 2003).

The sections of the new law providing for national level bargaining and independent review of decisions, §§ 9902(m)(5) and (6), are the only portions of the law that are directly inconsistent with chapter 71. On this point, and specifically regarding independent review, Senator Lieberman explained:

> The new provision . . . does not conflict with the statutory rights duties, and protections of employees, agencies, and labor organizations set forth in chapter 71, including . . . the duty to bargain in good faith . . . and others and such rights, duties, and protections will *remain fully applicable* at the department. The conference agreement provides . . . "for independent third party review of decisions." . . . The Secretary may use this provision to expedite the review of decisions, *but not to alter the statutory rights, duties, and protections established in chapter 71* or to compromise the right of parties to obtain fair and impartial review. [Emphasis added.]

149 Cong. Rec. S14490.

Under § 9902(b)(3) and (d) and chapter 71, provisions of Subpart I that depart from chapter 71 other than by providing for national level bargaining or independent review of decisions are contrary to law. Some provisions of Subpart I violate other provisions of § 9902. All but two of the Subpart I provisions that are not themselves unlawful are unnecessary—because they either have no use or purpose besides

introduction or implementation of other provisions that are contrary to law or merely repeat statutory provisions. The only two exceptions are the provisions for grievance procedures and official time.

§9901.901 - Purpose

We recommend that this section be deleted. This section has no use or purpose other than to introduce other sections that are contrary to law. It erroneously states that Subpart I "contains . . . regulations which implement . . . § 9902(m)." In fact, Subpart I contains regulations that violate § 9902(m). Contrary to § 9901,901, Subpart I's proposed regulations do not "recognize the rights of DOD employees"; rather, they violate the rights of DOD employees.

§9901.902 - Scope of Authority

We recommend that this section be deleted. Its assertions are contrary to law. This section erroneously asserts that "the provisions of 5 U.S.C. 7101 through 7135 are modified and replaced by the provisions" of Subpart I. The Secretary has no authority to depart from any of the provisions of §§ 7101 through 7135 other than by providing for national level bargaining or independent review of decisions.

This section also erroneously asserts that "DOD may prescribe implementing issuances to carry out the provisions" of Subpart I. DOD has no authority to carry out the provisions of Subpart I that are contrary to law. Further, DOD has no authority unilaterally to "prescribe implementing issuances to carry out" Subpart I, even if Subpart

I were lawful. Any "adjustment" of DOD's labor relations system must be developed not unilaterally, but in accordance with the collaboration process provided by § 9902(m)(3).

§9901.903 - Definitions

We recommend that this section be deleted. The definitions of "Board," "Component," "Consult," "DOD issuance or issuances," and "Grade" are unnecessary because their sole use and purpose is to implement provisions of Subpart I that are contrary to law. To the extent the other definitions depart from the definitions of the same terms in chapter 71 they are contrary to law. To the extent they conform to chapter 71 they are duplicative and unnecessary.

§9901.904 - Coverage

We recommend that this section be deleted. To the extent this section denies any employee chapter 71 rights—other than those that lawfully may be superseded by proper provision for national level bargaining or independent decision review—this section is contrary to law.

To the extent this section applies the 5 U.S.C. § 9902(m) labor relations system to employees not subject to it under §§ 9902(c)(1) and (l)(2), this section is also contrary to law. Under 5 U.S.C. § 9902(b)(4), the labor relations system is part of the § 9902(a) human resources management system; and the law restricts implementation of this system in certain parts of DOD. Under § 9902(c)(1), the system may not be implemented at a laboratory before October 1, 2008, and then only if the Secretary makes a determination required by that provision. Under § 9902(l)(2), the system may

not be applied to an organizational or functional unit including more than 300,000 employees unless the Secretary determines that the unit has in place a proper performance management system.

To the extent § 9901.904 repeats exceptions from the chapter 71 definition of "employee," 5 U.S.C. § 7103 (a)(2), it is duplicative and unnecessary.

§ 9901.905 - Impact on existing agreements

We recommend that this section be deleted. This section is contrary to law to the extent it makes collective bargaining agreements unenforceable due to inconsistency with either provisions of Subpart I that are unlawful or unilateral "DOD implementing issuances." Unlawful provisions of Subpart I do not override lawful collective bargaining agreements. Also, unilateral DOD issuances cannot be the basis for any change of employee rights under chapter 71 or § 9902(m). As noted above, any "adjustment" of those rights—even if it is a permissible provision for national level bargaining or independent decision review—cannot be promulgated other than through the collaborative process prescribed by § 9902(m)(3).

To the extent § 9901.905 provides for decision review or impasse resolution by "the National Security Labor Relations Board," this section violates 5 U.S.C. § 9902(m)(6) because, as stated below in the discussion of § 9901.907, the Board is not an "independent third party."

To the extent, if any, that § 9901.905 might be construed to provide for lawful superseding of a collective bargaining agreement under 5 U.S.C. § 9902(m)(8), this section is duplicative of § 9902(m)(8) and therefore unnecessary.

§9901.906 - Employee rights.

We recommend that this section be deleted. This section repeats 5 U.S.C. § 7102, except it substitutes the word "subpart" for "chapter." This section is contrary to law to the extent it restricts chapter 71 employee rights by making them subject to unlawful provisions of Subpart I. To the extent, if any, that it preserves a right provided by § 7102 it is duplicative of § 7102 and unnecessary.

§ 9901.907 - National Security Labor Relations Board and § 9901.908 - Powers and Duties of the Board.

We recommend that these sections be deleted. These sections are contrary to 5 U.S.C. § 9902(m)(6) because they create and vest authority in a board that is not an "independent third party." The Board created by § 9901.907 is not independent because (1) its members are chosen and appointed by the Secretary; (2) the Secretary has "sole and exclusive discretion" to pack the Board with an unlimited number of members to out-vote any previously-appointed members who might manifest independence from the Secretary's views; (3) the nominal requirements that Board members be "independent, distinguished, . . . well known for their integrity, impartiality, and expertise"; and subject to removal "only for inefficiency, neglect of duty, . . . malfeasance in office" or failure "to acquire and maintain an appropriate security clearance" are vague, subjective, and unaccompanied by appropriate enforcement procedures; (4) the Secretary's discretion to select members whose only expertise is "in . . . the DOD mission" permits the Secretary to select members who are unqualified and narrow-minded.

There is no single formula for creation of a genuinely independent board, but establishing an independent board requires provisions that include an adequate number and appropriate mix of concepts such as those in the following illustrative and non-exhaustive list: (1) appointment of board members by a commission having a balanced composition, such as a commission comprised of an equal number of commissioners selected by labor and management, respectively; where two board members each are appointed by the labor-selected commissioners and the management-selected commissioners, respectively; and a fifth board member is selected by consensus, majority vote, or alternating striking by commissioners of candidates who apply, until one is left; (2) in the absence of, or in addition to, appointment by a balanced (or perhaps genuinely independent commission), relatively objective and specific qualifications for board members—such as no previous employment or service within the Department (or prior employment exclusively in bargaining unit positions for two members, prior employment in managerial positions for two members, and no prior government service for a fifth member); (3) substantive provisions for tenure similar to those that protect other tenured professionals, such as judges or university faculty; (4) specific and adequate procedures for impartial adjudication of agency accusations against board members, including adequate incentives for accused members to defend themselves rather than resign—such as contemporaneous payment by the Department of members' reasonable expenditures for legal representation and automatic award of substantial monetary compensation to board members who defeat proposed removal or discipline and show that the accusations were wholly unjustified.

Apart from provisions ensuring its independence, an independent board should have its own appellate judicial review statute. Judicial review achieved by affording review of board decisions by the Federal Labor Relations Authority (FLRA), followed by judicial review under 5 U.S.C. § 7123, is inefficient. If the board is well-qualified and genuinely independent, review by the FLRA is unnecessary and a waste of time. Board decisions should be immediately reviewed by an appellate court. A board that is not subordinate to the FLRA, moreover, will attract higher quality candidates.

Section 9901.907(f) of Subpart I seeks to reduce the inefficiency of making Board decisions subject to FLRA review by forcing the FLRA both to speed up its decision-making process and to develop other procedural standards in conjunction with the Board. While this attempt is not objectionable from a policy standpoint, it probably is unlawful. The Department does not have express legislative authority to force the FLRA to change its internal procedures.

While channeling Board decisions through the FLRA is inefficient, establishing a board by regulation but not providing for review through the FLRA also is an unattractive option. Under this option, board decisions would be subject to federal district court review, followed by federal appellate court review, under 5 U.S.C. § 701 *et seq*. This two-court review would be inefficient.

In light of the considerations discussed above, an independent board should be created by statute, not by regulation—so that at the outset direct appellate judicial review of board decisions can be established and the highest quality candidates can be attracted. If the Department desires an independent board, it should work with the

employee representatives to draft a mutually-acceptable statute. Such a statute undoubtedly would be quickly passed by Congress.

A lawful alternative to creation of a new independent board would be expanded, effective use of Federal Mediation and Conciliation Service arbitrators, followed by FLRA and judicial review of legal issues. Procedures and time limits for arbitration would be lawful.

Separate from these points, § 9901.908(b) is contrary to law. The Department's authority under 5 U.S.C. § 9902(m)(6) is limited to providing "for independent third party review of decisions." A new board, even if independent, may not be vested with authority to issue binding opinions merely upon request.

§ 9901.909 - Powers and duties of the Federal Labor Relations Authority

We recommend that this section be deleted. This section, with § 9901.912, unlawfully modifies the chapter 71 standards for FLRA determination of appropriate bargaining units. The section therefore is contrary to law.

The section also is contrary to law because it deprives the FLRA of jurisdiction over matters within the jurisdiction of the Department's illegal, non-independent Board.

To the extent the section preserves some of the FLRA's lawful chapter 71 authority; it is duplicative of chapter 71 and unnecessary.

§9901.910 - Management rights

We recommend that this section be deleted. This section unlawfully expands the management rights listed in 5 U.S.C. § 7106(a). The section unlawfully eliminates §

7106(b) exceptions to § 7106(a) management rights. The section also unlawfully eliminates the agency's chapter 71 obligation to preserve the status quo pending completion of collective bargaining, including impasse resolution. For these reasons, the section is contrary to law.

Apart from the section's illegality, its unlimited expansion of non-negotiable management rights to include "whatever other actions may be necessary to carry out the Department's mission," and its gutting of § 7106(b) exceptions to management rights, are nothing less than obnoxious. They are a clear manifestation of the Department's intent to eliminate all meaningful collective bargaining.

Particularly repugnant is the cynical creation in § 9901.910(e)(1) of an illusory "right" to negotiate procedures for implementation of § 9901.910(a)(3) management rights. Under § 9901.910(f), proposed procedures that affect both (a)(3) and (a)(2) management rights are negotiable only to the extent procedures affecting (a)(2) rights are negotiable. Under § 9901.910(b), procedures affecting (a)(2) rights are not negotiable at all. This effectively bans all negotiation of procedures affecting (a)(3) rights, because (a)(2) rights embrace everything in (a)(3). This is the case because (a)(2) rights include the unlimited right to take "whatever . . . actions may be necessary to carry out the Department's mission," and every exercise of an (a)(3) right is an action that "may be necessary to carry out the Department's mission."

To the extent § 9901.910 incorporates § 7106(a) management rights and a few shredded remains of the exceptions to management rights stated in § 7106(b), the section is duplicative of § 7106 and unnecessary.

§ 9901.911 - Exclusive recognition of labor organizations

We recommend that this section be deleted. This section is duplicative of 5 U.S.C. § 7111(a) and unnecessary.

§ 9901.912 - Determination of appropriate units for labor organization representation

We recommend that this section be deleted. This section alters the standards of 5 U.S.C. § 7112. To the extent it does this, it is contrary to law. To the extent the section preserves standards stated in § 7112, the section is duplicative and unnecessary.

Apart from the section's illegality, its unlawful, total elimination of the collective bargaining rights of all attorneys and all personnel department clerical staff is unwarranted. The Department bases the exclusion of all personnel workers on its assertion that there are no (and never will be any) personnel workers who perform in a "purely clerical capacity," within the meaning of 5 U.S.C. § 7112(b)(3). But if what the Department asserts is true, then there is no need to change current law, because current law already excludes personnel workers except those who work in "a purely clerical capacity."

A similar point applies to attorneys. The Department asserts that all attorneys communicate confidentially with management on matters that "go to the heart of the managerial function." If that were true, then there would be no reason to change the law, because attorneys who provide confidential advice going to the heart of the managerial function are confidential employees excluded under current law, 5 U.S.C. § 7112(b)(2). The Department's assertion, however, is not true. Not all attorneys provide

advice concerning core managerial functions. There is no valid reason to terminate the collective bargaining rights of attorneys whose work concerns, for example, litigation between the Department and private businesses or individuals.

The Department's asserted rationales for change being invalid, the real motive for the proposed change is apparent—union busting. The Department's unlawful termination of the rights of all personnel workers and attorneys is an attempt to deprive bargaining units of employees who are particularly knowledgeable of employment matters and especially skilled in the exercise of employee rights.

§ 9901.913 - National consultation

We recommend that this section be deleted. This section unlawfully transfers from the FLRA to the Department's Board authority to determine eligibility criteria for national consultation rights. This transfer violates 5 U.S.C. § 7113. It is not authorized by § 9902(m)(6), because the authority granted by that section to define standards for review of decisions does not extend to determinations of criteria for the granting or denial of national consultation rights.

Section 9901.913 also grants the Board authority to adjudicate eligibility for national consultation rights. This is contrary to law because, as noted above, the Board is not an "independent third party" under § 9902(m)(6). For this reason, it cannot be vested with any authority to adjudicate chapter 71 legal rights.

§ 9901.914 - Representation rights and duties

We recommend that this section be deleted. This section alters the standards of 5 U.S.C. § 7114, depriving employees and labor organizations of rights guaranteed by § 7114. To the extent the section does this, it is contrary to law. To the extent the section preserves some threads of the standards stated in § 7114, the section is duplicative and unnecessary.

The changes made by § 9901.914 are unwarranted as well as unlawful. There is no valid reason why a union's right to attend formal discussions should be limited to discussions with "management official(s)," rather than other agency representatives, such as supervisors, as § 7114(a)(2)(A) requires. There is no valid reason why a union's right to attend formal discussions should not extend to formal discussions "concerning any grievance," as § 7114(a)(2)(A) also requires, rather than just grievances that have been "filed." There is no valid reason why unions should be excluded from formal discussions that occur in EEO proceedings—particularly since the Department would continue to allow union participation in such discussions where EEO claims are presented through the grievance procedure.

Nor is there a valid reason for the section's exclusion of the union, contrary to § 7114(a)(2)(A), from formal discussions of "any personnel policy or practices or other general condition of employment." The section's proposed exemptions—for formal "operational" discussions involving only "reiteration or application of existing personnel policies," policy change discussions "incidental or otherwise peripheral to the announced purpose of the meeting, or policy discussions that do not "result in an announcement of . . . or a promise to change" a policy—are unjustified. As a practical

matter, a formal discussion of policy or policy application almost always seeks change. The reason management formally discusses policy or policy application with employees is to change their behavior to increase conformity with policy. Unions should be present at all formal policy discussions that seek to change employee behavior.

Further, management should not be allowed to effect policy change through formal discussion by-passing the union simply by making a phony advance announcement as to the purpose of the discussion and then claiming that discussion of policy change during the meeting was merely "incidental." The section's proposed exemption for "phony announcement" meetings is insidious.

The section's unlawful elimination of employees' right to union representation during interrogations by agency criminal and inspector general investigators is another unwarranted change. The need for union representation is at its greatest in these serious contexts, which almost always threaten severe discipline. The Department's assertions that union representation threatens the independence, speed, integrity, or confidentiality of investigations are groundless. The Department points to no instance in which such a threat ever has occurred. The Department's proposed elimination of union representation in these interrogations is not based on any policy considerations underlying the reason Congress originally created the right to union representation. Instead, this proposed change is another manifestation of the Department's desire to deprive unions of any meaningful role in the work lives of employees.

The section's unlawful assertion that union representatives who are employees "are subject to the same expectations regarding conduct as any other employee, whether they are serving in their representative capacity or not," § 9901.914(a)(4), is

also indefensible. Contrary to § 9901.914(a)(4), employees serving in a representative capacity have statutory and first amendment rights to speak, write, associate, and petition for redress that other employees do not have.

When an employee represents another employee during an agency interrogation, for example, the representative has the right to advise the interrogated employee, to seek clarification of unclear questions, to ask other questions, and to make statements—provided the representative does not unduly interfere with the interrogation. "Any other employee" may not engage in this conduct. "Any other employee" may not attend the interrogation, advise the interrogated employee, ask questions, and make statements. If "any other employee" engaged in such conduct the employee could be ordered to stop and to go away and could be punished if she or he failed to do so. The same is not true of the employee who is a union representative engaged in representing the interrogated employee. Section 9901.914(a)(4)'s assertion that a union representative may engage in no conduct other than that in which "any other employee" also may engage, reflects a determination by the Department that employees should have no meaningful union representation at all.

Section 9901.914's unlawful total elimination of unions' § 7114(b)(4) right to information is another manifestation of the Department's intent to render unions impotent and useless to employees. The section authorizes the Department to ban all disclosure of information to unions simply by issuing a policy, regulation, or other "issuance" saying so. § 9901.914(c)(1).

The section also states that any "authorized official" may block any disclosure of information to a union if the official "has determined"—unreasonably or otherwise—that

the disclosure "would compromise the Department's mission, security, or employee safety." § 9901.914(c)(4). Presumably, "security" includes "information security," which always is "compromised" by any disclosure of information. The section thus authorizes a ban on disclosure if the official "has determined" that because disclosure of the information would result in disclosure of the information, the disclosure must not occur, lest "information security" be "compromised."

