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CRITICAL MISSION: ENSURING THE SUCCESS OF THE NATIONAL SECURITY PERSONNEL 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

FIRST SESSION

MARCH 15, 2005

Printed for the use of the
Committee on Homeland Security and Governmental Affairs

U.S. GOVERNMENT PRINTING OFFICE

20–176 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
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CRITICAL MISSION: ENSURING THE SUCCESS OF THE NATIONAL SECURITY PERSONNEL SYSTEM

TUESDAY, MARCH 15, 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 Subcommittee met, pursuant to notice, at 10:05 a.m., in room SD–342, Dirksen Senate Office Building, Hon. George V. Voinovich, Chairman of the Subcommittee, presiding.

Present: Senators Voinovich, Coburn, Warner, Akaka, Levin, and Pryor.

OPENING STATEMENT OF SENATOR VOINOVICH

Senator VOINOVICH. The hearing will come to order.

Good morning and thank you for coming. Today, this Subcommittee convenes a hearing entitled, "A Critical Mission: Ensuring the Success of the National Security Personnel System." The purpose of this hearing is to examine the proposed regulations of the National Security Personnel System and to continue the dialogue over its design.

When thinking about the Department of Defense, we often visualize the over 2 million active duty and reserve men and women in the Armed Forces. We are grateful to them for their heroic service to our country, but we must not forget that working alongside them are approximately 650,000 civilians who can be found working across the globe in support of our military.

These hardworking and dedicated individuals, including the 20,000 in my home State of Ohio, understand that the work that they do every day is instrumental to our national security. What responsibility could be more important than that? In April 2003, the Department of Defense presented to Congress a proposal for new personnel flexibilities. In essence, Defense sought similar and additional authorities to what was authorized for the Department of Homeland Security to develop a system that is able to respond to current and future workforce and mission needs.

Through the National Defense Authorization Act for fiscal year 2004, Congress granted the Department the authority to design the National Security Personnel System (NSPS). The proposed regulations for NSPS were published in the *Federal Register* on Monday,

February 14, 2005. The proposed regulations have a 30-day public comment period. It closes tomorrow. Next, the Department of Defense is required, by law, to enter into a meet-and-confer process with its employee organizations that must last a minimum of 30 days.

I understand that the process leading up to the publication of the proposed regulations was not always smooth. I encourage both sides to make the most of the meet-and-confer process, to have a constructive dialogue on what is needed for the new system. As with the Department of Homeland Security, I know many employees and their union representatives at the Department of Defense are concerned about the content of the proposal and the subsequent implementation of NSPS.

Several Defense employees in Ohio will transition into NSPS in a Spiral 1.1. Many of my constituents have taken the time to phone or to E-mail me. They are uncertain what changes they will see and unsure where to go to find the answers. One woman who works for the Defense Finance and Accounting Service in Columbus shared these thoughts with me in an E-mail:

"I understand that pay raises will be based on the discretion of your supervisor. This causes me great concern, as we have supervisors in our office who cannot take the time to do quarterly appraisals and awards let alone write appraisals to give them a raise. Also, we have asked management many questions about NSPS, and it appears that nothing has really been settled because they are unable to answer our questions."

To the administration, I would say it is your obligation to continue an open dialogue and maintain a collaborative process with your employees as you refine the proposal regulations for NSPS. It seems to me that the consensus of outside observers is that the labor-management collaboration process at DOD was not as open as the process at DHS, and I would invite all of today's witnesses to share their thoughts on this point.

The Defense Department must recognize that while the new personnel system is intended to assist it in responding to its national security mission, it, also, must provide employees the tools and structure to encourage, support and reward them. Defense leaders must recognize that despite the Department's experience with alternative personnel systems, the changes put forth at NSPS are new for the majority of the employees at the Department. It will take time to gain understanding.

The proposed regulations will impact the most fundamental concerns of an employee: Will my contributions be recognized? What are my opportunities for advancement and promotion? How will I be paid? What recourse do I have if unfairly treated?

Employees must be able to see that they have a valued role in shaping NSPS.

To employee organizations, it is your duty to roll up your sleeves and work with the Department of Defense and the Office of Personnel Management. It is not enough to say you do not like the system. I ask you to continue to offer constructive suggestions to improve the proposed regulations.

I want to assure all of you that I am committed to ensuring the success of NSPS. The regulations are not finalized. The publication

of proposed regulation is only one of the many milestones leading up to full implementation of NSPS. I know there are many interested parties that have suggestions for improvements. I am certain the Comptroller General, who I am pleased to welcome back to the Subcommittee today, has some thoughtful observations.

At times, I have had my own concerns with aspects of NSPS. For example, this time last year, I learned the Department was rushing to implement the system by October 2004. I thought this was simply unrealistic. I was so concerned that I went over to the Pentagon on March 30, 2004, and met with Deputy Secretary Paul Wolfowitz, Secretary of the Navy Gordon England, and Principal Deputy Undersecretary Charlie Abell, who I am pleased is here today. I conveyed to them my concerns that the Department was proceeding much too rapidly and that the massive change envisioned by NSPS would take years to implement properly. I was pleased to learn that they agreed and that after a hasty start, implementation was to proceed with much greater deliberation.

Secretary England was given a lead role and I had the chance to meet with him yesterday to discuss his progress. For the sake of continuity I am pleased that he is committed to leading the initial implementation of NSPS regardless of what secretariat he holds in the Defense Department.

I suspect there is room for improving the regulations in the days ahead, and I have my own recommendations. For example, there are differences between the final regulations for the Department of Homeland Security and the proposed regulations for the Department of Defense in areas such as labor participation. I am interested to learn why DOD has chosen a different path in some of those instances. I am certain my colleagues here today have similar observations and suggestions. I know the witnesses here today, representing employees of the Department, have their own concerns and suggestions for improvement. I look forward to discussing these regulations and their responses with them.

I now yield to my good friend, the Senator from Hawaii, Senator Akaka, and I want to thank you publicly for your commitment to human capital issues of the Federal Government, Senator.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Thank you very much, Mr. Chairman. I, too, am happy to work with you, my good friend and a champion leading this movement.

I welcome our distinguished panelists this morning.

DOD had a rocky start when first rolling out NSPS last year. I am pleased the Department started over after listening to concerns expressed by many of us. Although there is wide disagreement over the regulations, I very much appreciate the time and effort that has gone into working with employees and their unions and their representatives.

As the Ranking Member on this Subcommittee and the Armed Services Readiness Subcommittee, I am disappointed with this proposal, which I believe strips meaningful employee rights and protections and raises serious questions of fairness and collective bargaining and employee appeals. My concerns today are the concerns I voiced in 2003, when I was one of three Senators voting against

NSPS. I am not alone in my concerns and, Mr. Chairman, I do not recall a single issue in my 28 years in Congress that has generated more anxiety among Federal workers in Hawaii than NSPS.

There are nearly 16,000 civilian DOD employees in Hawaii, many of whom work at Pearl Harbor Naval Shipyard. I was particularly moved by one shipyard worker's letter that detailed how union and Metal Trades Council representatives completed successful negotiations on a number of occasions, resulting in improved efficiency and furthering labor management relations. His fear of NSPS was stated clearly when he wrote, "The respect and trust developed and nurtured over the years through formal discussions will be thrown out and discarded."

I know DOD and OPM are listening to these concerns, and I am pleased that coalition meetings are continuing. These meetings should be more than just exchanging concepts around vague and general policy statements. NSPS will bring significant changes. For example, collective bargaining on many issues, such as deployment, will be curtailed. I find this particularly egregious because DOD failed to prove during congressional testimony that bargaining over deployment was a problem. I know of no instance where union members have refused reassignment of deployment; rather, the opposite is true. At Pearl Harbor, the unions negotiated a long time ago on an orderly process for job site mobilization. There are no grievances over assignments, but there are grievances over not going.

I am concerned with internal review boards, such as the National Security Labor Relations Board, which are fundamentally inconsistent with needed checks and balances on government decision-making. Such boards lack credibility, blur the relationship between the career civil service and elected and appointed officials and could foster a back-door patronage system.

The NSPS was intended to provide managers with workforce flexibility not reduce the rights and protections of the civil service. I have other very fundamental problems with the proposed regulations, the first of which is the lack of detail. In congressional testimony, David Chu noted, "It is often said that the devil is in the details, that best intentions may be overcome by wrong-headed implementation. We—'that is DOD'—welcome scrutiny of the details of our implementation."

I agree the devil is in the details, but the proposed regulations lack details especially in critical areas like the compensation system.

My second concern is DOD's inability to assess accurately the workforce needs. As the Chairman knows from last month's hearing on the GAO High-Risk List, DOD has more programs on the list than any other agency. The Department does not have a Strategic Human Capital Plan in place, and no single document identifies DOD's recruitment and retention strategy or goals for its future workforce.

My third concern is over how DOD will implement the policy directives embodied in the proposed rules especially when this country is at war. The need to develop and fund the many implementation programs, especially the training of managers and employees, is a costly undertaking. Without a meaningful and fully funded

process, no policy directive can be effective. GAO took almost 15 years to bring all of its employees under a pay-for-performance system. DOD plans to do it in 3 to 4 years without increasing the training budget or funds to reward good performance. NSPS will require managers to make meaningful distinctions when making appraisals and evaluations. Without adequate training, this process is doomed.

DOD must also provide for transparency, accountability, and fairness in its pay system. There is no process for challenging a performance pay decision. I also urge DOD to reconsider the virtual wholesale elimination of employee union bargaining rights and the inability of DOD employees to have their appeals impartially adjudicated.

Last, I urge flexibility and communication in carrying out these regulations. DOD, by its organizational nature, operates in a command and control environment. Employee input is critical to the success of NSPS. And without union participation, not just consultation, there will be no winners. Limiting opportunities for employees to join unions and minimizing or curtailing the ability of labor unions to organize and bargain over issues that will have a direct and sometimes adverse impact on how employees will do their jobs guarantees failure.

Mr. Chairman, we have much to learn from today's hearing and, again, I thank our witnesses and look forward to their testimony.

Thank you very much, Mr. Chairman.

[The prepared statement of Senator Akaka follows:]

PREPARED STATEMENT OF SENATOR AKAKA

Thank you, Chairman Voinovich. Today's hearing focuses on the regulations for the National Security Personnel System (NSPS) proposed by the Department of Defense (DOD) and the Office of Personnel Management (OPM). I join our Chairman in welcoming our panelists. Given the rocky start that DOD had when first rolling out the NSPS a little more than a year ago, I am pleased that the Department began anew after heeding the concerns that I and other members of Congress expressed, along with those voiced by employees and OPM. Although there is wide disagreement over how successful the process turned out, I very much appreciate the time and effort that has gone into working with employees and their union representatives.

As the ranking member on this Subcommittee, as well as the ranking Democrat on the Armed Services Readiness Subcommittee, I am disappointed with the proposed regulations, which I believe significantly strip key rights and protections of employees and raise serious questions of fairness in collective bargaining and employee appeals. The concerns I have today are the concerns I voiced in 2003 when I was one of three Senators who voted against the underlying bill creating the NSPS.

I am not alone in my concerns, and Mr. Chairman, I do not recall a single issue in my 28 years in Congress that has generated more anxiety among federal workers in Hawaii than the NSPS. My state is home to over 16,000 civilian DOD employees, many of whom work at the Pearl Harbor Naval Shipyard. I was particularly moved by one shipyard employee's letter that detailed how union and Metal Trades Council representatives in the Shipyard completed successful negotiations on a number of occasions that resulted in improved efficiency and furthered labor-management relations. His fear of the NSPS was simply stated when he wrote, "The respect and trust developed and nurtured over the years through formal discussions will be thrown out and discarded."

I know that DOD and OPM are listening to the concerns voiced by employees, and I am pleased that the meetings with the United DOD Workers Coalition are continuing. However, these meetings must be more than the exchange of concepts developed around vague and general policy statements. I know everyone who is providing input on the final regulations understands just how significantly the NSPS will change the way DOD hires—fires—pays —assigns—and works with employees.

As examples, the regulations would create an internal panel to adjudicate labor-management disputes. Panel members would be appointed and removed solely by the Secretary of Defense. Collective bargaining on a number of issues, such as deployment, which has great impact on employees and their families, will be curtailed.

—MORE—I find these examples particularly egregious because DOD failed to prove during congressional testimony that such new flexibilities were needed. I know of no instance where union members have refused reassignment or deployment. Rather, the opposite is true. Approximately 5,000 federal civilian workers have been mobilized and serve in Afghanistan and Iraq. At Pearl Harbor, the unions negotiated a long time ago on an orderly process for mobilization to a job site. There are no grievances over assignments—but there are grievances over not going! Deployments are all-volunteers. The Shipyard boasts an all-volunteer fly away team that is able to change out nuclear submarine batteries in seven days, a job that normally takes anywhere from 15 to 21 days.

I also know of repeated instances where DOD has refused to consider transfer applications by civilian employees because they did not live in the geographic area of the opening.

The creation of internal review boards is fundamentally inconsistent with the Federal Government's long-held practice of providing checks and balances in ensuring the integrity of government decision-making. The Federal Labor Relations Authority (FLRA) was created in 1978 by the Civil Service Reform Act (CSRA) to separate the adjudication of labor-management disputes from the entity charged with managing the federal workforce. It provides a stable and independent forum to ensure an efficient and effective government. In my mind, internal adjudication panels do not foster independence. They lack credibility, blur the relationship between the career civil service and elected and appointed officials, and could foster a backdoor patronage system.

The NSPS was intended to provide managers with workforce flexibility, not reduce the rights and protections of the civil service. The NSPS is required to be based on federal merit principles and provide for collective bargaining. Recombining the responsibilities of employee protections and program management within DOD, while limiting the power of independent agencies that oversee the Department's activities, brings the Department's policies in direct conflict with the fundamental principles of the federal civil service and could substantially erode the rights and protections of federal employees—both DOD and non-DOD employees.

For example, the regulations place time limits on the MSPB to adjudicate cases which—given the size of DOD—will have a significant and substantial adverse impact on MSPB's ability to timely adjudicate the cases of non-DOD employees.

In addition, the regulations severely limit the discretion of MSPB judges to mitigate penalties or award attorney fees, and requires decisions to made in deference to DOD's national security mission. Even more shocking is the fact that the regulations provide DOD with wide discretion to review and reverse a MSPB administrative judge's initial findings of fact. Therefore, the NSPS is comparable to a system that would allow prosecutors to overturn the factual findings of a jury or a district court, replace it with the prosecutor's determination of facts, and require the appellate courts to be deferential to that finding. The proposed changes undermine the MSPB's effectiveness for serving as a neutral decision maker.

How credible can a system be that allows the employee's agency to reverse the findings of a neutral decision maker?

These proposed NSPS rules will only lower employee morale, impair DOD's recruitment and retention efforts, and impede—not aid—agency mission.

I want our first panel to explain why they believe the regulations are both fair and perceived as fair by employees, which is a stated goal of DOD, and will promote agency mission.

I have other very fundamental problems with the proposed regulations, the first of which is the lack of detail. In congressional testimony, David Chu, Under Secretary of Defense for Personnel and Readiness, noted, "It is often said that the devil is in the details, that best intentions may be overcome by wrongheaded implementation. We welcome scrutiny of the details of our implementation." I agree the devil is in the details, but the proposed regulations lack details. Modern organizations recruit and retain employees through pay, benefits, and improvements in work-life conditions. One of the most important benefits to all employees is pay, which is why I am troubled by the lack of detail given to the proposed NSPS compensation system.

My second concern is DOD's inability to assess accurately its workforce needs. As the Chairman knows from our hearing last month on the GAO High-Risk List, DOD has more programs on the list than any other agency. The Department does not

have a strategic human capital plan in place. No single document identifies DOD's recruitment and retention strategy or goals for its future workforce.

My third concern is over how DOD will implement the policy directives embodied in the proposed rules, especially when this country is at war. The need to develop and fund the myriad of implementation programs, especially the training of managers and employees, is a costly undertaking. Without a meaningful and fully-funded process, no policy directive can be effective. GAO took almost 15 years to bring all of its employees under a pay for performance system. DOD is planning to do it in three to 4 years without increasing the training budget or funds to reward good performers.

The NSPS is a performance-based system that will depend on managers making meaningful distinctions when making appraisal evaluations. Without adequate training, this process is doomed. Employees will be grouped into occupational pay clusters that will be based on market based compensation surveys. Getting these surveys and performance appraisals right the first time is critical and not cheap. Given the fact that most agencies fail to adequately fund training programs to begin with, I question the decision by DOD not to increase resources dedicated to training.

In addition, I believe that in order to be successful, DOD must ensure that any pay for performance system has adequate funding. A zero-sum reallocation of salaries and salary adjustments will guarantee failure by rewarding a select few at the expense of the majority of employees who do good work, thereby creating an atmosphere of distrust among the workforce and lowering morale.

DOD must also provide for transparency, accountability, and fairness in the system. The current regulations provide for an internal process to challenge a performance evaluation and no process for challenging a performance pay decision. Given the wide flexibility granted to the Department to establish this new system, it imperative that DOD uses this authority responsibly. Providing fair and transparent systems to make pay and performance decision-makers accountable is necessary.

I also urge DOD to reconsider the virtual wholesale elimination of employee union bargaining rights and the inability of DOD employees to have their appeals impartially adjudicated.

Last, I urge flexibility and communication in carrying out these regulations. DOD, by its organizational nature, operates in a command and control environment. Employee input is critical to the success of the NSPS, and without union participation—not just consultation—there will be no success. Limiting opportunities for employees to join unions and minimizing or curtailing the ability of labor unions to organize and bargain over issues that will have a direct and sometimes adverse impact on how employees will do their jobs will guarantee failure. There must also be defined roles for managers who under the NSPS will be more accountable for agency performance.

Mr. Chairman, I believe we have much to learn from today's hearing. I look forward to hearing from our distinguished witnesses who I hope will rejoin us for future hearings as we continue our oversight responsibilities of the NSPS.

Senator VOINOVICH. Thank you, Senator Akaka. Senator Coburn.

OPENING STATEMENT OF SENATOR COBURN

Senator COBURN. Mr. Chairman, thank you for holding the hearing. I want to welcome our guests. I look forward to hearing your comments. I am excited about putting better management into every level of the Federal Government. That has two basic principles: One is it accomplishes the tasks that the Congress has set out for the bureaucracies and, two, that it treats employees the way they would want to be treated. I think, if we follow those two guidelines, we are going to have effective management and effective Federal employees.

And with that, I would yield back.

Senator VOINOVICH. As is the custom before this Subcommittee, I am going to ask the witnesses to stand up and be sworn in.

[Witnesses sworn en masse.]

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

I would like to ask all the witnesses to limit your oral statement to 5 minutes and remind you that your entire written statement will be entered into the record.

I would like to welcome the Hon. David Walker, Comptroller General of the United States. Joining Mr. Walker on the first panel are the Hon. Charles Abell, Principal Deputy Undersecretary for Personnel and Readiness, Department of Defense, and George Nesterczuk, Senior Advisor to the Director, Office of Personnel Management.

Also, available for questions are Mary Lacey, Program Executive Officer for the National Security Personnel System, and Dr. Ronald Sanders, Associate Director for Strategic Human Resource Policy, Office of Personnel Management.

Would Ms. Lacey and Mr. Sanders identify themselves.

Mr. Sanders, thank you.

Ms. Lacey, I had a nice talk yesterday with Secretary England, and he tells me that you are doing a yeoman's job on this whole issue. He is relying on you for a lot of good work. I am sure that Mr. Abell is appreciative of all the effort and time that you have put into this. I understand you are a 31-year employee of the Department. It is reassuring to know you are there.

Thank you all for the time you have invested in developing the system. I commend you for your dedication to this important job, and I know you have much to talk about.

We will start with Mr. Walker, who has been here time and time again. David, nice to see you, again.

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

Mr. WALKER. Good to see you, Mr. Chairman. Mr. Chairman, Senator Akaka, and Senator Coburn, it is a pleasure to be back with you. Thank you for entering my entire statement into the record, and I will hit some highlights for you.

As you know, Mr. Chairman, Senators, I, as well as GAO, as an organization, have been longstanding proponents of modernizing our human capital policies and practices in the Federal Government and are strong believers in the fact that you need to have reasonable flexibility, at the same point in time, appropriate safeguards to prevent abuse of employees.

The NSPS is of critical importance not just for the Department of Defense, but, also, for the overall civil service reform process. It is critically important they get it right not just for the benefit of DOD and its employees, as well as our Nation's national security, but, also, to try to make sure that we can continue to modernize our human capital policies and practices consistent with that balancing of interests throughout the Federal Government.

As you mentioned, Mr. Chairman, the NSPS did not get off to a great start. It did not represent a model process of collaboration with the Congress, initially, nor at the initial stages of attempted design and implementation. I must, however, state that, in my opinion, there has been significant change that occurred in the tone, the tenor, and the approach that the Department of Defense

[1] The prepared statement of Mr. Walker appears in the Appendix on page 42.

has taken on this issue since Secretary of the Navy Gordon England was designated as the point person by Secretary Rumsfeld. I believe that Secretary England is a capable and caring individual who wants to do the right thing.

I think we all need to recognize that the NSPS is now the law of the land and, as a result, it is important that all parties work together to try to help assure that it is implemented both effectively and fairly. To do so, both management and labor must work together in a good-faith manner. Reasonable people can, and will, differ with regard to the individual proposals under NSPS, but it is absolutely critical that meaningful communications and consultations take place in order to maximize the chance of success and minimize the possibility of disruption.

These communications and consultations are a two-way street, and we are entering a particularly important period, as you mentioned, Mr. Chairman and the other Senators, namely the meet-and-confer period, which will begin in the very near future. It is very important that all parties take that seriously and act constructively.

In my view, Mr. Chairman, both management leaders and labor leaders will need to possess three key characteristics in order for this to be successful:

Firest, they will have to have the courage to speak the truth and to do the right thing, even though it may not be popular;

Second, they will have to have the integrity to lead by example and practice what they preach;

And third, they will have to be innovative enough to think outside the box and help others see the way forward.

Both labor leaders and management leaders will have to possess these three critical attributes. We at GAO, as you mentioned, have been in this business for many years. We have had broadbanding since 1989. We have had pay-for-performance since 1989, although, as Senator Akaka mentioned, we brought it out in phases. Now all but about 10 of our employees in GAO are subject to broadbanding and pay-for-performance. We are happy to share our knowledge and experiences. Our way is not the way, but it is a way, and we do believe that we can help others see their way forward here and, hopefully, avoid some pitfalls.

Now, I would like to mention one positive, one concern and one point on the way forward.

The framework, I believe, that relates to these proposed regulations does provide for a more flexible and modern human capital system, and that part is a step in the right direction.

Second, an area of concern, there are many details that have not been defined. The details matter. How these details are defined can have a direct bearing on whether or not the ultimate system is both reasoned and reasonable. And the meet-and-confer period is critically important to try to help make sure that both parties recognize that and come to the table in good faith to try to deal with some of these details—details in the areas of performance management, compensation, reductions in force, appeal rights, transparency provisions, training aspects, these are all critically important details.

And last, but not least, as I have said before, and as Senator Akaka mentioned, DOD has 14 of 25 high-risk areas, up 2 from 2 years ago. DOD does many things right, including fighting and winning armed conflicts, where it is unparalleled. Nobody is even close. DOD is a "D" on economy, efficiency, transparency, and accountability. It needs a chief management officer or a chief operating officer to be in charge of the overall business transformation effort, to take a strategic, integrated, and persistent approach to a whole range of business transformation issues, of which NSPS is but one, but a critically important one.

Thank you, Mr. Chairman.

Senator VOINOVICH. Thank you, Mr. Walker. Mr. Abell.

TESTIMONY OF HON. CHARLES S. ABELL,[1] PRINCIPAL DEPUTY UNDER SECRETARY FOR PERSONNEL AND READINESS, U.S. DEPARTMENT OF DEFENSE

Mr. ABELL. Thank you, Mr. Chairman, and Members of the Subcommittee.

The National Security Personnel System is a key part of a DOD transformation. We will create a total force, uniformed military and civilian employees, who share a common vision, who recognize common strategic and organizational objectives and who operate as one cohesive unit. DOD civilians are unique in government in that they are an integral part of an organization that has a military mission, a national security mission. DOD civilians are at work side-by-side with our uniformed military personnel around the world in every time zone every day. NSPS will bring 21st Century human resource management to these dedicated public servants.

NSPS has been designed to meet a number of essential requirements. Our guiding principles, as we designed this, were mission first; respect the individual; protect the rights guaranteed by law; value talent, performance and leadership, and commitment to public service; be flexible, understandable, credible, responsive, and executable; to balance the HR system interoperability with the unique mission requirements; and to be competitive and cost effective. We have key performance parameters that implement these guiding principles with measurable metrics.