Finally, the section's total elimination of the statutory right to collective bargaining—repeated in § 9901.917 and reinforced by § 9901.910's expansion of management rights to include "whatever other actions may be necessary"—also manifests the Department's intent to deprive employees and unions of any meaningful rights. Under § 9901.914(d)(2), the Department or any Component of the Department can wipe out any term of a collective bargaining agreement merely by writing a "rule, regulation or similar . . . issuance" saying so. Under § 9901.914(d)(5), provisions of any collective bargaining agreement are "unenforceable if an authorized official determines"—correctly or incorrectly—"that they are contrary to . . . DOD issuances." Under §9901.914, collective bargaining is not a statutory right. Under this section, and §9901.917 as well, collective bargaining can be totally banned through DOD "issuances."

<u>§9901.915 - Allotments to representatives</u>

We recommend that this section be deleted. This section duplicates 5 U.S.C. § 7115 and is unnecessary.

§9901.916 - Unfair labor practices

We recommend that this section be deleted. This section limits unfair labor practices to violations of Subpart I, thereby unlawfully permitting practices that are violations of 5 U.S.C. § 7116, but not Subpart I. In this regard the section is contrary to law. Particularly noteworthy is the section's unlawful elimination, in its entirety, of the unfair labor practice stated in § 7116(a)(7) (enforcement of a regulation that conflicts with a collective bargaining agreement, if the agreement predates the regulation).

The section's unlawful elimination of unfair labor practices contradicts Under Secretary Chu's explicit contrary representation to Senator Levin during the Senate Committee hearings in the summer of 2003. Senator Levin said, "The question is, do you intend to modify the provisions of Chapter 71 of Title 5 relative to unfair labor practices." Mr. Chu replied, "We don't have such an intent, sir."

To the extent unfair labor practices under § 9901.916 also are unfair labor practices under § 7116, the section is duplicative and unnecessary. The provision in § 9901.916(e) of a 90-day time limit for filing unfair labor practice charges with the Department's Board is unnecessary because its sole use and purpose is to implement the functioning of the unlawful Board. The Board has no authority to adjudicate legal rights because the Board is not an "independent third party" authorized by 5 U.S.C. § 9902(m)(6).

§ 9901.917 - Duty to bargain and consult

We recommend that this section be deleted. This section, as noted earlier, totally eliminates the statutory right to collective bargaining by banning bargaining of any

matter "inconsistent with . . . Department or Component policies, regulations or similar issuances." § 910.917(d)(1). The section's total elimination of the chapter 71 statutory right to collective bargaining is contrary to law. Under 5 U.S.C. § 7117, only agency regulations for which there is a compelling need restrict bargaining.

In addition to making bargaining rights subject to elimination by "issuances," § 9901.917 unlawfully shrinks the Department's chapter 71 obligation to bargain over significant changes in working conditions or at least their impact and implementation. In eliminating the duty to bargain over changes that are not "foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change," § 9901.917(d)(2), the section is contrary to law.

The section authorizes labor and management to refer bargaining impasses and negotiability disputes to the Department's unlawful Board. These provisions are unnecessary because their sole use and purpose is to implement the Board's unlawful functioning. Because the Board is not an "independent third party" authorized by 5 U.S.C. § 9902(m)(6), the Board has no authority to determine employee rights or to resolve bargaining impasses.

<u>§ 9910.918 Multi-unit bargaining and § 9901.919 Collective bargaining above the level of recognition</u>

We recommend that these sections be deleted. These sections are contrary to law to the extent they ban union ratification of collective bargaining agreements.

Contrary to the Department's assertion, ratification does not delay implementation of agreements. Ratification is part of reaching an agreement.

These sections also are contrary to law to the extent they make bargaining impasses subject to resolution by the Department's Board. Because the Board is not an "independent third party" authorized by 5 U.S.C. § 9902(m)(6), the Board has no authority to resolve bargaining impasses.

To the extent these two sections are not contrary to law they are duplicative of 5 U.S.C. §§ 9902(g) and (m)(5) and are unnecessary.

§ 9901.920 - Negotiation impasses

We recommend that this section be deleted. This section unlawfully authorizes the Department's Board to resolve negotiation impasses. Because the Board is not an "independent third party" authorized by 5 U.S.C. § 9902(m)(6), the Board has no authority to resolve bargaining impasses. The section also authorizes labor and management voluntarily to refer bargaining impasses to the Board. These provisions are unnecessary because their sole use and purpose is to implement the Board's unlawful functioning.

§9901.921 - Standards of conduct for labor organizations

We recommend that this section be deleted. This section duplicates 5 U.S.C. § 7120 and is unnecessary.

§9901.922 - Grievance procedures

We recommend that this section be deleted and we incorporate here our recommendations and objections stated elsewhere with regard to specific actions subject to the negotiated grievance procedure. The deletion of "administrative," a term found in 5 U.S.C. § 7121(a)(1), is contrary to law. The deletion erases legal rights to seek judicial redress. The Department's authority to provide new independent third party review of decisions does not include authority to eliminate currently available judicial review

The exclusions of pay and ratings of record are contrary to law because no new independent third party review of these matters is afforded. The effect of the exclusions is to eliminate all independent review of these matters. Congress did not grant the Department authority to eliminate existing rights to independent review without providing lawful substitutes.

The reference to mandatory removal offenses is unnecessary because its sole use and purpose is to facilitate the Department's unlawful establishment of mandatory removal offenses. As we stated earlier, the Department's attempt to eliminate the authority of the Merit Systems Protection Board to mitigate penalties is contrary to law. It violates 5 U.S.C. § 9902(h)(5), which expressly preserves the Board's authority to "order such corrective action as the Board considers appropriate" in any case where the Department's decision is "arbitrary, capricious, an abuse of discretion" or unlawful under any of the other standards of § 9902(h)(5)(A) through (C).

The insertion of an additional appellate layer—the Merit Systems Protection Board—between arbitration and judicial review of adverse actions or other appealable

matters is unwarranted. The creation of this additional layer belies the Department's assertions of intent merely to make review more speedy and efficient. The delay and inefficiency injected by this additional review layer is designed to eliminate proper deference to arbitrators—obviously because, in the Department's mind, arbitrators are too independent.

To the extent § 9901.922 incorporates provisions of 5 U.S.C. § 7121, it is duplicative and unnecessary.

§9901.923 - Exceptions to arbitration awards

We recommend that this section be deleted. This section unlawfully authorizes the Department's Board to decide exceptions to arbitration awards. Because the Board is not an "independent third party" authorized by 5 U.S.C. § 9902(m)(6), the Board has no authority to decide arbitration cases.

The section also authorizes labor and management to submit exceptions to the Board, states a new ground for exceptions, and authorizes the Board to determine its jurisdiction. These provisions are unnecessary because their sole use and purpose is to implement the Board's unlawful functioning.

§9901.924 - Official time

We recommend that this section be deleted. This section authorizes official time for employees performing employee representational duties under Subpart I, but not under chapter 71. In this regard, the section is contrary to law.

The section also is unnecessary. It is unnecessary to authorize official time for representational duties under Subpart I because no provision of Subpart I should be adopted or implemented. Apart from this, the section also is unnecessary because it is duplicative of 5 U.S.C. § 7131, which authorizes official time for "any employee representing an exclusive representative." § 7131(d)(1).

§ 9901.925 - Compilation and publication of data

We recommend that this section be deleted. This section is unnecessary because its sole use and purpose is to facilitate the Board's unlawful functioning.

§9901.926 - Regulations of the Board

We recommend that this section be deleted. To be independent, a Board must determine its own rules of operation. The Department's usurpation of this function is contrary to law.

In addition, the Department has no authority to issue rules merely upon consultation with unions having national consultation rights. Any "adjustment" of the labor relations system must be accomplished through the collaboration procedures established by 5 U.S.C. § 9902(m)(3).

Apart from these points, § 901.926 is unnecessary because its sole use and purpose is to facilitate the Board's unlawful functioning.

§9901.927 - Continuation of existing laws, recognitions, agreements and procedures

We recommend that this section be deleted. To the extent this section invalidates collective bargaining agreements and Executive Orders on the ground that they are inconsistent with DOD regulations and issuances, the section is contrary to law. To the extent it acknowledges the continuing validity of collective bargaining agreements and Executive Orders it is unnecessary.

§9901.928 - Savings provisions

We recommend that this section be deleted. To the extent this section declares administrative remedies unenforceable on the ground that they are inconsistent with provisions of the proposed regulation that are unlawful, the section is contrary to law. To the extent that this section acknowledges the inapplicability of Subpart I to pending grievances or administrative proceedings, the section is unnecessary.

D. Current Law Does Not Impede Pursuit of the Department's Professed Goals

On August 16, 2004, the Department of Defense released a paper entitled "Potential Options for the National Security Personnel System." This paper, among other things, stated goals the Department sought to accomplish regarding labor relations, and potential options for accomplishing them. We asked the Department to explain, with citation of cases, how current law impeded pursuit of the Department's goals. On September 9, 2004, the Department responded with remarks and an annotated list of cases. We replied, showing that the cases cited by the Department did not support the Department's views, and pointing out that current law did not impede

pursuit of the Department's professed goals. We attach and incorporate that reply here, as Attachment A. The Department has never answered it.

XI. CONCLUSION

The fundamental bases for the proposed human resources management system, including the appeals process and the labor management relations system, are unacceptably flawed. Except to the extent expressly stated above, we object to the proposed rule in its entirety and do not acquiesce to the implementation of any part of it. Any individual proposal in the rule that is not expressly accepted in these comments and recommendations is rejected. We recommend that all current provisions of law be retained until such time as all of the numerous defects of the proposed rule can be cured.

During the statutorily prescribed consultation process, we will attempt to work with you to devise a human resource system that meets legitimate management needs without sacrificing important employee rights and union protections. Through a process which includes collaboration and collective bargaining, employee representatives expect to work with the Agencies to create a personnel system described in the statute. Once the system is developed and implemented, the new personnel system will be subject to the collective bargaining process.

Such a system should, at a minimum, include the following elements:

1. It should preserve all chapter 71 rights and legal standards except those directly inconsistent with the two labor relations changes expressly specified by chapter

99—bargaining above the level of unit recognition and new independent third party review of decisions.

2. It should provide for collective bargaining over the design of the pay, performance, and classification systems. Such bargaining is common in the public and private sectors, including federal components not covered by the General Schedule pay and classification system. Bargaining would in no way negatively impact the agency's ability to accomplish its mission. Instead, it would enhance the effectiveness of the system by providing greater fairness, credibility, accountability and transparency.

3. It should ensure that employees are not disadvantaged by the implementation of any new pay system. That is, employees must, at a minimum, be entitled to the same pay increases and advancement potential under a new system that is available under the General Schedule.

4. It should retain the provisions of 5 U.S.C. Chapter 43 and 5 C.F.R. Part 430, governing performance management.

5. It should provide, as does the current system, for a choice between the Merit Systems Protection Board and the negotiated grievance/arbitration procedure for serious adverse actions.

6. It should provide for impartial review of labor relations disputes by an independent entity like the Federal Labor Relations Authority.

7. It should protect, as we believe Public Law 108-13 mandates, the right of employees to organize and bargain collectively over workplace decisions that affect them. For example, employees should have the right to bargain over procedures and

appropriate arrangements related to the exercise of management's right to assign work, deploy personnel, and use technology.

To require such bargaining would not prevent management from exercising its rights. Instead, it would allow agreements to be reached over such things as fair and objective methods of assigning employees to shifts and work locations. It would allow agreements to be reached over fair and objective methods of reassigning employees on short notice to new posts of duty that may be thousands of miles from home and family. It would allow agreements to be reached over training and safety issues related to the use of new technology by employees whose jobs put their lives at risk on a daily basis.

8. It should encourage, not suppress, the pre-implementation participation of employees and their unions in mission-related decisions. Frontline employees and their unions want to help DOD accomplish its mission, and they have the expertise to do it. They should not be shut out of mission-related decisions.

9. It should, as the law requires, protect the due process rights of employees and provide them with fair treatment. Employees must have the right to a full and fair hearing of adverse actions appeals before an impartial and independent decision maker, such as an arbitrator or the MSPB. DOD should be required to prove, by the preponderance of the evidence, that adverse actions imposed against employees promote the efficiency of the service. An impartial and independent decision maker must have the authority to mitigate excessive penalties.

We hope the statutory collaboration process will be a success. We are determined, however, to protect the rights of DOD employees and will use all appropriate means to challenge the implementation of any system that does not

comport with law, needlessly reduces employee rights, or amounts to a waste of our nation's resources.

Sincerely,

Byron Charlton

On Behalf of the
United Department of Defense Workers Coalition

Attachment A
to the Recommendations on Subpart I

Union Coalition's Reply to the Department of Defense on Questions Concerning Labor Management Relations

Introduction

The Department of Defense prepared an August 16, 2004, paper entitled "Potential Options for the National Security Personnel System." The Union Coalition presented to the Department written questions regarding the portions of the Department's August 16 paper that concerned labor management relations. On September 9, 2004, the Department responded with remarks and an annotated list of cases.[3] The Coalition now replies.

Negotiation Speed

The Union Coalition asked the Department, "Have there been protracted negotiations that, due to resulting delay in change of working conditions, have caused the Department's national security mission not to be properly supported?"

The Department's September 9 paper said there have been "many negotiations where there is no agreement reached either because of different[t] perspectives or difficult relationships." This assertion, however, is not relevant to the issue of negotiation speed. Under Chapter 71, failure to reach agreement--whether due to different perspectives or difficult relationships, or other reasons--does not mean the parties must have spent a long time negotiating. Agencies can prevent negotiating sessions from becoming "protracted" simply by having a mediator declare the parties to be at impasse. The Department's September 9 response identified no instance in which the Department believed the parties to be at impasse, but a mediator refused to declare an impasse, causing negotiations to become "protracted."[4]

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[3] In addition, the Department repeated assertions made in its August 16 paper and presented an annotated list of cases concerning individual employee appeals. We do not, in this paper, address individual employee appeals. We reply to the Department's September 9 paper to the extent it contains new statements concerning labor relations.

[4] Chapter 71 may not even require the agency to obtain a mediator's declaration of impasse. It may (1) allow the agency, based on belief that an impasse exists, to announce that it will implement its last proposal; and (2) require the union thereafter to seek FSIP assistance within a few days or lose the right to preserve the status quo. Whether Chapter 71 does or does not require an agency to obtain a mediator's declaration of impasse, the law clearly affords the Department effective means to reach agreement or impasse promptly.

The Department's September 9 response asserted that "facilitation" and "mediation" are factors that cause negotiations to be "protracted," but this assertion makes no sense. Under Chapter 71, resort by the agency to a mediator is required (if required at all, see n. 2) only if the agency desires to *shorten* negotiations, by having the mediator declare the parties to be at impasse. All other resort to third-party facilitation or mediation of negotiations is voluntary.

Delay During Impasse Resolution

The Department's September 9 response asserted that instances of "protracted" negotiations "typically include . . . impasse procedures." The Department, however, overlooked that under current law impasse proceedings do not preclude the Department from changing working conditions if the "necessary functioning of the agency" requires the change before the proceedings are completed. Our previous paper pointed out, and the Department's September 9 response did not dispute, that if failure to make a particular change in working conditions before completion of impasse proceedings would cause the Department's national security mission not to be properly supported, the "necessary functioning of the agency" standard would allow the Department to make the change before the FSIP resolves the impasse.

On the issue of delay due to pending impasse proceedings, the Union Coalition asked the Department three specific questions:

> Have there been cases where the Department, invoking the "necessary functioning of the agency" doctrine, has implemented a change in working conditions during pending impasse resolution proceedings, but subsequently the Department has been found guilty of an unfair labor practice because the change was determined by the FLRA not to be necessary for the functioning of the agency? . . . If so, in what published cases has this occurred?
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> * * *
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> Have there been instances in which the Department, due to fear of being found guilty of an unfair labor practice, has declined to implement a working condition change during pending impasse resolution proceedings even though the Department believed the change was necessary for the functioning of the agency, and harm resulted from the decision not to implement during impasse resolution?
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> * * *
>
> Are there any published cases (involving any agency) on implementation of change during pending impasse resolution proceedings that the Department maintains were wrongly decided? If so, which ones and why?

The Department's September 9 response answered none of these questions. It did not identify a single published case or instance falling in any of the categories described by these questions. The September 9 response asserted that "as noted in [the Department's discussion of cases cited in the paper], delay of implementation directly affects how positions are filled, which is critical to the support of the DOD mission"; but none of the cases cited by the September 9 response was a case in which (a) the Department, while impasse proceedings were pending, changed the manner in which the Department filled positions; (b) the Department asserted the change was necessary for the functioning of the agency because it was critical to support a DOD mission; yet (3) the FLRA rejected the Department's assertion and found the Department guilty of an unfair labor practice.

The September 9 response did not explain, moreover, how mere change in the procedure for filling positions could be so critical that delay in making the procedural change could result in a mission not being properly supported. This would be the case only if the procedure to be changed were so ineffective as to be incapable of selecting competent persons to fill mission-critical positions. DOD's September 9 response did not assert that DOD's position-filling procedures have ever been incapable of selecting competent applicants; nor did DOD point to any case law saying that, if the Department ever were to have a position-filling procedure so flawed as to be incapable of selecting competent personnel for mission-critical positions, the Department nonetheless would have to keep using the flawed procedure while impasse proceedings were pending.