As you noted, Mr. Chairman, NSPS was enacted on November 24, 2003. And since January 2004, we have been engaged in a process to design the HR appeals and labor relations system in an open, collaborative environment, in consultation with our employees, the unions, and other interest groups.

Since January 2004, we have met face-to-face with employees, unions, and interest groups in many settings, as well as maintaining two-way communications via written correspondence, conversations and exchanges of documents. Based on feedback from the unions and congressional committees in March 2004, as you noted. Sir, the Department adjusted the process, established a different governance and enhanced our partnership with OPM.

The proposed regulations published in the *Federal Register* on February 14, 2005, reflect the result of this adjusted process. We are currently in the public comment phase, which will formally

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

close tomorrow, March 16. We anticipate comments will come in after the March 16 deadline, and we will certainly review those comments as well. The *Federal Register* notice is the formal notice required by the statute. Following the 30-day comment period, we will review the comments, and then we will engage in a meet-and-confer process for a minimum of 30 days.

Mr. Chairman, I stress the word "minimum." We will devote the time necessary to adequately discuss and confer on every issue raised during the comment period, and this is where the details that so many long for will begin to emerge. We have asked the Federal Mediation and Conciliation Service to assist us in this meet-and-confer process. At the conclusion of the meet-and-confer period, we will report the results to our congressional oversight committees.

I suspect that we will spend some time today talking about what NSPS does, but let me take a minute to talk about what NSPS does not do. It does not change the merit system principles that are the foundation of the civil service system. It does not change prohibited personnel practice rules. It does not change whistleblower protections nor anti-discrimination laws. It does not modify or diminish veterans preference. It does not change employee benefits, such as health care, life insurance, retirement and so forth. It does preserve due process for employees, and it does not reduce opportunities for training and professional development.

On the other hand, the National Security Personnel System will provide a streamlined, more responsive hiring process, simplified pay banding structure, which will allow us flexibility in assigning work, performance-based management that is linked to strategic and organizational goals and includes accountability at all levels, pay increases based on performance rather than longevity, efficient, faster procedures for addressing performance and disciplinary issues, while protecting due process rights, and a labor relations system that recognizes our national security mission, while preserving collective bargaining rights of employees.

Although we plan to implement the labor relations system DOD-wide, we intend to phase in the HR system beginning as early as July of this year. We expect full implementation by late 2007 or perhaps early into 2008.

We recognize that the National Security Personnel System is a significant change, but these are necessary changes. We will meet the challenge of change and change management willingly.

Senator Akaka talked to the value of training. We agree. We are committed to training employees, managers, supervisors. We are committed to the collaborative approach that we have used to get to this point. We understand the concern and the anxiety of our employees. It would be unnatural if they were not concerned or anxious. We will address those concerns.

NSPS is the right system, based on the right philosophy, at the right time in our history. The Department, in partnership with the Office of Personnel Management, the unions, interest groups, and our employees will implement it with efficiency, effectiveness, transparency, and sensitivity.

Mr. Chairman, before I close, I would like to recognize the great contributions of my partner, George Nesterczuk, Dr. Ron Sanders

and Mary Lacey. As you mentioned, they have been invaluable in helping us get to where we are, and they are going to be part of the team that takes us all the way home.

Thank you, Mr. Chairman.

Senator VOINOVICH. Thank you, Mr. Abell. Mr. Nesterczuk.

TESTIMONY OF GEORGE NESTERCZUK,[1] SENIOR ADVISOR TO THE DIRECTOR ON DEPARTMENT OF DEFENSE, OFFICE OF PERSONNEL MANAGEMENT

Mr. NESTERCZUK. Thank you, Mr. Chairman, and Members of the Subcommittee. I want to thank you for holding this hearing at this particular time. It comes at a critical time in the process of developing the NSPS regulations.

As you mentioned, we recently published the proposed regulations, and we are coming to conclusion on an initial 30-day comment period. It is an important part of our regulatory process, getting input from various constituencies, employees, and the general public, as well as the employee representatives of the Department. We are looking forward to analyzing, and assessing those inputs as we proceed in developing final regulations over the coming weeks and months.

I would like to thank DOD for the collaboration that we have engaged in. After an initial rough start, as you mentioned, we have had a year's worth of excellent cooperation, leading to what I think is a fairly decent proposal in our initial stab at the regulations.

As we developed the proposal, we kept in mind the importance of keeping balance before everyone; balancing the interests of the Department, the vital mission that it has to accomplish, while, at the same time, not compromising the core principles of the civil service, and that is the principles of merit and fairness to our employees. That is the backbone of having the type of democracy and respect for government that we enjoy.

We have, also, had to maintain a balance between the operational imperatives and employee interests in all of the specific components of the NSPS: Performance-based pay, staffing flexibilities, employee accountability and due process, as well as the reforms in labor-management relations.

In striking those balances, we paid particular attention, as Mr. Abell mentioned, to protecting merit system principles, making sure that prohibited personnel practices are adhered to, that due process for employees is guaranteed, veterans preference is fully protected, and that employees do enjoy the right to representation and collective bargaining. I believe we have achieved those balances properly in our proposal.

As we have mentioned, the outreach that we engaged in over the past year has been very instrumental in promoting credibility and acceptance, ultimately, of the NSPS regulations. DOD arranged a number of focus groups and town hall meetings throughout its installations around the world. Thousands of employees were directly engaged. DOD created an interactive website which provided access to a far greater audience, interactive in that questions could be

[1] The prepared statement of Mr. Nesterczuk appears in the Appendix on page 89.

raised and responded to while information was disseminated about the process.

We were, also, well-informed by the DHS experience, the Department of Homeland Security, which was ongoing at the time and which provided some valuable input on labor-management relations and the perspectives of unions on some of these proposals. We were able to feed that into our development process.

DOD, also, brought 25 years' worth of direct hands-on experience with alternative personnel systems and alternative pay systems through their demonstrations that they have been running. OPM has done extensive analysis of those. We provided that analysis to the working groups and teams and shared those with the unions in the course of our engagement.

The meet-and-confer process that is upcoming is critical to the continued development process. There are a number of issues that have not been defined in great detail, specifically, because we are looking for the input from the unions on ways to go. Some of the proposals are necessarily general to provide DOD with the flexibilities that they will need at the implementation level and subsequent evolution of the pay systems and the performance systems. So we have left those as enabling regulations purposely.

There is a level of detail that we can still get to for clarification in the meet-and-confer process. And we recently met with the unions to try to start to define that process, and to coordinate schedules. We do look forward to constructive comment from the unions. Should we fail to reach those, that would be a lost opportunity, and I think the members of the unions would be shortchanged in the process. We have reached out, and we will continue to reach out, and the meet-and-confer process, I think, will be the proof of the pudding in that. Thank you.

Senator VOINOVICH. Thank you very much. We will have 6-minute rounds of questions. I will begin.

DOD has laid out an aggressive implementation strategy. It is my understanding that implementation will occur in 3 phases, or spirals, and that Spiral 1 will take approximately 18 months. According to Secretary England, DOD will begin implementation with 60,000 employees. How did the Department decide which organizations will be in that first spiral? What steps has the Department taken thus far to prepare employees transitioning into NSPS this summer? And as Senator Akaka mentioned, I share his concern regarding training of managers and the Department's communication strategy with employees?

The biggest issue is employee training and budget. How do you anticipate initiating implementation of this new system?

Mr. ABELL. Yes, sir. I will try to address those in the order that you asked them, sir.

First, how did we identify the folks to be in Spiral 1. We went out to the services and to the Defense agencies and asked for those who felt they were ready, those organizations that had a desire to move to NSPS, but, also, with a caveat that these ought to be organizations that we would evaluate these organizations who volunteered as to where were they in performance management, did they have a strategy where their work could be linked to the organizational and, ultimately, strategic goals of the organization.

So we asked for input from the units themselves, from the major commands and the units. We also said that at the end of Spiral 1 we wanted an organization to be—we wanted it to be an entire organization it was in. For instance, Air Force Materiel Command or an Army unit or a Navy systems command, so that we did not have people everywhere.

We exempted in Spiral 1 wage grade and NAF employees because they present unique challenges, and we did not want to try and take on all of those challenges in the first round. So the units came in, the organizations came in volunteered at the service and OSD level, we evaluated against our criteria, and that is how they were selected.

The transition is one that will be managed. It is a change management process. It involves training. It involves mock payouts, if you will, so that we can tell whether or not our training has taken effect.

Senator VOINOVICH. Have you included in your budget funding for training? Will it be conducted in house or with contractor assistance?

Mr. ABELL. The answer is, yes, sir. We are going to do both. The PEO's office has a modest budget and is doing training development. The actual execution will be done in the services. It is difficult to look at a budget and see the training lines in there because there is money in those budgets every year for training, and it is an O&M account, which is a fungible account, as you know well. So the components will pay for that. There is not an NSPS training line, per se.

Senator VOINOVICH. Well, I would like to see in writing what you allocated in the budget for the training of these individuals.

Mr. ABELL. OK, sir. We will send that to you,

You mentioned a communication strategy—we have also begun that. Ms. Lacey hosted a meeting for the commanders and the senior leaders of the organizations that are going to be in Spiral 1. Secretary England came down and spent a day with those folks. This began the orientation process. We have done, as you have heard reported here, focus groups, nd town hall meetings. We intend to continue that. We have command information programs. We have informal e-mails from the PEO's office out to the commands that keep them up-to-date, and we have a very active website that keeps everyone up-to-date.

Senator VOINOVICH. What I hear is that the Department has not done well with that. However, once the meet and confer process is over, you will have more details to answer the questions of the employees.

Mr. ABELL. Yes, sir. We see two types of training: First, what we call the soft skills, which is management, change management, and performance management, how one does that. And then the second type of training does follow the more—once the regulations have been fluffed up with the details, that is when the specific HR management training can occur. So it is a two-sided training system. We are already in the first part.

I am just about out of my time. I think what I will do is I will turn this over to—well, Mr. Walker, you are probably going to have to answer these questions from some of the other Senators here. In

past hearings, you highlighted the importance of an internal DOD infrastructure to incorporate human capital planning process that is integrated with its mission, develop the internal workforce capable to develop and implement a human resource system and a validated performance appraisal system. The real issue is, yes or no, have you watched the system enough that you can answer these three questions?

Mr. WALKER. What I have said, Mr. Chairman, is that we believe it is critically important that an adequate infrastructure be in place that has been designed, tested and where appropriate training has been provided with regard to that system before the additional flexibility should be operationalized.

I would imagine that the Department of Defense plans to do that. I think it is critical that they do, if they do not, it will likely not be successful. But there is a lot of work that is going to have to be done to get them to that point. I don't know who their Spiral 1 entities are, but I think the other thing they ought to think about is there are two ways to look at roll-out.

One way to look at roll-out is by organization, which is very vertical, and that is, obviously, relevant to consider. But another way to look at roll-out is horizontal, which is by functional area of responsibility, which cuts across a bunch of silos, many of which are hardened at DOD, silos such as the various services and other functional units, and I would hope they would think about the horizontal dimension as well. When you develop core competencies many times you will find that there are some that go throughout the organization, but there are others that very much lend themselves toward horizontal application across many different organizations.

Senator VOINOVICH. Thank you. Senator Akaka.

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

Undersecretary Abell, it is good to see you again. I want to sincerely thank you and Mr. Nesterczuk for your efforts in developing a new personnel system for the Department of Defense.

And, Mr. Walker, it is good to have you with us again. GAO has had a great deal of experience in developing and reporting on best practices and implementing new personnel flexibilities, and I truly value your input.

Undersecretary Abell and Mr. Nesterczuk, George Washington said, "The willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional to how they perceive the veterans of earlier wars were treated and appreciated by their Nation."

This is especially true for veterans preference in Federal employment. However, DOD's proposed regulations do not guarantee veterans preference rights in regard to the bump and retreat options that preference-eligible employees have.

Is it DOD's intent to circumvent veterans preference under bump and retreat by offering temporary employment that is not guaranteed and not an appropriate intermediate step before subjecting a veteran to separation through a reduction in force?

Mr. NESTERCZUK. Senator, the veterans preference was always foremost in our minds in the staffing area, both on RIF and on the

intake side in the hiring flexibilities we provided, where veterans preference has been fully protected. There are no changes to that.

On the RIF side, we also make no changes to the hierarchical retention of veterans in a reduction in force. They get exactly the same protections that they currently do. The one change that we have implemented or are proposing to implement is to build the retention registers within each of these categories, veterans preference eligibles, the disabled veterans, and the nonveterans, within each of those categories, retention lists would be done on the basis of performance first and then seniority within the performance groupings. That is the one change.

But otherwise the veterans protections are the same.

Senator AKAKA. Thank you.

Mr. Nesterczuk, Congress intended OPM to be a full partner in the development and implementation of the NSPS. However, the regulations state that OPM may review and comment on proposed DOD implementing issuances, but that in cases where the Director of OPM does not concur with the proposed action of DOD, the Department may implement it anyway.

What recourse does the Director of OPM have in cases where OPM does not concur with the actions of the DOD?

Mr. NESTERCZUK. On implementing issuances, we have permitted the Department a great deal of flexibility so that they can tailor the issuances to the various structures and organizational components of DOD. DOD is a complex organization.

That is why we consciously regulated, in the areas of pay and performance, at the level of enabling regulations, to give DOD those flexibilities. We will be maintaining oversight on a regular basis. We do on a government-wide basis and NSPS is not precluded from the same oversight in the future.

So we will be working with DOD in its application of its internal regulations to make sure that they comport with government-wide standards and the mission requirements of the Department. We do not anticipate any difficulties, as there is nothing here that we do not currently deal with in civil service.

Senator AKAKA. Mr. Walker, the proposed regulations allow pay pool managers to make final decisions for performance pay allocations, but there is no process to challenge this decision. What is your opinion of the lack of appeals? And what does GAO do to ensure fairness and transparency in the allocation of performance awards?

Mr. WALKER. First, I think any system that provides for additional flexibility has got to have adequate safeguards to prevent abuse. I think part of that includes having a reasonable degree of transparency with regard to the results of key decisions, whether it be pay, whether it be promotions or other types of actions, while protecting personal privacy.

Another aspect of it is to be able to have both informal and formal appeal mechanisms within the organization and outside the organization if individuals feel that there has been an abuse or a violation of the policies and procedures or otherwise the protected rights of the individual.

I believe that it's important, when you are talking about performance management, that you not just have the supervisor dealing

with it. You have to have a reviewer look at it. You also have to have other institutional mechanisms within the department or agency. For example, the Human Capital Office, which is not a line organization, is a supplement, not a substitute, for the line, the Office of Opportunity and Inclusiveness, to be able to look to try to provide reasonable assurance that there has been consistency and nondiscrimination.

And then in the end, to have reasonable transparency and appropriate appeal rights if people believe they have been aggrieved in some way.

Mr. NESTERCZUK. Can I add to that? Because it is an important consideration for us, too, transparency and making sure that there is a sense of fairness and employee buy-in. If employees do not think that it is fair, they are not going to buy in, particularly in the performance appraisal area. They have to buy in.

We did build in an appeal process. There is a built-in administrative review, a departmental review, proposed. That is something that we are willing to flesh out in the course of meet and confer. If that is not sufficiently credible, we are willing to talk about that. But the idea is to have an appeal process in there, a review process, that lends credibility to the system.

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

Senator VOINOVICH. Senator Coburn.

Senator COBURN. Thank you, Mr. Chairman.

My questions really go back to what you have been talking about, and I would ask the Secretary and Mr. Nesterczuk to just outline—the whole basis for controversy over this is the lack of confidence that it is going to be handed out fairly, that it is trustworthy, that there will not be individual bias in the management above somebody, that they will use something other than a standard of performance and work to measure somebody's performance in the long run, which, i.e., will become their basis for earning a living—outline for me, both in a positive sense and a negative sense, the steps that are in the implementation of this that will assure the employees of DOD that you are going to build the confidence into the system, so that they know that their questions and their openness to abuse is going to be answered.

I would like for you to just detail that. I think that will give us—and thinking, put their hat on for a minute, and if you were in that position, what would you like to see in terms of fairness. And I would like for you just to summarize quickly, if you would. I will not have any other question. Here are the positive things that we are doing to assure that. Here are the penalties if somebody violates that. In other words, just go through it, if you would, in a systematic fashion, to list both the positive and negative incentives that are in this system that will assure people who work for DOD that they are going to have a fair system.

Mr. ABELL. I will start, sir, and then I will defer to my colleague.

This whole system, as many have said, is predicated on being credible and being respected. And we will demonstrate, through communications, and our actions, and our regulations, to the workforce that all the safeguards that they would want are there. They are going to participate in the training. They are going to participate in the setting of their goals, their performance standards, and

they will participate in the quarterly or semi-annual evaluations with their supervisors.

The supervisor's decision is not one of total discretion. It is reviewed by a board of the supervisor's peers. The supervisor's pay raises are contingent upon the success of the work unit and not his personal production or performance, so it is the supervisor's incentive to have his work unit do well. Thus, he would be incentivized to reward those who perform. And the overriding thing I think is that the Department of Defense is an institution that values, cherishes, demands success, and success only comes from a cohesive workforce. So those are the positives.

The negative incentives, if you will, there will be, there is, accountability at all levels. Our commanders watch our supervisors. Our supervisors watch those managers below them. It is an open process. It is transparent. There are avenues for those who feel they have not been treated fairly, and our union partners are, also, watching, helping us identify areas where we need to do better.

Mr. NESTERCZUK. Although the proposal for the NSPS is a new personnel system, and there is a lot of newness about it in the pay-for-performance system and some of the classification system changes. Yet from an employee's perspective, their rights, their rights to contest any of the processes or procedures really don't change. The prohibited personnel practices have not changed. So, if there are any decisions that are arrived at in the course of NSPS on pay, on performance, on adverse actions that an employee feels are not fair or not right, whether it is nepotism, favoritism, political performance, whatever, none of those have changed.

So the safety net, from an employee's standpoint, is that the avenues for appeal are still the same, and those are familiar to them.

Senator COBURN. So that means, if I am an employee at DOD, and I outperform and I produce, I am going to make more?

Mr. NESTERCZUK. Yes.

Senator COBURN. I am going to hold you all to that because that is the only way this works for those employees. You cannot say here is the carrot and not give the carrot.

Mr. Walker.

Mr. WALKER. Senator, a couple of comments.

First, if the system is not credible, it won't be effective. You have properly pointed out the need to balance flexibility with safeguards to prevent abuse.

The other thing I think we have to keep in mind is there is nothing probably more complex and controversial in the human capital area as classification and compensation issues. These are the closest to the bone you are ever going to get in any organization. We have to keep in mind where we are coming from as well.

Right now, we have an overly complex, very hierarchical classification system that also includes compensation ranges that, in many cases, are not reflective of the current market.

Second, we have a system whereby, for a typical Executive Branch agency, 85 percent-plus of the pay raises have nothing to do with skills, knowledge, and performance.

They are on autopilot. So, by definition, that means to the extent that you end up moving to a system that is more market based and performance oriented, that is a huge change. And to the extent that

it involves more management discretion and more meaningful performance appraisal systems, there is understandable apprehension. If there is not trust in management, if there is not an understanding of the system, if there are not adequate safeguards and transparency mechanisms, you are going to have big problems.

They are at the beginning of a long road, and one of the things that has to happen is for the meet-and-confer process to be meaningful, for a lot of these details to be worked out because these details do matter. DOD needs to continue to take this in a phased approach, learning as they go along to be able to continuously improve as they move forward.

Senator COBURN. Thank you, Mr. Chairman.

Senator VOINOVICH. Senator Levin.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Thank you, Mr. Chairman.

I would like to go right to that issue of employee confidence, credibility, acceptance, and apprehension. Before you have even gotten to the proposal in the draft regulation before us, we have a pay-for-performance issue which is very current.

We have a law that says that performance has got to be the basis for pay increases, and yet on July 12 of this year the director of administration and management, in the Office of the Secretary of Defense, directed across-the-board pay raises of 2.5 percent, which is the maximum increase allowable for senior executives who are political appointees. For nonpolitical senior executives who got the same performance rating, they get a 2-percent pay increase.

Now, on February 4, Senators Warner, Collins, Lieberman, and I wrote Secretary Rumsfeld, pointing out that the decision to use the career or noncareer status of an employee as a factor in the awarding of a pay raise is inconsistent with the law and with the Department's stated intent to pay employees on the basis of performance. We asked the Secretary to take appropriate steps to ensure that the pay raise for DOD senior executives is implemented in a manner that is consistent with the requirement of law and policy, but the Department has not yet taken those steps.

So, Mr. Abell, are you going to take those steps or not?

Mr. ABELL. Senator, we are going to take those steps. It is prospective at this point. We have a performance plan that is currently with our colleagues at OPM, SES performance plan with OPM, that will comport with the spirit and intent of the law for performance management for our Senior Executive Service going forward. We anticipate that we——

Senator LEVIN. "Going forward" is not enough. We have a law that is in place now——

Mr. ABELL. Yes, sir.

Senator LEVIN [continuing]. For current pay increases. Why is that law not being abided by? And why would employees have confidence in the future in your pay-for-performance proposal, when you have got a law now that says performance has got to be the basis for pay increases, but you have a 2.5-percent across the board for political senior executives and 2 percent for nonpolitical senior executives. Why does that engender confidence, and why is it legal?

In other words, not just promises about what you are going to do in the future. You have got an existing law, why is that not being abided by? Why are not this year's pay increases based on that law and on the same premise and principle that you just laid out for the future?

Mr. ABELL. The January sequence of events, the performance evaluation was based on a legacy system, an old system, that was, essentially, a pass/fail system—is, essentially, a pass/fail system. The DOD general counsel has reviewed the actions that were reported in the letter from the director of Administration and Management and has opined that they were legal. I am not a lawyer. I do not practice law in the Department of Defense, so I leave that to the general counsel, but that is a report from there.

Senator LEVIN. Putting aside the law, is it a coincidence that every political appointee gets a 2.5-percent increase and the nonpolitical appointees get 2 percent? Is that a coincidence for the same performance improvements?

Mr. ABELL. Sir, as I recall, the director of Administration and Management letter, the noncareer folks could fall into a category of 2.5, 2.3, or 2—I am recalling that off the top of my head—depending, again, on how their performance was rated.

The noncareer folks were rated as well. Their performance was evaluated, although not in the same system as the career SES, and that was the basis for those decisions.

Senator LEVIN. Are you saying there was individualized appraisal of the noncareer employees? Mr. Abell, you are proposing a system here which is based on an important premise. You are not living by that premise right now, despite the law's requirement that you abide by the pay-for-performance rule now.

There are a lot of other issues that these regulations raise, and my time is almost up, but I have to tell you it goes right to the heart of questions which have been raised here—pay-for-performance. You are not abiding by the current law. Why would people have confidence that the discretion which is being given is going to be used fairly, when it is not being used fairly right now under current law? It is not being used individually. It is a pattern. It is based on your political or nonpolitical appointment status.

I think, and this is a letter which the Chairman of this Subcommittee, the Ranking Member of this Subcommittee, Senator Warner and I have raised with the Department. It seems to me we are entitled, and more importantly the people of the United States and the employees are entitled to an answer on a very fundamental question which has been raised by this letter. And it is not good enough to simply say the lawyers have approved it.

I hope you would reconsider it because it goes to the heart of what you are proposing here.

My time is up, Mr. Chairman, unless he wants an opportunity to respond.

Mr. ABELL. Senator, I understand. I will report your concern about not responding to the letter. I am sure the Secretary will give you a comprehensive response.

Senator LEVIN. Thank you.

Mr. WALKER. Senator Levin, we have not been asked to look at this issue from a legal standpoint, but as you know, yourself and

others being lawyers, the law represents the minimum standard for acceptable behavior. You do not want to just do what is arguably legal, you want to do what is right, and, hopefully, you will get a response.

Senator VOINOVICH. Senator Pryor.

OPENING STATEMENT OF SENATOR PRYOR

Senator PRYOR. Thank you, Mr. Chairman.

Mr. Walker, I want to ask you just a big-picture question. And that is, in the 107th Congress, we acted to create a new personnel system for the Department of Homeland Security, and that was created through legislation. Last year, Congress passed legislation that allowed fairly significant changes in the DOD personnel system. Are we getting to the point where it no longer makes sense to go through this agency-by-agency, that we ought to look more globally at our civil service system across the board? I would like to hear your comments on that.

Mr. WALKER. I do think that, ultimately, the Congress is going to want to look at the entire civil service system because what has happened over the years is that we now have a situation where, through the individual initiatives of various departments and agencies, and in the interest of full and fair disclosure, including GAO, over 50 percent of the Federal workforce is now covered by new systems, systems that provide for broadbanding, that provide for more market-based and performance-oriented compensation systems, that, also, provide for certain other flexibilities.

I think over time we are going to need to try to make sure that there is more consistency throughout the Federal Government. By that I mean not that there should be one broadbanding system or one pay-for-performance system, but that these types of flexibilities apply broadly throughout government. I think it is very important that we make sure that certain values, certain principles, and certain safeguards should apply throughout the Federal Government in order to maximize the chance of success and minimize the possibility of abuse.

Senator PRYOR. So do you think we ought to continue going agency-by-agency or even department-by-department or is it time now to really look at the entire system collectively?

Mr. WALKER. I think, at a minimum, you need to look at what type of principles and safeguards should be in place throughout the Federal Government. These can serve to provide the glue that binds us together and can help to provide reasonable assurance that any flexibilities that exist would be both effective, credible, and nondiscriminatory.

Senator PRYOR. Mr. Abell, in your opening statement you said, "We," meaning the Department of OPM, "We take this task seriously and recognize the responsibility we have to balance our vital national security mission with protecting the interests of the people."

I am curious about that statement. Could you explain some specific instances in the past where you believe the "interests of the people" have differed from the "national security mission" of the Department.

Mr. ABELL. Senator, as the many instances of testimony over the proposal to approve the National Security Personnel System, this type of question came up over and over again. And I think the answer is that, moving forward, we do not want to do that. We do not want to have one get out of balance with the other. I do not think that implies that it is currently out of balance——

Senator PRYOR. Or it has been out of balance in the past.

Mr. ABELL. Or it has been out of balance. As I said earlier to Senator Coburn, it is an organization that does succeed, the Department of Defense is. Failure is not an option, and so our employees, and our managers, and our commanders collaborate to make sure that occurs.

Senator PRYOR. Yes, I heard your answers to Senator Coburn's questions, which I thought were very good questions. Maybe I misunderstood that sentence or that phrase from your opening statement, but I wanted to just clarify, for the Subcommittee's purposes, that you are not saying that it has been out of balance in the past.

Mr. ABELL. No, sir, I am not implying that is a change.

Senator PRYOR. Now, Mr. Abell, my understanding is that performance expectations are not required to be put in writing; is that right?

Mr. ABELL. No, sir, that is not correct today, and it will not be correct in the new one. Supervisors and employees will sit down together. They will lay out at the beginning of a performance cycle, an evaluation cycle, what the objectives are, what the standards are. There will be periodic reviews during that cycle, and then at the end of the cycle will be the evaluation.

Senator PRYOR. I am just asking how is that going to be documented? Is all of this required to be in writing?

Mr. ABELL. Yes, sir. There will be instances during the evaluation period where changes occur, as mission changes, as production needs change. It depends on the organization. Not all of those may be necessarily in writing, but the initial one certainly would.

Senator PRYOR. Well, my experience in matters relating to personnel in my private law practice or as the attorney general of my State, is that it is important to be consistent. And you are probably much better off in the long term to take the time to get as much in writing as possible because people's memories get hazy over time, and they have different understandings of what was said or what was implied. So I would think that the Department needs to try to make sure they have a good, concise way to document this, otherwise I think you are asking for trouble.

Thank you, Mr. Chairman.

Senator VOINOVICH. Thank you, Senator Pryor.

I am going to have a short 2-minute question period.

I hope that you are tracking what the Department of Homeland Security is doing in designing their personnel system. Please clarify for me why some aspects of the NSPS rules will be different from those at the Department of Security. For example, the Homeland Security Labor Relations Board has a process for participation by the unions in selecting the members of the Board. From my pespective, the Defense Department needs a good reason for differences between its personnel system.

The other question I have concerns certification of NSPS. For more than 300,000 employees to be covered by NSPS it has to be certified. Who is going to certify the system. Is that the Office of Personnel Management, Mr. Nesterczuk?

Mr. NESTERCZUK. We have talked to the Department about that. We will set up some evaluation criteria. The PEO is in the process of doing that, setting up an evaluation program as part of the implementation. We will work with them on that, and we will help them achieve that certification.

Senator VOINOVICH. I am going to be very interested in making sure that process—I want to understand what it is, I want to know what the metrics are and so on because 300,000 is a lot of people, but at least we have got an opportunity then to go back and review how the system has worked.

Senator LEVIN. Thank you, Mr. Chairman.

Mr. Abell, as you know from your past experience, the Senate Armed Services Committee has had a lot of dealings with a broad range of actions that are taken in personnel actions involving military personnel. These issues come up in the context of confirmation hearings for senior officers, and we see cases that range from misuse of government property, abuse of authority, to drunken driving, to retaliation against whistleblowers. Nonetheless, even in those cases where there are shortfalls, human failings, we have officers that are recommended for promotion and, as far as I am concerned, rightly so.

I do not need to tell you, because of your experience, just how many letters we get from the Department that will identify an offense committed by a nominee, but reach a conclusion that it was an isolated incident in that officer's career, and it should not preclude promotion to a higher rank. But the draft regulation provides that a proposed penalty against a DOD civilian employee may not be reduced on appeal unless "the penalty is so disproportionate to the basis for the action as to be wholly without justification."

And even in those cases where the penalty is reduced, the draft regulation states that "the maximum justifiable penalty must be applied."

That is pretty draconian, and it is not consistent with the promotion policy for our uniformed military officers. For instance, the draft regulation does not even allow the reviewing authorities to take into account a lot of factors that could reduce the penalty, such as the employee's past record, whether the offense was intentional or inadvertent, consistency of the penalty with those imposed on other employees for the same or similar offenses. Instead, it just simply says that the MSPB—the Appeal Board—should apply "the maximum justifiable penalty."

Now, would it not make more sense to recognize, in the case of DOD, civilian employees, as we do for senior military officers, that there is a whole range of penalties that may be appropriate for a given offense, depending on its context? And should not the regulations reflect the full range of factors that could be considered in determining an appropriate remedy?

Mr. ABELL. Sir, I believe that you are referring to what prerogatives accrue to an administrative judge who is reviewing an appeal, MSPB administrative judge. And it is true that the proposed regu-

lations would limit the administrative judge's ability to mitigate the punishment. He may—he or she—may recommend mitigation back to the Secretary of Defense, but does not have, under our proposed regulations, the ability to direct that mitigation.

I think that is entirely consistent with the military side that you described in that the military side is done solely within the Department of Defense. All of those same leaders and those same concerns for due process exist prior to the case getting to the administrative judge, and then the administrative judge sends back his findings to the Secretary, who again can review it and take one of three actions, as I understand it.

Senator LEVIN. Is the DOD allowed to consider those factors or must the maximum justifiable penalty be applied? This is not a question of whether it is a recommendation or not. This is a question of whether or not the maximum justifiable penalty has to be applied or whether you can take into consideration, whoever makes that final decision, the full range of factors which are normally considered in employment cases, whether it is promotion or punishment.

Mr. ABELL. Senator, my understanding of the regs is that they are not intended to direct a supervisor, manager or commander to employ the maximum penalty possible. If it says that, we will review it and look at it.

Senator LEVIN. But the MSPB, on its decision, must do that.

Mr. ABELL. Yes, sir. The ability of the MSPB to change the finding of the leadership of the Department of Defense from the individual through the Secretary is limited, and that is to consider the national security mission and the impact on the national security mission, but that does not imply that the line of supervision from the individual through the Secretary is somehow limited.

Mr. NESTERCZUK. Let me make a comment here, if I may, Senator, since we had some input on this as well.

Our concern was that the statute permits the Department to establish new standards in the area of appealing decisions. The reason is there are many instances of AJs second-guessing first-line managers who make a penalty decision in the context of mission, in the context of operational requirements. Managers are subsequently second-guessed in an entirely different context, may be based on the AJ's experience with an agency with a less-vital mission, where a similar transgression could call for a less-severe penalty.

So this is an attempt to give more weight to the mission requirements of the Department, the operational needs of the Department, in achieving——

Senator LEVIN. You can give presumptive weight. You do not have to direct that an appeal body apply the maximum justifiable penalty. You can give a presumption to a decision without being this inflexible, rigid and draconian on the appeal of that decision.

Thank you, Mr. Chairman.

Senator VOINOVICH. Senator Akaka.

Senator AKAKA. Senator Pryor can go first.

Senator VOINOVICH. Any other questions, Senator Pryor?

Senator PRYOR. No questions.

Senator VOINOVICH. Senator Akaka.

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

Following on Senator Voinovich's question, and this is to Undersecretary Abell, the proposed regulations state that the internal National Security Labor Relations Board will consistent of members selected by the Secretary, except for one appointed by the Secretary upon consultation with OPM.

Why have Federal employees been left out of this process?

Mr. ABELL. Senator, there are a number of ways that we could have done this. As Senator Voinovich points out, DHS used a different model. This is something that we can, and will, review during the meet-and-confer process, but this is the model that we selected to put in our proposed regulations.

Senator AKAKA. Undersecretary Abell, the regulations state that DOD will issue implementing issuances on premium pay and compensatory time, including compensatory time off for travel. As author of the new governmentwide compensatory time for travel provision, I am interested in learning what changes DOD plans to make to this provision, and what are some changes being considered to the compensatory time for travel provisions of Title 5?

Mr. ABELL. Senator, I do not know that we have any changes to that in mind at this point.

Senator AKAKA. Let me, also, follow up on the line of questioning of Senator Levin. Could you provide us with examples of AJs disregarding agency mission.

Mr. ABELL. Yes, sir. I have several here if you would like them or I can give them to you for the record, whichever way you choose.

Senator AKAKA. Thank you very much. For the record is fine. , Mr. Chairman, my time has expired.

Senator VOINOVICH. Obviously, there are a lot more questions. We will submit them for the record and give you an opportunity to answer them.

We thank you very much for the work that you have put into this. Mr. Walker, thank you for staying on top of this whole area. We hope that the period that the meet and confer process will be fruitful. I am glad, Mr. Abell, you said that you would be willing to extend it beyond the minimum 30 day requirement, as was the case with the Department of Homeland Security. It is really important that the regulations be vetted and everybody feels that they have had an opportunity to discuss concerns. So I hope you remain committed because I think the commitment of senior leadership will determine whether or not NSPS is going to be successful.

Thanks very much.

Mr. WALKER. Thank you, Senator.

Senator VOINOVICH. Testifying in our second panel is Richard Oppedisano, the National Secretary of the Federal Managers Association. Testifying on behalf of the United DOD Workers Coalition are John Gage, President of the American Federation of Government Employees, and Gregory Junemann, President of the International Federation of Professional and Technical Engineers.

Thank you for coming. I know that all of you have invested much time and energy on this issue. I also know that you have many concerns, and I look forward to your testimony.

If you will all stand, I will swear you in.

[Witnesses sworn en masse.]

The record will indicate that the witnesses answered in the affirmative.

We will begin with Mr. Oppedisano.

TESTIMONY OF RICHARD OPPEDISANO,[1] NATIONAL SECRETARY, FEDERAL MANAGERS ASSOCIATION

Mr. OPPEDISANO. Thank you, Mr. Chairman.

Chairman Voinovich, Ranking Member Akaka, and Members of the Subcommittee, I sit before you today as the National Secretary of the Federal Managers Association, FMA. I was recently retired as the chief of staff and the operations officer for the U.S. Army Watervliet Arsenal in Watervliet, New York. I have been involved in human resource management and labor relations for the better part of my 30 years of Federal civil service before retiring last May. 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 proposed personnel regulations outlining the National Security Personnel System, NSPS, at the Department of Defense.

Managers and supervisors are in a unique position under the final regulations. Not only will they be responsible for the implementation of the Department's new personnel system, but they will also be subjected to its requirements. As such, managers and supervisors are pivotal to ensuring the success of the 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 on-the-ground functions of the civilian DOD workforce.

The proposed rules that were provided in the *Federal Register* were not all-inclusive. The proposal indicates that detailed instructions will be provided in DOD's implementing regulations. Without these detailed regulations, it is difficult to have a complete understanding of the regulatory requirements. Therefore, we recommend that the implementing regulations be made available for review and comment prior to being issued as final.

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 an intensive training program and budget proposals that will lend credibility to the intent of the new personnel system. We, also, need the consistent oversight and appropriations 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 be 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 critical that this happens in the implementation of these regulations. Training of managers and employees on their rights, responsibilities and expectations, through a corrobora-

[1] The prepared statement of Mr. Oppedisano appears in the Appendix on page 106.

tive and transparent process, will help to allay concerns and create an environment focused on the mission at hand.

Managers have often been given additional authority under the final regulations in the area 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. 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 cannot do this alone, cooperation between management employees must be encouraged in order to debunk myths and create a performance and a results-oriented culture that is so desired by these final regulations. Managers have also been given greater authority in the performance review process that more directly links employees' pay to their performance. We believe that transparency leads to transportability, as interdepartment drop 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 regulated 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 maintaining a cooperative and congenial work environment. Title 5 CFR 251 and 252 allows FMA, as an example, to come to the table with DOD 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 critical to its long-term vitality.

There has also been a commitment on the part of OPM, DOD and DHS to hold close to merit systems principles, and we cannot stress adherence to these timely standards enough. However, we also believe that there is a need to be additional guiding principles that link all organizations of the Federal Government within a framework of a unique and a single civil service. OPM should take the current systems being implemented at DOD and DHS and create a set of public principles that can be guided for all other agencies and their efforts to develop new systems—systems that parallel one another to allow for cross-agency mobility and evaluation instead of disjointed ones that become runaway trains.

We, at FMA, are cautiously optimistic that the new personnel system at DOD 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 systems roll-out, the willingness of OPM and DOD to reach out to employee organizations such a FMA is a positive indicator of cooperation and transparency.

We look forward to continuing to work closely with the 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 important matter. Should you need addi-

tional feedback or have any questions, we will be glad to offer our assistance.

Senator VOINOVICH. Thank you very much. Mr. Gage, welcome back. It is nice to see you, again. I compliment you on developing a union coalition, on whose behalf you are testifying today. I understand there are 27 unions in the coalition?

Mr. GAGE. I think there are 36 unions.

Senator VOINOVICH. I stand corrected. I thought that I had a lot when I was mayor of Cleveland. We had 27.

Mr. GAGE. That does not make it easier. That is for sure.

Senator VOINOVICH. We look forward to your testimony.

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

Mr. GAGE. Thank you, Mr. Chairman and Members of the Subcommittee.

I want to focus my remarks on the broad outline of a pay-for-performance scheme that was included in the proposed NSPS regulations. Our unions' objections are detailed in our written testimony and formal comments in response to the February 14, 2005 *Federal Register* notice.

Today, I want to emphasize that DOD's proposed pay system is nothing more than an elaborate and costly mechanism to reduce salaries and salary growth for the vast majority of DOD workers. It is interesting to note that in response to the outpouring of workforce opposition to NSPS, DOD has launched an effort to convince its employees that they will do better under the new system. They are trying to sell it as market-sensitive pay rather than performance pay. But our members seem to know that no matter what name is attached, the NSPS is no more about market sensitivity than it is about performance. It is not about improving their pay.

After all, the general schedule and locality pay component are both supposed to be market-based system. The GS is supposed to combine periodic performance-based raises called within-grade increases with market-based adjustments to the entire schedule. FEPCA's locality raises are, also, supposed to be entirely market-based. Likewise, blue-collar Federal employees are supposed to receive market-based prevailing rates, but neither the GS nor the blue collar FWS system ever actually uses the market data because of budget constraints.

DOD's scheme, whether it is market sensitive or market based, does not even promise market rates on paper. Instead, it admits that budget neutrality will be the primary principle guiding pay raises. Despite the fact that DOD has not revealed anything close to the detail necessary to evaluate its plan properly, we know enough to be strongly opposed to it as both a tremendous waste of time and money and a guaranteed way to introduce corruption, cronyism and chaos into a workplace that should be focused on national security and troop support.

First, no one whose performance is judged fully satisfactory will receive any raise at all unless DOD decides to adjust the bottommost level of his or her pay bands. DOD will be able to use any

[1] The prepared statement of Mr. Gage appears in the Appendix on page 126.

one of numerous factors to justify a decision not to raise the bottom of the pay band, factors that will include, but not be limited to, its own interpretation of data it buys from consultants. One year it might refuse to adjust the bottom because its consultants say it is not necessary. Another year it might refuse to adjust the bottom because it is not recruiting at the entry level and, thus, there is no need to make any adjustment. Any reason will do.

But in the meantime, when entry rate is frozen, every other rate in the band will be frozen as well. And it is my suspicion that the market rate will be used to lower entry rates rather than to raise them. Movement within a band, a so-called performance raise, will be worth less and less in terms of purchasing power if the rates are not adjusted due to a freeze on the entry level.

These performance raises will also be a moving target. Even if your supervisor recommends you for a raise based on your performance, you end up competing against everyone else whose name is placed in that performance pay pool. Whether you are a winner or a loser in that contest has nothing to do with performance. It will be all about which component is a priority that year, and there will be no uniformity regarding the size of a performance raise. An employee rated outstanding in one place may get 2 percent, while another working elsewhere, with the identical job and an identical outstanding rating, might receive 1 percent or nothing at all.

An individual's performance rating in the DOD scheme will be a crucial factor in deciding salary level, salary adjustments and vulnerability to reduction in force. However, in the proposed regulations, these evaluations will not be subject to challenge through the union's negotiated grievance and arbitration process. This last is perhaps the system's fatal flaw. DOD management has decided to base the two most critical aspects of an employee's job—his pay and whether he keeps his job in the face of RIFs—on his performance evaluation. Yet it is not willing to allow those evaluations to be held up to scrutiny by an impartial third party. It is not willing to require that the documentation justifying a performance evaluation be made available to the employee and not willing to let the employee have a real opportunity to challenge the evaluation. This absence of accountability on the very mechanism that DOD intends to place at the heart of its new personnel system makes a mockery of its promise to uphold the merit system principles and is simply not credible.

If employees cannot appeal performance ratings to an impartial third party, how will they or the public know that salaries in the Defense Department are based upon factors other than politics? If employees cannot appeal performance ratings to an impartial third party, how will they or the public know that getting or keeping a job in the Defense Department is based upon who you know, rather than what you know. There will be no way to verify this. The hubris on the part of the DOD will doom its system. The only question is how much damage will be done before the scandals amount to such a level that Congress is forced to enact new legislation that constrains the power of the Agency to act without accountability to any outside authority.

Pay-for-performance schemes, even those not plagued with the DOD's fatal flaws, have never been shown to deliver improved per-

formance in either the public or the private sector. Indeed, they do not improve performance of either individual workers or organizations. And unless substantial additional resources are made available to fund pay-for-performance, these schemes inevitably end up lowering pay for the majority of workers and diverting enormous resources to bureaucracies rather than mission.

Professor Jeffrey Pfeffer of Stanford University's School of Business summed up the research on pay-for-performance by saying that it eats up enormous amounts of managerial resources and makes everyone unhappy. Thank you, Senator.

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

TESTIMONY OF GREGORY J. JUNEMANN,[1] PRESIDENT, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS

Mr. JUNEMANN. Thank you, Mr. Chairman. I would like to thank the Subcommittee of the Oversight of Government Management, the Federal Workforce and the District of Columbia for holding today's hearing. I would also like to extend a special note of appreciation to Chairman Voinovich and Ranking Member Akaka for giving me the opportunity to testify here.

Before I begin my personal remarks, I would like to join my good friend John Gage in submitting the official record of the comments of the United DOD Workers Coalition, the UDWC, of which IFPTE is a member. The document represents the official testimony of the UDWC, a coalition of 36 unions working together on this NSPS issue. I would like to directly associate myself with the UDWC document, which was delivered to this Subcommittee last week.

Although I would be happy to engage in discussion on pay-for-performance, I will restrict my remarks to the Department's regulation subparts on appeals and labor relations. The features of these two sections are critically important if we want to preserve fairness and equity for the civilian workforce of the Department of Defense and the accountability of management. The Department has insisted that it requires flexibility in its personnel system, and this is necessary to better our Nation's security. But so far we have seen no evidence that this system, despite its title, was developed with our national security in mind.

DOD states that the current appellate system is complex, legalistic and slow. But gutting the current personnel system and effectively starting over simply will not work.

First, it strikes at the heart of a system of justice that is crucial to assuring employees that they work in an environment where their side of the story can be heard and not ignored.

Second, in some ways, it will not streamline the system, but will make it more complex.

Finally, it will push good employees out of government service and discourage qualified employees from applying.

At every juncture in these regulations, the Department is seeking to avoid being held to any objective standards. Even third parties, like the Merit System Protections Board, are required to afford DOD great deference in interpretation of these regulations.

[1] The prepared statement of Mr. Junemann appears in the Appendix on page 140.

This creates an entirely new legal standard which an established body of law, under MSPB, already exists and is yet another loophole for managers to escape accountability for their actions.

DOD has not even provided evidence as to why MSPB's authority to provide impartial review should be usurped. We do not think it is required to protect our Nation's security since, under the current personnel system, separation or removal already may be effective rapidly, if in the interests of national security.

Finally, DOD claims that the complexity of the existing system deters managers from taking the necessary action against poor performers and those engaged in misconduct. We have long maintained that the proper training and resource management within the existing personnel system would allow managers to maintain discipline, ensure efficiency and good performance, while maintaining fairness and esprit de corps within the workforce. Certainly, it would be cheaper than creating an entirely new and untested system.

As to the issue of labor relations provisions the goal of the Department says it seeks to accomplish may be achieved, as it has always been, by the continued adherence to the provisions of Chapter 71 of Title 5. The Department has not pointed to a single instance in which the Department has ever failed to carry out its mission swiftly and authoritatively due to the existence of Chapter 71 requirement.

Congress provided the Department with new tools to increase efficiency, bargaining above the level of bargaining unit recognition and new, independent third-party review of decisions. The Department needs only to use these new tools properly and train managers and supervisors properly to use the authority that the current law provides.

Despite the plain meaning of the statute, the Department is attempting to eradicate existing labor law protections. Again, the sole purpose appears to be avoid accountability not to protect national security. The regulations drastically limit the subjects of bargaining, expand management's right to act unilaterally and to restrict and/or eliminate the rights of employees.

By far, the most outrageous feature of Subpart 1 of the regulations is the creation of what can only be described as a kangaroo labor board, the National Security Labor Relations Board. Board members are to be appointed by the Secretary and will essentially replace the Federal Labor Relations Authority, which just celebrated 25 years of success in the Federal labor relations business.

In conclusion, every successful civil service system ensures a few basic critical concepts—flexibility, yes, but also fairness, consistency, and accountability. The Department has taken a straightforward mandate from Congress and abused it. It has reserved for itself a great deal of flexibility while shedding accountability and fairness.

We strongly urge Congress to step in. Any new personnel system should preserve, at the very least, the following attributes:

It should provide, as does the current system, for a choice between Merit Systems Protection Board and negotiated grievance/arbitration procedures for all serious adverse actions.

It should provide impartial review of labor relations disputes by an independent entity like the Federal Labor Relations Authority. We recommend that the FLRA's current role be preserved in its entirety.

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 decisionmaker, such as an arbitrator or MSPB.

DOD should be required to prove, by the preponderance of evidence, that adverse actions imposed against employees promote the efficiency of the service.

An impartial and independent decisionmaker must have the authority to mitigate excessive penalties.

This concludes my remarks, Mr. Chairman, and again thank you.

Senator VOINOVICH. I would like to thank the panel for your testimony.

Senator WARNER. Mr. Chairman, would you indulge me, I have a remark or two?

Senator VOINOVICH. Senator Warner, of course, I will.

OPENING STATEMENT OF SENATOR WARNER

Senator WARNER. Thank you very much. I conducted a hearing of the Armed Services Committee this morning, otherwise I would have attended the session from the beginning.

Mr. Chairman and Members of the Subcommittee, I was privileged to serve over 5 years, 4 months, and 3 days in the Department of the Navy during some of the most intense years of Vietnam, and I saw an almost seamless working relationship between a civilian component of the Department of the Navy and a uniform component of Naval and Marine Corps officer and men and women. And it was magnificent in that very stressful and difficult period in our history. And unlike other departments and agencies of the Federal Government, there is an extraordinary camaraderie between these two groups of individuals.

And while I do not pretend to know all of the specifics of this, I would urge that this Subcommittee and, indeed, the Congress carefully evaluate the honest, forthright petitions that have been presented to us this morning by both panels and see whether or not we can reconcile the differences in such a way as to even make a stronger team—and certainly I will speak for the Department of Defense at this time—between the uniform and civilian individuals.

I thank each of you for your contributions today.

I might add, at that time, I had over 600,000 in the Department of the Navy, alone, of civilians, and many of them were taking risks commensurate with the men and women of the Armed Forces in the far-flung places of the world. I thank the Chairman.

Senator VOINOVICH. Thank you, Senator Warner.