Delay During Dispute Resolution

The Department's September 9 response asserted that instances of "protracted" negotiations "typically include . . . negotiability disputes." The Department, however, did not deny the point we made in our previous paper that under Chapter 71 pending negotiability disputes "do not preclude the agency from assigning work or taking other action to accomplish a mission."

If a negotiability dispute is pursued as a negotiability appeal under 5 U.S.C. § 7117(c), the agency not only may act without waiting for resolution of the appeal but also faces no possibility of status quo ante relief if the union wins the case. Under Chapter 71, a union can prevail on an unfair labor practice charge concerning the negotiability of a proposal only if the negotiability of the proposal has been clearly established by previous FLRA decisions. Even then, status quo ante relief cannot be ordered if this relief would cause undue disruption of agency operations outweighing the benefits the relief would provide to the affected employees.

On this latter point, which the Department's September 9 paper did not dispute, we asked:

> Have there been cases where the Department has argued against status quo ante relief from the Department's legal violations, asserting that delay in dispute resolution has made status quo ante relief unduly disruptive, but

> the relief has been ordered over the Department's objection, causing, in the Department's view, harm to mission accomplishment? . . . If so, in what published cases has this occurred?
>
> * * *
>
> Are there any published cases (involving any agency) in which status quo ante relief was ordered over agency objection that delay made the relief unduly disruptive, and that the Department maintains were wrongly decided? If so, which cases and why?

The Department's September 9 response answered neither of these questions. It did not identify a single published case falling in either of the categories described by these questions.[5]

Cases Cited in the Department's September 9 Paper

The Department's September 9 paper included, in addition to the remarks we have discussed above, an annotated list of cases. Our review of the list follows.

> ***Department of the Navy, Naval Air Depot, NAS Jacksonville, Florida*, Case No. AT-CA-02-0575 (FLRA Regional Director letter, December 26, 2002); *Department of the Navy, Naval Air Station, Naval Air Depot, Jacksonville, Florida* and Local 1943, AFGE, AFL-CIO, Case No. 02 FSIP 34 (June 13, 2002) (Executive Director letter)**

The Department's September 9 paper asserted that in this case "[d]eployment of a . . . hiring and recruitment tool--RESUMIX--was delayed nearly two years . . . because of [the Department's] bargaining obligation."

The Department's assertion is incorrect. The delay was not "because of" the Department's "bargaining obligation." The delay was due to the agency's failure--during over a year and eight months of "sporadic" negotiations--either to seek a mediator's declaration of impasse or to announce that the agency would implement its last proposal.

The facts were as follows. The agency in late 1999 notified the union that the agency intended to implement RESUMIX in March 2000. The union on January 7, 2000, demanded negotiations. The agency waited until February 23, 2000, to invoke its contractual right to demand written union proposals. The union submitted its proposals eight days later. Thereafter, the agency and the union negotiated sporadically for 20 months. Until November 13, 2001, the agency failed either to seek a mediator's

[5] Regarding the latter question, the Department's September 9 paper listed some cases and indicated generally that the Department does not like their outcomes, but the Department did not say whether the Department thinks the cases were (1) wrongly decided under current law (and thus vulnerable to future overruling) or (2) correctly decided under current law (warranting, in the Department's view, statutory change).

declaration of impasse or to announce that the agency would implement RESUMIX. The case plainly reveals that the delay was due not to the agency's "bargaining obligation," but to its agreement--not required by Chapter 71--to negotiate intermittently over a long period of time.

***DOJ, INS and AFGE National Border Patrol Council*, 55 FLRA 892 (1999)**

The Department's September 9 paper asserted that in this case the FLRA found the agency had committed an unfair labor practice by implementing a new policy without bargaining its effects, "even though the policy was implemented pursuant to a congressional mandate."

The Department's assertion is incorrect. The FLRA held that the policy was *not* implemented "pursuant to a congressional mandate." Rather, the policy adopted by the agency was an exercise of agency discretion granted by Congress, where Congress had not said that discretion was to be exercised without negotiation. 55 FLRA at 898 ("[a]lthough [the statutory] provision specifically requires the Attorney General to promulgate regulations setting forth a policy on this matter, and sets forth the points that the regulations must address, there is nothing . . . that specifies the actual policy to be established, or limits the discretion of the Attorney General to implement any particular policy; . . . [r]ather, [the law] leaves the content of the policy to the discretion of the Attorney General").

The FLRA, applying settled law, rejected the agency's argument that *status quo ante* relief should not be ordered in this case. The FLRA held, "The Respondent does not provide any explanation for its assertion that such a remedy would be 'extremely disruptive,' and there is no record evidence establishing that the efficiency of the Respondent's operations would be impaired." 55 FLRA at 907. The Department's September 9 paper challenged neither the legal standard used by the FLRA in determining the appropriateness of *status quo ante* relief nor the FLRA's application of the standard in the particular case in question.

Three information cases

The Department's September 9 paper cited three cases on union access to information, saying the agency's "requirement to produce information can serve to delay bargaining" and have "a significant impact on agency resources" because it can include the obligations "to 'comb through' 90 locations in search of union requested documents" and "to spend three weeks compiling data."

The Department's September 9 paper, however, overlooked that Chapter 71 grants unions a right to agency information for the purpose of bargaining a negotiable subject only if the information is (1) "normally maintained by the agency in the regular course of business"; and (2) "reasonably available and necessary for full and proper discussion, understanding, and negotiation" of that subject. 5 U.S.C. § 7114(b)(4). The Department's September 9 paper did not assert that the information at issue in any of

the three cases was not necessary for reasonably full and proper understanding of the subject in question.

This being the case, the Department's September 9 paper identified no valid basis for complaint. Under Chapter 71, an agency that has "reasonably . . . full and proper . . . understanding" of a subject on which the agency proposes to take action suffers no delay in bargaining due to its obligation to produce to the union information that is "reasonably available and necessary for full and proper . . . understanding" of that subject. The reason is simple. If the available information is reasonably necessary for full and proper understanding of the subject, then the agency officials proposing action on that subject must, themselves, have compiled and reviewed the information in order to have full and proper understanding of what they propose to do. If they have compiled the information to review it themselves, they are in a position to turn it over to the union without delay.

For this reason, to complain that union information access rights delay negotiation of, and agency action on, a particular subject is to complain that negotiation should occur, and agency action should be taken, without either the agency or the union having a full and proper understanding of the subject in question. To so complain is absurd.

***DOD American Forces Radio and Broadcast Center and AFGE Local 2776*, 59 FLRA 759 (2004)**

The Department's September 9 paper asserted that in this case the Department was found to have committed an unfair labor practice by changing work schedules set by a collective bargaining agreement, even though the change was "due to mission requirements."

The Department's assertion is incorrect. In *Broadcast Center*, the agency presented no argument that changing work schedules was required to accomplish a mission. The agency did not claim that a mission could not be accomplished properly using the work schedules stated in the collective bargaining agreement.

The Department's September 9 paper said, "The FLRA ordered a status quo ante remedy forcing management to return to the previous work schedule." This is true, but the agency made no argument that return to the previous work schedule was an inappropriate remedy. The agency did not claim that return to the previous work schedule would cause undue disruption of agency operations outweighing the benefits that the relief would provide to the employees.

Potential obligation to bargain over de minimus changes

The Department's September 9 paper said that a pending D.C. Circuit case may decide that even de minimis changes in working conditions are subject to substantive or impact and implementation bargaining. The Department's paper, however, did not

assert that any significant consequence for the Department's national security mission, or any other agency concern, would result if the court were to so decide. Nor could such an assertion reasonably be made. Whether de minimis changes are negotiable is unimportant to the establishment of the Department's labor management relations system.

***AFGE Local 1760 and HHS, SSA*, 28 FLRA 160 (1987)**

The Department's September 9 paper noted that this case held negotiable a proposal that would require an agency to delay implementation of transfers until resolution of any grievances challenging them.

The Department's annotation is correct. That this subject is negotiable, however, does not mean the FSIP always will order agencies to adopt contract terms providing for delay of all transfers pending resolution of grievances--in all circumstances, regardless of proven deleterious mission impact. Such a contract term, moreover, if adopted, would not restrain the agency in an emergency. 5 U.S.C. § 7106(a)(2)(D). And if the agency repudiated the provision and carried out transfers immediately, despite pending grievances, status quo ante relief would be unavailable if the disruption that would be caused by this relief were to outweigh its value to the affected employees. The significance of the disruption would depend substantially on the extent to which the transfers were, and continued to be, necessary to meet mission requirements; and the value of the relief to the employees would depend substantially on the merit, or likely merit, of their grievances. The merit of the grievances, in turn, would depend on whether the transfers clearly or likely violated a statute, a government regulation, or a negotiated contract term providing pre-transfer procedures.[6] Statutes, regulations, and negotiated procedures do not significantly constrain agency discretion to transfer employees. So long as the agency met the minimal requirements of these provisions, meritorious transfer-blocking grievances could not arise. In light of these considerations, the mere negotiability of contract terms that would delay transfers until resolution of grievances is not a threat to mission accomplishment.

***Association of Civilian Technicians, Inc., Heartland Chapter and DOD, NGB, Iowa National Guard*, 56 FLRA 236 (2000)**

The Department's September 9 paper asserted that this case required the Department "to bargain over the Bureau-wide Merit Promotion Regulation" even though the regulation is intended "to ensure consistency throughout the National Guard."

The Department's assertion is incorrect. The FLRA did not decide whether a compelling need for the regulation precluded negotiation of proposals inconsistent with it, because the FLRA found the union's proposal to be consistent with the regulation. 56 FLRA at 241-242.

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[6] Because filling positions from any appropriate source is a management right, 5 U.S.C. § 7106(2)(C), pre-transfer procedures negotiable under § 7106(b)(2) would be the only negotiable pre-transfer requirements. (Appropriate arrangements for transferred employees, negotiated under § 7106(b)(3), would be post-transfer agency obligations, rather than bases for stopping or rescinding transfers.)

Nonetheless, if merit promotion procedures in the Guard should be federal standards that are consistently implemented nationwide, as the Department's September 9 paper seems to indicate would be desirable, this could be accomplished by national-level bargaining. The legislation supported by the Department and enacted by Congress, however, excluded the Guard from national level bargaining. As we said in our previous paper, we support legislative repeal of this ill-advised exclusion. The Department should join us in seeking this change. In the meantime, uniform nationwide procedures could be negotiated among the Department and local bargaining units by mutual agreement to engage in coordinated bargaining.

***AFGE Local 1786 and Dept of the Navy, Marine Corps Combat Development Command*, 49 FLRA 34 (1994)**

The Department's September 9 paper said that in this case, despite "a Congressional letter," the FLRA (1) "found no Congressional mandate" for an agency regulation "limiting Exchange shopping privileges," and (2) rejected "the agency's assertion that the proposal interferes with the agency's right to determine the mission of the Exchange system."

The FLRA held the congressional letter did not establish a congressional mandate because it "was a personal letter expressing the Congressman's views as Chairman of the HASC [House Armed Services Committee] concerning the use of military exchanges and . . . there is no indication that Congress as a whole was aware of those views."

The agency, moreover, admitted that "the mission of base exchanges is to serve authorized patrons," not just the persons mentioned in the Congressman's personal letter. The FLRA held that the union's proposal did not interfere with accomplishment of the agency's mission, because the proposal merely added a new category of authorized patrons. The Department made no claim that serving the new category of patrons would directly interfere with serving the other authorized patrons. Further, the agency's own regulation authorized the Secretary "to grant deviations from the list of authorized patrons set forth in the regulation."

Thus, the agency's evidence was patently deficient to establish a congressional mandate prohibiting new categories of authorized patrons. The agency's own regulation precluded a finding that the agency's mission was to limit patrons to those expressly listed in the regulation; and the agency did not even argue that adding the category identified in the union proposal would directly interfere with accomplishment of the agency's mission.

***NAGE Local R4-26 and Dept of the Air Force, Langley Air Force Base*, 40 FLRA 118 (1991)**

The Department's September 9 paper said that in this case "[t]he FLRA held that Non-appropriated Fund (NAF) regulations regarding NAF insurance coverage and wage increases are not a bar to negotiations and, thus, subject to negotiations at each NAF bargaining unit."

In a lengthy opinion, the FLRA considered and rejected each of the agency's several arguments asserting compelling need for the regulations. The Department's September 9 paper did not state the Department's view of which of the agency's arguments were improperly rejected by the FLRA. The paper did not state whether, in the Department's view, the FLRA's decision was consistent or inconsistent with other compelling need decisions, or whether the Department believes the Authority's entire body of precedents on this subject is correct or incorrect.

If the Department will state its views specifically we will respond. So far as we can tell from the Department's September 9 paper, the Department appears to object to negotiation of any proposal that is inconsistent with an agency regulation. If that is the case, then the Department's view is nothing less than a belief that the Department should have unrestricted authority to eliminate all collective bargaining, simply by issuing a regulation on each negotiable subject. If that is not the Department's belief, we ask the Department to articulate specifically whatever criticism it has of the FLRA's precedents on compelling need, and to tell us, in particular, how those precedents preclude or impair the agency's accomplishment of its national security mission.

If the Department's concern, however, is merely that the FLRA's decision required "negotiations at each NAF bargaining unit," the Department's new legislative authority to bargain above the level of unit recognition satisfies that concern.

***AFGE Local 1501 and Dept of the Air Force, Airlift Military Command*, 38 FLRA 1515 (1991)**

The Department's September 9 paper said that in this case, "[t]he FLRA found that DOD-wide Instructions on childcare were negotiable and, thus, subject to negotiations at all DOD bargaining units having child care centers."

The Department's annotation is correct. The FLRA so held, principally because (1) the Department admitted that the applicable federal statute afforded the agency discretion as to the manner in which it would provide childcare; (2) the agency's own behavior was inconsistent with its interpretation of its regulation; and (3) the Department submitted "no evidence, empirical or otherwise, to support its assertions" that particular adverse consequences would follow if childcare were provided in a manner other than that stated in the agency's interpretation of its regulation. The Department's arguments, behavior, and (non-existent) evidence plainly failed to establish a compelling need for the Department's regulation.

Again, however, if the Department's concern is merely that the FLRA's decision required "negotiations at all DOD bargaining units having child care centers," the

Department's new legislative authority to bargain above the level of unit recognition satisfies that concern.

***Dept of Veterans Affairs, Newington Medical Center and NAGE Local R1-109*, 53 FLRA 440 (1997)**

The Department's September 9 paper said that in this case an "[e]mployee removed for absence without leave (AWOL) appealed [the] action before both [the] MSPB and [through] grievance arbitration."

The arbitrator ruled that the AWOL charge was arbitrable because it was separate from the removal. The arbitrator deemed it separate because the settlement of the MSPB removal case did not resolve the dispute over the AWOL charge. The agency filed an exception to the arbitrator's award, saying that the AWOL charge and the removal action were not separate. The FLRA agreed with the agency, but a consequence of the FLRA's agreement was that, under 5 U.S.C. § 7122(a), the FLRA lacked jurisdiction over the case and had to dismiss the agency's exception. As noted, however, the FLRA's *opinion* resolved the issue, for future cases, in favor of the agency's position. The opinion also noted that the agency could have avoided the problem if it had conditioned settlement of the MSPB case on the employee's withdrawal of the grievance.

Under 5 U.S.C. § 9902(h), the Department now has authority to establish a new employee "appeals process." This authority affords the Department opportunity to clearly define the jurisdiction of the employee appeals process and to address the question of overlapping jurisdiction with grievance arbitration. If the Department will send us its proposed draft regulation, we will review it and respond in an effort to ensure clarity and to otherwise improve the draft.

***Headquarters, Space Division, Los Angeles Air Force Station and AFGE Local 2429*, 17 FLRA 969 (1985)**

The Department's September 9 paper said that in this case the [u]nion pursued [the] same issue through ULP and arbitration procedures resulting in unnecessary costs."

This early case clarified the applicable law, and did so in accordance with the agency's position. The Department's September 9 paper did not assert the existence of continuing ambiguity or uncertainty on the issue that this case resolved, nearly twenty years ago. We are aware of no current confusion or lack of clarity in this regard. If the Department believes otherwise, we ask the Department to state specifically what cases give rise to continuing ambiguity or uncertainty, and what particular issues remain to be resolved.

***Dept of the Navy, Navy Resale Activity, Guam and AFGE Local 1689*, 40 FLRA 30 (1991).**

The Department's September 9 paper asserted that in this case the "FLRA upheld [an] arbitrator's award overturning a debarment from the installation, which did not take into account [the] agency's national security mission."

The Department's assertion is incorrect. The FLRA did not uphold the arbitrator's decision. The FLRA dismissed the agency's exception for lack of jurisdiction. The arbitrator did not fail to consider the agency's national security mission; rather, the arbitrator held "that the Agency violated its own rules and regulations when it barred the grievant permanently from the Naval Station."

***Dept of the Air Force, Grissom Air Force Base and AFGE*, 51 FLRA 7 (1995)**

The Department's September 9 paper asserted that in this case the "[s]ame set of facts led to inconsistent decisions by an arbitrator and the Federal Labor Relations Authority."

The Department's assertion is incorrect. This ULP case makes no reference to an arbitration decision involving the same set of facts.

***DOD Defense Logistics Agency and LIUNA Local 1276*, 37 FLRA 952 (1990)**

The Department's September 9 paper stated that in this case "[d]uring a meeting to discuss work procedures (which was not a formal discussion), management was found to have committed a ULP when it responded to employees' questions regarding impact of leave on performance standards."

The Department's unqualified assertion that the meeting "was not a formal discussion" is incorrect. The meeting did not start out as a formal meeting, because at the outset management merely presented instructions for implementing previously established methods and means of work; but management thereafter responded to employees' questions by announcing a general personnel policy. In doing so, management transformed the meeting into a formal meeting, under clearly established law.