Mr. Gage, I heard your testimony with respect to performance evaluations. You said that they do not make a difference. From my own personal experience, performance evaluations make a difference in the performance of employees. I was mayor of the City of Cleveland for 10 years, and I was governor of Ohio for 8 years, and I can assure you that it does make a difference if undertaken

in a proper way. I think that Mr. Walker's testified that 85 percent of the employee pay currently is on auto pilot.

For example, I will never forget having dinner one night with one of our ambassadors. His wife and I talked about Federal workforce issues. She told me that she had 15 workers. She had five superperformers, five that were pretty good, and five that are not performing. They all earned the same pay, and she saw how it was demoralizing to the people that are doing a better job.

Second, Mr. Oppedisano discussed training. I agree with your concerns. I think you heard the question I asked of Mr. Abell regarding the Department's budget for training. I would like to hear your view of the Department's training budget. Also, the Defense Department has operated alternative personnel systems for 25 years.

Are you familiar with any of those, Mr. Oppedisano?

Mr. OPPEDISANO. You are probably referring to China Lake. More than likely you are talking about the Naval China Lake program.

As you stated before, sir, the monies that are going to be necessary for training, we honestly feel that there should be an appropriate line item for actual NSPS training. If it is not, there is no guarantee that the individual installations are going to receive the monies to be able to do the training for their managers and their employees. And without that proper training, there is no way that the system is going to be successful. There is going to be no credibility on either side of the aisle, without both of those parties sitting down together and saying, "OK. This is how we work it out." And without the proper funding, it is not going to happen, sir.

Senator VOINOVICH. Do you believe that experts need to be brought in to help with training should it be conducted in house?

Mr. OPPEDISANO. My personal experience is with the Department of Army right now. Over the past few years, since 1997 or so, we have been under the Civilian Personnel Operations Center versus the Civilian Personnel Administrative Center. And I do not believe, at the present time, within the Department of Army at least, that there is enough sufficient resources at the installation level that will be able to give the training that is necessary.

They are going to go out, and they are going to say, "OK. We are going to train the trainers, and then go take it back to the site, and then they are going to train at the site level." The credibility is not going to be there.

Senator VOINOVICH. In other words, the system right now is in-house. You train the trainers, and then the trainers go back and train the individuals to do performance evaluations.

Mr. OPPEDISANO. That is correct. Now, also, the fact that they say the Human Resource Offices is the——

Senator VOINOVICH. Who is going to train the trainers?

Mr. OPPEDISANO. Well, that is the question. I do not have an answer for you. I do not know. I do not think that has been resolved yet, although, from what I am hearing, it is going to come from the Civilian Personnel Operations Center for the Department of Army folks.

So I am not sure whether that is finalized yet, Mr. Chairman.

Senator VOINOVICH. Then it is unclear?

Mr. OPPEDISANO. I know there is going to be training. How much, to what degree, and who is going to be involved has not been specified yet, to my knowledge.

Senator VOINOVICH. Then your recommendation is for a dedicated training line item in the budget? I have asked agencies for this, for the last several years. I will never forget when I first became a Senator, I asked all the departments how much money they spent on training. I think 11 departments came back and said, "We do not know what we spend for training," and one said, "We know, but we will not tell you."

The point is for NSPS to be successful, the Departments needs additional money for training.

Mr. OPPEDISANO. There is no question about that, Mr. Chairman.

Also, the fact that it just cannot be a one-time application. It has got to be continuous as the system grows. Will the system work? It will work. We will make it work. That is the way we do things in the Department of Defense. And what will happen now is the fact that you just cannot do one set of training and expect that to just be it and go your merry way. It is not going to happen. You have to have a continuous training operation as the system is implemented.

Senator VOINOVICH. Do you have experiene with demonstration projects?

Mr. OPPEDISANO. I have not at my own installation, no, sir.

Senator VOINOVICH. Are you aware of them?

Mr. OPPEDISANO. Yes, I have, sir.

Senator VOINOVICH. Do you think they offer appropriate benchmarks for NSPS?

Mr. OPPEDISANO. I think there are some benchmarks, yes. Do I think they still need improvement? Yes, I do. I think there is always room for improvement in any system that we establish. I think some of the benchmarks are out there. I think some of the systems have some very good results, but there has been some dissatisfaction with them, also.

So depending on how they are implemented, and the degree of implementation, and the degree of training that is given to the managers and the employees, that is what is going to make the system successful or not.

Senator VOINOVICH. I can tell you this, it is a big job. Anybody that has done performance evaluation knows that it takes time, and supervisors and managers need to be trained.

Senator Akaka.

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

Mr. Gage and Mr. Junemann, you heard my question to Mr. Nesterczuk about whether veterans preference is protected in the bump and retreat options during a reduction in force. Do you agree with Mr. Nesterczuk's response?

Mr. GAGE. I think that the performance, the weight on the performance, the last performance evaluation of an employee, overweighs or outweighs what currently veterans enjoy on their preference. I think, in that way, it lessens veterans preference.

Senator AKAKA. Do you have any comment, Mr. Junemann?

Mr. JUNEMANN. Essentially, I agree with what Mr. Gage is saying. But it just seems without knowing, because we heard this

morning, and I am hearing this for the first time, that there are some parameters set up on pay-for-performance and that there are some metrics that DOD has. So I do not know what is in them.

Without knowing that, there may be something in there about veterans preference. There may not. Again, it would be nice to have them. We just met face-to-face last Thursday.

So again, essentially I agree. It sort of seems up in the air. But they do not have, again because of this unilateral scrutiny by front-line management on an employee's performance, it does not seem that veterans rights are protected as much as they are now.

Senator AKAKA. Mr. Oppedisano.

Mr. OPPEDISANO. Senator, can I respond to that question, also?

I have had some experience in reductions in force. Over the period of a 10-year period from 1991 to 2001, I was a director of human resources and my office and my staff ran nine reductions in forces. So I know about reductions in force.

Under the current system, there is a process where you do get certain amounts of time added for performance. It is over a 3-year cycle. And that was more accepted by the unions at the time.

And to sit back and say that 1 year of performance adequately shows how that individual will perform in the future, we do not necessarily agree with. There is something in the system already that establishes the fact that you do get recognition for a performance in the reduction in force process.

To that matter, I am not too much in disagreement with our union counterparts.

Senator AKAKA. Mr. Oppedisano, you and Senator Voinovich discussed the importance of training. In your opinion, on how much money do you believe will be needed by DOD to adequately train employees on NSPS?

Mr. OPPEDISANO. Senator, I do not have an answer for that because I really just don't have that kind of knowledge. But I know there has got to be a lot.

Senator AKAKA. This is something that we must pay attention to. Chairman Voinovich has been a champion of human capital because we know that in a few years we will be facing the retirement of the baby boomers. Without training, we are going to have a huge problem with employees and passing on institutional knowledge.

Mr. Oppedisano, following up on your earlier comments, what about a manager who is specifically charged with overseeing training, just like a chief human capital officer?

Mr. OPPEDISANO. Well, I do not see where it would hurt anything. I think it would give some credibility.

However, it depends on how that position is actually written to say what their duties and responsibilities are. What influence will they have in Congress with the idea of funding and so on and so forth? How much influence are they going to have within the Department, would be another point.

Do I think it is necessary? I do not think it would hurt anything. I think probably it would be a good point for us to be able to start.

Senator AKAKA. Mr. Gage and Mr. Junemann, the DOD Workers Coalition made suggestions to DOD and OPM for NSPS. Would you please describe some of the proposals that were offered to protect

employees while still meeting the Department's national security mission.

Mr. OPPEDISANO. Well, Senator, I think that we offered commonsense, realistic proposals for every concern that management had.

But I want to say something to Senator Voinovich. I never said that performance evaluations were not necessary or good things. They are. My problem is with this particular pay-for-performance scheme.

Senator the one thing I would like you to watch is to make sure the bottom does not fall out of Federal pay where they can hire at localities for whatever they can get an applicant, money that they would take. That is the real concern I have on it, not at the top rewarding good employees. I am all for that.

I am afraid with this scheme and the way they have it, they are going to drop the bottom out of Federal pay to reduce it across the board.

Mr. JUNEMANN. I would tell you that in the meetings that I attended with DOD and management, we talked specifically. Some of their problems are our problems, as well. Some of the current practices under current law are a bit cumbersome to us as well as they are to management. And, certainly, there needs to be continuous reform of these processes.

So we offered ideas on streamlining the process under labor-management appeals, under such things as if decisions take too long, we can have expedited arbitrations. We can have expedited decisions where the arbiter is mandated by statute to say you will issue a decision within 30 days, 60 days, what have you. You can even issue bench decisions in cases where that is appropriate. So we offered these as some of the suggestions.

Under pay-for-performance, we really never got past the title pay-for-performance. We never really got into a give and take on that. My union represents private sector and State, county and municipal workers as well as DOD and other Federal employees. So as Chairman Voinovich pointed out that he has experience, I have experience in this, as well.

And I offered that. We have represented a lot of engineers and scientists, they are not new to pay-for-performance. We have a tremendous amount of experience, and when it works, when it does not work. Certainly training, not only on the front end but continuous ongoing training of front-line management as well as employees, is part of all of that.

But employees have to have the assurance that it is going to work. Right now our local in Portsmouth, New Hampshire, at the shipyard up in Portsmouth, they are supposed to be reviewed annually, every employee within—we have a local up there of about 1,200 workers. They have not had an evaluation, a performance evaluation, in the year 2003 or the year 2004.

So I cannot go to them and say I am confident that this new thing will work because they are saying to me we have not had an evaluation since 2002. How can this new system possibly work?

And that is really the gist of it. No matter how much training you put into it, how much you put into the budget, if the employees are not confident that it is going to work, I think it is going to fail.

Senator AKAKA. Thank you. My time has expired.

Senator VOINOVICH. Thank you, Senator Akaka.

As I indicated in my opening statement, there are some elements of the DHS personnel system which are not included in NSPS. For example, the internal Homeland Security Labor Relations Board establishes a process whereby employee organizations may recommend nominees to the Secretary. This process has not been replicated for the National Security Labor Relations Board. The Department of Homeland Security establishes a process for employee involvement on matters such as pay. No similar process exists under NSPS.

How do you feel about having consistency between the Department of Homeland Security and the Department of Defense?

Mr. GAGE. Well, as you said, or one of the panelists said, I do not see any reason why they would not be consistent, and I hope they would be consistently good.

Senator VOINOVICH. You have got members in both organizations.

Mr. GAGE. We do. And, Senator, DOD went much farther than DHS. For instance, even on the pay-for-performance, on your evaluations, in DHS, you can arbitrate it. In DOD, you can only go to a board or some type of management review board, but even if they say, "Yes, employee, you are right. Your evaluation should be higher," it still goes into the management chain so that they can say, "But you do not get the commensurate money for that new review."

Now, there is no credibility with that type of system with employees, and I think they should just let us arbitrate these evaluations—they mean so much to an employee—and have an impartial third party. As DHS is saying, we can arbitrate employee evaluations in DHS, and I think DOD ought to follow that line.

Senator VOINOVICH. Mr. Junemann.

Mr. JUNEMANN. We do not have employees within the Department of Homeland Security, but just looking at it, it makes nothing but sense that the board should be a compilation of some members appointed by management representatives, some members appointed by labor representatives. Otherwise what you have got is two parties meet and eventually reach disagreement, and you end up going to a board consisting of representatives from only one party to say who is correct in their argument. Well, obviously, it is going to be towards management in just about every case. I mean, that is just common sense.

Senator VOINOVICH. Mr. Oppedisano, do you have any comment on that?

Mr. OPPEDISANO. Again, we are talking a training issue, and we are talking a monetary issue. We are into the pockets of the employees at this particular time. And for the employees who will be dissatisfied with their ratings, it is going to happen, we know that right up front, but now it is going to be more adversarial than ever before because now you are talking actual money into my pocket for a day-to-day operation, my weekly salary. You are also talking my retirement entitlements, and so on and so forth.

Should there be an appeal process in place somewhere that can be relied on as being fair? Yes, we do believe in that.

Senator VOINOVICH. So you all agree that consistency would be beneficial?

Mr. JUNEMANN. Absolutely, sir.

Mr. GAGE. Senator, except in one area, of course, the mitigation of penalties. DHS is not much better than DOD when it comes down to restricting an arbitrator or a third party from mitigating a penalty. I think both of them have to be really liberalized on that point.

Senator VOINOVICH. Well, you are all have an opportunity during meet-and-confer. I did speak to Secretary England yesterday. We spent a half an hour together because I wanted to find out who was going to be leading NSPS implementation. He assured me that he was going to continue to play a leadership role.

I will say this, since Secretary England has taken over NSPS has progressed in a much better manner. He understands implementation will take a long time and that substantial resources are needed if it is going to be successful. But I would like to recommend that you take this period of time and sit down and come up with your top priorities.

Because there are many unions within the Department of Defense, I think it would be in your best interest if you collaborated and prioritized your top concerns.

I would like to be informed, as I am sure Senator Akaka would as well, on the progress of meet and confer. If you do not think it is going well—not just differing opinions but the process itself.

NSPS must be done right. I want to make sure that your rights are preserved. As you know, I supported binding arbitration on developing the regulations. I think that if that had been the case, progress would be a lot further today. Everybody would have been forced to compromise.

What happens at DOD is significance if the Administration wants Congress to consider extending these flexibilities governmentwide. My feeling is that we need a better sense of this process. It is easy to talk about this implementing an effective performance management system, but it is a lot more difficult to actually implement.

I will confer with Senator Akaka, and some of our other colleagues to discuss NSPS funding, to guarantee that money is there to train the people.

Senator Akaka, do you have anything else that you would like to say?

Senator AKAKA. Yes. Thank you, Mr. Chairman. I want to thank you for convening this hearing today. I am sorry that our witnesses from DOD and OPM were unable to stay to hear our exchange with our second panel. However, I would like to note how pleased I am that Dave Walker stayed until the very end of this hearing. And I want you to know I am with you on this. It is so important that we have a training program and have money for it.

And in light of what we are expecting in the future, of retirements, we are really going to need training programs to take care of our Federal programs.

So I thank you very much for this hearing.

Senator VOINOVICH. Thank you very much. The meeting is adjourned.

[Whereupon, at 12:13 p.m., the Subcommittee was adjourned.]

APPENDIX

PREPARED STATEMENT OF SENATOR LAUTENBERG

Mr. Chairman: Thank you for convening this Subcommittee hearing to review the recently published rules for the new personnel system of the Department of Defense—the National Security Personnel System (NSPS).

Like the new personnel system of the Department of Homeland Security, the centerpiece of NSPS is "pay-for-performance" and the virtual elimination of Federal workers' right to bargain collectively.

The Administration "sold" both personnel systems to Congress using the argument that the post 9–11 era somehow required senior executives and managers to disregard the concerns of rank-and-file workers.

To this day, I fail to understand the Administration's reasoning. In fact, I believe that one of the most important lessons to be learned from the tragedy of 9–11 is that there must be better communication between the senior levels of management and the rank-and-file.

The notion that the right to bargain collectively and to appeal personnel decisions somehow threaten national security, and that Federal employees who are members of a union are somehow suspect, is deeply offensive.

Frankly, I have grown sick and tired of attacks on organized labor.

The first responders who rushed up the emergency stairwells in the World Trade Center on 9/11—while civilians filed past them on the way down—were union workers.

I challenge anyone to question the commitment, professionalism, or bravery of the union members who dies on 9/11 as they did their jobs and saved the lives of others.

I'm a strong believer in treating our Federal workforce fairly. As someone with extensive experience in the private sector, I know that workers are most productive when they receive fair pay and benefits, and when they can make their ideas heard.

I can also attest to the unique commitment, talent, and spirit of public service exhibited by our Federal employees.

With regard to NSPS—the new DOD personnel proposal—I'm particularly concerned that the plan could be subject to political manipulation.

Doing away with the normal General Schedule (GS) system—which has served Federal employees and the American people well—probably creates more problems than it solves.

Given the importance of the Defense Department's mission, we need to attract the "best and brightest" to work in its civilian workforce. Beating people down and taking away their rights and union protections isn't going to create the DOD workforce we need to keep America safe.

I hope we can work together to fix the problems with this new plan. I welcome our witnesses and look forward to hearing their testimony about it.

Thank you, Mr. Chairman.

United States Government Accountability Office

GAO

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

For Release on Delivery
Expected at 10:00 a.m. EST
Tuesday, March 15, 2005

HUMAN CAPITAL

Preliminary Observations on Proposed DOD National Security Personnel System Regulations

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

GAO-05-432T

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Highlights

Highlights of GAO-05-432T, a testimony to 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

Why GAO Did This Study

The Department of Defense's (DOD) new human resources management system—the National Security Personnel System (NSPS)—will have far-reaching implications for the management of the department and for civil service reform across the federal government. The National Defense Authorization Act for Fiscal Year 2004 gave DOD significant authorities to redesign the rules, regulations, and processes that govern the way that more than 700,000 defense civilian employees are hired, compensated, promoted, and disciplined. In addition, NSPS could serve as a model for governmentwide transformation in human capital management. However, if not properly designed and effectively implemented, it could severely impede progress toward a more performance- and results-based system for the federal government as a whole.

On February 14, 2005, the Secretary of Defense and Acting Director of the Office of Personnel Management (OPM) released for public comment the proposed NSPS regulations. This testimony (1) provides GAO's preliminary observations on selected provisions of the proposed regulations, (2) discusses the challenges DOD faces in implementing the new system, and (3) suggests a governmentwide framework to advance human capital reform.

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To view the full product, including the scope and methodology, click on the link above. For more information, contact Derek B. Stewart at (202) 512-5559 or stewartd@gao.gov.

March 15, 2005

HUMAN CAPITAL

Preliminary Observations on Proposed DOD National Security Personnel System Regulations

What GAO Found

Given DOD's massive size and its geographically and culturally diverse workforce, NSPS represents a huge undertaking for DOD. DOD's initial process to design NSPS was problematic; however, after a strategic reassessment, DOD adjusted its approach to reflect a more cautious, deliberate process that involved more stakeholders, including OPM.

Many of the principles underlying the proposed NSPS regulations are generally consistent with proven approaches to strategic human capital management. For instance, the proposed regulations provide for (1) elements of a flexible and contemporary human resources management system—such as pay bands and pay for performance; (2) DOD to rightsize its workforce when implementing reduction-in-force orders by giving greater priority to employee performance in its retention decisions; and (3) continuing collaboration with employee representatives. (It should be noted that 10 federal labor unions have filed suit alleging that DOD failed to abide by the statutory requirements to include employee representatives in the development of DOD's new labor relations system authorized as part of NSPS.)

GAO has three primary areas of concern: the proposed regulations do not (1) define the details of the implementation of the system, including such issues as adequate safeguards to help ensure fairness and guard against abuse; (2) require, as GAO believes they should, the use of core competencies to communicate to employees what is expected of them on the job; and (3) identify a process for the continuing involvement of employees in the planning, development, and implementation of NSPS.

Going forward, GAO believes that (1) the development of the position of Deputy Secretary of Defense for Management, who would act as DOD's Chief Management Officer, is essential to elevate, integrate, and institutionalize responsibility for the success of DOD's overall business transformation efforts, including its new human resources management system; (2) DOD would benefit if it develops a comprehensive communications strategy that provides for ongoing, meaningful two-way communication that creates shared expectations among employees, employee representatives, and stakeholders; and (3) DOD must ensure that it has the institutional infrastructure in place to make effective use of its new authorities before they are operationalized.

GAO strongly supports the concept of modernizing federal human capital policies, including providing reasonable flexibility. There is general recognition that the federal government needs a framework to guide human capital reform. Such a framework would consist of a set of values, principles, processes, and safeguards that would provide consistency across the federal government but be adaptable to agencies' diverse missions, cultures, and workforces.

Chairman Voinovich and Members of the Subcommittee:

I appreciate the opportunity to be here today to provide our preliminary observations on the Department of Defense's (DOD) proposed National Security Personnel System (NSPS) regulations, which the Secretary of Defense and the Acting Director of the Office of Personnel Management (OPM) jointly released for public comment last month.[1] The National Defense Authorization Act for Fiscal Year 2004[2] gave DOD significant authorities to redesign the rules, regulations, and processes that govern the way that defense civilian employees are hired, compensated, promoted, and disciplined. The proposed regulations, which according to DOD will ultimately affect more than 700,000 defense civilian employees, are especially critical because of their implications for governmentwide reform. These implications have long been a concern to this Subcommittee.

NSPS represents a huge undertaking for DOD, given its massive size and geographically and culturally diverse workforce. In addition, DOD's new human resources management system will have far-reaching implications for the management of the department and for civil service reform across the federal government. NSPS could serve as a model for governmentwide transformation in human capital management. However, if not properly designed and effectively implemented, NSPS could impede progress toward a more performance- and results-based system for the federal government as a whole.

We raised several issues regarding DOD's civilian workforce in a recently released report on the fiscal challenges the federal government faces in the 21st century, including whether DOD is pursuing the design and implementation of NSPS in a manner that maximizes the chance of success.[3] In recent testimony on DOD's business transformation efforts, we indicated that DOD is challenged in its efforts to effect fundamental business management reform, such as NSPS, and indicated that our ongoing work continues to raise questions about DOD's chances of

[1] National Security Personnel System, 70 Fed. Reg. 7552 (Feb. 14, 2005).

[2] Pub. L. No. 108-136 § 1101 (Nov. 24, 2003).

[3] GAO, *21st Century Challenges: Reexamining the Base of the Federal Government*, GAO-05-325SP (Washington, D.C.: February 2005).

success.[4] There is general recognition that the government needs a framework to guide the kind of large-scale human capital reform occurring at DOD and the Department of Homeland Security (DHS), a framework that Congress and the administration can implement to enhance performance, ensure accountability, and position the nation for the future. Implementing large-scale change management initiatives is a complex endeavor, and failure to address a wide variety of personnel and cultural issues, in particular, has been at the heart of unsuccessful organizational transformations. Strategic human capital management, which we continue to designate as a high-risk area governmentwide,[5] can help agencies marshal, manage, and maintain the workforce they need to accomplish their missions.

DOD's proposed regulations are intended to provide a broad outline of its new human resources management system. They are not, nor were they intended to be, a detailed presentation of how the new system will be implemented. Although we continue to review these extensive regulations, today I will (1) provide some preliminary observations on selected provisions, (2) discuss the multiple challenges that DOD faces as it moves toward implementation of its new human resources management system, and then (3) suggest a governmentwide framework that can serve as a starting point to advance human capital reform.

Summary

Let me begin by summarizing three positive features, three areas of concern, and three comments regarding the way forward. The first positive feature is that the proposed regulations provide for many elements of a flexible and contemporary human resources management system—such as pay bands and pay for performance. The second positive feature is that the proposed regulations will allow DOD to rightsize its workforce when implementing reduction-in-force (RIF) orders. For example, DOD will be able to give greater priority to employee performance in RIF decisions and take more factors into consideration when defining the areas in which employees will compete for retention. The third positive feature is that DOD has pledged to engage in a continuing collaboration with employee

[4] GAO, *Department of Defense: Further Actions Are Needed to Effectively Address Business Management Problems and Overcome Key Business Transformation Challenges*, GAO-05-140T (Washington, D.C.: Nov. 18, 2004).

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

representatives. (It should be noted that 10 federal labor unions have filed suit alleging that DOD failed to abide by the statutory requirements to include employee representatives in the development of DOD's new labor relations system authorized as part of NSPS.)

However, in addition to the litigation referenced above, our initial work indicates three primary areas of concern. First, DOD has considerable work ahead to define the details of the implementation of its system, including such issues as adequate safeguards to help ensure fairness and guard against abuse. Second, in setting performance expectations, the proposed regulations would allow the use of core competencies to communicate to employees what is expected of them on the job, but the proposed regulations do not require the use of these core competencies. Requiring such use can help provide consistency and clarity in performance management. Third, the proposed regulations do not identify a process for the continuing involvement of employees in the planning, development, and implementation of NSPS.

Regarding the way forward, development of the position of Deputy Secretary of Defense for Management, who would act as DOD's Chief Management Officer, will be essential to provide leadership that can elevate, integrate, and institutionalize responsibility for the success of DOD's overall business transformation effort, including its new human resources management system. In fact, in my previous testimony on DOD's business transformation efforts, we identified the lack of clear and sustained leadership for overall business transformations as one of the underlying causes that has impeded prior DOD reform efforts.[6] Additionally, DOD would benefit if it develops a comprehensive communications strategy that provides for ongoing, meaningful two-way communication that creates shared expectations among employees, employee representatives, managers, customers, and stakeholders. Finally, DOD must ensure that it has the institutional infrastructure in place to make effective use of its new authorities. At a minimum, this infrastructure includes a human capital planning process that integrates DOD's human capital policies, strategies, and programs with its program goals and mission, and desired outcomes; the capabilities to effectively develop and implement a new human capital system; and, importantly, a set of adequate safeguards, including reasonable transparency and appropriate

[6] GAO-05-140T.

accountability mechanisms, to help ensure the fair, effective, and credible implementation and application of a new system.