Formal meetings concerning EEO claims and grievances in arbitration

Citing four cases, the Department's September 9 paper said, "Mediation of a formal EEO complaint, even when conducted by a contractor, requires management to invite the union, [which] has an independent right to attend, regardless of the employee desires or whether the employee has elected other legal representation. . . . Failure to

invite the union to the agency attorney's brief interview of unit employees in preparation for arbitrations resulted in a ULP."

These four cases were straightforward applications of the clear, mandatory text of the statute, which affords the union a right to attend "any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment." 5 U.S.C. § 7114(a)(2)(A). Agency contractors and attorneys clearly are representatives of the agency. The purpose of the union's presence at formal meetings involving individual complaints or grievances is not to represent the individual complainant or grievant (unless asked), but to represent the interests of the bargaining unit as a whole. Under the text of the statute, whether the individual complainant or grievant is personally represented by someone else or would prefer that the union not attend is irrelevant.

***Weingarten* rights**

Citing a case, the Department's September 9 paper said, "Management must reasonably postpone criminal, as well as administrative investigations, if the employee's selected representative is not available."

Again, the statute clearly requires this. It says the union, upon the employee's request, "shall be given opportunity to be represented at . . . any examination of an employee in the unit by a representative of the agency in connection with an investigation if . . . the employee reasonably believes that the examination may result in disciplinary action against the employee." 5 U.S.C. § 7114(a)(2)(B). A criminal investigation is "an investigation"; and it certainly is reasonable for an employee to believe that if examination may result in criminal charges, it may result as well in disciplinary action.

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

March 31, 2005

The Honorable George V. Voinovich
Chairman
The Honorable Daniel K. Akaka
Ranking Member
Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
Committee on Homeland Security and Governmental Affairs
United States Senate

Subject: *Posthearing Questions Related to the Department of Homeland Security's (DHS) New Human Capital System*

On February 10, I testified before your Subcommittee at a hearing on "Unlocking the Potential within Homeland Security: the New Human Resources System."[1] This letter responds to requests from each of you that I provide answers to follow-up questions from the hearing. The questions, along with my responses, follow.

Questions from Chairman Voinovich

1. What does an internal review board like the Homeland Security Labor Relations Board have to do to maintain its independence and impartiality?

Under the recently finalized regulations implementing its new human capital system, DHS is to establish its own internal labor relations board—the Homeland Security Labor Relations Board—to deal with most agencywide labor relations policies and disputes. In our previous testimonies on the proposed and final DHS regulations, we stressed the importance of the actual and perceived independence and impartiality of such boards.[2] Members of these types of boards should be, and appear to be, free from interference in the legitimate performance of their duties and should adjudicate cases in an impartial manner, free from initial bias and conflicts of interest.

The labor relations board can strengthen its independence and impartiality through a commitment to transparency, reporting, and evaluation, which can be critical

[1]GAO, *Human Capital: Preliminary Observations on Final Department of Homeland Security Human Capital Regulations*, GAO-05-320T (Washington, D.C.: Feb. 10, 2005).
[2]GAO, *Human Capital: Preliminary Observations on Proposed DHS Human Capital Regulations*, GAO-04-479T (Washington, D.C.: Feb. 25, 2004) and GAO-05-320T.

processes in ongoing human capital reform efforts.[3] Through regular and public reporting on its activities and the results of its adjudications, the board can demonstrate to DHS's employees, labor organizations, and others that it is carrying out its duties in a fair and impartial manner. This reporting would likewise aid in promoting and facilitating formal oversight and evaluations of the board's activities as well as DHS's overall human capital management system.

Consistent with fostering board independence and impartiality, the DHS regulations provide for staggered term appointments for members of the labor relations board and place some limited conditions on the removal of a member. For example, members of the board are appointed for terms of 3 years, except that the appointments of the initial members will be for terms of 2, 3, and 4 years, respectively. The Secretary may appoint a member for an additional term. DHS could further enhance the independence and impartiality of the board through the appointment and removal processes of board members. This could include such areas as: 1) a nomination panel that reflects input from appropriate parties and a reasonable degree of balance among differing views and interests in the composition of the board to ensure credibility and 2) appropriate notification to interested parties in the event that a board member is removed.

2. What role should the Government Performance and Results Act (GPRA) documents produced by the Department of Homeland Security play in the establishment of a pay-for-performance system and the evaluation of employee performance?

High-performing organizations use their performance management systems to improve performance by helping individuals see the connection between their daily activities and organizational goals and encouraging individuals to focus on their roles and responsibilities to help achieve such goals—creating a "line of sight" between individual and ongoing performance and results. We have found that a key practice for effective performance management is to align individual performance expectations with organizational goals, such as those discussed in agency strategic and/or annual performance plans required under GPRA.[4] In turn, we have reported that it is critical that agencies follow GPRA requirements to produce high quality planning documents such that agency managers and employees can be held accountable for achieving the intended short and long-term goals.[5] Another key practice for effective performance management is to create pay, incentive, and reward systems that clearly link employee knowledge, skills, and performance to organizational results. At the same time, high-performing organizations recognize that adequate safeguards to help assure consistency and prevent abuse of employees are a precondition to such an approach.

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[3]GAO and the National Commission on the Public Service Implementation Initiative, *Highlights of a Forum: Human Capital: Principles, Criteria, and Processes for Governmentwide Federal Human Capital Reform*, GAO-05-69SP (Washington, D.C.: Dec. 1, 2004).
[4]GAO, *Results-Oriented Cultures: Creating a Clear Linkage between Individual Performance and Organizational Success*, GAO-03-488 (Washington, D.C.: Mar. 14, 2003).
[5]GAO, *Results-Oriented Government: GPRA Has Established a Solid Foundation for Achieving Greater Results*, GAO-04-38 (Washington, D.C.: Mar. 10, 2004).

According to DHS's final regulations, the DHS performance management system is to align individual performance expectations with the mission, strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance. This link between individual performance and organizational success can help DHS transform its culture to be more results-oriented, customer-focused, and collaborative in nature and show how team, unit, and individual performance can contribute to overall organizational results. However, we have found that such alignment is still very much a work in progress across the government. High-performing organizations continuously review and revise their performance management systems to support their strategic and performance goals, as well as their institutional core values and transformational objectives.

Questions from Senator Akaka

1. In your testimony, you noted that agencies implementing a pay-for-performance system use both merit increases in base pay and one-time performance cash bonuses. I am concerned that agencies may try to cut costs by only awarding one-time cash bonuses which may not count towards an employee's retirement. Do you have any suggestions as to how we can ensure that agencies give both merit increases and one-time bonuses so as to not harm employees financially over the long term?

We have observed that a competitive compensation system can help organizations attract and retain a quality workforce. Since the Subcommittee's hearing, GAO issued its report on 21st century challenges, which is intended to help Congress address a range of 21st century trends and challenges, including our current unsustainable fiscal path, by providing a series of illustrative questions that could help support a fundamental and broad-based reexamination initiative.[6] Among these challenges is that the government has not transformed, in many cases, how it motivates and compensates its employees to achieve maximum results within available resources and existing authorities. A key question is how the government can make an increasing percentage of federal compensation dependent on achieving individual and organizational results by, for example, providing more compensation as one-time bonuses rather than as permanent salary increases.

We reported that direct costs associated with salaries was one of the major cost drivers of implementing pay for performance systems, based on the data provided us by selected Office of Personnel Management's (OPM) demonstration projects.[7] We found that some of the demonstration projects intended to manage costs by providing a mix of one-time awards and permanent pay increases. Rewarding an employee's performance with an award instead of an equivalent increase to base pay can help contain salary costs in the long run because the agency only has to pay the amount of the award one time, rather than annually.

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[6]GAO, *21st Century Challenges: Reexamining the Base of the Federal Government*, GAO-05-325SP (Washington, D.C.: February 2005).
[7]GAO, *Human Capital: Implementing Pay for Performance at Selected Personnel Demonstration Projects*, GAO-04-83 (Washington, D.C.: Jan 23, 2004).

This practice is consistent with modern compensation systems which typically include a mix of base pay increases plus other compensation incentives, such as one-time performance awards or bonuses. In developing pay for performance systems, agencies must consider what percentage of performance-based pay should be awarded as base pay increases versus one-time cash increases while still maintaining fiscally sustainable compensation systems that reward performance. In addition to the costs associated with base pay increases, modern compensation systems typically consider an employee's salary in relation to a competitive range when determining the amount of performance pay that should be provided as a base pay adjustment versus a cash bonus amount. This base versus bonus concept differs from the largely longevity-driven base pay adjustments provided to employees under the General Schedule. This new direction concerns employees, especially those who are close to retirement, who see these regular base pay increases as the foundation of future retirement benefits.

To address employees' concerns and to recognize the increasing significance of one-time cash bonuses in GAO's own pay for performance system, we are exploring various dimensions of potential legislative changes to permit GAO employees to have one-time cash bonuses considered in the calculation of retirement and thrift savings benefits. Such a change might also be applicable to DHS and other agencies that are using one-time cash bonuses as part of their pay for performance systems to recognize employees' concerns about their retirement benefits.

The final DHS regulations provide for a Homeland Security Compensation Committee that is to provide oversight and transparency to the compensation process. The 14 member committee is to develop recommendations and options for the Secretary's consideration on compensation matters. A committee such as this one can provide one avenue where employee views and concerns—such as the impact of one-time awards and permanent pay increases on retirement—could be expressed and considered.

2. The four major unions representing employees at DHS have filed a lawsuit in opposition to the final regulations. One issue raised by the filing is the authority of DHS and OPM to change the procedures of the Merit Systems Protection Board (MSPB) and provide for judicial review of the mandatory removal cases. What is your view of the unions' claim that DHS and OPM have exceeded their authority in issuing the regulations in these two areas?

The changes in labor-management relations under the DHS regulations have not been without controversy. Four federal employee unions have filed suit alleging that DHS has exceeded its authority under the statute establishing the DHS system. That suit discusses bargaining and negotiability practices, adverse action procedures, and the roles of the Federal Labor Relations Authority and MSPB under the DHS regulations. Since the issues are currently pending in federal court, I do not believe it would be appropriate to comment further at this time. However, we believe it is important to have continued union and employee involvement in developing and implementing the details of DHS's new human capital system. This involvement needs to be meaningful, not just pro forma.

3. In your testimony you discussed the importance of employee perception that the Mandatory Removal Panel and the Homeland Security Labor Relations Board be viewed as independent. Please elaborate on the need for internal panels to be both fair and perceived as fair. Do you believe the DHS regulations meet this standard given that the Secretary of DHS does not have to select members for either panel that have been nominated by employee unions?

Employee perceptions concerning the independence of these types of panels can be critical to the resolution of personnel actions and issues raised about labor relations policies and disputes in the department. Several factors could influence such perceptions, including the panel's structure and composition, established policies and procedures, and actual operations as it carries out its duties as well as the panel members' qualifications and their selection and removal processes. For example, the DHS regulations establish some general qualifications for the panel members related to the issue of independence. Specifically, members of both panels must be "independent, distinguished citizens of the United States who are well known for their integrity and impartiality." Members of both panels must also have expertise in labor relations, law enforcement, or national security matters. The DHS Secretary retains the authority to appoint panel members and is not required to select members for either panel from among individuals nominated by employee unions. To enhance the independence and impartiality of the panels, DHS could also consider using a nomination panel that considers input from appropriate parties for the appointment process of the members and provide for a reasonable degree of balance among differing views and interests in the composition of the panels to ensure credibility. Whether the members of these DHS panels act independently and are perceived by employees as being independent will bear close watching.

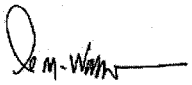
4. The DHS regulations permit supervisors and managers to communicate performance expectations to employees orally. Given the lack of documentation with oral communication, what recommendations do you have to ensure transparency in the performance management system and clarity in the oral communication of performance expectations?

Some sort of written documentation of performance expectations is appropriate; however, the means for achieving it can vary. For example, at GAO, we have developed, and periodically reassessed and revised, a set of core competencies that have been validated by the employees and are clearly linked to our organizational values and goals. These include competencies that address achieving results, communicating orally and in writing, leading others, and developing people, among others. For each competency, we also have a more detailed set of performance standards that describe the behaviors required to merit a rating of "meets" expectations or "role model" for each competency. Each competency and list of standards is documented in writing. Such documentation helps to ensure transparency, consistency, and clarity in communicating performance expectations to the analyst community. Supervisors are to refer to these competencies and standards when setting performance expectations for each of their staff members.

Employees are to be informed about the performance standards and if they do not understand these standards, are responsible for seeking clarification. In addition,

employees are to be provided specific information on the employee's role and the engagement's objective, scope and method, anticipated product, and timeframe, and are responsible for seeking clarification for any of these matters. The level of detail appropriate for an expectation setting discussion will depend on the employee's prior knowledge related to the work and their experience level, as well as the nature and timing of the engagement. Initial expectations are to be amplified and clarified as needed. Supplemental written expectations are encouraged, but not required and the date the expectations were set and communicated to the employee is recorded. Likewise, at least at the mid-point and end of a rating year, designated performance managers are to formally provide employees feedback on how well they are meeting expectations, standards, and competencies. In addition, supervisors are encouraged to provide such feedback throughout the year. This communication further provides for transparency and clarity.

For additional information on our work on strategic human capital management, please contact me on 512-5500 or Eileen Larence, Director, Strategic Issues at 512-6806 or larencee@gao.gov.



David M. Walker
Comptroller General
of the United States

(450395)

Questions For the Record
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
"Unlocking the Potential within Homeland Security: the New Human Resources System"
February 10, 2005
Chief Human Capital Officer Ronald James

Questions from Chairman George V. Voinovich

1. There is significant confusion over the scope of collective bargaining under the new regulations. Please elaborate on areas where employees will continue to have a role and where they will not regarding collective bargaining and provide specific examples.

Response: As is currently the case, management will not bargain over the substance of what are often referred to as reserved management rights. These rights include determining the mission, budget, organization, number of employees, internal security practices of the agency; the right to hire, assign, direct, make determinations with regard to contracting, and to determine the personnel by which agency operations may be conducted. Management will also **not bargain on any classification or pay determinations.**

Management also will not bargain over the numbers, types, grades or occupational clusters and bands of employees or positions assigned to any organizational subdivision, work project or tour of duty, or the technology, methods, and means of performing work, or whatever other actions are essential to carry out the Department's mission. Under chapter 71, title 5, United States Code, these rights are subject to bargaining, but only at the election of the agency. Under the new regulations, they would be non-negotiable.

Not only is the substance of the foregoing operational rights non-negotiable, so too are the procedures DHS will follow in exercising any of these rights. This is however balanced by the unions' right to negotiate over appropriate arrangements for bargaining unit employees adversely affected by the exercise of any of these rights when the duration of the adverse affect exceeds or is expected to exceed 60 days. Such negotiations will take place after a new procedure is effected to ensure the agency's ability to act swiftly.

Under these regulations, the Department will not negotiate over the introduction of new technology because they must be able to act swiftly, and when they see fit, to deploy the latest technology to be effective in the war on terror. However, if the new **technology has a significant and substantial** adverse effect on employees **and is expected to exceed 60 days,** appropriate arrangements to address those adverse effects are fully negotiable, after implementation, to include impasse procedures.

Other reserved management rights include the right to lay off and retain employees, or to suspend, remove, reduce in grade, band or pay, or take other disciplinary action against such employees, or with respect to filling positions, to make selections for appointment from properly ranked and certified candidates for promotion or from any other appropriate source.

As is the case under chapter 71, title 5, United States Code, the substance of these rights is non-negotiable. However, unlike the situation with the previously discussed operational rights, not only are appropriate arrangements for adversely affected employees negotiable, but the

Questions For the Record
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
"Unlocking the Potential within Homeland Security: the New Human Resources System"
February 10, 2005
Chief Human Capital Officer Ronald James

procedures management will follow are also negotiable as they are under chapter 71 and the controlling caselaw.

As noted earlier, management would not bargain over the right to determine the budget, but if a management budget determination resulted in the need to conduct a reduction in force, management is obligated to negotiate over the procedures and appropriate arrangements regarding the reduction in force, to the extent the obligation exists under chapter 71 and the controlling caselaw. Some other examples where management will continue to bargain over procedures and appropriate arrangement include such issues as how employees will be notified of a decision to implement a reduction in force and any outplacement assistance that would be provided, or how vacancy announcements are distributed and how long they remain open.

Unlike the requirements of chapter 71, title 5, United States Code, the DHS regulations permit management to act on management rights without delay. When bargaining is required, management may elect to bargain prior to acting, or may act and then bargain after the fact. In this way, we have preserved employee input through their exclusive representatives, while providing managers with the critical authority to respond appropriately and timely to unpredictable and ever changing homeland security threats.

In addition, the regulations provide that a change to conditions of employment will be subject to bargaining when that change has a significant and substantial impact on the bargaining unit, or on those employees in that part of the bargaining unit affected by the action or event, and expected to exceed 60 days. For example, managers may need to temporarily move a substantial number of employees to different locations within a port of entry. The manager has reason to suspect that a specific type of threat is possible at that part of the terminal and needs the best people in place to counter that threat. The manager has authority under the revised regulations to immediately move the most qualified employees to the new post for a short period of time without having to bargain over appropriate arrangements for such a temporary and fluid situation. However, if the manager determines that there is a need to make these changes for a longer period of time, that is exceeding sixty days in duration, management still would be able to immediately move the most qualified employees to the new post but would be obligated to bargain over appropriate arrangement proposals submitted by the union.

2. Training is a major component for the success of a performance based pay system. What role will OPM have in developing the curriculum and conducting the training? What system is in place to receive input from the individuals who need to be trained in developing the program? Besides training, what is the communication strategy to educate employees on the new system?

Response: DHS has the lead in preparing for the implementation of the new pay-for-performance system but will coordinate with OPM as needed or as required by the final joint regulations.

Questions For the Record
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
"Unlocking the Potential within Homeland Security: the New Human Resources System"
February 10, 2005
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There are a variety of methods and processes in place, or planned for the near future, to address input from individuals who need to be trained on MAX^{HR}. They include focus groups; an "Ask MAX" email box with a link located on the DHS intranet; a web-based manager survey; short web-based "pulse" surveys for employees; and advisory and liaison groups representing the organizational elements. We also conducted a series of interviews with representatives of each organizational element and are incorporating their feedback into the training development. During training, we will receive course evaluations and incorporate feedback to ensure an iterative process for continuous improvement.

In addition to training, we have an extensive communication strategy and implementation plan that includes a number of communication vehicles to educate employees on the new MAX^{HR} program. The communication strategy objectives include:

- Build awareness and understanding of MAX^{HR}
- Reinforce the commitment to employees
- Position DHS as a great place to work and an "employer of choice"
- Provide the tools for DHS leaders to become active advocates of MAX^{HR}
- Ensure all DHS employees understand what will change and how it will impact them
- Create mechanisms so DHS employees can provide feedback and get their questions answered
- Use communication to facilitate the desired outcomes of MAX^{HR}
- Reinforce the vision of "One DHS"
- Build on the core values: integrity, vigilance, respect -- show linkages between MAX^{HR} and the core values

To date we have created and distributed communications for all employees distributed around the signing of the final regulations; we scripted and produced a satellite video broadcast to all employees with an overview of MAX^{HR} ; we've re-worked and improved content on the MAX^{HR} website on DHSOnline, and continue to update information on the site and make it more interactive for employees; we produced a MAX^{HR} Briefing Toolkit to cascade information on MAX^{HR} throughout DHS; and we draft weekly articles focusing on aspects of MAX^{HR} for the *DHS Today* newsletter.

Other communications in the near future will include information regarding training opportunities and feedback from training sessions to advance the overall change management effort.

3. The regulations provide guidance for the establishment of the Homeland Security Labor Relations Board. The creation of this Board has been met with some strong opposition. How will the Homeland Security Labor Relations Board maintain its independence and impartiality?

Questions For the Record
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
"Unlocking the Potential within Homeland Security: the New Human Resources System"
February 10, 2005
Chief Human Capital Officer Ronald James

Response: The selection process for Homeland Security Labor Relations Board (HSLRB) members has been designed to ensure neutrality and impartiality. HSLRB members must be known for their integrity and impartiality as well as their expertise in labor relations, law enforcement or national or homeland security. The Department will also consult with labor unions about possible selections for Board members before their appointment. We expect that process to further reassure employees that HSLRB members are thoughtful individuals who will fairly balance Homeland Security with the labor relations guarantees that have been preserved for DHS employees. It must also be noted that Board members will not be part of the Department's supervisory management structure in any way. The only task of HSLRB members, like that of Federal Labor Relations Authority (FLRA) members, is to make certain that the Department continues to observe its labor relations responsibilities. Finally, any employee or labor organization who is unhappy with a decision by the HSLRB may appeal to *both* the FLRA and then to the courts.

4. Why will TSA not be placed in the new HR system? What is the justification for its exclusion? What consideration has been given to extending the right of TSA employees to join unions?

Response: All DHS civilian employees are eligible for coverage under one or more subparts of the regulations with the exception of those covered by provisions of law outside title 5, United States Code. Under 49 U.S.C. 114(n), TSA is governed by the FAA's personnel management system as established by 49 U.S.C. 40122, except to the extent that, *subject to the provisions of that section*, TSA modifies the FAA personnel management system. (Emphasis added). TSA's screeners operate under an even more expansive waiver of title 5, United States Code, pursuant to section 111(d) of the Aviation and Transportation Security Act (P.L. 107-71).

TSA's personnel management system as established by 49 U.S.C. 40122 is exempt from title 5 of the United States Code except for a listed series of provisions. The title 5 provisions that specifically remain applicable to TSA include chapter 71, which addresses labor relations for civilian employees, and sections 7701-7703, which relate to certain appeals to the Merit Systems Protection Board. TSA's fundamental authority does not permit the waivers of chapter 71 and sections 7701-7703 of title 5.

DHS received statutory permission to deviate from the provisions of title 5, subject to certain terms, in 5 U.S.C. 9701. That provision, 5 U.S.C. 9701, applied to provisions in title 5 and title 5 personnel systems. It does not provide authority for TSA to deviate from its title 49 authorities. TSA operates "notwithstanding" title 5, except for the specified exceptions, which do not include 5 U.S.C. 9701.

Questions For the Record
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
"Unlocking the Potential within Homeland Security: the New Human Resources System"
February 10, 2005
Chief Human Capital Officer Ronald James

In the Supplementary Information for the final DHS regulations, we addressed the status of TSA employees consistent with the explanation provided above. (See 70 FR 5287, February 1, 2005.) As we explained there, while TSA employees are excluded from coverage under the DHS HR system established under 5 U.S.C. 9701, DHS can direct that the TSA personnel systems align administratively with the DHS HR system except to the extent that aspects of that system conflict with the statutory authorities applicable to TSA employees. The DHS regulations also include a paragraph noting that agencies with independent authorities may be able to establish parallel systems that follow some or all of the provisions of the DHS HR system for employees who are not covered by that system. (See 5 CFR 9701.102(f).)

When Congress enacted the Aviation and Transportation Security Act, it provided the Under Secretary of Transportation for Security with exclusive personnel authority to set the terms and conditions of screener employment notwithstanding any other provision of law. This authority includes the exclusive discretion to determine matters that, under the provisions of Title 5, would be subject to collective bargaining. Congress granted this authority to provide maximum flexibility in establishing the terms and conditions of screener employment to best meet the agency's national security mission. Given the nation's current security environment, the Under Secretary has elected not to extend collective bargaining rights to TSA screeners.

5. Please provide examples of how job classification will work under the new HR system compared to the GS system. Please provide additional details of how locality pay will work in the new system.

Response: DHS anticipates a simplified classification system under the new HR system. The GS classification system typically uses nine factors to classify non-supervisory positions into fifteen grade levels. Under the new HR system, DHS will establish definitions for a small number of broad pay bands (typically 4-5), within occupational clusters. Grading criteria will be developed for these broad pay bands that will specify the type and range of difficulty and responsibility, qualifications, competencies, or other characteristics of the work encompassed by the band. This will allow us to describe a range of work (broad band) rather than the narrow distinctions that must be made under the fifteen grade GS system.

The DHS HR system will include "locality rate supplements" that are similar in concept to locality pay under the General Schedule. However, DHS will have greater flexibility in setting the supplements based on labor market conditions and other factors. While the GS locality pay percentage must be the same for all occupations and all grades or levels, DHS may provide for different locality rate supplement percentages for different occupational categories and/or different band levels. Thus, DHS will be able to take a more strategic approach in applying locality rate supplements

Questions For the Record
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
"Unlocking the Potential within Homeland Security: the New Human Resources System"
February 10, 2005
Chief Human Capital Officer Ronald James

Questions from Senator Daniel K. Akaka

1. The final regulations state that provisions of existing collective bargaining agreements that are inconsistent with the new regulations or other policies of the Department of Homeland Security (DHS) are unenforceable. In your opinion, to what extent will existing collective bargaining agreements be unenforceable in light of the final regulations?

Response: The new regulations provide that any provision of a collective bargaining agreement that is inconsistent with the new regulations and/or its implementing directives is unenforceable on the effective date of coverage of the applicable subpart of the new regulations or directive. To alleviate concerns raised by our unions, our new regulations allow for a 60-day period during which the parties to a collective bargaining agreement can bring conflicting and other impacted provisions into conformance. The regulations also provide that the Secretary may exercise his or her discretion to continue certain contract provisions as appropriate. If the parties fail to reach agreement, they may utilize the negotiation impasse provisions to seek the assistance of the Homeland Security Labor Relations Board (HSLRB) to resolve the matter. In addition, unions have the right to appeal to the HSLRB the Department's determination that a provision is unenforceable and to seek review of the HSLRB's decision by the Federal Labor Relations Authority (FLRA). **The FLRA's decision would be subject to judicial review.**

Because this process has not yet begun, the Department cannot identify definitively which collective bargaining agreements will be affected. However, the following provisions of the regulation may have an impact on one or more collective bargaining agreements:
certain unfair labor practices and the filing of arbitration exceptions involving the exercise of management rights and the duty to bargain will be reviewed, in the first instance, by the HSLRB, and the HSLRB's decision may be appealed to the FLRA; the Homeland Security Labor Relations Board rather than the Federal Mediation and Conciliation Service and the Federal Service Impasses Panel will resolve most negotiation disputes; changes in bargaining unit exclusions due to the expansion of the definition of a management official; certain formerly permissive subjects of bargaining will be nonnegotiable; formerly negotiable procedures over management rights subjects will be nonnegotiable; and management may engage in post-implementation bargaining when bargaining is required in order to respond appropriately and timely to homeland security threats; term negotiations will be limited to 90 days; mid-term bargaining will be limited to 30 days, subject to appeal; management may not bargain over any matters that are inconsistent with law or the new regulations, government-wide rules and regulations, Departmental implementing directives and other policies and regulations, or Executive orders (see 5 CFR 9701.518(d)(1)); regarding any discussion between a Department representative and a bargaining unit employee in connection with a formal complaint of discrimination, the union will be given an opportunity to be represented only if the complainant requests representation; places new restrictions on the disclosure of information to unions;

Questions For the Record
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
"Unlocking the Potential within Homeland Security: the New Human Resources System"
February 10, 2005
Chief Human Capital Officer Ronald James

creates a single process for proposing and taking performance- and conduct-based actions, with reduced minimum periods for advance written notice and reply, and with a single standard of proof (preponderance of the evidence); and arbitrators and MSPB may not reduce a penalty unless it is so disproportionate to the offense as to be wholly without justification.

2. The new regulations restrict the issues that are subject to bargaining at DHS. Please elaborate on the subject areas over which DHS and employee unions will bargain?

Response: DHS and employee unions will continue to bargain over appropriate arrangements for employees adversely affected by the exercise of a management right, if the effects of the change have a significant and substantial impact on the bargaining unit, or on employees in that part of the unit that is affected by the action, and if the change is expected to exceed 60 days. The parties will engage in post-implementation bargaining to ensure the agency's ability to act swiftly. For example, DHS will not negotiate over the introduction of new technology because of the need to act swiftly to be effective in the war on terror, but will negotiate appropriate arrangements if the new technology adversely affects employees after implementation. These negotiations include impasse procedures.

As is currently the case, DHS and employee unions will also continue to bargain over procedures and appropriate arrangements for employees adversely affected by the exercise of management rights regarding the right to lay off and retain employees; to suspend, remove, reduce in grade, band or pay or take other disciplinary action against such employees; or with respect to filling positions, to make selections for appointment from properly ranked and certified candidates for promotion or from any other appropriate source. For example, if a management budget decision were to result in the need to conduct a reduction-in-force (RIF), DHS is obligated to negotiate over the procedures and appropriate arrangements regarding the RIF. This might include such issues, for example, as how employees will be notified of a decision to implement a RIF, any outplacement assistance that would be provided, or how vacancy announcements are distributed and how long they remain open.

The new regulations, however, permit DHS to act on management rights without delay. When bargaining is required, DHS may elect to bargain prior to acting, or may act and then bargain after the fact. This preserves employee input through their exclusive representatives while providing managers with the critical authority to respond **in an** appropriate and timely manner to unpredictable and changing homeland security threats.

3. The President's FY 06 budget proposal requests $53 million for the implementation of the new human resources system, $10 million of which will be used for training employees about the new system.

Questions For the Record
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
"Unlocking the Potential within Homeland Security: the New Human Resources System"
February 10, 2005
Chief Human Capital Officer Ronald James

a. Approximately how many employees will receive training based on the budget request and which employees will receive the training?

Response: During FY 06, it is anticipated that all covered DHS employees (currently estimated at 90,000) will receive training with respect to at least one aspect of the new HR system. The type of training may vary from instructor-led classes to computer-based learning. In addition, some of the funds targeted for training in FY 06 will be used to develop the course content for training modules that will be delivered in subsequent years.

b. What type of training will employees receive and how will they receive it?

Response: The specific types of training and target audiences during FY 06 are identified below:

- Managers/supervisors will complete training via instructor-led courses and eLearning on how to develop a high performance culture and exercise leadership skills to coincide with the rollout of the new performance management program in late 2005. Much of the training will occur prior to the rollout, but some will occur during FY 06, including end-of-cycle refresher classes regarding process, roles, and responsibilities. In addition, those managers/supervisors who will be a part of Phase 1 of the rollout (HQ, IAIP, S&T, FLETC and FEMA) will be trained on the fundamentals of pay for performance.
- Individual employees will be trained on performance management skills, such as receiving constructive feedback and setting measurable objectives, as well as on the performance management process itself. Similar to the managers and supervisors, the employees will receive end-of-cycle refresher training and those who will be a part of Phase 1 of the rollout will be trained on the fundamentals of pay for performance.
- HR professionals will be receiving more intensive instructor-led training on the fundamentals of MAX^{HR}, including the tools, resources, processes, and roles and responsibilities for administering pay pools to ensure the HR staffs are prepared to support employees through the implementation.

c. Does this amount cover initial training or ongoing training?

Response: During FY 06, we anticipate the training will be both initial and/or refresher training for the implementation of the new HR system.

4. The Federal Managers Association testified that training dollars have historically been a low priority for agencies, and that when money is available, those funds are used to pay for other

agency activities. If Congress appropriates the requested amount for training, will DHS use this amount solely for training purposes?

Response: We strongly believe that for this program to be successful, adequate communications and training is essential. It is for this reason that we made the decision to centrally fund, design, oversee, monitor and evaluate the training supporting its implementation. It is our expectation that all funds appropriated for communications and training will be used for that purpose.

5. The final regulations state that the performance expectations must be communicated to the employee beforehand, but that they need not be in writing. I am concerned about the clarity of oral expectations and how this activity may eliminate transparency in the performance evaluation process. What steps will DHS take to ensure that oral expectations are clearly communicated to employees and will not open the door to discriminatory performance evaluations?

Response: Under current performance management processes, most employees receive written performance expectations only at the beginning of the performance cycle. In today's dynamic environment, it is not realistic to think that exact expectations for every position in the Department can be completely known and documented a year in advance. Changes in the MAX^{HR} program design are intended to capture the full spectrum in which evolving expectations are best communicated between supervisors and employees – including email, standard operating procedures, directives, etc. It is important that employees be held accountable and rewarded for total job performance, not just what was called for on an annual employee appraisal form.

Under the new performance management program, it is our expectation that managers will be spending more time, not less, communicating expectations and providing feedback to employees. Regardless of the communication method that makes the most sense for the situation, it will be in the manager's best interest to ensure that expectations are clearly communicated and documented in some way. The extensive training that is planned as a part of implementing MAX^{HR} will prepare managers to set measurable, results-oriented performance expectations and to document them appropriately. DHS employees also retain all of their current protections under the merit system principles and prohibited personnel practices. This training also will remind managers of the importance of documented performance standards to ensure against discrimination against employees on basis prohibited by federal law, regulation, and Executive Order. Any employee who believes that he or she has been subjected to prohibited personnel practices will be able to raise that issue through established procedures.

6. As you know, the four major unions representing employees at DHS have joined together in a lawsuit to stop the implementation of the final personnel regulations. The lawsuit and the anxiety over the implementation of the regulations in light of the unions' concerns raise questions about employee morale. I believe that employee morale is an essential part of ensuring that agencies can successfully carry out their missions. What will you do to improve employee

Questions For the Record
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
"Unlocking the Potential within Homeland Security: the New Human Resources System"
February 10, 2005
Chief Human Capital Officer Ronald James

morale and ensure a strong recruitment and retention program in light of the strong employee opposition to the new regulations?

Response: The Department of Homeland Security has developed a strategic approach to recruitment that supplements and coordinates Departmentwide recruiting initiatives. This approach was designed to provide DHS and its organizational elements the necessary flexibility to develop and change recruitment efforts based on a variety of factors, such as workforce trend analysis and the Department's transition into a new personnel system. This is critical to the Department's ability to determine recruitment priorities; to target individuals with the appropriate skills-mix for mission critical occupations; and to effectively market the Department as an employer of choice, one that will develop its employees and equitably reward exceptional employee performance.

We also believe that the flexibilities contained in the new system, MAX^{HR}, will improve morale as well as recruitment and retention capabilities, both by creating a demonstrable link between performance and compensation and by linking that compensation to local market forces. To reinforce this we have comprehensive communications and training plans established to educate employees on the components and benefits of MAX^{HR}. We also will be using climate surveys and involvement in focus groups and working groups to engage employees and monitor and track their concerns.

7. Comptroller General David Walker testified that agencies must ensure reasonable transparency and provide appropriate accountability mechanisms in connection with the results of the performance management process. To do this, Mr. Walker suggests that DHS could publish internally the overall results of performance management and individual pay decisions, while protecting individuals' confidentiality, and report periodically on internal assessments and employee survey results relating to the performance management system. What is your opinion of this recommendation?