Preliminary Observations on the Proposed DOD National Security Personnel System Regulations

DOD and OPM's proposed NSPS regulations would establish a new human resources management system within DOD that governs basic pay, staffing, classification, performance management, labor relations, adverse actions, and employee appeals. We believe that many of the basic principles underlying the proposed DOD regulations are generally consistent with proven approaches to strategic human capital management. Today, I will provide our preliminary observations on selected elements of the proposed regulations in the areas of pay and performance management, staffing and employment, workforce shaping, adverse actions and appeals, and labor-management relations.

Pay and Performance Management

In January 2004, we released a report on pay for performance for selected OPM personnel demonstration projects that shows the variety of approaches taken in these projects to design and implement pay-for-performance systems.[7] Many of these personnel demonstration projects were conducted within DOD. The experiences of these demonstration projects provide insights into how some organizations in the federal government are implementing pay for performance, and thus can guide DOD as it develops and implements its own approach. These demonstration projects illustrate that understanding how to link pay to performance is very much a work in progress in the federal government and that additional work is needed to ensure that performance management systems are tools to help agencies manage on a day-to-day basis and achieve external results.

When DOD first proposed its new civilian personnel reform, we strongly supported the need to expand pay for performance in the federal government.[8] Establishing a clear link between individual pay and performance is essential for maximizing performance and ensuring the accountability of the federal government to the American people. As I have

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

[8] GAO, *Defense Transformation: Preliminary Observations on DOD's Proposed Civilian Personnel Reforms*, GAO-03-717T (Washington, D.C.: Apr. 29, 2003).

stated before, how pay for performance 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.[9] DOD's proposed regulations reflect 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. To this end, the DOD proposal takes another valuable step toward a modern performance management system as well as a market-based, results-oriented compensation system. My comments on specific provisions of pay and performance management follow.

Aligning Individual Performance to Organizational Goals

Under the proposed regulations, the DOD performance management system would, among other things, align individual performance expectations with the department's overall mission and strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance. However, the proposed regulations do not detail how to achieve such an alignment, which is a vital issue that will need to be addressed as DOD's efforts in designing and implementing a new personnel system move forward. Our work on public sector performance management efforts in the United States and abroad has underscored the importance of aligning daily operations and activities with organizational results.[10] We have found that organizations often struggle with clearly understanding how what they do on a day-to-day basis contributes to overall organizational results, while high-performing organizations demonstrate their understanding of how the products and services they deliver contribute to results by aligning the performance expectations of top leadership with the organization's goals and then cascading those expectations to lower levels.

A performance management system is critical to successful organizational transformation. As an organization undergoing transformation, DOD can use its proposed performance management system as a vital tool for aligning the organization with desired results and creating a "line of sight" to show how team, unit, and individual performance can contribute to overall organizational results. To help federal agencies transform their culture to be more results oriented, customer focused, and collaborative in nature, we have reported on how a performance management system that

[9] GAO, *Human Capital: Preliminary Observations on Proposed DHS Human Capital Regulations*, GAO-04-479T (Washington, D.C.: Feb. 25, 2004).

[10] GAO-04-479T.

defines responsibility and ensures accountability for change can be key to a successful merger and transformation.[11]

Establishing Pay Bands

Under the proposed regulations, DOD would create pay bands for most of its civilian workforce that would replace the 15-grade General Schedule (GS) system now in place for most civil service employees. Specifically, DOD (in coordination with OPM) would establish broad occupational career groups by grouping occupations and positions that are similar in type of work, mission, developmental or career paths, and competencies. Within career groups, DOD would establish pay bands. The proposed regulations do not provide details on the number of career groups or the number of pay bands per career group. The regulations also do not provide details on the criteria that DOD will use to promote individuals from one band to another. These important issues will need to be addressed as DOD moves forward. Pay banding and movement to broader occupational career groups can both facilitate DOD's movement to a pay-for-performance system and help DOD better define career groups, which in turn can improve the hiring process. In our prior work, we have reported that the current GS system, as defined in the Classification Act of 1949,[12] is a key barrier to comprehensive human capital reform and that the creation of broader occupational job clusters and pay bands would aid other agencies as they seek to modernize their personnel systems.[13] The standards and process of the current classification system are key problems in federal hiring efforts because they are outdated and thus not applicable to today's occupations and work.

Under the proposed regulations, DOD could not reduce employees' basic rate of pay when converting to pay bands. In addition, the proposed regulations would allow DOD to establish a "control point" within a band that limits increases in the rate of basic pay and may require certain criteria

[11] GAO, *Results-Oriented Cultures: Implementation Steps to Assist Mergers and Organizational Transformations*, GAO-03-669 (Washington, D.C.: July 2, 2003).

[12] 5 U.S. Code §§ 5101-5115.

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

to be met for increases above the control point.[14] The use of control points to manage employees' progression through the bands can help to ensure that their performance coincides with their salaries and that only the highest performers move into the upper half of the pay band, thereby controlling salary costs. The OPM personnel demonstration projects at China Lake and the Naval Sea Systems Command Warfare Center's Dahlgren Division have incorporated checkpoints or "speed bumps" in their pay bands. For example, when an employee's salary at China Lake reaches the midpoint of the pay band, the employee must receive a performance rating that is equivalent to exceeding expectations before he or she can receive additional salary increases.

Setting and Communicating Employee Performance Expectations

Under the proposed regulations, DOD's performance management system would promote individual accountability by setting performance expectations and communicating them to employees, holding employees responsible for accomplishing them, and making supervisors and managers responsible for effectively managing the performance of employees under their supervision. While supervisors are supposed to involve employees, insofar as practicable, in setting performance expectations, the final decisions regarding performance expectations are within the sole and exclusive discretion of management.

Under the proposed regulations, performance expectations may take several different forms. These include, among others, goals or objectives that set general or specific performance targets at the individual, team, or organizational level; a particular work assignment, including characteristics such as quality, quantity, accuracy, or timeliness; core competencies that an employee is expected to demonstrate on the job; or the contributions that an employee is expected to make. As DOD's human resources management system design efforts move forward, DOD will need to define, in more detail than is currently provided, how performance expectations will be set, including the degree to which DOD components, managers, and supervisors will have flexibility in setting those expectations.

[14] Because movement through the pay band is based on performance, employees could progress through the pay band more quickly than they could receive similar increases under the GS system. One method of preventing employees from eventually migrating to the top of the pay band, and thus increasing salary costs, is to establish control points within each band.

The range of expectations that DOD would consider in setting individual employee performance expectations are generally consistent with those used by high-performing organizations. DOD appropriately recognizes that given the vast diversity of work done in the department, managers and employees need flexibility in crafting specific expectations. However, the experiences of high-performing organizations suggest that DOD should require the use of core competencies as a central feature of its performance management effort.[15] Based on our review of other agency efforts and our own experience at GAO, we have found that 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. By including such competencies as change management, cultural sensitivity, teamwork and collaboration, and information sharing, DOD would create a shared responsibility for organizational success and help ensure accountability for the transformation process.

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. DOD's proposed regulations state that supervisors and managers would be held accountable for making meaningful distinctions among employees based on performance and contribution, fostering and rewarding excellent performance, and addressing poor performance.

Under the proposed regulations, DOD is expected to have at least three rating levels for evaluating employee performance. We urge DOD 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 rating levels to provide a clear and direct link between SES performance and pay as well as to make meaningful distinctions based on relative performance. Cascading this approach to other levels of employees can help DOD recognize and

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

reward employee contributions and achieve the highest levels of individual performance.[16]

Providing Adequate Safeguards to Ensure Fairness and Guard Against Abuse

Although DOD's proposed regulations provide for some safeguards to ensure fairness and guard against abuse, additional safeguards should be developed. For example, as required by the authorizing legislation, the proposed regulations indicate that DOD's performance management system must comply with 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. However, the proposed regulations do not offer details on how DOD would (1) promote consistency and provide general oversight of the performance management system to help ensure it is administered in a fair, credible, and transparent manner, and (2) incorporate predecisional internal safeguards that are implemented to help achieve consistency and equity, and ensure nondiscrimination and nonpoliticization of the performance management process.

In April 2003, when commenting on DOD civilian personnel reforms, we testified that Congress should consider establishing statutory standards that an agency must have in place before it can implement a more performance-based pay program, and we developed an initial list of possible safeguards to help ensure that pay-for-performance systems in the government are fair, effective, and credible.[17] For example, we have noted that agencies need to ensure reasonable transparency and provide appropriate accountability mechanisms in connection with the results of the performance management process.[18] This can be done by publishing the overall results of performance management and individual pay decisions while protecting individual confidentiality and by reporting periodically on internal assessments and employee survey results relating to the performance management system. DOD needs to commit itself to publishing the results of performance management decisions. By publishing the results in a manner that protects individual confidentiality, DOD could provide employees with the information they need to better understand their performance and the performance management system.

[16] GAO, *Human Capital: Observations on Final DHS Human Capital Regulations*, GAO-05-391T (Washington, D.C.: Mar. 2, 2005).

[17] GAO-03-717T.

[18] GAO-04-479T.

Several of the demonstration projects have been publishing information about 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, on internal Web sites for use by employees. As DOD's human resources management system design efforts move forward, DOD will need to define, in more detail than is currently provided, how it plans to review such matters as the establishment and implementation of the performance appraisal system—and, subsequently, performance rating decisions, pay determinations, and promotion actions—before these actions are finalized, to ensure they are merit based.

Staffing and Employment

The authorizing legislation allows DOD to implement additional hiring flexibilities that would allow it to (1) determine that there is a severe shortage of candidates or a critical hiring need and (2) use direct-hire procedures for these positions. Under current law, OPM, rather than the agency, determines whether there is a severe shortage of candidates or a critical hiring need. DOD's authorizing legislation permits that DOD merely document the basis for the severe shortage or critical hiring need and then notify OPM of these direct-hire determinations. Direct-hire authority allows an agency to appoint people to positions without adherence to certain competitive examination requirements (such as applying veterans' preference or numerically rating and ranking candidates based on their experience, training, and education) when there is a severe shortage of qualified candidates or a critical hiring need. In the section containing DOD's proposed hiring flexibilities, the proposed regulations state that the department will adhere to veterans' preference principles as well as comply with merit principles and the Title 5 provision dealing with prohibited personnel practices.

While we strongly endorse providing agencies with additional tools and flexibilities to attract and retain needed talent, additional analysis may be needed to ensure that any new hiring authorities are consistent with a focus on the protection of employee rights, on merit principles—and on results. Hiring flexibilities alone will not enable federal agencies to bring on board the personnel that are needed to accomplish their missions. Agencies must first conduct gap analyses of the critical skills and competencies needed in their workforces now and in the future, or they may not be able to effectively design strategies to hire, develop, and retain the best possible workforces.

Workforce Shaping

The proposed regulations would allow DOD to reduce, realign, and reorganize the department's workforce through revised RIF procedures. For example, employees would be placed on a retention list in the following order: tenure group (i.e., permanent or temporary appointment), veterans' preference eligibility (disabled veterans will be given additional priority), level of performance, and length of service; under current regulations, length of service is considered ahead of performance. I have previously testified, prior to the enactment of NSPS, in support of revised RIF procedures that would require much greater consideration of an employee's performance.[19] Although we support greater consideration of an employee's performance in RIF procedures, agencies must have modern, effective, and credible performance management systems in place to properly implement such authorities.

An agency's approach to reductions should be oriented toward strategically shaping the makeup of its workforce if it is to ensure the orderly transfer of institutional knowledge and achieve mission results. DOD's proposed regulations include some changes that would allow the department to rightsize the workforce more carefully through greater precision in defining competitive areas, and by reducing the disruption associated with RIF orders as their impact ripples through an organization. For example, under the current regulations, the minimum RIF competitive area is broadly defined as an organization under separate administration in a local commuting area. Under the proposed regulations, DOD would be able to establish a minimum RIF competitive area on a more targeted basis, using one or more of the following factors: geographical location, line of business, product line, organizational unit, and funding line. The proposed regulations also provide DOD with the flexibility to develop additional competitive groupings on the basis of career group, occupational series or specialty, and pay band. At present, DOD can use competitive groups based on employees (1) in the excepted and competitive service, (2) under different excepted service appointment authorities, (3) with different work schedules,[20] (4) pay schedule, or (5) trainee status. These reforms could help DOD approach rightsizing more carefully; however, as I have stated,

[19] GAO-03-717T; GAO, *Defense Transformation: DOD's Proposed Civilian Personnel System and Governmentwide Human Capital Reform*, GAO-03-741T (Washington, D.C.: May 1, 2003); and *Human Capital: Building on DOD's Reform Effort to Foster Governmentwide Improvements*, GAO-03-851T (Washington, D.C.: June 4, 2003).

[20] For example, employees who work full time, part time, seasonally, or intermittently.

agencies first need to identify the critical skills and competencies needed in their workforce if they are to effectively implement their new human capital flexibilities.

Adverse Actions and Appeals

As with DHS's final regulations,[21] DOD's proposed regulations are intended to streamline the rules and procedures for taking adverse actions, while ensuring that employees receive due process and fair treatment. The proposed regulations establish a single process for both performance-based and conduct-based actions, and shorten the adverse action process by removing the requirement for a performance improvement plan. In addition, the proposed regulations streamline the appeals process at the Merit Systems Protection Board (MSPB) by shortening the time for filing and processing appeals.

Similar to DHS, DOD's proposed regulations also adopt a higher standard of proof for adverse actions in DOD, requiring the department to meet a "preponderance of the evidence" standard in place of the current "substantial evidence" standard. For performance issues, while this higher standard of evidence means that DOD would face a greater burden of proof than most agencies to pursue these actions, DOD managers are not required to provide employees with performance improvement periods, as is the case for other federal employees. For conduct issues, DOD would face the same burden of proof as most agencies.

DOD's proposed regulations generally preserve the employee's basic right to appeal decisions to an independent body—the MSPB. However, in contrast to DHS's final regulations, DOD's proposed regulations permit an internal DOD review of the initial decisions issued by MSPB adjudicating officials. Under this internal review, DOD can modify or reverse an initial decision or remand the matter back to the adjudicating official for further consideration. Unlike other criteria for review of initial decisions, DOD can modify or reverse an initial MSPB adjudicating official's decision where the department determines that the decision has a direct and substantial adverse impact on the department's national security mission.[22] According

[21] Department of Homeland Security Human Resources Management System, 70 Fed. Reg. 5272 (Feb. 1, 2005).

[22] Any final DOD decision under this review process may be further appealed to the full MSPB. Further, the Secretary of Defense or an employee adversely affected by a final order or decision of the full MSPB may seek judicial review.

to DOD, the department needs the authority to review initial MSPB decisions and correct such decisions as appropriate, to ensure that the MSPB interprets NSPS and the proposed regulations in a way that recognizes the critical mission of the department and to ensure that MSPB gives proper deference to such interpretation. However, the proposed regulations do not offer additional details on the department's internal review process, such as how the review will be conducted and who will conduct them. An internal agency review process this important should be addressed in the regulations rather than in an implementing directive to ensure adequate transparency and employee confidence in the process.

Similar to DHS's final regulations, DOD's proposed regulations would shorten the notification period before an adverse action can become effective and provide an accelerated MSPB adjudication process. In addition, MSPB would no longer be able to modify a penalty for an adverse action that is imposed on an employee by DOD unless such penalty is so disproportionate to the basis of the action as to be "wholly without justification." In other words, MSPB has less latitude to modify agency-imposed penalities than under current practice. The DOD proposed regulations also stipulate that MSPB could no longer require that parties enter into settlement discussions, although either party may propose doing so. DOD, like DHS, expressed concerns that settlement should be a completely voluntary decision made by parties on their own initiative. However, settling cases has been an important tool in the past at MSPB, and promotion of settlement at this stage should be encouraged.

Similar to DHS's final regulations, DOD's proposed regulations would permit the Secretary of Defense to identify specific offenses for which removal is mandatory. Employees alleged to have committed these offenses may receive a written notice only after the Secretary of Defense's review and approval. These employeess will have the same right to a review by an MSPB adjudicating official as is provided to other employees against whom appealable adverse actions are taken. DOD's proposed regulations only indicate that its employees will be made aware of the mandatory removal offenses. In contrast, the final DHS regulations explicitly provide for publishing a list of the mandatory removal offenses in the *Federal Register*. We believe that the process for determining and communicating which types of offenses require mandatory removal should be explicit and transparent and involve relevant congressional stakeholders, employees, and employee representatives. Moreover, we suggest that DOD exercise caution when identifying specific removable offenses and the specific punishment. When developing these proposed

regulations, DOD should learn from the experience of the Internal Revenue Service's (IRS) implementation of its mandatory removal provisions.[23] (IRS employees feared that they would be falsely accused by taxpayers and investigated, and had little confidence that they would not be disciplined for making an honest mistake.) 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.[24] Careful drafting of each removable offense is critical to ensure that the provision does not have unintended consequences.

DOD's proposed regulations also would encourage the use of alternative dispute resolution and provide that this approach be subject to collective bargaining to the extent permitted by the proposed labor relations regulations. To resolve disputes in a more efficient, timely, and less adversarial manner, federal agencies have been expanding their human capital programs to include alternative dispute resolution approaches. These approaches include mediation, dispute resolution boards, and ombudsmen. Ombudsmen typically are used to provide an informal alternative to addressing conflicts. We previously reported on common approaches used in ombudsmen offices, including (1) broad responsibility and authority to address almost any workplace issue, (2) their ability to bring systemic issues to management's attention, and (3) the manner in which they work with other agency offices in providing assistance to employees.[25]

Labor-Management Relations

The DOD proposed regulations recognize the right of employees to organize and bargain collectively.[26] However, similar to DHS's final regulations, the proposed regulations would reduce the scope of bargaining by (1) removing the requirement to bargain on matters traditionally referred to as "impact and implementation" (which include the processes

[23] Section 1203 of the IRS Restructuring and Reform Act of 1998 outlines conditions for firing of IRS employees for any of 10 actions of misconduct.

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

[25] GAO-01-479T.

[26] Under current law, the rights of employees to bargain may be suspended for reasons of national security. See Title 5 U.S. Code §§ 7103(b) and 7112(b)(6).

used to deploy personnel, assign work, and use technology) and (2) narrowing the scope of issues subject to collective bargaining. A National Security Labor Relations Board would be created that would largely replace the Federal Labor Relations Authority. The proposed board would have at least three members selected by the Secretary of Defense, with one member selected from a list developed in consultation with the Director of OPM. The proposed board would be similar to the internal Homeland Security Labor Relations Board established by the DHS final regulations, except that the Secretary of Defense would not be required to consult with the employee representatives in selecting its members. The proposed board would be responsible for resolving matters related to negotiation disputes, to include the scope of bargaining and the obligation to bargain in good faith, resolving impasses, and questions regarding national consultation rights.

Under the proposed regulations, the Secretary of Defense is authorized to appoint and remove individuals who serve on the board. Similar to DHS's final regulations establishing the Homeland Security Labor Relations Board, DOD's proposed regulations provide for board member qualification requirements, which emphasize integrity and impartiality. DOD's proposed regulations, however, do not provide an avenue for any employee representative input into the appointment of board members. DHS regulations do so by requiring that for the appointment of two board members, the Secretary of Homeland Security must consider candidates submitted by labor organizations. Employee perception concerning the independence of this board is critical to the resolution of issues raised over labor relations policies and disputes.

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 in April 2004 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 also was 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.

DOD Faces Multiple Implementation Challenges

Once DOD issues its final regulations for its human resources management system, the department will face multiple implementation challenges that include ensuring sustained and committed leadership, establishing an overall communications strategy, providing adequate resources for the implementation of the new system, involving employees in designing the system, and evaluating DOD's new human resources management system after it has been implemented. For information on related human capital issues that could potentially affect the implementation of NSPS, see the "Highlights" pages from previous GAO products on DOD civilian personnel issues in appendix I.

Ensuring Sustained and Committed Leadership

As DOD and other agencies across the federal government embark on large-scale organizational change initiatives, such as DOD's new human resources management system, another challenge is to elevate, integrate, and institutionalize leadership responsibility for these key functional management initiatives to ensure their success. A chief management officer or similar position can effectively provide the continuing, focused leadership essential to successfully completing these multiyear transformations. For an endeavor as critical as DOD's new human resources management system, such a leadership position would serve to

- elevate attention 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 various management responsibilities into the new system so they are no longer "stove-piped" and fit 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.[27]

In 2004, we testified that while the Secretary of Defense and other key DOD leaders have demonstrated their commitment to the business transformation efforts, in our view, the complexity and long-term nature of these efforts requires the development of an executive position capable of providing strong and sustained executive leadership—over a number of years and various administrations.[28] The day-to-day demands placed on the Secretary, the Deputy Secretary, and others make it difficult for these leaders to maintain the oversight, focus, and momentum needed to resolve the weaknesses in DOD's overall business operations. While sound strategic planning is the foundation upon which to build, sustained and focused leadership is needed for reform to succeed. One way to ensure sustained leadership over DOD's business transformation efforts would be to create a full-time executive level position for a chief management official who would serve as the Deputy Secretary of Defense for Management.[29] This position would provide the attention essential for addressing key stewardship responsibilities, such as strategic planning, human capital management, performance and financial management, acquisition and contract management, and business systems modernization, while facilitating the overall business transformation operations within DOD.

Establishing an Overall Communications Strategy

Another significant challenge for DOD is to ensure an effective and ongoing two-way communications strategy, given its size, geographically and culturally diverse audiences, and different command structures across DOD organizations. We have reported that a communications strategy that creates shared expectations about, and reports related progress on, the implementation of the new system is a key practice of a change

[27] On September 9, 2002, GAO convened a roundtable of government leaders and management experts to discuss the chief operating concept. For more information, see GAO, *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), and *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).

[28] GAO-05-140T.

[29] GAO-05-140T.

management initiative.[30] DOD acknowledges that a comprehensive outreach and communications strategy is essential for designing and implementing its new human resources management system, but the proposed regulations do not identify a process for the continuing involvement of employees in the planning, development, and implementation of NSPS.

Because the NSPS design process and proposed regulations have received considerable attention,[31] we believe one of the most relevant implementation steps is for DOD to enhance two-way communication between employees, employee representatives, and management. Communication is not only about "pushing the message out," but also using two-way communication to build effective internal and external partnerships that are vital to the success of any organization. By providing employees with opportunities to communicate concerns and experiences about any change management initiative, management allows employees to feel that their input is acknowledged and important. As it makes plans for implementing NSPS, DOD should facilitate a two-way honest exchange with, and allow for feedback from, employees and other stakeholders. Once it receives this feedback, management needs to consider and use this solicited employee feedback to make any appropriate changes to its implementation. In addition, management needs to close the loop by providing employees with information on why key recommendations were not adopted.

Providing Adequate Resources for Implementing the New System

Experience has shown that additional resources are necessary to ensure sufficient planning, implementation, training, and evaluation for human capital reform. According to DOD, the implementation of NSPS will result in costs for, among other things, developing and delivering training, modifying automated human resources information systems, and starting up and sustaining the National Security Labor Relations Board. We have found that, based on the data provided by selected OPM personnel demonstration projects, the major cost drivers in implementing pay-for-

[30] GAO-03-669.

[31] DOD's efforts to date to involve labor unions have not been without controversy. Ten federal labor unions have filed suit alleging that DOD failed to abide by the statutory requirements to include employee representatives in the development of DOD's new labor relations system authorized as part of NSPS. See *American Federation of Government Employees, AFL-CIO et al v. Rumsfeld et al*, No. 1:05cv00367 (D.D.C. filed Feb. 23, 2005).

performance systems are the direct costs associated with salaries and training.

DOD estimates that the overall cost associated with implementing NSPS will be approximately $158 million through fiscal year 2008. According to DOD, it has not completed an implementation plan for NSPS, including an information technology plan and a training plan; thus, the full extent of the resources needed to implement NSPS may not be well understood at this time. According to OPM, the increased costs of implementing alternative personnel systems should be acknowledged and budgeted up front.[32] 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 DOD's budget. Other costs, such as employees' salaries, are recurring and thus would be built into the base of DOD's budget for future years. Therefore, funding for NSPS will warrant close scrutiny by Congress as DOD's implementation plan evolves.