Response: DHS believes accountability and transparency are critical to the success of the performance management program. In selecting an e-performance system, we are looking for a system that provides for accountability tracking as well as a "Reports Component" that will assist in identifying and addressing program administration. To ensure the pay setting process is transparent and credible, DHS plans to establish a Homeland Security Compensation Committee (HSCC). The HSCC will be an advisory body to the Secretary for making annual recommendations regarding strategic pay decisions such as budget allocation for market and locality adjustments and aggregate review of performance ratings and performance payouts. The HSCC will also recommend process improvements or policy changes to improve program effectiveness. The Secretary or designee will make final decisions. We appreciate the suggestion to publish internally the overall results of performance management decisions and will consider doing so as an initiative to ensure transparency in the process.

Questions For the Record
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
"Unlocking the Potential within Homeland Security: the New Human Resources System"
February 10, 2005
Chief Human Capital Officer Ronald James

8. The Department has stated its commitment to working with employees in the implementation and evaluation of the new personnel system and has acknowledged that one of the best ways to deal with the concerns associated with change is to involve employees and their representatives in the process. How will the Department communicate and work with employees and their representatives in implementing the new human resources system at DHS?

Response: There will be opportunities for employees and their representatives to serve on focus groups and working groups which have been and which will discuss design concepts related to performance management, occupational clusters, and pay banding. Both employees and their representatives also will have the opportunity to discuss their views and concerns during our drafting of Implementing Directives that will set forth details of the program design. Our new regulations provide a formal role for employees and their representatives in helping to gauge whether the program is having the intended effects in the short and long term. They will be asked to provide comments on the design as well as the results of the program evaluation. We are proud of the collaborative atmosphere in which these regulations have been designed and are committed to keeping that same spirit in the discussions going forward.

9. The final regulations replace the Performance Review Board in the proposed regulations which was to review performance ratings to promote consistency and conduct oversight of the pay-for-performance system, with a Compensation Committee, which will address strategic compensation matters such as the annual allocation of funds between market and performance pay adjustments. In light of this change, please explain how the Department will ensure that the pay-for-performance system will be administered in a fair, creditable, and equitable manner.

Response: From a departmental perspective, the Homeland Security Compensation Committee will be established to ensure the pay setting process is transparent and credible. The Committee will be a 14-member Committee, chaired by the Under Secretary of Management. Membership will include OPM, DHS and four seats for labor organizations granted national consultation rights (2 – NTEU; 2 – AFGE). The Committee will be an advisory body to the Secretary in making annual recommendations regarding strategic pay decisions such as budget allocation for market and locality adjustments and reviewing performance management results. The Committee will also recommend process improvements or policy changes to improve program effectiveness.

In addition to departmental oversight, the design and understanding of the new performance management program will be very important in ensuring the pay-for-performance system will be fair, creditable and equitable. We will have a major emphasis on employee and supervisory/managerial training: increased emphasis on manager-employee interaction; and on-going feedback. A critical part of this will also be the new MAX^{HR} process for cascading goals and objectives from the top of the organization throughout the organization. Under this process,

each manager's goals will be based on his or her manager's goals, thus creating a "line-of-sight" cascade that starts with the Secretary and his direct reports and is repeated through the chain, creating subsets of goals that all point to the Department's mission objectives. With this cascade comes responsibility and accountability for managers to not only set appropriate goals, but to actually nurture their employees to achieve success. Because employees' goals will be tied directly to their manager's goals, the manager's success is tied to how well employees perform.

And finally, managers will also be assessed on their management skills under MAX^{HR}, including their ability to justify and stand behind pay decisions. Employee climate surveys and use of 360°performance appraisal systems are being seriously considered as a means to ensure that employees have a voice in providing feedback on how well their leaders are leading. Managers will be held accountable for fairly administering the new human resource system as a part of their own pay-for-performance.

10. Mr. Kim Mann of the National Association of Agriculture Employees testified that agriculture specialists and technicians have been leaving Customs and Border Protection (CBP) in droves and that CBP management has not filled these positions and probably cannot fill them. How is DHS addressing the loss of agriculture specialists and technicians and ensuring that CBP's mission to protect American agriculture is not neglected?

Response: The Department is committed to conducting workforce planning for its mission critical occupations. Through systematic workforce planning, DHS will identify competencies and skill gaps and develop strategies for closing the gaps to ensure that DHS has the highly skilled workforce to meet it mission. Customs and Border Protection (CBP) has identified the agriculture specialist occupation as one of its mission critical occupations, and as part of the workforce planning process is analyzing attrition data and developing strategies for addressing any anomaly. CBP has concluded that the attrition rate for agricultural specialists has stabilized over the past year and is actively working to hire approximately 400 additional agriculture specialists by the end of FY2005.

11. According to the regulations, DHS can use a number of factors in determining pay increases including: recruitment and retention needs, budgets, performance, and local labor market conditions. Mr. John Gage, National President of the American Federation of Government Employees, testified that DHS will use these various factors to justify inconsistent pay decisions that could be based on retaliation. Please comment on how DHS will apply the aforementioned factors in setting and adjusting pay and how the various factors interrelate.

Response: DHS will have the following types of annual pay adjustment features:

- market-based pay which will be based on a market survey approach;
- Locality Rate Supplements which will be based on the cost of labor at different localities or geographic areas; and

Questions For the Record
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
"Unlocking the Potential within Homeland Security: the New Human Resources System"
February 10, 2005
Chief Human Capital Officer Ronald James

- performance based pay increases which will be based on individual performance.

The DHS compensation plan will also offer a special rate supplement which will provide a higher pay level for subcategories of employees within an occupational cluster if warranted by current or anticipated recruitment and/or retention needs. These supplements are similar to special salary rates used today.

As advised in an earlier question, the Homeland Security Compensation Committee will be the advisory body to the Secretary in making annual recommendations regarding strategic pay decisions such as budget allocation for market and locality adjustments and reviewing performance management results.

Questions for the Record
From Chairman George V. Voinovich
Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
"Unlocking the Potential within Homeland Security: the New Human Resources System"
February 10, 2005

Questions for Dr. Ronald Sanders, OPM

1. There is significant confusion over the scope of collective bargaining under the new regulations. Please elaborate on areas where employees will continue to have a role and where they will not regarding collective bargaining and provide specific examples.

Response: As is currently the case, management will not bargain over the substance of what are often referred to as "reserved management rights." These rights include determining the mission, budget, organization, number of employees, internal security practices of the agency; the right to hire, assign, direct, make determinations with regard to contracting, and to determine the personnel by which agency operations may be conducted.

Management also will not bargain over the numbers, types, grades or occupational clusters and bands of employees or positions assigned to any organizational subdivision, work project or tour of duty, or the technology, methods, and means of performing work, or whatever other actions are essential to carry out the Department's mission. Under chapter 71, title 5, United States Code, these rights are subject to bargaining, but only at the election of the agency. Under the new regulations, they would be non-negotiable.

In addition, the procedures the Department of Homeland Security (DHS) will follow in exercising any of these rights are non-negotiable. This is however balanced by the unions' right to negotiate over appropriate arrangements for bargaining unit employees adversely affected by the exercise of any of these rights when the duration of the adverse effect exceeds or is expected to exceed 60 days. Such negotiations will take place after a new procedure is implemented to ensure the agency's ability to act swiftly.

Under these regulations, the Department will not negotiate over the introduction of new technology because it must be able to act swiftly, and when it sees fit, to deploy the latest technology to be effective in the war on terror. However, if the new technology adversely affects employees, appropriate arrangements to address those adverse effects are fully negotiable, after implementation. If the parties failed to reach agreement during those negotiations, the parties could utilize impasse procedures to resolve their bargaining dispute.

Other reserved management rights include the right to lay off and retain employees, or to suspend, remove, reduce in grade, band or pay, or take other disciplinary action against such employees, or with respect to filling positions, to make selections for appointment from properly ranked and certified candidates for promotion or from any other appropriate source.

Again, as is the case under chapter 71, title 5, United States Code, the substance of these rights is non-negotiable. However, unlike the situation with the previously discussed operational rights, not only are appropriate arrangements for adversely affected employees negotiable, but the procedures management will follow are also fully negotiable--as they are under chapter 71.

As noted earlier, management would not bargain over the right to determine the budget, but if a management budget determination resulted in the need to conduct a reduction in force, management is obligated to negotiate over the procedures and appropriate arrangements regarding the reduction in force--the same obligation that exists under chapter 71. Management will also continue to bargain over procedures and appropriate arrangements on such issues as how employees will be notified of a decision to implement a reduction in force and any outplacement assistance that would be provided, or how vacancy announcements are distributed and how long they remain open.

Unlike the requirements of chapter 71, title 5, United States Code, the DHS regulations permit management to act on management rights without delay. When bargaining is required, management may elect to bargain prior to acting, or may act and then bargain after the fact. In this way, we have preserved employee input through their exclusive representatives, while providing managers with the critical authority to respond appropriately and timely to unpredictable and ever changing homeland security threats.

In addition, the regulations provide that a change to conditions of employment will be subject to bargaining when that change has a significant and substantial impact on the bargaining unit or on those employees in that part of the bargaining unit affected by the action or event, and is expected to exceed 60 days. For example, a manager may need to temporarily move a particular employee to a different location within a port of entry, an airport passenger terminal for instance. The manager has reason to suspect that a specific type of threat is possible at that part of the terminal and needs the best person in place to counter that threat. The manager has authority under the revised regulations to immediately move the most qualified employee to the new post for a short period of time without having to bargain over appropriate arrangements for such a temporary and fluid situation. However, if the manager determines that there is a need to make these changes for a longer period of time, exceeding sixty days in duration, management still would be able to immediately move the most qualified employee to the new post but would be obligated to bargain over appropriate arrangement proposals submitted by the union.

2. Training is a major component for the success of a performance based pay system. What role will the Office of Personnel Management (OPM) have in developing the curriculum and

conducting the training? What system is in place to receive input from the individuals who need to be trained in developing the program? Besides training, what is the communication strategy to educate employees on the new system?

Response: DHS has the lead in preparing for the implementation of the new pay-for-performance system but will coordinate with OPM as needed or as required by the final joint regulations.

There are a variety of methods and processes in place, or planned for the near future, to address input from individuals who need to be trained on MAX^{HR}. They include focus groups; an "Ask MAX" email box with a link located on the DHS intranet; a web-based manager survey; short web-based "pulse" surveys for employees; and advisory and liaison groups representing the organizational elements. We also conducted a series of interviews with representatives of each organizational element and are incorporating their feedback into the training development. During training, we will receive course evaluations and incorporate feedback to ensure an iterative process for continuous improvement.

In addition to training, we have an extensive communication strategy and implementation plan that includes a number of communication vehicles to educate employees on the new MAX^{HR} program. The communication strategy objectives include:

- Build awareness and understanding of MAX^{HR}
- Reinforce the commitment to employees
- Position DHS as a great place to work and an "employer of choice"
- Provide the tools for DHS leaders to become active advocates of MAX^{HR}
- Ensure all DHS employees understand what will change and how it will impact them
- Create mechanisms so DHS employees can provide feedback and get their questions answered
- Use communication to facilitate the desired outcomes of MAX^{HR}
- Reinforce the vision of "One DHS"
- Build on the core values: integrity, vigilance, respect -- show linkages between MAX^{HR} and the core values

To date we have created and distributed communications for all employees distributed around the signing of the final regulations; we scripted and produced a satellite video broadcast to all employees with an overview of MAX^{HR}; we have re-worked and improved content on the MAX^{HR} website on DHSOnline, and continue to update information on the site and make it more interactive for employees; we produced a MAX^{HR} Briefing Toolkit to cascade information on MAX^{HR} throughout DHS; and we draft weekly articles focusing on aspects of MAX^{HR} for the DHS Today newsletter.

Other communications in the near future will include information regarding training opportunities and feedback from training sessions to advance the overall change management effort.

3. The regulations provide guidance for the establishment of the Homeland Security Labor Relations Board (HSLRB). The creation of this Board has been met with some strong opposition. How will the Homeland Security Labor Relations Board maintain its independence and impartiality?

Response: The HSLRB members are to be appointed to fixed 3-year terms (however, the initial period of appointment will be for 2, 3, or 4 years), as are Federal Labor Relations Association (FLRA) members, and can be removed only for inefficiency, neglect of duty, or malfeasance – again the same standards which apply to FLRA members. Therefore, the Secretary is not authorized to remove a member simply because he or she disagrees with the member's decision on a particular case, just as an Authority member cannot be removed because there is disagreement with a particular decision.

4. Why will Transportation Security Administration (TSA) not be placed in the new HR system? What is the justification for its exclusion? What consideration has been given to extending the right of TSA employees to join unions?

Response: All DHS civilian employees are eligible for coverage under one or more subparts of the regulations with the exception of those covered by provisions of law outside title 5, United States Code. Under 49 U.S.C. §114(n), TSA is governed by the FAA's personnel management system as established by 49 U.S.C. §40122, except to the extent that, *subject to the provisions of that section*, TSA modifies the FAA personnel management system. (Emphasis added). TSA's screeners operate under an even more expansive waiver of title 5, United States Code, pursuant to section 111(d) of the Aviation and Transportation Security Act (P.L. 107-71).

TSA's personnel management system as established by 49 U.S.C. §40122 is exempt from title 5 of the United States Code except for a listed series of provisions. The title 5 provisions that specifically remain applicable to TSA include chapter 71, which addresses labor relations for civilian employees, and sections 7701-7703, which relate to certain appeals to the Merit Systems Protection Board. TSA's fundamental authority does not permit the waivers of chapter 71 and sections 7701-7703 of title 5.

DHS received statutory permission to deviate from the provisions of title 5, subject to certain terms, in 5 U.S.C. § 9701. That provision, 5 U.S.C. §9701, applied to provisions in title 5 and title 5 personnel systems. It does not provide authority for TSA to deviate from its title 49 authorities. TSA operates "notwithstanding" title 5, except for the specified exceptions, which do not include 5 U.S.C. § 9701.

In the Supplementary Information for the final DHS regulations, we addressed the status of TSA employees consistent with the explanation provided above. (See 70 FR 5287, February 1, 2005.) As we explained there, while TSA employees are excluded from coverage under the DHS HR system established under 5 U.S.C. 9701, DHS can direct that the TSA personnel systems align administratively with the DHS HR system except to the extent that aspects of that system conflict with the statutory authorities applicable to TSA employees. The DHS regulations also include a paragraph noting that agencies with independent authorities may be able to establish parallel systems that follow some or all of the provisions of the DHS HR system for employees who are not covered by that system. (See 5 CFR 9701.102(f).)

When Congress enacted the Aviation and Transportation Security Act, it provided the Under Secretary of Transportation for Security with exclusive personnel authority to set the terms and conditions of screener employment notwithstanding any other provision of law. This authority includes the exclusive discretion to determine matters that, under the provisions of title 5, would be subject to collective bargaining. Congress granted this authority to provide maximum flexibility in establishing the terms and conditions of screener employment to best meet the agency's national security mission. Given the nation's current security environment, the Under Secretary has elected not to extend collective bargaining rights to TSA screeners.

5. Please provide examples of how job classification will work under the new HR system compared to the GS system. Please provide additional details of how locality pay will work in the new system.

Response: DHS anticipates a simplified classification system under the new HR system. The GS classification system typically uses nine factors to classify non-supervisory positions into 15 grade levels. Under the new HR system, DHS will establish definitions for a small number of broad pay bands (typically four or five), within occupational clusters. Grading criteria will be developed for these broad pay bands that will specify the type and range of difficulty and responsibility, qualifications, competencies, or other characteristics of the work encompassed by the band. This will allow us to describe a range of work (broad band) rather than the narrow distinctions that must be made under the fifteen grade GS system.

The DHS HR system will include "locality rate supplements" that is similar in concept to locality pay under the General Schedule. However, DHS will have greater flexibility in setting the supplements based on labor market conditions and other factors. While the GS locality pay percentage must be the same for all occupations and all grades or levels, DHS may provide for different locality rate supplement percentages for different occupational categories and/or different band levels. Thus, DHS will be able to take a more strategic approach in applying locality rate supplements

Questions for the Record
Senator Daniel K. Akaka
Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
"Unlocking the Potential within Homeland Security: the New Human Resources System"
February 10, 2005

Questions for Dr. Ronald Sanders, Office of Personnel Management

1. The Homeland Security Act states that the new personnel system at the Department of Homeland Security (DHS) may not waive or modify any provision of section 2302 of title 5, United States Code, relating to prohibited personnel practices. One provision of section 2302 states that a person may not be retaliated against through a performance evaluation under chapter 43 of title 5. As you know, DHS employees will now receive performance evaluations under regulations issued pursuant to chapter 97, not chapter 43. To clear up any ambiguity, please state for the record whether performance evaluations for DHS employees under chapter 97 will be considered personnel actions for the purposes of enforcing the ban against prohibited personnel practices under section 2302?

Response: I am pleased to state for the record that OPM (or OPM and DHS) will treat performance evaluations for DHS employees under 5 U.S.C. chapter 97 as personnel actions for purposes of enforcing the ban against prohibited personnel practices under 5 U.S.C. 2302. Under the final regulations, DHS is responsible for evaluating its performance management system to ensure compliance with the provisions of 5 U.S.C. chapter 23 that set forth the merit system principles and prohibited personnel practices (5 CFR 9701.410(b)).

2. One issue of concern that employees had with the Guaranteed Fair Treatment Program at the Federal Aviation Administration (FAA), which replaced the Merit Systems Protection Board (MSPB) in adjudicating employee appeals at FAA, was whether MSPB precedent was applicable to the new appeals system. Will the Mandatory Removal Panel and the Homeland Security Labor Relations Board be bound by MSPB and Federal Labor Relations Authority (FLRA) precedent?