Involving Employees and Other Stakeholders in Implementing the System

The proposed regulations do not identify a process for the continuing involvement of employees in the planning, development, and implementation of NSPS. However, DOD's proposed regulations do provide for continuing collaboration with employee representatives. According to DOD, almost two-thirds of its 700,000 civilian employees are represented by 41 different labor unions, including over 1,500 separate bargaining units. In contrast, according to OPM, just under one-third of DHS's 110,000 federal employees are represented by 16 different labor unions, including 75 separate bargaining units. Similar to DHS's final regulations, DOD's proposed regulations about the collaboration process, among other things, would permit the Secretary of Defense to determine (1) the number of employee representatives allowed to engage in the collaboration process, and (2) the extent to which employee representatives are given an opportunity to discuss their views with and submit written comments to DOD officials. In addition, DOD's proposed regulations indicate that nothing in the continuing collaboration process will affect the right of the Secretary of Defense to determine the content of implementing guidance and to make this guidance effective at any time. DOD's proposed regulations also will give designated employee representatives an opportunity to be briefed and to comment on the design

[32] OPM, *Demonstration Projects and Alternative Personnel Systems: HR Flexibilities and Lessons Learned* (Washington, D.C.: September 2001).

and results of the new system's implementation. DHS's final regulations, however, provide for more extensive involvement of employee representatives. For example, DHS's final regulations provide for the involvement of employee representatives in identifying the scope, objectives, and methodology to be used in evaluating the new DHS system.

The active involvement of employees and employee representatives will be critical to the success of NSPS. We have reported that the involvement of employees and employee representatives both directly and indirectly is crucial to the success of new initiatives, including implementing a pay-for-performance system. High-performing organizations have found that actively involving employees and stakeholders, such as unions or other employee associations, when developing results-oriented performance management systems helps improve employees' confidence and belief in the fairness of the system and increases their understanding and ownership of organizational goals and objectives. This involvement must be early, active, and continuing if employees are to gain a sense of understanding and ownership of the changes that are being made.

Evaluating DOD's New Human Resources Management System

Evaluating the impact of NSPS will be an ongoing challenge for DOD. This is especially important because DOD's proposed regulations would give managers more authority and responsibility for managing the new human resources management system. High-performing organizations continually review and revise their human capital management systems based on data-driven lessons learned and changing needs in the work environment. Collecting and analyzing data will be the fundamental building block for measuring the effectiveness of these approaches in support of the mission and goals of the department.

DOD's proposed regulations indicate that DOD will establish procedures for evaluating the regulations and their implementation. We believe that DOD should consider conducting evaluations that are broadly modeled on the evaluation requirements of the OPM demonstration projects. Under the demonstration project authority, agencies must evaluate and periodically report on results, implementation of the demonstration project, cost and benefits, impacts on veterans and other equal employment opportunity groups, adherence to merit system principles, and the extent to which the lessons from the project can be applied governmentwide. A set of balanced measures addressing a range of results, customer, employee, and external partner issues may also prove beneficial. An evaluation such as this would facilitate congressional oversight; allow for any midcourse corrections;

assist DOD in benchmarking its progress with other efforts; and provide for documenting best practices and sharing lessons learned with employees, stakeholders, other federal agencies, and the public.

We have work under way to assess DOD's efforts to design its new human resources management system, including further details on some of the significant challenges, and we expect to issue a report on the results of our work sometime this summer.

Framework for Governmentwide Human Capital Reform

DOD recently joined a few other federal departments and agencies, such as DHS, the National Aeronautics and Space Administration, and the Federal Aviation Administration, in receiving authorities intended to help them strategically manage their human resources management system to achieve results. In this changing environment, the federal government is quickly approaching the point where "standard governmentwide" human capital policies and processes are neither standard nor governmentwide.

To help advance the discussion concerning how governmentwide human capital reform should proceed, we 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.[33] To start the discussion, we suggested, in advance of the forum, a framework of principles, criteria, and processes based on congressional and executive branch decision making and prior work.

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 faced by government, there was equally broad agreement that there should be a governmentwide framework to guide human capital reform. Furthermore, 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 would not be easy, but such a balance is

[33]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).

necessary to maintain a governmentwide system that is responsive enough to adapt to agencies' diverse missions, cultures, and workforces.

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;
- continued prohibition of certain personnel practices; and
- 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; and
- 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; and
- assuring adequate training.

Source: GAO.

Concluding Observations

As we testified previously on the DOD and DHS civilian personnel reforms, an agency should have to demonstrate that it has a modern, effective, credible, and, as appropriate, validated performance management system in place with adequate safeguards, including reasonable transparency and appropriate accountability mechanisms, to ensure fairness and prevent politicization of the system and abuse of employees before any related flexibilities are operationalized. DOD's proposed NSPS regulations take a valuable step toward a modern performance management system as well as a more market-based, results-oriented compensation system. DOD's proposed performance management system is intended to align individual performance and pay with the department's critical mission requirements; hold employees responsible for accomplishing performance expectations; and provide meaningful distinctions in performance. However, the experiences of high-performing organizations suggest that DOD should require core competencies in its performance management system. The core competencies can serve to reinforce employee behaviors and actions that support the DOD mission, goals, and values and to set expectations for individuals' roles in DOD's transformation, creating a shared responsibility for organizational success and ensuring accountability for change.

DOD's overall effort to design and implement a strategic human resources management system—along with the similar effort of DHS—can be particularly instructive for future human capital management, reorganization, and transformation efforts in other federal agencies.

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 at this time.

Contacts and Acknowledgments

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Appendix I

"Highlights" from Selected GAO Human Capital Reports

GAO

Highlights

Highlights of GAO-04-753, a report to the Ranking Minority Member, Subcommittee on Readiness, Committee on Armed Services, House of Representatives

Why GAO Did This Study

During its downsizing in the early 1990s, the Department of Defense (DOD) did not focus on strategically reshaping its civilian workforce. GAO was asked to address DOD's efforts to strategically plan for its future civilian workforce at the Office of the Secretary of Defense (OSD), the military services' headquarters, and the Defense Logistics Agency (DLA). Specifically, GAO determined: (1) the extent to which civilian strategic workforce plans have been developed and implemented to address future civilian workforce requirements, and (2) the major challenges affecting the development and implementation of these plans.

What GAO Recommends

GAO recommends that DOD and the components include certain key elements in their civilian strategic workforce plans to guide their human capital efforts. DOD concurred with one of our recommendations, and partially concurred with two others because it believes that the department has undertaken analyses of critical skills gaps and are using strategies and personnel flexibilities to fill identified skills gaps. We cannot verify DOD's statement because DOD was unable to provide the gap analyses. In addition, we found that the strategies being used by the department have not been derived from analyses of gaps between the current and future critical skills and competencies needed by the workforce.

www.gao.gov/cgi-bin/getrpt?GAO-04-753

To view the full product, including the scope and methodology, click on the link above. For more information, contact Derek Stewart at (202) 512-5559 or stewartd@gao.gov.

June 2004

DOD CIVILIAN PERSONNEL

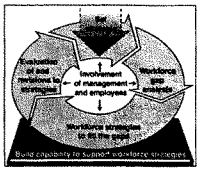
Comprehensive Strategic Workforce Plans Needed

What GAO Found

OSD, the service headquarters, and DLA have recently taken steps to develop and implement civilian strategic workforce plans to address future civilian workforce needs, but these plans generally lack some key elements essential to successful workforce planning. As a result, OSD, the military services' headquarters, and DLA—herein referred to as DOD and the components—do not have comprehensive strategic workforce plans to guide their human capital efforts. None of the plans included analyses of the gaps between critical skills and competencies (a set of behaviors that are critical to work accomplishment) currently needed by the workforce and those that will be needed in the future. Without including gap analyses, DOD and the components may not be able to effectively design strategies to hire, develop, and retain the best possible workforce. Furthermore, none of the plans contained results-oriented performance measures that could provide the data necessary to assess the outcomes of civilian human capital initiatives.

The major challenge that DOD and most of the components face in their efforts to develop and implement strategic workforce plans is their need for information on current competencies and those that will likely be needed in the future. This problem results from DOD's and the components' not having developed tools to collect and/or store, and manage data on workforce competencies. Without this information, it not clear whether they are designing and funding workforce strategies that will effectively shape their civilian workforces with the appropriate competencies needed to accomplish future DOD missions. Senior department and component officials all acknowledged this shortfall and told us that they are taking steps to address this challenge. Though these are steps in the right direction, the lack of information on current competencies and future needs is a continuing problem that several organizations, including GAO, have previously identified.

Strategic Workforce Planning Process



Source: GAO.

United States General Accounting Office

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Highlights

Highlights of GAO-03-851T, testimony before the Committee on Governmental Affairs, United States Senate

June 4, 2003

HUMAN CAPITAL

Building on DOD's Reform Effort to Foster Governmentwide Improvements

Why GAO Did This Study

People are at the heart of an organization's ability to perform its mission. Yet a key challenge for the Department of Defense (DOD), as for many federal agencies, is to strategically manage its human capital. DOD's proposed National Security Personnel System would provide for wide-ranging changes in DOD's civilian personnel pay and performance management and other human capital areas. Given the massive size of DOD, the proposal has important precedent-setting implications for federal human capital management.

This testimony provides GAO's observations on DOD human capital reform proposals and the need for governmentwide reform.

www.gao.gov/cgi-bin/getrpt?GAO-03-851T.

To view the full testimony, click on the link above. For more information, contact Derek Stewart at (202) 512-5559 or stewartd@gao.gov.

What GAO Found

GAO strongly supports the need for government transformation and the concept of modernizing federal human capital policies both within DOD and for the federal government at large. The federal personnel system is clearly broken in critical respects—designed for a time and workforce of an earlier era and not able to meet the needs and challenges of today's rapidly changing and knowledge-based environment. The human capital authorities being considered for DOD have far-reaching implications for the way DOD is managed as well as significant precedent-setting implications for the rest of the federal government. GAO is pleased that as the Congress has reviewed DOD's legislative proposal it has added a number of important safeguards, including many along the lines GAO has been suggesting, that will help DOD maximize its chances of success in addressing its human capital challenges and minimize the risk of failure.

More generally, GAO believes that agency-specific human capital reforms should be enacted to the extent that the problems being addressed and the solutions offered are specific to a particular agency (e.g., military personnel reforms for DOD). Several of the proposed DOD reforms meet this test. In GAO's view, the relevant sections of the House's version of the National Defense Authorization Act for Fiscal Year 2004 and the proposal that is being considered as part of this hearing contain a number of important improvements over the initial DOD legislative proposal.

Moving forward, GAO believes it would be preferable to employ a governmentwide approach to address human capital issues and the need for certain flexibilities that have broad-based application and serious potential implications for the civil service system, in general, and the Office of Personnel Management, in particular. GAO believes that several of the reforms that DOD is proposing fall into this category (e.g., broad banding, pay for performance, re-employment and pension offset waivers). In these situations, GAO believes it would be both prudent and preferable for the Congress to provide such authorities governmentwide and ensure that appropriate performance management systems and safeguards are in place before the new authorities are implemented by the respective agency. Importantly, employing this approach is not intended to delay action on DOD's or any other individual agency's efforts, but rather to accelerate needed human capital reform throughout the federal government in a manner that ensures reasonable consistency on key principles within the overall civilian workforce. This approach also would help to maintain a level playing field among federal agencies in competing for talent and would help avoid further fragmentation within the civil service.

United States General Accounting Office

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Highlights

Highlights of GAO-03-493T, a testimony before the Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia, Senate Committee on Governmental Affairs

Why GAO Did This Study

People are at the heart of an organization's ability to perform its mission. Yet, a key challenge for the Department of Defense (DOD), as for many federal agencies, is to strategically manage its human capital. With about 700,000 civilian employees on its payroll, DOD is the second largest federal employer of civilians in the nation. Although downsized 38 percent between fiscal years 1989 and 2002, this workforce has taken on greater roles as a result of DOD's restructuring and transformation. DOD's proposed National Security Personnel System (NSPS) would provide for wide-ranging changes in DOD's civilian personnel pay and performance management, collective bargaining, rightsizing, and other human capital areas. The NSPS would enable DOD to develop and implement a consistent DOD-wide civilian personnel system. Given the massive size of DOD, the proposal has important precedent-setting implications for federal human capital management and OPM.

This testimony provides GAO's preliminary observations on aspects of DOD's proposal to make changes to its civilian personnel system and discusses the implications of such changes for governmentwide human capital reform. Past reports have contained GAO's views on what remains to be done to bring about lasting solutions for DOD to strategically manage its human capital. DOD has not always concurred with our recommendations.

www.gao.gov/cgi-bin/getrpt?GAO-03-493T.
To view the full testimony, including the scope and methodology, click on the link above.
For more information, contact Derek B.Stewart at (202) 512-5140 or StewartD@gao.gov.

May 2003

HUMAN CAPITAL

DOD'S CIVILIAN PERSONNEL STRATEGIC MANAGEMENT AND THE PROPOSED NATIONAL SECURITY PERSONNEL SYSTEM

What GAO Found

DOD's lack of attention to force shaping during its downsizing in the early 1990s has resulted in a workforce that is not balanced by age or experience and that puts at risk the orderly transfer of institutional knowledge. Human capital challenges are severe in certain areas. For example, DOD has downsized its acquisition workforce by almost half. More than 50 percent of the workforce will be eligible to retire by 2006. In addition, DOD faces major succession planning challenges at various levels within the department. Also, since 1987, the industrial workforce, such as depot maintenance, has been reduced by about 56 percent, with many of the remaining employees nearing retirement, calling into question the longer-term viability of the workforce. DOD is one of the agencies that has begun to address human capital challenges through strategic human capital planning. For example, in April 2002, DOD published a department wide strategic plan for civilians. Although a positive step toward fostering a more strategic approach toward human capital management, the plan is not fully aligned with the overall mission of the department or results oriented. In addition, it was not integrated with the military and contractor personnel planning.

We strongly support the concept of modernizing federal human capital policies within DOD and the federal government at large. Providing reasonable flexibility to management in this critical area is appropriate provided adequate safeguards are in place to prevent abuse. We believe that Congress should consider both governmentwide and selected agency, including DOD, changes to address the pressing human capital issues confronting the federal government. In this regard, many of the basic principles underlying DOD's civilian human capital proposals have merit and deserve serious consideration. At the same time, many are not unique to DOD and deserve broader consideration.

Agency-specific human capital reforms should be enacted to the extent that the problems being addressed and the solutions offered are specific to a particular agency (e.g., military personnel reforms for DOD). Several of the proposed DOD reforms meet this test. At the same time, we believe that Congress should consider incorporating additional safeguards in connection with several of DOD's proposed reforms. In our view, it would be preferable to employ a government-wide approach to address certain flexibilities that have broad-based application and serious potential implications for the civil service system, in general, and the Office of Personnel Management (OPM), in particular. We believe that several of the reforms that DOD is proposing fall into this category (e.g., broad-banding, pay for performance, re-employment and pension offset waivers). In these situations, it may be prudent and preferable for the Congress to provide such authorities on a governmentwide basis and in a manner that assures that appropriate performance management systems and safeguards are in place before the new authorities are implemented by the respective agency.

However, in all cases whether from a governmentwide authority or agency specific legislation, in our view, such additional authorities should be implemented (or operationalized) only when an agency has the institutional infrastructure in place to make effective use of the new authorities. Based on our experience, while the DOD leadership has the intent and the ability to implement the needed infrastructure, it is not consistently in place within the vast majority of DOD at the present time.

United States General Accounting Office

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Highlights

Highlights of GAO-03-741T, testimony before the Committee on Armed Services, House of Representatives

Why GAO Did This Study

DOD is in the midst of a major transformation effort including a number of initiatives to transform its forces and improve its business operations. DOD's legislative initiative would provide for major changes in civilian and military human capital management, make major adjustments in the DOD acquisition process, affect DOD's organization structure, and change DOD's reporting requirements to Congress, among other things.

DOD's proposed National Security Personnel System (NSPS) would provide for wide-ranging changes in DOD's civilian personnel pay and performance management, collective bargaining, rightsizing, and a variety of other human capital areas. The NSPS would enable DOD to develop and implement a consistent DOD-wide civilian personnel system.

This testimony provides GAO's preliminary observations on aspects of DOD's legislative proposal to make changes to its civilian personnel system and discusses the implications of such changes for governmentwide human capital reform. This testimony summarizes many of the issues discussed in detail before the Subcommittee on Civil Service and Agency Organization, Committee on Government Reform, House of Representatives on April 29, 2003.

www.gao.gov/cgi-bin/getrpt?GAO-03-741T.

To view the full testimony, click on the link above. For more information, contact Derek Stewart at (202) 512-5559 or stewartd@gao.gov.

May 1, 2003

DEFENSE TRANSFORMATION

DOD's Proposed Civilian Personnel System and Governmentwide Human Capital Reform

What GAO Found

Many of the basic principles underlying DOD's civilian human capital proposal have merit and deserve serious consideration. The federal personnel system is clearly broken in critical respects—designed for a time and workforce of an earlier era and not able to meet the needs and challenges of our current rapidly changing and knowledge-based environment. DOD's proposal recognizes that, as GAO has stated and the experiences of leading public sector organizations here and abroad have found, strategic human capital management must be the centerpiece of any serious government transformation effort.

More generally, from a conceptual standpoint, GAO strongly supports the need to expand broad banding and pay for performance-based systems in the federal government. However, moving too quickly or prematurely at DOD or elsewhere, can significantly raise the risk of doing it wrong. This could also serve to severely set back the legitimate need to move to a more performance- and results-based system for the federal government as a whole. Thus, while it is imperative that we take steps to better link employee pay and other personnel decisions to performance across 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 or not we are successful. One key need is to modernize performance management systems in executive agencies so that they are capable of supporting more performance-based pay and other personnel decisions. Unfortunately, based on GAO's past work, most existing federal performance appraisal systems, including a vast majority of DOD's systems, are not currently designed to support a meaningful performance-based pay system.

The critical questions to consider are: should DOD and/or other agencies be granted broad-based exemptions from existing law, and if so, on what basis? Do DOD and other agencies have the institutional infrastructure in place to make effective use of any 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 and mission, and desired outcomes; the capabilities to effectively develop and implement a new human capital system; and, importantly, a set of adequate safeguards, including reasonable transparency and appropriate accountability mechanisms to ensure the fair, effective, and credible implementation of a new system.

In GAO's view, as an alternative to DOD's proposed approach, Congress should consider providing governmentwide broad banding and pay for performance authorities that DOD and other federal agencies can use provided they can demonstrate that they have a performance management system in place that meets certain statutory standards, that can be certified to by a qualified and independent party, such as OPM, within prescribed timeframes. Congress should also consider establishing a governmentwide fund whereby agencies, based on a sound business case, could apply for funding to modernize their performance management systems and ensure that those systems have adequate safeguards to prevent abuse. This approach would serve as a positive step to promote high-performing organizations throughout the federal government while avoiding further human capital policy fragmentation.

United States General Accounting Office

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Highlights

Highlights of GAO-03-472, a report to the Subcommittee on Readiness, Committee on Armed Services, House of Representatives

Why GAO Did This Study

Between 1987 and 2002, the Department of Defense (DOD) downsized the civilian workforce in 27 key industrial facilities by about 56 percent. Many of the remaining 72,000 workers are nearing retirement. In recent years GAO has identified shortcomings in DOD's strategic planning and was asked to determine (1) whether DOD has implemented our prior recommendation to develop and implement a depot maintenance strategic plan, (2) the extent to which the services have developed and implemented comprehensive strategic workforce plans, and (3) what challenges adversely affect DOD's workforce planning.

What GAO Recommends

GAO recommends that the DOD complete revisions to core policy, promulgate a schedule for completing core computations, and complete depot strategic planning; develop a plan for arsenals and ammunition plants; develop strategic workforce plans; and coordinate the implementation of initiatives to address various workforce challenges. DOD concurred with 7 of our 9 recommendations; nonconcurring with two because it believes the proposed National Security Personnel System, which was submitted to Congress as a part of the DOD transformation legislation, will take care of these problems. We believe it is premature to assume this system will (1) be approved by Congress as proposed and (2) resolve these issues.

www.gao.gov/cgi-bin/getrpt?GAO-03-472.

To view the full report, including the scope and methodology, click on the link above. For more information, contact Derek Stewart at (202) 512-5559 or stewartd@gao.gov.

April 2003

DOD CIVILIAN PERSONNEL

Improved Strategic Planning Needed to Help Ensure Viability of DOD's Civilian Industrial Workforce

What GAO Found

DOD has not implemented our October 2001 recommendation to develop and implement a DOD depot strategic plan that would delineate workloads to be accomplished in each of the services' depots. The DOD depot system has been a key part of the department's plan to support military systems in the past, but the increased use of the private sector to perform this work has decreased the role of these activities. While title 10 of the U.S. code requires DOD to retain core capability and also requires that at least 50 percent of depot maintenance funds be spent for public-sector performance, questions remain about the future role of DOD depots. Absent a DOD depot strategic plan, the services have in varying degrees, laid out a framework for strategic depot planning, but this planning is not comprehensive. Questions also remain about the future of arsenals and ammunition plants. GAO reviewed workforce planning efforts for 22 maintenance depots, 3 arsenals, and 2 ammunition plants, which employed about 72,000 civilian workers in fiscal year 2002.

The services have not developed and implemented strategic workforce plans to position the civilian workforce in DOD industrial activities to meet future requirements. While workforce planning is done for each of the industrial activities, generally it is short-term rather than strategic. Further, workforce planning is lacking in other areas that OPM guidance and high-performing organizations identify as key to successful workforce planning. Service workforce planning efforts (1) usually do not assess the competencies; (2) do not develop comprehensive retention plans; and (3) sometimes do not develop performance measures and evaluate workforce plans.

Several challenges adversely affect DOD's workforce planning for the viability of its civilian depot workforce. First, given the aging depot workforce and the retirement eligibility of over 40 percent of the workforce over the next 5 to 7 years, the services may have difficulty maintaining the depots' viability. Second, the services are having difficulty implementing multiskilling—an industry and government best practice for improving the flexibility and productivity of the workforce—even though this technique could help depot planners do more with fewer employees. Finally, increased training funding and innovation in the training program will be essential for revitalizing the aging depot workforce.

Staffing Levels, Age, and Retirement Eligibility of Civilian Personnel in Industrial Facilities

Service	FY 2002 civilian staffing levels	Average age	Percent eligible to retire by 2007	Percent eligible to retire by 2009
Navy	35,583	46	28	39
Army	14,234	49	41	52
Marine Corps	1,323	48	45	60
Air Force	21,152	47	35	44
Total	72,272	47	33	43

Source: DOD (data), GAO (presentation).

United States General Accounting Office

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United States General Accounting Office

Highlights

Highlights of GAO-03-717T, testimony before the Subcommittee on Civil Service and Agency Organization, Committee on Government Reform, House of Representatives

April 29, 2003

DEFENSE TRANSFORMATION

Preliminary Observations on DOD's Proposed Civilian Personnel Reforms

Why GAO Did This Study

DOD is in the midst of a major transformation effort including a number of initiatives to transform its forces and improve its business operations. DOD's legislative initiative would provide for major changes in the civilian and military human capital management, make major adjustments in the DOD acquisition process, affect DOD's organization structure, and change DOD's reporting requirements to Congress, among other things.

DOD's proposed National Security Personnel System (NSPS) would provide for wide-ranging changes in DOD's civilian personnel pay and performance management, collective bargaining, rightsizing, and a variety of other human capital areas. The NSPS would enable DOD to develop and implement a consistent DOD-wide civilian personnel system.

This testimony provides GAO's preliminary observations on aspects of DOD's legislative proposal to make changes to its civilian personnel system and poses critical questions that need to be considered.

www.gao.gov/cgi-bin/getrpt?GAO-03-717T.

To view the full report, including the scope and methodology, click on the link above. For more information, contact Derek Stewart at (202) 512-5559 or stewartd@gao.gov.

What GAO Found

Many of the basic principles underlying DOD's civilian human capital proposals have merit and deserve serious consideration. The federal personnel system is clearly broken in critical respects—designed for a time and workforce of an earlier era and not able to meet the needs and challenges of our current rapidly changing and knowledge-based environment. DOD's proposal recognizes that, as GAO has stated and the experiences of leading public sector organizations here and abroad have found strategic human capital management must be the centerpiece of any serious government transformation effort.

More generally, from a conceptual standpoint, GAO strongly supports the need to expand broad banding and pay for performance-based systems in the federal government. However, moving too quickly or prematurely at DOD or elsewhere, can significantly raise the risk of doing it wrong. This could also serve to severely set back the legitimate need to move to a more performance and results- based system for the federal government as a whole. Thus, while it is imperative that we take steps to better link employee pay and other personnel decisions to performance across 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 or not we are successful. In our view, one key need is to modernize performance management systems in executive agencies so that they are capable of supporting more performance-based pay and other personnel decisions. Unfortunately, based on GAO's past work, most existing federal performance appraisal systems, including a vast majority of DOD's systems, are not currently designed to support a meaningful performance-based pay system.