Response: Because the DHS human resources regulations create a new process for actions based on mandatory removal offenses (MROs), it is not readily apparent how existing MSPB precedent will apply to those actions. The regulations do not prohibit the Mandatory Removal Panel from applying MSPB precedent that it determines to be applicable. Also, the decisions of the MRO Panel are subject to review by the MSPB. In the course of its review of a particular case, the MSPB may apply its own precedent, consistent with the new DHS regulations, or potentially issue decisions that create a new body of applicable case law. The MRO Panel would be bound to follow such precedent.

Similarly, the Homeland Security Labor Relations Board (HSLRB) is part of a new DHS process for addressing certain labor relations matters that were formerly considered by the FLRA in the first instance. The regulations do not prohibit the HSLRB from applying FLRA precedent,

consistent with the new DHS regulations, to the extent it deems such precedent to be applicable. HSLRB decisions are further subject to FLRA and judicial review, and both the FLRA and the courts could determine that FLRA precedent would apply to a particular case. The HSLRB would be found to follow such precedent. The FLRA will establish a new body of case law to address matters unique to DHS by virtue of these regulations. Its decisions would be subject to judicial review.

3. The Supreme Court has firmly established that public employees have a right to procedural due process. A hearing and decision from a neutral and impartial adjudicator is a fundamental part of the process that is due to the employees. Please explain how the internal Mandatory Removal Panel and the Homeland Security Labor Relations Board are both neutral and impartial.

Response: Although the Mandatory Removal Panel is an internal body, it has been established in a manner to ensure its neutrality and impartiality. The final regulations require that (1) two of the three members of the Panel be selected by the Secretary after consideration of nominees submitted by labor organizations; and (2) all members be independent, distinguished citizens who are well known for their integrity, impartiality, and have expertise in labor or employee relations or law enforcement/homeland security. A somewhat similar panel was created by Congress to review appeals of adverse actions taken against employees of the Government Accountability Office (see 37 U.S.C. 751).

Furthermore, MRO panel members are required to conduct a hearing to resolve any factual disputes and other relevant matters; decisions of the Panel will be subject to MSPB record review, and judicial review of MSPB decisions under the same criteria applied today. The Secretary and the Director set forth these requirements in the regulation in response to labor organizations participating in the meet-and-confer process who raised concerns regarding the independence of the Panel and due process protections.

The Homeland Security Labor Relations Board is composed of at least three members appointed to three years terms, and the Secretary may appoint additional members provided such appointments ensure an odd number of members. To be considered for appointment to the HSLRB, individuals must be known for their integrity and impartiality as well as their expertise in labor relations, law enforcement or national or homeland security and at least one member must have expertise in labor relations.

The neutrality and independence of the Board is further enhanced by the requirement that members can only be removed for inefficiency, neglect of duty, or malfeasance – the same standards which apply to FLRA members. Thus, the Secretary cannot remove a member simply because he or she disagrees with a decision on a particular case,

To develop a pool of impartial candidates, labor organizations that represent employees in the department may submit a list of nominees to the Secretary for consideration. The Secretary will make appointments to non-Chair members after considering any nominees submitted by the unions and may also provide for additional consultation in order to obtain further information about a recommended nominee.

Impartiality is further enhanced by the procedures regarding case processing. Cases involving a matter of first impression or major policies may be elevated to the full board for decision. In cases where the full Board decides an issue, the decision will be based on a majority vote by the members. Decisions by individual members are subject to appeal to the full Board. The full board is held accountable as its decisions, or its failure to render a timely decision, are appealable to FLRA. And finally, continuing with past practice and consistent with 5 U.S.C. 7123, these decisions remain subject to judicial review.

4. The regulations provide for the creation of Mandatory Removal Offenses, which appears similar to the so-called Ten Deadly Sins established at the Internal Revenue Service (IRS) in the late 1990s. After the Ten Deadly Sins were enacted, the Treasury Department came to Congress asking that the law be restructured to allow more flexibility to make punishment tailored to the specific offense. The IRS said the stringent rules contributed to low employee morale at the agency, and some claimed the fear of job loss had a negative impact on employee performance.

a. What are some best practices that can be taken from the IRS experience and used at DHS?

Response: Some of the lessons from the IRS experience are that any offenses carrying a mandatory penalty of removal must be carefully and narrowly defined, that the agency must retain some discretion to impose lesser sanctions, and that standards should be implemented describing how that discretion will be exercised. Furthermore, the DHS regulations preserve the Secretary's flexibility to make changes over time and provide employees advance notice of the changes.

b. What steps will you take to ensure that the Mandatory Removal Offenses do not negatively impact employee morale or performance?

Response: We do not anticipate that MROs will have a negative impact on either employee morale or performance. With carefully drafted and narrowly defined offenses, all employees will understand that certain offenses cannot and will not be tolerated. Employees will be provided sufficient notice of what an MRO is well in advance of being held accountable for committing such an offense.

5. The regulations state that the MSPB and the FLRA may review decisions of the internal panels at DHS and overturn such decisions if they are arbitrary, capricious, an abuse of discretion, or not in accordance with law. The regulations further state that if the MSPB or FLRA do not issue a final decision on cases appealed from the internal appeals and labor management panels within 45 days, MSPB and the FLRA will be considered to have denied the request for review, and this will constitute a final decision of those agencies subject to judicial review.

a. Can you provide other examples where an executive branch agency has issued regulations mandating to an independent quasi-judicial body what its final decision will be?

Response: There is no example of an executive branch agency issuing such regulations, and these regulations also do not mandate what MSPB's or FLRA's final decisions will be. Instead, the regulations merely provide timeframes during which MSPB and the FLRA must act to ensure that employees receive timely decisions on their appeals.

b. Please clarify whether the intent of the regulations is for the Federal Circuit Court of Appeals to review the denial of the request for review or review the merits of the case.

Response: The Federal Circuit Court of Appeals reviews decisions of the MSPB, and the Circuit Courts of Appeals review decisions of the FLRA. The DHS regulations did not alter either of the statutes governing judicial review of MSPB and FLRA decisions. See 5 U.S.C. §§ 7123, 7703.

6. Employees have expressed concern over the regulations which permit MSPB to mitigate penalties only when the agency imposed penalties are deemed wholly without justification. This is a very high standard that is extremely difficult to meet.

a. Please explain why the decision was made to use this burden and provide the definition of the term "wholly without justification."

Response: The Department bears full accountability for accomplishing the homeland security mission, and the Department must be given deference in determining the appropriate penalty for employees who engage in misconduct or poor performance which negatively affect its mission. There is a presumption that DHS officials will exercise that judgment in good faith. If they do not, however, providing MSPB (and private arbitrators) with limited authority to mitigate is a significant check on the Department's imposition of penalties.

The phrase, "wholly without justification" means that there is no justification for the Department's penalty. Only when MSPB (or a private arbitrator) finds that there is no justification for the penalty, may it mitigate the Department's penalty.

b. What other burdens of proof were considered that would have required the MSPB to take the mission of DHS into consideration when determining whether to mitigate penalties?

Response: We considered the current mitigation authority under the standard set forth in *Douglas v. Veterans Administration* (5 M.S.P.R. 280 (1981)). Under that decision, MSPB stated that it would evaluate agency penalties to determine not only whether they were too harsh or otherwise arbitrary but also whether they were unreasonable under all the circumstances. In practice, the MSPB has exercised considerable latitude in modifying agency penalties and, over the last 20 years, that latitude has been exercised somewhat inconsistently. The "wholly without

justification" standard, on the other hand, explicitly limits the circumstances in which the MSPB may modify penalty.

> c. You testified that MSPB's current standard does not allow the Department to give deference to an agency's mission in determining whether to mitigate penalties. Please explain this statement as MSPB rules in favor of the agency over 80 percent of the time.

Response: I testified that the current MSPB standard allows it and private arbitrators to mitigate the agency's penalty without giving special deference to an agency's mission. While mission currently is one of many factors MSPB and private arbitrators may consider when reviewing the agency's penalty, it can be outweighed by other factors of less significance. We believe MSPB and private arbitrators frequently have failed to give appropriate weight to the agency's mission which is of particular concern given the unique and critical nature of the DHS mission. The new standard is intended to ensure that MSPB and private arbitrators give proper deference to the agency's mission.

7. One criticism that I had with the Homeland Security Act and the proposed regulations for the DHS human resources system was the absence of judicial review for employee appeals. I am pleased to see that the final regulations provide judicial review for employee appeals and labor management disputes. However, critics of the regulations claim that DHS and OPM exceeded their authority in providing judicial review. Can you please state for the record the authority DHS and OPM relied upon to grant judicial review to these proceedings?

Response: In all cases, whether an appeal of an MRO or an appeal of a non-MRO, the full Board has authority to issue a final order or decision. That decision is subject to judicial review under existing statutory authority at 5 U.S.C. 7703. That provision of title 5 has not been waived.

8. The Federal Managers Association testified that neither the Office of Management and Budget nor OPM collects information on agency training and budget activities and claimed that this lack of reporting has further diminished the minimal attention to training. Why does OPM not collect information on training? How is OPM ensuring that federal employees are receiving the necessary training to do their jobs?

Response: In December 1995, the Reports Elimination and Sunset Act abolished the agency reporting requirement on training data, 5 U.S.C. 4113. However, OPM maintained sufficient authority in 5 U.S.C. 4115 and 4118 to require reports, as needed, from the agencies. By regulation, agencies must still maintain records of agency training plans and activities.

Currently, through the President's Management Agenda Scorecard process, OPM reviews agencies' implementation of workforce development plans and training programs to close skill gaps to ensure that employees are receiving necessary training.

Responses to Questions from Senator Akaka
Before the United States Senate
Homeland Security and Governmental Affairs Committee
Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia
Responses Submitted Monday June 6, 2005

Unlocking the Potential within Homeland Security: the New Human Resources System

Department of Homeland Security Final Personnel Regulations: Managers' Cautious Optimism

Question Responses of
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Questions from Senator Akaka

1. After Congress granted the Federal Aviation Administration (FAA) personnel flexibility in 1995, the Federal Managers Association was one of the lead groups asking Congress to restore appeal rights to the Merit Systems Protection Board and replace the internal appeals panel, the Guaranteed Fair Treatment Program. Please compare the Guaranteed Fair Treatment Program at the FAA to the Mandatory Removal Panel at the Department of Homeland Security. In what ways is the MRP an improvement over the Guaranteed Fair Treatment Program? In what ways is the MRP worse?

A: Maintaining an independent third party appellate body is essential for creating a fair and accountable appeals system. Employees and managers alike must feel confident that there is integrity to the process for determining any adverse action. The Federal Aviation Administration saw a considerable set back in the accountability and integrity of their appeals processes with the creation of an internal Guaranteed Fair Treatment Program. Our members were prescient enough to see this coming down the pike and warned against it, but ultimately it took implementation to realize the error of those ways.

The Mandatory Removal Panel and the Guaranteed Fair Treatment Program were both attempts at finding easy solutions to removing poor performers. While we believe that this is such a critical piece to creating any efficient and effective government operation, we also believe that without proper appeals processes in place the culture of fear created in an agency by the threat of a mandatory removal offense creates a worse situation. As we saw at the Internal Revenue Service, employees became reluctant to do their jobs well for fear that they would violate a mandatory removal offense and be fired with little to no appeals rights. In order to create a personnel system that empowers employees and maintains a focus on a results oriented culture, the MRP should not be implemented without serious consideration for the offenses it seeks to list as mandatory removal. We have seen from the end of the Guaranteed Fair Treatment Program and the end of the Mandatory Removal Offenses at the Internal Revenue Service that it is a dangerous path to go down that could very well lead us back to where we started.

2. The final regulations state that an employee's performance expectations must be communicated to the employee, but that they need not be in writing. What impact would this have on a manager's ability to effectively manage and measure the performance of their employees?

A: The rating an employee or manager receives should never be a surprise. If the employee is surprised, the manager/supervisor and the employee both failed to communicate throughout the rating period. The idea that managers will be able to successfully implement an effective pay for performance rewards system without communicating in writing the employee's expectations is not realistic.

For this system to work there will need to be discussions between management and employees to establish a measurable, systematic performance blueprint or plan before its roll out. Presently at the shipyard we have an informal system entitled Performance Accountability Feedback (PAF). This is a quarterly review with the employee on specific areas of performance. This effort must be in writing and establish clear guidelines for performance and measurement of those areas. A second concern I have with the measures not being in writing is that any air of trust will take form in a written context. To execute this system in any other manner will lend itself to creating an air of mistrust.

I believe, however, that it is imperative that the performance requirements be written as well as orally communicated to the employee. One of my biggest problems as a manager was trying to discipline an employee without everything being in writing. That is imperative-if you depend on verbal communication you can be open to many problems. For example, if I record my conversation with you when doing your evaluation I had better record everyone's. Then it becomes my word against the word of the employee.

Performance standards will never be all inclusive and can be changed or modified during the rating period. A written record of what was expected as well as how the standards were performed will serve the manager/supervisor and the employee well when the actual yearly rating is determined. Communication of what is expected during the development of the performance standards as well as throughout the rating period is essential to successful performance. If the performance standards are not written than the actual intent of the standards are left to he said / she said when the actual rating comes due. The development and communication of standards is an area that training of supervisors and employees is critical. When developing performance standards the employee must be able to not only meet the standards but also be able to exceed them. Subjectivity must be keep to a minimum. If performance standards are not written, it is my opinion, that this will be another area that will take all of the managers/supervisors time defending their actions in some form of grievance or other legal action.

March 15, 2005

The Honorable Daniel Akaka
Subcommittee on Oversight of Government Management,
The Federal Workforce, and the District of Columbia
442 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Akaka:

In response to your questions regarding the February 10, 2005 hearing, "Unlocking the Potential within Homeland Security: the New Human Resources System," the National Treasury Employees Union (NTEU) and the National Federation of Federal Employees (NFFE) submit the following joint answers (attached).

It was extremely disappointing that the Department of Homeland Security (DHS) chose to ignore a number of balanced recommendations that were offered by NTEU, NFFE, and other employee representatives with regard to the pay, labor relations, and due process systems during the "meet and confer" period of designing the new DHS personnel system. While the final personnel regulations were altered to include some of the modifications proposed by employee representatives during the meet and confer process, a number of the recommendations were not included in the final personnel regulations.

On behalf of the over 15,000 DHS employees that NTEU and NFFE represent, we look forward to continuing to work with Congress to alter the final DHS personnel regulations to provide Customs and Border Protection employees with a personnel system that is fair and balanced and that is good for the mission of DHS as well as its employees.

Sincerely,

Colleen M. Kelley
National President
NTEU

Richard N. Brown
President
NFFE FD1-IAMAW
AFL-CIO

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Answers for the Record In Response to Questions Asked by Senator Daniel K. Akaka, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Re: "Unlocking the Potential within Homeland Security: the New Human Resources System"

Submitted Jointly by Colleen M. Kelley, National Treasury Employees Union and Richard Brown, National Federation of Federal Employees

March 15, 2005

Question 1: How would you describe the collaboration process during the meet and confer period? Do you feel that your views were taken seriously?

Answer: Our experience during the meet and confer period can best be described as "mixed." The meet and confer process produced several important modifications to DHS/OPM's proposed regulations in response to concerns expressed by the unions. Examples of such modifications are:

A. DHS/OPM abandoned the proposed reduction of rights available to employees during investigatory interviews (commonly known as "Weingarten" rights).

B. DHS/OPM abandoned the proposed elimination of a union's right to arbitrate an adverse action otherwise appealable to the Merit Systems Protection Board (MSPB).

C. DHS/OPM abandoned the proposed adoption of the more lenient "substantial evidence" burden of proof for all adverse actions.

D. The proposed regulations allowed management to simply implement proposed changes after engaging in mid-term bargaining over negotiable topics for 30 days. The final version allows mid-term impasses to be referred to the Homeland Security Labor Relations Board (HSLRB) for resolution.

E. The final regulations create a Compensation Committee to make recommendations to the Secretary on matters related to the new pay system and to perform an oversight function for he new performance

management system. Four of the fourteen members of the Committee will be representatives of the largest DHS labor organizations. The proposed regulations did not provide for any involvement by the unions in such matters.

Without the input from unions during the meet and confer process, it is very unlikely that any of these enhancements would have been made to the proposed system. It seems, then, that the unions' views on these matters were taken seriously.

On the other hand, DHS/OPM seemed determined to make significant changes to the current system without adequate justification and despite compelling arguments in opposition from the unions. For example:

A. DHS/OPM drastically restricted the scope of collective bargaining without demonstrating that the current collective bargaining system was incompatible with the protection of homeland security. Among the most troubling aspects of this approach was DHS/OPM's steadfast refusal to allow procedure and appropriate arrangement negotiations over currently negotiable operational matters such as shift selection, days off, and overtime assignment; and 2) DHS/OPM's unwavering insistence on the right to preclude bargaining and void negotiated agreements by issuing non-negotiable DHS regulations.

B. DHS/OPM gave the HSLRB jurisdiction over many labor-management disputes, but refused to acknowledge the obvious unfairness of a system that allows labor-management-disputes, including negotiations impasses, to be resolved by a board appointed by management.

C. DHS/OPM insisted on the right to implement a mandatory removal offense (MRO) process, but refused to acknowledge the obvious unfairness of a system that permits direct appeals of removals involving the most egregious types of misconduct to be heard only by a panel appointed by management.

D. DHS/OPM insisted, without justification, on curtailing the current authority of arbitrators and the MSPB to mitigate unreasonable penalties, which has resulted in a system that permits the imposition of

unreasonably harsh discipline, unless the penalty is "wholly without justification."