The critical questions to consider are: should DOD and/or other agencies be granted broad-based exemptions from existing law, and if so, on what basis; and whether they have the institutional infrastructure in place to make effective use of the 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 and mission, and desired outcomes; the capabilities to effectively develop and implement a new human capital system; and, importantly, a set of adequate safeguards, including reasonable transparency and appropriate accountability mechanisms to ensure the fair, effective, and credible implementation of a new system.

In our view, Congress should consider providing governmentwide broad banding and pay for performance authorities that DOD and other federal agencies can use provided they can demonstrate that they have a performance management system in place that meets certain statutory standards, which can be certified to by a qualified and independent party, such as OPM, within prescribed timeframes. Congress should also consider establishing a governmentwide fund whereby agencies, based on a sound business case, could apply for funding to modernize their performance management systems and ensure that those systems have adequate safeguards to prevent abuse. This approach would serve as a positive step to promote high-performing organizations throughout the federal government while avoiding fragmentation within the executive branch in the critical human capital area.

United States General Accounting Office

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Highlights

Highlights of GAO-03-475, a report to the Ranking Minority Member, Subcommittee on Readiness, House Committee on Armed Services

March 2003

DOD PERSONNEL

DOD Actions Needed to Strengthen Civilian Human Capital Strategic Planning and Integration with Military Personnel and Sourcing Decisions

Why GAO Did This Study

The Department of Defense's (DOD) civilian employees play key roles in such areas as defense policy, intelligence, finance, acquisitions, and weapon systems maintenance. Although downsized 38 percent between fiscal years 1989 and 2002, this workforce has taken on greater roles as a result of DOD's restructuring and transformation. Responding to congressional concerns about the quality and quantity of, and the strategic planning for the civilian workforce, GAO determined the following for DOD, the military services, and selected defense agencies: (1) the extent of top-level leadership involvement in civilian strategic planning; (2) whether elements in civilian strategic plans are aligned to the overall mission, focused on results, and based on current and future civilian workforce data; and (3) whether civilian and military personnel strategic plans or sourcing initiatives were integrated.

What GAO Recommends

GAO recommends DOD improve the departmentwide plan to be mission aligned and results-oriented; provide guidance to align component- and department-level human capital strategic plans; develop data on future civilian workforce needs; and set milestones for integrating military and civilian workforce plans, taking contractors into consideration. DOD comments were too late to include in this report but are included in GAO-03-690R.

www.gao.gov/cgi-bin/getrpt?GAO-03-475.

To view the full report, including the scope and methodology, click on the link above. For more information, contact Derek B. Stewart at (202) 512-5559 or stewartd@gao.gov.

What GAO Found

Generally, civilian personnel issues appear to be an emerging priority among top leaders in DOD and the defense components. Although DOD began downsizing its civilian workforce more than a decade ago, it did not take action to strategically address challenges affecting the civilian workforce until it issued its civilian human capital strategic plan in April 2002. Top-level leaders in the Air Force, the Marine Corps, the Defense Contract Management Agency, and the Defense Finance Accounting Service have initiated planning efforts and are working in partnership with their civilian human capital professionals to develop and implement civilian strategic plans; such leadership, however, was increasing in the Army and not as evident in the Navy. Also, DOD has not provided guidance on how to integrate the components' plans with the department-level plan. High-level leadership is critical to directing reforms and obtaining resources for successful implementation.

The human capital strategic plans GAO reviewed for the most part lacked key elements found in fully developed plans. Most of the civilian human capital goals, objectives, and initiatives were not explicitly aligned with the overarching missions of the organizations. Consequently, DOD and the components cannot be sure that strategic goals are properly focused on mission achievement. Also, none of the plans contained results-oriented performance measures to assess the impact of their civilian human capital initiatives (i.e., programs, policies, and processes). Thus, DOD and the components cannot gauge the extent to which their human capital initiatives contribute to achieving their organizations' mission. Finally, the plans did not contain data on the skills and competencies needed to successfully accomplish future missions; therefore, DOD and the components risk not being able to put the right people, in the right place, and at the right time, which can result in diminished accomplishment of the overall defense mission.

Moreover, the civilian strategic plans did not address how the civilian workforce will be integrated with their military counterparts or sourcing initiatives. DOD's three human capital strategic plans– two military and one civilian–were prepared separately and were not integrated to form a seamless and comprehensive strategy and did not address how DOD plans to link its human capital initiatives with its sourcing plans, such as efforts to outsource non-core responsibilities. The components' civilian plans acknowledge a need to integrate planning for civilian and military personnel—taking into consideration contractors—but have not yet done so. Without an integrated strategy, DOD may not effectively and efficiently allocate its scarce resources for optimal readiness.

United States General Accounting Office

Statement of

The Honorable Charles S. Abell
Principal Deputy Under Secretary of Defense
Personnel and Readiness

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

On
National Security Personnel System
Proposed Regulations

March 15, 2005

Mr. Chairman and members of the committee. Thank you for the opportunity to appear before you to discuss the proposed design of the National Security Personnel System. Mr. George Nesterczuk, Senior Advisor on Defense Issues to the Director of the Office of Personnel Management (OPM) and my partner in chairing the NSPS Overarching Integrated Product Team joins me today. We are pleased to appear before you to discuss the recently published proposed regulations for the National Security Personnel System, or NSPS. We wish to formally thank Congress for granting the Department the authority to establish, in partnership with OPM, a new civilian human resources management system to support our critical national security mission. We take this task seriously and recognize the responsibility we have to balance our vital national security mission with protecting the interests of our people.

We also want to thank you for your ongoing support of civilian personnel issues and your desire to not only find ways to enhance the way we manage human resources within the government, but also to ensure we protect the fundamental merit principles of the Federal civil service.

The Collaborative Process

In November 2003, Congress granted the Department of Defense (DoD) the authority to establish a new human resources management system, appeals system, and labor relations system. The existing systems were designed for a different time. The

world has changed, jobs have changed, missions have changed – and our HR systems need to change as well to support this new environment. NSPS allows DoD to establish a more flexible civilian personnel management system that is consistent with its overall human capital management strategy. NSPS will make the Department a more competitive and progressive employer at a time when the country's national security demands a highly responsive civilian workforce. The NSPS is a transformation lever to enhance the Department's ability to execute its national security mission. It's a key pillar in the Department's transformation – a new way to manage its civilian workforce. NSPS is essential to the Department's efforts to create an environment in which the total force, uniformed personnel and civilians, functions and operates as one cohesive unit.

NSPS has tremendous potential to greatly enhance the way DoD manages its civilian workforce, but it is also critical that DoD takes care of its most critical asset – its people. The proposed NSPS design follows a set of guiding principles that have acted as the guideposts in the process. "Mission First" has been the emphasis, but there is also an absolute need to respect the individual and to protect workers' rights that are guaranteed by law, including veterans in the civil service. The new system will generate respect and trust; it is based on the principles of merit and fairness embodied in the statutory merit system principles, and it will comply with all other applicable provisions of the law.

In addition to the opportunities that NSPS offers, it presents great challenges. Shortly after enactment of the NSPS statute, we initiated contact with union leaders to solicit their input. During this time, many stakeholders, including members of this

Committee, voiced concerns about our plans and process. In response, the Department engaged in a broad, comprehensive review of our design and implementation strategy. In January and February 2004, we met for the purpose of exchanging ideas and interests on a new labor relations system for DoD. In April 2004, senior DoD leadership approved the collaborative process that the Department is using to design and implement NSPS. This process was crafted over a period of about three weeks by a group of 25 to 30 senior leaders representing various elements within DoD, OPM, and the Office of Management and Budget. Using a bold, innovative approach, the senior leaders used the Defense Acquisition Management model as a way to establish the requirements for the design and implementation of NSPS. These senior leaders recommended Guiding Principles and Key Performance Parameters (KPPs), which defined the minimum requirements for NSPS. They also recommended establishing a Senior Executive and Program Executive Office (PEO), modeled after the Department's acquisition process. Subsequently, the Honorable Gordon England, was appointed by the Secretary of Defense as the NSPS Senior Executive, in addition to his duties as Secretary of the Navy, to design, develop, establish, and implement NSPS. As the NSPS Senior Executive, Secretary England chartered the NSPS PEO as the central DoD program office to conduct the design, planning and development, deployment, assessment, and full implementation of NSPS. Secretary England designated Mrs. Mary Lacey as the NSPS Program Executive Officer to provide direction to and oversight of the PEO, a joint program office staffed with representatives from across the Department, including Component program managers who are dual-hatted under their parent Component.

At OPM, the Director designated my colleague, Mr. George Nesterczuk, the Senior Advisor on Department issues to the Director of OPM, to lead OPM activities in the joint development of the NSPS. The Director received frequent and regular briefings on the progress of NSPS and on the status of key policy options across the spectrum of authorities granted in the NSPS statute. Subsequently, in periodic reviews, the Director exercised policy options, thereby providing guidance to the OPM team.

An integrated executive management team composed of senior DoD and OPM leaders provides overall policy and strategic advice to the PEO and serves as staff to the Senior Executive. The PEO meets with and consults with this team, the Overarching Integrated Product Team (OIPT), which I co-chair with Mr. Nesterczuk, eight to ten times a month. The Senior Executive convenes meetings with the PEO and OIPT at least twice a month to monitor and direct the process.

Following the April decision to revise our design and implementation process, we initiated a series of additional meetings with the union leaders. Beginning in the spring of 2004 and continuing over the course of several months, the PEO sponsored a series of meetings with union leadership to discuss design elements of NSPS. Officials from DoD and OPM met throughout the summer and fall with union officials representing many of the DoD civilians who are bargaining unit employees. These sessions provided the opportunity to discuss the design elements, options, and proposals under consideration for NSPS and solicit union feedback. A number of these meetings were facilitated by the

Federal Mediation and Conciliation Service in order to ensure open and robust communication.

Since April, DoD and OPM have conducted 10 meetings with officials of the unions that represent DoD employees, including the nine largest unions that currently have national consultation rights. These union officials represent 1,500 separate bargaining units covering about 445,000 employees. These meetings involved as many as 80 union leaders from the national and local level at any one time, and addressed a variety of topics, including: the reasons change is needed and the Department's interests; the results of Department-wide focus group sessions held with a broad cross-section of DoD employees; the proposed NSPS implementation schedule; employee communications; and proposed design options in the areas of labor relations and collective bargaining, adverse actions and appeals, and pay and performance management.

In keeping with DoD's commitment to provide employees and managers an opportunity to participate in the development of NSPS, the PEO sponsored a number of Focus Group sessions and town hall meetings at various sites across DoD. Focus Group sessions began in mid-July 2004, and continued for approximately three weeks. A total of 106 focus groups were held throughout DoD, including at several overseas locations. Bargaining unit employees and union leaders were invited to participate. Focus group participants were asked what they thought worked well in the current human resources systems and what they thought should be changed. Over 10,000 comments, ideas and

suggestions were received during the Focus Groups sessions and were summarized and provided to NSPS Working Groups for use in developing options for the labor relations, appeals, adverse actions, and human resources design elements of NSPS.

In addition, town hall meetings were held in DoD facilities around the world during the summer and fall of 2004. These meetings provided an opportunity to communicate with the workforce, provide the status of the design and development of NSPS, respond to questions, and listen to their thoughts and ideas. The NSPS Senior Executive, Secretary Gordon England, conducted the first town hall meeting at the Pentagon on July 7, 2004.

In July 2004, the PEO established working groups to begin the NSPS design process. Over 120 employees representing the Military Departments and other DoD activities and OPM began the process of identifying and developing options and alternatives for consideration in the design of NSPS. The Working Group members included representatives from the DoD human resources community, DoD military and civilian line managers, representatives from OPM, the legal community, and subject matter experts in equal employment opportunity, information technology, and financial management.

The working groups were functionally aligned to cover the six program areas: 1) compensation (classification and pay banding); 2) performance management; 3) hiring, assignment, pay setting, and workforce shaping; 4) employee engagement; 5) adverse

actions and appeals; and 6) labor relations. Each group was co-chaired by an OPM and DoD subject matter expert. Working Groups were provided with available information and input from the focus groups and town hall sessions, union consultation meetings, data review and analysis from alternative personnel systems and laboratory and acquisition demonstration projects, the NSPS statute, the Guiding Principles and Key Performance Parameters. Additionally, subject matter experts briefed the Working Groups on a variety of topics, such as pay-for-performance systems, alternative personnel systems, pay pool management, and market sensitive compensation systems.

In addition to reaching out to DoD employees and labor organizations, DoD and OPM met with other groups who were thought to be interested in the design of a new HR system for DoD. DoD and OPM invited selected stakeholders to participate in briefings held at OPM in August and September 2004. Stakeholder groups included the National Academy of Public Administration (NAPA), Coalition for Effective Change, Partnership for Public Service, veterans' service organizations, Federal Managers Association, and other non-union employee advocacy groups.

Before and after these stakeholder briefings, DoD and OPM responded to dozens of requests for special briefings. DoD and OPM also met with the Government Accountability Office, Office of Management and Budget, and Department of Homeland Security to keep them up to date on the team's activities.

We have worked hard to obtain the input of our employees and their representatives, managers and supervisors, and other stakeholders. We believe we have developed a human resources system that will create a work environment for our people that will encourage excellence and innovation and reward our people accordingly. It will provide our leaders and supervisors with flexibilities to better manage our people, while at the same time it will expand opportunities for our employees. It will mandate greater communication between managers and employees so that each and every employee will know what is expected.

Details of the Proposed Regulations

The Secretary of Defense and the Director of OPM jointly issued the proposed regulations and they were published in the Federal Register on February 14, 2005. This initiated a 30-day comment period that ends on March 16, 2005. This event provides another opportunity for input on the design of the system.

The Federal Register Notice also serves as the formal written proposal of the system for review and comment by our employee unions, as required by the NSPS statute. We encourage them to participate in the public comment period as well. In recognition of the union's special status as our employee representatives, the NSPS statute also provides for a "meet and confer" process with them for a minimum of 30 days. We will initiate that process following the 30-day period that the statute provides for employee representatives to review and make recommendations on the system. We

look forward to having a continuing dialogue with our unions and, with the help of the Federal Mediation and Conciliation Service (FMCS), we hope to find common ground. Upon completion of the meet and confer process, we will report the results and outcomes to Congress.

Before I go in to what the proposed design is, I would like to emphasize what will not change. As you know, the system will not change merit system principles that form the foundation for the federal civil service. Rules against prohibited personnel practices won't change. Protections for whistleblowers won't change nor will anti-discrimination laws. Veterans' preference is preserved under NSPS. Employee benefits – health and life insurance, retirement, leave – NSPS does not affect the laws covering these programs. Employees facing adverse actions will still be entitled to due process. And, employees will continue to have the same, if not more, opportunities for training.

The new system will provide for:

- A simplified pay banding structure, allowing flexibility in assigning work and a move toward market sensitive pay
- A performance management system that requires supervisors to set clear expectations (linked to DoD's strategic plan) and employees to be accountable
- Pay increases based on performance, rather than longevity
- Streamlined and more responsive hiring processes

- More efficient, faster procedures for addressing disciplinary and performance problems, while protecting employee due process rights
- A labor relations system that recognizes our national security mission and the need to act swiftly to execute that mission, while preserving collective bargaining rights of employees as provided for in the NSPS statute.

The proposals for performance management are designed to foster high levels of performance and to ensure excellent performance is recognized, rewarded, and reinforced. The system is designed to make meaningful distinctions in levels of performance and to hold employees accountable at all levels. We will ensure employees are under the performance management system for an adequate period of time before making any performance-based adjustments to pay.

One of the most important changes the proposed system offers is a stronger correlation between performance and pay and greater consideration of local market conditions in setting pay rates. Our proposal contains three major changes to the current General Schedule pay structure: first, emphasizing performance over tenure, we have proposed open pay ranges eliminating the "step increases" in the current system, which are tied to longevity; second, we are proposing that pay be adjusted by job type in each market, not across all job types in each market; and third, we are proposing to create performance pay pools where employees will receive increases based on their performance. We are fully cognizant that this is one of the biggest challenges that lie

ahead and that there is detailed work that must be done before we can implement the new system.

Our proposed appeals system focuses on simplifying a complex, legalistic and often too slow process that can disrupt operations. At the same time, it will ensure our employees receive fair treatment and that they are afforded the full protections of due process.

The proposed regulations were developed in consultation with staff of the Merit Systems Protection Board, with extensive discussions relative to appellate options and alternatives. MSPB officials were particularly constructive and many of their numerous suggestions are reflected in our proposed appellate procedures, including the retention of MSPB administrative judges as the initial adjudicators of employee appeals of adverse actions. Although the NSPS law allowed for DoD to establish an internal appeals process, we concluded the potential advantages of creating a new infrastructure – greater efficiency of decision-making and deference to agency mission and operations, among them – could be achieved if MSPB administrative judges were retained but with procedural modifications. The modifications we propose will streamline the process without sacrificing employee protections.

Among those changes is a proposal to allow the Department to review initial decisions of the Administrative Judges to ensure that MSPB interprets NSPS and these regulations in a way that recognizes the critical mission of the Department and to ensure that MSPB gives proper deference to such interpretation. After review, the Department may affirm the decision, remand the case to the AJ for further adjudication, modify or

reverse the decision, but only based on stringent criteria. Final Department decisions may be appealed to the MSPB, which retains limited review authority established in the NSPS statute. Ultimately, an employee or the Secretary may seek judicial review if still not satisfied with the appeal decision.

To balance some of the proposed changes, the Department will establish a single burden of proof standard for itself. Currently, the evidentiary standards for performance and conduct actions differ, with performance-based actions requiring a lower standard of proof. That will no longer be the case – the Department's decision will be subject to a single standard – the preponderance of the evidence – for all adverse actions, whether based on conduct or performance.

Throughout the development process, we have been cognizant of the need to provide protections guaranteed by law to our employees. We were also concerned with a basic tenet of the civil service – preserving merit system principles – treating employees fairly and equitably and protecting them from arbitrary actions, improper political influence and personal favoritism, and protecting them against reprisal. The proposed appeals system will continue to provide our employees with these all-important protections.

Our proposed labor relations construct balances our operational needs while providing for collective bargaining and encouraging consultation with employee representatives. In the face of a committed and unpredictable enemy, the Department

must have the authority to move quickly to confront threats to national security. We propose that the Department not be required to bargain over the exercise of rights impacting operations and mission accomplishment. Our proposal provides for consultation with employee representatives both before and after implementation when circumstances permit. We have proposed to retain bargaining obligations concerning the exercise of the remaining management rights. DoD plans to make the new labor relations provisions effective across the entire Department after the issuance of final regulations, and notification to Congress as required by law.

The Department proposes to create a National Security Labor Relations Board (NSLRB) composed of at least three members appointed to fixed terms. In evaluating the merits of a separate NSLRB that would largely replace the Federal Labor Relations Authority, with its Government-wide responsibilities, DoD and OPM put a high premium on the opportunity to establish an independent body whose members would have a deep understanding of and appreciation for the unique challenges the Department faces in carrying out its national security mission. The NSLRB will issue decisions on unfair labor practices (ULPs), to include scope of bargaining, duty to bargain in good faith, and information requests; certain arbitration exceptions; negotiation impasses; and questions regarding national consultation rights. FLRA will continue to determine appropriate bargaining units and supervise and conduct union elections as well as review NSLRB decisions using appellate standards. FLRA decisions will be reviewable by various Federal Circuit Courts of Appeals as occurs today.

Implementation – a Phased Approach

Although DoD will implement the labor relations system DoD-wide, we intend to implement the human resources system in phases, or spirals, to start as early as July 2005. In the first spiral, up to 300,000 General Schedule (GS and GM), Acquisition Demonstration Project, and certain alternative personnel system employees will be brought into the system through incremental deployments over 18 months, with the first increment covering 60,000 employees. After an assessment cycle and the certification of the performance management system required by the NSPS statute are completed, the second spiral will be deployed. Spiral two, consisting of Federal Wage System employees, overseas employees, and all other eligible employees, will be phased in over a three-year period, with full implementation to occur by 2007/2008.

We recognize these are significant changes. They are necessary for the Department to carry out its mission and to create a 21st century system that is flexible and contemporary while protecting fundamental employee rights. We have developed these proposals with extensive input from our employees and their representatives. We look forward to reviewing and analyzing the comments on the proposed regulations and to the meet and confer process with our employee representatives. We remain committed to the collaborative approach we have taken in the development of NSPS and we will continue to encourage a dialogue as we proceed through the writing and development of the implementing issuances.

I appreciate the opportunity to testify and welcome your questions and observations.

Statement of

George Nesterczuk

Senior Advisor to the Director on Department of Defense

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

"Critical Mission: Ensuring the Success of the National Security Personnel System"

March 15, 2005

I. Introduction

Mr. Chairman, I am George Nesterczuk, the Senior Advisor to the Director of the Office of Personnel Management (OPM) on matters related to the National Security Personnel System (NSPS). It is my privilege to represent the Office of Personnel Management before you today to discuss the proposed regulations implementing NSPS in the Department of Defense (DOD). The proposed regulations will establish a new human resources (HR) management system that we believe is as flexible, contemporary, and responsive as the President and the Congress envisioned. It has been a privilege for me

and the team at OPM to work with the dedicated men and women of DOD, its employees and senior leadership in the development of this system. The proposed regulations are the result of an intense collaborative process that has taken over a year. There is still much to do before the NSPS proposal can be finalized, beginning with the assessment of all the comments we are currently receiving and beyond that a hopefully productive period of conferring with DOD unions. Nevertheless, I want to express our appreciation to you for your leadership and continued interest, and that of this Subcommittee. Without your efforts, we would not be here today.

Mr. Chairman, with passage of the National Defense Authorization Act of 2004 (Pub. L. 108-136), you and other Members of Congress gave the Secretary of Defense and the Director of OPM broad authority to establish a new human resources management system to fully support the Department's vital mission without compromising the core principles of merit and fairness. Striking the right balance, between transformation on one hand and protecting core values on the other, is the essence of the transformation process that you established in that statute. We believe the regulations we have jointly proposed strike that balance in all of the key components of the NSPS: performance-based pay, staffing flexibility, employee accountability and due process, and labor-management relations. In each case we struck a careful and critical balance between operational imperatives and employee interests, without compromising either mission or merit.

Mr. Chairman, in inviting OPM to this hearing you asked, in addition to discussing the proposed regulations, that we address the process employed to gather employee input and also how OPM will work with DOD to ensure employees have

meaningful input in the remaining design and implementation. I will address these two procedural points first and then summarize the major highlights of each of the key components of the proposed regulations.

II. Outreach and Employee Involvement

Just about a year ago, the Department stopped its NSPS development efforts in order to assess its progress and its direction. As a result of that pause, a new program office was created to manage the joint development of NSPS regulations with OPM, and a broad outreach effort was initiated to ensure the participation of DOD managers, employees and their representatives. Over a period of several months, the Department held over 50 Town Hall meetings in locations throughout the world. Over 100 Focus Groups were convened separately with employees (including bargaining unit representatives), managers, and HR professionals and practitioners. Briefings were initiated with a host of public interest groups, employee advocacy groups, and other stakeholders including veterans service organizations.

Comments, observations, and suggestions from these many sources were compiled and provided to NSPS working groups organized to gather information, provide research, synthesize findings and develop design options. We were well served in this process by the extensive research that had been compiled by the teams working on the Department of Homeland Security (DHS) personnel system some months earlier. All of the DHS reference materials were provided to our NSPS teams, so we were well informed by that earlier effort.

We also have the benefit of DOD's experience with alternative pay and personnel systems going back nearly 25 years. The employee evaluations and comments amassed through studies of these demonstration projects were part of the information base provided to our working groups. OPM has done an extensive analysis of the DOD demonstration projects and generated a comprehensive report. Copies of all of these compilations and reports were also provided to DOD unions as an aid in our discussions and deliberations.

We also launched a special effort to engage the Department's 43 unions in meaningful discussions over key components of the NSPS: performance pay, staffing flexibilities, adverse action and appeals, and labor management relations. Beginning in April of last year until early December, we held 10 meetings with the unions. In an attempt to address each other's priorities, we set the agenda for some of the meetings, while the unions set the agenda for others. We developed presentations of possible NSPS design options in order to better focus discussion in specific issue areas. The meeting format was plenary in nature, with 25 to 30 unions from their Coalition participating in most of the sessions. We held separate meetings with the smaller number of non-Coalition unions. We received what we consider useful input from these meetings, particularly when some of the unions shared experiences of practices that had worked or failed.

We expect to reconvene our meetings with the Department's unions during the upcoming "meet and confer" process established in the NSPS statute. We are very interested in receiving their views on the proposed regulations, and we look forward to a productive set of meetings.