E. DHS/OPM proposed only general guidelines for a new pay, performance, and classification system and refused to allow the unions to collaborate concerning specific elements of these systems during the meet and confer process. DHS/OPM also ignored the overwhelming opposition of DHS employees to the abandonment of the General Schedule system. Instead, DHS/OPM opted to retain a contractor, at taxpayer expense of up to $175,000,000, to formulate the details of a new pay and classification system and to only provide the unions with briefings and the chance to react to management-prepared draft directives.

DHS/OPM's adherence to unreasonable positions concerning these issues strongly indicates that the outcome of the meet and confer process was, as it pertained to these key matters, pre-determined. Agency representatives also refused to extend the meet and confer period despite the unions' willingness to continue efforts to reach agreement. The objectives of the Homeland Security Act, which required the parties to attempt the reach agreement during the meet and confer process, were thwarted by DHS/OPM's intransigence.

Question 2: What were some of the proposals you made to the Department of Homeland Security and the Office of Personnel Management regarding judicial review, employee appeals, and labor management relations that were not included in the final regulations?

Answer: Judicial Review: In comments submitted in response to the proposed regulations, the three largest DHS unions (NTEU, AFGE, and NAAE) jointly, and NFFE, objected to the establishment of the HSLRB and the MRO panel. One of the bases for those objections was DHS/OPM's inability to specify the type of judicial review that would follow an action taken by these management-appointed boards. For this reason, and others, the three unions urged DHS/OPM to jettison the HSLRB and MRO concepts.

Because the unions opposed the establishment of the HSLRB and the MRO panel and believe that DHS has no legal authority to confer jurisdiction on any federal court, the unions made no substantive proposals concerning judicial

review during the meet and confer process. The unions suggested that, if complete agreement could be reached on the new human resource management system, they would consider joining DHS/OPM in approaching Congress with proposed legislation to confer appropriate federal court jurisdiction over decisions of the proposed DHS boards. Because no such agreement was reached, no legislative proposals were considered.

In the final regulations, DHS/OPM purport to provide eventual judicial review of decisions of the HSLRB by creating an intermediate appellate role for the FLRA. The FLRA's disposition of an appeal from the HSLRB would be subject to judicial review as a final order of the FLRA. A similar scheme was devised for decisions of the MRO panel, with an appellate role being created for the MSPB. In their complaint, filed on January 27, 2005 in the U.S. District Court for the District of Columbia, the unions challenge DHS/OPM's legal authority to confer this type of appellate jurisdiction on the FLRA and MPSB.

Employee Appeals: As noted above, in their response to the proposed regulations, the three largest DHS unions jointly, and NFFE, objected to the MRO concept in its entirety and urged that it be deleted from the new human resource management system. The unions objected to the unfettered discretion sought by the Secretary to establish a list of MROs, which could include virtually any offense, including offenses for which removal would be, by any objective standard, too harsh a penalty. The unions objected to the unfairness of the MRO appeals process, which permits direct employee appeals only to a panel selected by management and precludes that panel from mitigating a removal penalty. Union recommendations for procedures to select a truly impartial and independent panel were rejected. During the meet and confer process, the unions also informed DHS/OPM of H.R. 1528, legislation introduced to repeal statutory mandatory termination offenses currently applicable to Internal Revenue Service employees.[1] In their final regulations, DHS/OPM rejected the unions' concerns and retained the MRO concept.

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[1] H.R. 1528 passed the House of Representatives with bipartisan Congressional and administration support in the 108th Congress, but was not enacted into law. The President's FY 2006 budget again includes a proposal to repeal the IRS's mandatory removal provisions.

During the meet and confer process, the unions informed DHS/OPM that they lacked legal authority to modify MSPB's appellate procedures. Despite the unions' admonition, in the final regulations, DHS/OPM purport to impose numerous modifications to existing MSPB procedures aimed at making it more difficult for employees to have a full and fair hearing of their appeals. In their January 27 complaint, the unions challenge DHS/OPM's legal right to force such changes.

In their joint response to the proposed regulations and throughout the meet and confer process, the unions urged DHS/OPM to retain the current authority of the MSPB and arbitrators to mitigate unreasonable penalties. The unions noted the obvious injustice of a system that would insulate excessively harsh penalties from mitigation and argued that the proposal clashed with notions of due process and the fair treatment to which DHS employees are entitled pursuant to the Homeland Security Act. DHS/OPM rejected the unions' proposal to retain the current standard, and, in the final regulations, made only a minor, unsatisfactory, modification to the proposal. The final regulations allow mitigation only when the penalty is "wholly without justification." In their January 27 complaint, the unions challenge this new mitigation standard as being contrary to Homeland Security Act.

Labor Management Relations: From the outset of the meet and confer process, the unions objected to the drastic reduction of collective bargaining rights proposed by DHS/OPM. Union requests that DHS/OPM retreat from its proposal to void collective bargaining agreements and bargaining obligations through the issuance of non-negotiable agency regulations were rejected. Also rejected were union proposals that would have struck a fairer balance between management's needs to act swiftly and the employees' right to bargain collectively. The unions offered several proposals that would have allowed management to implement changes immediately when necessary to protect homeland security, yet preserve current bargaining rights over matters not requiring immediate changes. Union proposals to allow a full range of post-implementation bargaining in instances where immediate implementation is necessary were also rejected. Instead, DHS/OPM issued final regulations depriving unions of meaningful collective bargaining rights whenever the

agency chooses to exercise its core "operational" management rights.

As noted above, the unions urged DHS/OPM to retain the FLRA, including the Federal Service Impasses Panel (FSIP), as the independent adjudicator of labor-management disputes. The unions' recommendation was not included in the final regulations. Instead, DHS/OPM have decided to create the HSLRB to supplant many of the FLRA's functions. Moreover, DHS/OPM refused to adopt union recommendations for procedures aimed at ensuring the appointment of a truly impartial and independent HSLRB. In their January 27 complaint, the unions challenge the legality of the one-sided labor relations system described in the final regulations.

During the meet and confer process, the unions proposed that DHS/OPM incorporate a regulation requiring negotiations over the establishment of mission-related collaborative committees at all levels of the department. These committees would permit employees, through their unions, to contribute to the successful accomplishment of the agency's mission. DHS/OPM rejected this chance to take advantage of the dedication and expertise of front-line employees.

Questions for the Record
Senator Daniel K. Akaka
Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
"Unlocking the Potential within Homeland Security: the New Human Resources System"
February 10, 2005

Question for John Gage, American Federation of Government Employees

1. In response to my question on the lawsuit brought by the unions in opposition to the Department of Homeland Security (DHS) personnel regulations and problems with the new human resources system, you said that a pay-for-performance system for law enforcement officers will not work. I am also concerned with the issue and fear that a pay-for-performance system for law enforcement officers could lead to increased civil rights abuses. At the joint House/Senate hearing on the proposed regulations last February, I asked Comptroller General David Walker the best way to measure the performance of law enforcement officers. He replied:

> While we have reported on local police forces' experiences in recruiting and retaining officers after the terrorist attacks of September 11, 2001, we have not reviewed how to measure the performance of law enforcement officers. However, high-performing organizations use validated core competencies to examine individual contributions to organizational results. Competencies define the skills and supporting behaviors that individuals are expected to exhibit to carry out their work effectively and can provide a fuller picture of an individual's performance and contribution to organizational goals. With regard to law enforcement, a focus on competencies would entail identifying and validating those competencies that are critical to successful law enforcement efforts. This approach should involve a range of factors, including achieving results and protecting individual constitutional rights and civil liberties. A related pay for performance approach would center on creating incentives for—and rewarding—demonstrated proficiencies in the validated core competencies.

What is your opinion of the Comptroller General's response? What are some ways to measure the performance of law enforcement officers while at the same time protecting civil rights?

A. Pay-for-performance in general raises a number of serious concerns, and attempting to impose such a system on law enforcement employees who rely upon close teamwork to accomplish their mission compounds these concerns. In order to achieve the goal of motivating employees to perform at their maximum level, any pay system must contain the following minimum elements:

- The system must be fair. It must compensate employees at least as much as comparable occupations in the local commuting area. (Of course, in order to attract the best and the brightest employees, it must do significantly more, including compensating employees better than those comparable occupations, providing job satisfaction and a good working environment, and ensuring opportunities for training and advancement.) Employees with similar experience who perform similar duties at a similar level of competence must be compensated similarly. The system must be objective and devoid of favoritism.

- The system must be transparent and readily understandable. Employees must be able to easily understand what is expected of them and exactly how they will be rewarded for meeting and exceeding those expectations. This transparency must be long-range as well as short-range. In other words, employees must be able to see how their pay will increase over the duration of their career. Allowing agency budget shortfalls to disrupt this progression will destroy the system's credibility. Performance expectations must be realistic and aligned with the agency's mission. They must also be clearly communicated to all employees.

- The system must reward teamwork and cooperation. The accomplishment of the agency mission rather than the attainment of individual goals must be emphasized and rewarded.

Even a cursory review of the proposed system reveals that it is woefully deficient in all of these areas. No amount of supervisory training will overcome these deficiencies, as the flaws are rooted in the system.

While the measurement of validated core competencies, as suggested by Comptroller General David Walker, is not as arbitrary as the measurement of results such as apprehensions and seizures, it still suffers from a number of flaws. To cite but a few: Since not all skills are used in all operations, who decides which skills are more valuable than others? Are skills measured subjectively by the employees' first and second-line supervisors or more objectively by an independent group of experts? Will everyone be offered equal opportunities to acquire these skills, or will the current system of uneven distribution of training opportunities be perpetuated?

With respect to your concern that the implementation of a pay-for-performance system could lead to increased civil rights abuses, there is a far greater danger that the radical reduction in employee rights and protections in the new disciplinary system will yield this undesirable result. Just as children who are raised in an atmosphere of violence are far more likely to engage in acts of violence as adults, employees who work in a culture where fairness and justice are foreign concepts and their own rights are routinely ignored cannot reasonably be expected to treat the public any differently.

2. How would you describe the collaboration process during the meet and confer period? Do you feel your views were taken seriously?

A. It seemed clear from the start that the meet and confer process was not a serious open-minded effort undertaken in good faith. It is AFGE's belief that the DHS proposed regulations contained a series of "throwaway" radical concepts that were included solely with the intent that they would later be taken out of the regulations. (ex: elimination of arbitration). This was done so that DHS could falsely proclaim later that the meet and confer process had in fact been meaningful, all the time holding to their preconceived real agenda of stripping the scope of bargaining. They accomplished their real goal by eliminating the union's longstanding rights to bargain over such routine day-to-day matters as: the fair rotation of shifts among qualified employees (as under current law, they would retain the right to set qualifications), the equitable rotation of overtime, health, safety, and training concerns arising from new technology or dangerous assignments, reducing the impact of assignments in cases of hardship, etc.

We do not feel our views were taken seriously.

3. What were some of the proposals you made to DHS and the Office of Personnel Management regarding judicial review, employee appeals, and labor management relations that were not included in the final regulations?

A. We acknowledged that DHS had a legitimate interest in acting expeditiously where they believed in good faith, that Homeland Security could be affected and negotiating with their unions before acting was not consistent with their ability to safeguard homeland security. We offered a proposal that we believe would have fully met this legitimate interest. Rather than negotiating over our proposal, DHS chose simply to eliminate the right to bargain.

Specifically, the unions proposed that DHS would have the right to act unilaterally in situations where it acted in good faith, based on the circumstances it believed to be true at the time (even if they were later proven to be wrong) if: 1) It believed that existing negotiated procedures could not be followed; or 2) There were no existing negotiated procedures covering the situation and there was not sufficient time to negotiate procedures.

In such cases, DHS could act without bargaining or following bargaining agreements. However, we proposed a new concept: post – implementation bargaining where, as soon as practical, the parties would enter into expedited negotiations (2 day time limit) to accommodate hardships that had occurred or to make whole, any individuals that were adversely affected by the unilateral action.

Post-implementation bargaining would have allowed the union to ask for qualified volunteers in a situation where a single head of household was suddenly deployed from San Diego to Seattle for 45 days or a pregnant employee was reassigned to physically onerous or dangerous work. The post-implementation

right to solicit qualified volunteers in an orderly manner would have accommodated everyone's needs, but our concepts were ignored in favor of simply eliminating the right to bargain "operational or work assignment" issues.

In the area of employee appeals, DHS has invented a new standard which an employee must prove, and the MSPB must apply, when there is an issue that the Agency's penalty in a case is too severe. Currently, the MSPB can review the penalty under a "reasonableness" standard and if the penalty is patently unreasonable, it must impose the next "most serious" penalty that is reasonable, even if it would not be the MSPB's de novo choice of penalty. The penalty is reviewed under a doctrine established by the Federal Circuit Court of Appeals some twenty-five years ago in a case called Douglas v. MSPB. The Douglas factors include such concerns as: has the employee been previously disciplined, how long has the employee worked for the Agency, is the employee a good candidate for "rehabilitation", is the single instance of wrongdoing so egregious as to justify removal, is there even a nexus between the misconduct and the employee's job (for off-duty misconduct).

DHS has eliminated the so-called Douglas factors, and its Regulations provide that a penalty can only be reduced if it is "wholly unjustified." This means if the penalty is clearly unreasonable or 99% unjustified, it must be kept in place and not mitigated. We advised DHS that this was an illegal breach of due process that could and would lead to absurd results. We implored them to honor the longstanding Douglas factors precedent because they were fair and rational (and DoD wins about 90% of their MSPB cases). They refused. Under this new "wholly unjustified" standard, it can be argued that a 30 year employee with an unblemished record who comes in 10 minutes late one day can literally be fired. In reviewing the absurdity of the penalty in this instance, there is a serious question whether the MSPB can say the action was "wholly unjustified" since it is clear that the employee was in fact 10 minutes late.

Finally, in the area of judicial review, we proposed that DHS not waive or affect the judicial review provisions of Title V (Sec. 7703 and 7123). Instead, DHS waived these provisions and has set up a "Rube Goldberg" scheme where cases must "pass through" the FLRA and MSPB for a specified period of time under limited review standards before the "FLRA or MSPB" decision or (non-decision) can be judicially appealed. This appears to us to not only be illegal, but overly burdensome, inefficient, unnecessary and contrary to the intent of their statutory mandate to establish a flexible and contemporary system that does not affect due process.

RESPONSES OF THE NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES TO THE QUESTIONS POSED BY SENATOR AKAKA FOLLOWING HEARINGS ON "UNLOCKING THE POTENTIAL WITH HOMELAND SECURITY: THE NEW HUMAN RESOURCE SYSTEM" BEFORE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE WORKFORCE AND THE DISTRICT OF COLUMBIA.

1. How would you describe the collaboration process during the meet-and-confer period? Do you feel that your views were taken seriously?

The National Association of Agriculture Employees ("NAAE") characterizes the collaboration process as more of a Management orchestrated charade, paying lip service to Management's obligation to meet and confer with the unions, than as a serious commitment from DHS and OPM to exchange ideas and information with the unions in a good-faith effort to formulate a consensus-based personnel system consistent with the mission the Design Team established for the DHS Personnel System. For this reason, NAAE believes the collaboration process was mostly a waste of time.

Because the DHS and OPM Management participants did not come to the meet-and-confer table with authority to make decisions on behalf of their respective Agencies, many of the significant items on which both sides appeared to have reached agreement during the so-called collaborative process did not find their way into the final DHS regulations as published. Given this sleight-of-hand, NAAE perceives the meet-and-confer process, viewed in hindsight, as primarily a Management tool, allowing DHS and OPM to assert, with superficial credibility, they had listened to the views of the unions, but, having considered those views, opted to adopt a course of action reflecting the original, restrictive, anti-union/-employee positions Management had taken since the inception of the process.

The collaborative process also failed to achieve its original objectives because Management cut it short, leaving critical issues unresolved when resolution, or at least mutual agreement, was actually within reach. Many of the more difficult, contentious issues were the initial subject of only superficial discussion and then were deferred until the very end for more thorough discussion. While Management agreed to meet and confer beyond the original deadline set in the scheduling protocol, Management abruptly shut down this process just when these extra-sessions appeared to be most productive and nearing the achievement of a consensus on several weighty, deferred issues. The premature ending served to reinforce NAAE's perception that Management was intent upon only going through the motions in order to satisfy Congress. It lacked a sincere commitment to the collaborative process.

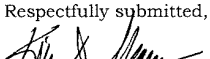
Despite NAAE's overall criticism of the meet-and-confer process, NAAE recognizes that a number of changes, a few of them important, actually did emerge following the collaborative effort to appear in the final regulations. Undoubtedly, many of these changes resulted from the exchange of information and views during the collaborative process. NAAE firmly believes, however, that a continuation of that process would have produced even more agreement and ultimately final regulations more satisfactory to the DHS employees who NAAE represents.

2. What were some of the proposals that you made to the Department of Homeland Security and the Office of Personnel Management regarding judicial review, employee appeals, and labor management relations that were not included in the final regulations.

NAAE participated actively in the Design Team process, including during the meet-and-confer period; however, it deferred to NTEU and AFGE to present specific union proposals addressing the three non-pay-for-performance areas the DHS regulations covered. Some of the more important proposals the unions offered (and NAAE fully backed) not appearing in the final regulations include (1) maintaining the traditional statutory criteria for judicial review of challenged agency decisions, whether issued by DHS, FLRA, or MSPB; (2) retaining the existing neutral third-party appellate structure and procedures for challenging personnel decisions of the Department in lieu of the new internal DHS labor review board composed of DHS selected members; and, (3) most importantly, according unions full opportunity to negotiate changes in traditional conditions of employment prior to implementation in non-emergency situations and post-implementation in asserted emergency situations.

There are many more, but these three are a few touching upon each of the three areas mentioned in the question posed, excluding pay and pay management.

Respectfully submitted,



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