III. Continued Collaboration

Mr. Chairman you asked how OPM will work with DOD to ensure the continued involvement of employees in the development and implementation process. We have addressed this specific issue in our regulations and have proposed a process that will ensure employee representatives are provided the opportunity to discuss their views with DOD officials. The proposal specifically identifies conceptual design and implementation issues as subject to discussion. Unions will be provided access to information to make their participation productive, including review of draft recommendations or alternatives.

The proposed collaboration process draws on our experience over the past several months. While we value the participation of all DOD unions in the NSPS development process, it is at times impractical to convene a full plenary session of all 43 unions to discuss or review a particular initiative or proposal. So we propose to provide the Secretary the flexibility to convene smaller working groups of unions or to deal with review of written materials or solicit written comments for consideration, as appropriate. Some matters may involve development of concepts; others may consist of review of issuances before they are published. The best approach is to permit the Secretary to tailor the interaction and communications with DOD unions to the circumstances at hand.

We also propose to have the Secretary develop procedures to allow continuing collaboration with organizations that represent the interests of substantial numbers of non-bargaining unit employees. We believe this process will allow the Department to

maintain a broad outreach to its stakeholder community during the continuing evolution of the NSPS.

IV. Pay, Performance, and "Politicization"

The new pay system established by the regulations was designed to fundamentally change the way DOD employees are paid, to place far more emphasis on performance and the labor 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 adjustments on performance. No longer will employees who are rated as unacceptable performers receive annual across-the-board pay adjustments, as they do today. No longer will annual pay adjustments apply to all occupations and levels of responsibility, regardless of market or mission value. Instead, adjustments will be based on national and local labor market trends, budget, recruiting and retention patterns, and other employment factors. And no longer will employees who merely meet time-in-grade requirements 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 of 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" DOD 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 DOD and OPM authority to jointly prescribe the NSPS. 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. Those laws remain unchanged, intact and binding on DOD. 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 proposed NSPS 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 proposed regulations reveals that they include considerable protection against such practices – and no less than every other Federal employee enjoys today.

For example, if a DOD 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, 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. Of the four

variables in the 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 does not think it is fair. Finally, the other factors governing performance pay are also shielded from any sort of manipulation. And as far as the distribution of ratings is concerned, the Department has stated it will not use any sort of quota or forced distribution.

Ultimately there is no better guarantor of compliance to laws and standards than transparency and access to information. The rules and procedures governing the translation of employee ratings into pay adjustments will be available to all DOD employees, and will be part of the training everyone will receive. Unless employees readily understand how their pay adjustments are arrived at they will harbor suspicions and generate skepticism which would adversely impact the acceptance of pay for performance.

Of course, DOD managers will receive intensive training in the new system, a further safeguard against abuse. And many of them too will be covered by it, with their pay determined by how effectively <u>they</u> 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 there is no danger whatsoever that the pay of individual DOD employees will

become "politicized" just because it will be more performance-based. To the contrary, we believe the American people expect that performance should determine the pay of public sector employees. That is exactly what the NSPS pay system is intended to do.

V. Staffing Flexibilities

To fulfill its mission requirements the Department needs a workforce suited to the complex tasks of a dynamic national security environment. The key to aligning and shaping a workforce lies in greater flexibility to attract, recruit, shape and retain high quality employees. The proposed regulations provide DoD with a set of flexible hiring tools to respond to continuing changes in mission and priorities. New flexibilities will provide options to target recruitment, expedite hiring, and adjust for the nature of the work and its duration.

Under NSPS, employees will be either career, serving without time limit in competitive or excepted service positions, or they will be time-limited, serving for a specific period (term) or for an unspecified but limited duration (temporary.) The Secretary (in coordination with the Director of OPM) will have the authority to prescribe the duration of time-limited appointments, advertising requirements, examining procedures, and appropriate uses of time-limited employees.

To expedite recruitment and hiring DOD will continue to use direct-hire authority for severe shortage or critical hiring needs but subject to the same criteria OPM currently uses to make these determinations. In addition the Director and the Secretary may jointly establish new appointing authorities subject to public notice and comment.

The proposed rules provide recruitment flexibilities in permitting DOD to target recruitment efforts consistent with merit system principles and complying fully with veterans' preference requirements. The Department will provide public notice in filling positions and will accept applications from all qualified applicants, but DOD may initially consider, at a minimum, only applicants in the local commuting area. If the minimum area of consideration does not provide sufficient qualified candidates, then DoD may expand consideration more broadly or nationally.

Finally, the proposed regulations would permit DOD to more effectively shape competitive areas during reductions in force (RIF) to better fit the circumstances driving the reduction and to minimize disruption to employees and their organizations. The competitive area may be based on one or more factors such as geographical location, lines of business, product lines, organizational units, and/or funding lines. Retention lists will be assembled using the same four retention factors of tenure, veterans' preference, performance and seniority. Veterans' preference remains untouched under NSPS RIF actions, but performance and seniority are reversed in priority. Within tenure and veterans status groupings, retention lists place high performers at the top and low performers at the bottom. Within performance categories, employees are grouped by seniority with longer years of service at the top of the category and lesser seniority at the bottom. The performance based retention inherent in this proposal is entirely consistent with the greater emphasis on performance throughout the NSPS, including the pay system.

VI. Accountability and Due Process

The Department of Defense is unique among Cabinet departments in both its size and organizational complexity. It also carries the awesome responsibility of protecting our national security – a vital mission that requires a high level of workplace accountability. Congress recognized this fact when it gave DOD and OPM the authority to waive those chapters of title 5, United States Code, which deal with adverse actions and appeals. However, in so doing, Congress also assured DOD employees that they would continue to be afforded the protections of due process. We believe the proposed NSPS regulations strike this balance. They assure far greater individual accountability, but without compromising the protections Congress guaranteed.

In this regard, DOD employees will still be guaranteed notice of a proposed adverse action. While the proposed 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 proposed 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). The proposed regulations also provide bargaining unit employees the option of contesting an adverse action through a negotiated grievance procedure all the way to a neutral private arbitrator, if their union invokes arbitration.

The proposed regulations authorize the Secretary to establish a number of MROs that he or she determines will ". . . have a direct and substantial adverse impact on the Department's national security mission." The regulations provide a number of checks and balances on the use of this authority, including requiring case-by-case Secretary-level approval before an employee is charged with an offense, and providing full due process to employees charged. 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.

While no list of MROs has as yet been proposed, the proposed regulations reserve to the Secretary the flexibility to determine such offenses should the need arise in the future. Mandatory removal will allow management to act swiftly to address and resolve misconduct or unacceptable performance that would be most harmful to the Department's critical mission. Of course, DOD employees will be properly notified before any MROs are established.

In adjudicating employee appeals, regardless of forum, the proposed NSPS regulations place a heavy burden on the agency to prove its case against an employee. Indeed, we propose to establish a *higher* burden of proof: a "preponderance of the evidence" standard for <u>all</u> adverse actions, whether based on misconduct 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 action.

Finally, the proposed regulations authorize MSPB (as well as arbitrators) to mitigate penalties in adverse action cases, but only under limited circumstances. Thus,

the proposed 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." 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 (chapter 43 of title 5) literally precludes them from mitigating a penalty in a performance-based action taken under that chapter. 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.

The President, the Congress, and the American public all hold the Department accountable for accomplishing its national 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, DOD 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 DOD 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.

VII. Mission Imperatives and Employee Interests

As I stated before, the Department is a large and complex organization, with widely dispersed components and commands, and varied mission elements mixing both military and civilian workforces. With lives literally at stake, the Department's commanders cannot afford mission failure. The chain of command depends on an ethos of accountability, and this goes to the heart of some of the most important 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 reconfigure resources to deal with a host of new and deadly threats to the nation, the Secretary cannot issue personnel or other rules and regulations that are binding on his subordinate organizational units. Instead, those rules must be negotiated in over 1,500 bargaining units currently recognized by DOD, represented by 43 separate unions. The organization of the unions and the bargaining units does not always bear resemblance to the Department's organizational structure or chain of command. This cumbersome labor environment within DOD adversely affects the timeliness, uniformity and predictability of internal policy directives. The Secretary of Defense needs quick response and great certainty in the management of his Department. The proposed rules permit this by making Department and component level rules and regulations management actions not subject to bargaining. Below this level,

personnel policies, practices and working conditions would still be subject to collective bargaining. Therein lies the balance – where the Department needs expedited rules and directives and uniform implementation, it will have the means to issue such. Otherwise, where local policy discretion is appropriate local commands can negotiate through their individual bargaining units.

Today, if the Department wants to introduce new technology, it cannot – unless it first negotiates with the Department's various unions, at their various sub-component levels of recognition, over the implementation and impact of that new technology on bargaining unit employees . . . and the Department cannot act until those negotiations have been concluded. How can we hold the Department accountable for rapid response to an elusive foe if it cannot act swiftly to take full advantage of new technology? The proposed regulations give the Department the authority to do so, and they provide for consultations with unions both before and after implementation, as circumstances permit.

Today, the Department cannot permanently or even temporarily assign its front-line employees without following complicated procedures governing who, when, and how such assignments will take place – procedures that, in some cases where there are collective bargaining units, 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 situations have real operational impact, all the result of current law. The proposed regulations prohibit negotiations over these operational procedures. However, the regulations do require that managers consult with unions over such procedures, and they also permit employees to grieve alleged violations of the

procedures -- all the way to arbitration, if their union invokes it. In addition, the regulations require full collective bargaining over non-operational procedures.

Critics of these proposed changes will argue 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. Current law simply does not allow DOD to take action quickly to prevent an emergency, to prepare or practice for dealing with an emergency, to implement 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 unions 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. OPM recognizes that this simply cannot continue.

You may also hear that the National Security Labor Relations Board (NSLRB), 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 NSLRB 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 any of the many other Boards or Panels in the Department...or any agency's Administrative Law Judges (ALJs). Just as an agency's ALJs operate outside the chain of command, so too will NSLRB's members. Just as ALJ decisions are binding on the agency that employs them, so too will NSLRB's decisions be binding – subject to appeal by either party to the Federal Labor Relations Authority

and the Federal courts of appeals. Thus, assertions to the contrary notwithstanding, the proposed regulations make it patently clear that the NSLRB's decisions will be subject to at least *two levels* of outside review.

VIII. Conclusion

If DOD is to be held accountable for national security, it must have the authority and flexibility essential to that mission. That is why Congress gave the Department and OPM authority to waive and modify the laws governing staffing, classification, pay, performance management, labor relations, adverse actions, and appeals. And that is why we have proposed the changes that we did. 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. At the same time we made sure core merit system principles were preserved.

Mr. Chairman this 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
Committee on Homeland Security and Governmental Affairs
Subcommittee on the Oversight of Government Management, the Federal Workforce and the District of Columbia
Tuesday March 15, 2005

Moving Ahead: Management Perspectives on the New National Security Personnel System a the Department of Defense

Department of Defense NSPS Proposed Regulations: Collaborative Development and Deliberate Implementation Are a Must for Success

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

My name is Richard Oppedisano and I am the National Secretary of the Federal Managers Association (FMA). I recently retired as the Chief of Staff and Operations Officer for the U.S. Army Watervliet Arsenal in Watervliet, NY. I have been involved in human resources management and labor relations for the better part of my 30 years of Federal civil service before retiring last May. 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 proposed personnel regulations outlining the National Security Personnel System (NSPS) at the Department of Defense (DOD).

Established in 1913, FMA is the largest and oldest Association of managers and supervisors in the Federal Government. FMA was originally organized within the Department of Defense to represent the interests of civil service managers and supervisors, and has since branched out to include some 35 different Federal departments and agencies. We are a non-profit professional organization dedicated to advocating excellence in public service. As those who will be responsible for the implementation of the Department's proposed 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 process of developing the regulations, the proposed changes themselves, and the eventual rollout of the new system.

The Department of Defense is the largest employer of civilian Federal employees, and roughly 700,000 employees, nearly half the 1.8 million members of the Federal civil service, will fall under the scope of the new NSPS. The critical mission and sheer size of the Pentagon makes the success of the development and implementation of the new personnel system vital. With an impending Base Realignment and Closure (BRAC) process that looks to reduce an estimated twenty-five percent of Defense infrastructure, the civilian employees of DOD must be reassured of the commitment by the Secretary of Defense and Congress to ensure a positive and successful implementation of the new regulations that take into account managerial and employee protections.

The Department of Homeland Security (DHS) and the Office of Personnel Management (OPM) have recently released the final regulations outlining its new personnel system. Similar changes are being proposed in for the DOD regulations. However, so much of the proposed regulations provide often

vague and undefined guidance it is difficult to see what the final implementation would look like under any final regulation. We would ask that more attention be paid to the specifics in all areas of change so that there is greater transparency with what will be expected of managers and employees. As we move towards the implementation phase, we already know that there will be:

- maintenance of current benefits for active duty and retired employees;
- support for travel and subsistence expenses;
- continuation of current leave and work schedules;
- no loss of pay or position for any current employee;
- no changes in current overtime policies and practices; and
- merit principles will be maintained, preventing prohibited personnel practices, adherence to current whistleblower protections and honoring and promoting veterans' preference.

We at FMA recognize that change does not happen overnight. However, we are optimistic that the new personnel system known as NSPS 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 NSPS 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. 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 training, 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 integration and implementation of the new system – and the stronger the likelihood that managers will be able to carry out their day to day responsibilities in support of the Department's critical 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 and therefore have no faith in the appraisal process. This contradiction does not create the environment of performance based pay and results oriented productivity. Rather, it creates an environment of mistrust and conflict in opposition to the intended efforts of the proposed regulations.

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 intended 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 Department of Defense has estimated that the cost for the implementation of the new human resources management system and the internal labor relations board will be approximately $158 million with no more than $100 million spent in a given twelve month period. However, there is no clear indication of how this money will be spent, what portion will be reserved for training, and out of what budget those funds will come. The initial budget request for the implementation of the DHS MAX^{HR} system that included training for managers and employees was already underfunded by Congress for fiscal year 2005, and could be again for fiscal year 2006. 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 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. The Office of Personnel Management (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 would 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.

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 was finally brought 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 the government. Without proper training, and funding for training, we cannot hope to effectuate expansive human resources changes and fully achieve them.

DEVELOPMENT AND IMPLEMENTATION PROCESS

The development process for the Department of Homeland Security final personnel regulations took two years and a considerable amount of outreach and input from management and employees. We are seeing an expedited and larger scale development and implementation for the NSPS than we did with DHS. Whereas DHS will only have 110,000 employees subject to its new system, DOD will be looking at nearly seven times that many employees coming under NSPS and the timeframe for implementation is only slightly longer. We want to strongly recommend a deliberate and reflective process during the creation and application of the new regulations. It is with great patience in addressing both the positive and critical feedback that the success of the new system will be boosted.

As we look at the process for the development of the NSPS, we were initially discouraged by the lack of outreach that the DOD was conducting to management and employee groups as well as OPM. However, we were similarly encouraged once OPM was brought more directly into the fold, and the Executive Program Office (EPO) was created for the development and implementation phases. We firmly believe that the DHS human resources system benefited greatly from the involvement of all parties, and continue to believe that NSPS will also benefit in the attempting to debunk myths and create a culture of change.

The NSPS EPO sent a representative to our 13th Annual Mid-Year Conference in August of 2004 to discuss the upcoming changes to the current personnel systems with our membership. Our membership was grateful for the chance to listen to the development of the possible outcomes for the new human resources management system and discuss concerns they have out in the field with the

implementation and specifics of the new NSPS. The NSPS staff availed themselves to our membership for further inquiry and discussion.

In addition, our national leadership was invited on several occasions to meet with both DOD and OPM officials during the development phase of the NSPS proposed regulations. In our discussions, we have expressed concerns with the training and budgeting needed to ensure success with the new system as well as the need for continued inclusion of management and employee groups in the implementation process. It is this point that we cannot stress enough.

As we move forward with the thirty-day public comment/thirty-day "meet and confer"/ and thirty day congressional oversight period, otherwise known as the "30/30/30 timeframe," it has become clear that continued collaboration between OPM, DOD and representative management and employee groups will go along way towards alleviating fears and angst over the implementation of the new system. Allowing our voice at the table helps OPM and DOD understand the perspective of managers in the field and allows us a chance to go back to our membership and explain the reasoning behind decisions being made. While consensus may not always be reached, the act of inclusion into the process ensures greater transparency and accountability from all sides involved.

After the meet and confer process and the release of the final regulations, management and employee groups need to have continued input during the implementation phases of the new human resources system. Our members on the ground both will be subjected to and responsible for bringing these ideas into real working systems. Without their continued feedback on both successes and bumps in the road, there is little confidence that problems will be properly addressed.

PAY FOR PERFORMANCE

There has been much discussion about the creation of a pay-for-performance system at both DOD and 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 DOD 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 DOD should continue to allocate at least the annual average pay raise that is authorized and appropriated by Congress for General Schedule employees to DOD employees who are "fully successful" (or the equivalent rating), in addition to other rewards based on "outstanding" performance (or equivalent rating).

There is an increased emphasis in the proposed regulations on basing general pay for employees on the local job market. This is certainly a step in the right direction of closing the pay gap between Federal civilian employees and their private sector counterparts. However, we believe that these provisions should be expanded on to establish multiple locality market supplements to prospective pay adjustments, and require clear compelling criteria for the establishment of additional locality market supplements. Furthermore, the supplements should contain implementing issuances that require a balance of human resources interoperability with mission requirements.

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 agencies within DOD. 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.

HIRING AND STAFFING

Sixty percent of managers and fifty percent of all Federal civilian employees will be eligible for retirement in the next few years. The average age of the Federal workforce rises every year, and currently it is 47. In addressing the growing attrition rates and the need for recruiting and retaining the most talented workforce, we fully support the regulations move towards increasing both increased hiring authorities and retention tools while maintaining the important veterans' preference. In order to successfully implement any new management flexibilities, proper budgetary allotments for bonuses, programs such as student loan repayments, and the training for managers to properly use the new authorities must be made.

Congress has authorized and increased a number of management authorities and benefits to help address the human capital crisis over the past few years. The annual amount an employee can receive

for their student loan repayments was raised from $6,000 to $10,000, and the aggregate was raised from $40,000 to $60,000. Last year, Congress approved the Workforce Flexibilities Act (S. 129), a bill to end the Thrift Savings Plan open seasons (H.R. 4324) and a measure (S. 2657) to improve dental and vision care benefits for Federal employees, retirees and their families. As an author of the bill, you know that under S. 129 agencies have the following five authorities:

- Recruitment and Retention Bonuses – Agencies may offer recruitment and retention bonuses worth up-to 100 percent of a current or future employee's annual pay. The bonuses would be paid out over a four year period.
- Streamlined Critical Pay Authority – Allow OPM to use greater authorities to recruit employees into historically difficult government positions to fill.
- Agency Training – Improve agency training of managers in areas of performance review, mentoring activities and addressing poor performers. Agencies will also be charged with adopting better training for management succession planning.
- Annual Leave Enhancement - An agency will be allowed to offer mid-career professionals moving from industry into government service annual leave comparable to employees who spent a similar amount of time earning the leave in Federal service.
- Compensatory Time Off for Travel – Agencies may offer employees compensatory time-off for each hour they spend in transit for official business travel.

We are in strong support of the additional hiring flexibilities and authorities proposed in the regulations, but we would also like to see a stronger commitment by DOD and OPM to enforcing the current hiring and retention flexibilities currently available to agencies. A perfect example of a management tool not being properly implemented is the student loan repayment program. This program is not properly funded and therefore many agencies do not offer this incentive to their recent college graduates. Too few flexibility tools are being used in too few agencies with little training and funding across the government to education managers on their given authorities.

In addition to the need for greater hiring tools is the general concern about security clearances. A balance must be struck between creating a thorough background security check for new employees

brought in under the direct hire authority and timely processing of the security clearances. Far too often employees will not be afforded the opportunity to perform their full duties because of the delay in getting the proper security clearance. As many of our members hold high security level clearance, we understand and appreciate the need for examining all aspects of a person's personal record including finances, but we also believe that a balance can be struck to help expedite the process.

REDUCTIONS-IN-FORCE (RIF)

Reductions-in-Force (RIF) are not new to many DOD employees. The current RIF regulations allow for performance recognition in retention standing and we believe is acceptable to management and the employees being affected by RIF. We support the position that employees should be judged not only on the amount of time they have put into an agency, but on the breadth and depth of their performance. However, we acknowledge that their time is the primary factor in the ultimate determination of any reduction. Under the new system, we would recommend that as with the current system performance ratings be given a time value that would be added to the employees seniority (Service Computation Date.) An employee with one year of an "Exceptional" performance rating versus an employee with three years of "Above Fully" should not be penalized. In fact, one year of an "Exceptional" rating is not a blue print for a lifetime of exceptional work.

As we have seen throughout the rest of the regulations, DOD has maintained its commitment to the Merit Systems Protection Board as the independent body for appeals making decisions. Under the RIF Appeals provision, employees may appeal the RIF's action to the MSPB, but no provisions exist in the Federal Register for such appeals to be streamlined or handled under an expedited way spelled out in the other sections of the regulations dealing specifically with appeals processes. We at FMA suggest that this section be modified to reflect the reduced time frames and streamlining for appeals that the rest of the Department will see under the proposed regulations.

Lastly, the proposed regulations define the basis for competitive areas being subjected to RIF as including one or more of the following considerations: (1) geographic location(s); (2) line(s) of business; (3) product line(s); (4) organizational unit(s); and (5) funding line(s). We understand that these are part of the outline for making RIF decisions, but it is still very vague how they will be applied. We ask that additional specific information on the design and impact of the considerations for defining competitive areas be more explicitly spelled out in the final regulations.

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 National Security Labor Relations Board (NSLRB) 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.

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 National 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 DOD.

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 DOD 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. The Merit System Protection Board (MSPB) 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 less. We are pleased to see that the Merit Systems Protection Board, an independent third party review board, will remain as the primary appeals decision maker. Furthermore, the expedited process requirement would hopefully improve employee and management morale in allowing decisions to be rendered more swiftly.

We are concerned, however, that the Secretary retains ultimate decision making authority on the appeals process. In many ways this creates a system of little accountability and integrity as the need for a third party intermediary to have authority over appeals is critical to the integrity of the system. Moreover, the current model has been successful because it is a uniform system for the entire Federal government. Establishing appeals processes that leave ultimate authority with the each individual Secretary 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 the reduced time requirements are a step in the right direction, but MSPB must be given the full authority to make binding independent decisions otherwise the system runs the risk of creating a lack of trust, 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 and internal appeals process – we at FMA believe that not doing so would create more problems than it solves.

The mission of the Department of Defense demands high performance and the utmost integrity from its employees. As the adage goes, one bad apple can spoil the rest. DOD 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 sabotaging machinery, abetting an enemy, 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 public sector. The practice has been in use since the late 1980's, and 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.

Under the proposed NSPS regulations, applicable employees will no longer be governed by the traditional General Schedule (GS) pay system. 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 a broad job cluster based that combine like job functions, and then placed in one of three pay bands: Entry Level, Full Performance, and Supervisory (with the potential for more bands).

The difficult determination of the final outcome of the pay banding and job classification system is the vague outline sketched in the proposed regulations. While we can look to DHS, the Government Accountability Office, or other demonstration projects for insight, without a more clearly defined explanation of the system sought to be implemented we can only offer a general perspective. We at FMA support the use of the GS salary structure 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 would like 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. 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. However, careful consideration should be given to the use of the term "bonus". A bonus is not considered part of basic pay for retirement purposes so therefore not considered when calculating retirement entitlement.

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 DOD 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[1], 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.

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

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.

GOVERNMENT-WIDE STANDARDS

The passage of the National Defense Authorization Act of 2004 (P.L. 108-136) marked the second step in what is quickly becoming the largest civil service reform effort since the Civil Service Reform Act of 1978. Included in the legislation was an authorization for major changes to the pay, hiring and staffing, labor relations, collective bargaining, adverse actions, appeals process, reductions-in-force, 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 Pentagon employees to respond quickly to any threats to our national security and prevent any military actions that would harm America. While this justification has come under fire, we agree that the needs of national security and protecting America's infrastructure, citizens and interests around the globe 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 NSPS human resources transformation at the Department of Defense and the new MAX^{HR} system at the Department of Homeland Security.

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.

The NSPS and MAX^{HR} 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 DOD and DHS.

There has also been a commitment on the part of the Office of Personnel Management, DOD, and DHS 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 DOD 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 Defense 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 DOD 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 NSPS. 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 NSLRB should do all in their power to create an open and fair working environment. At the same time, DOD 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 hopeful 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 DOD and OPM are committed to implementing the new regulations with minimal emphasis placed on a slow and reflective process. We caution 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 Defense 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.

STATEMENT BY

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AND

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ON BEHALF OF THE
UNITED DOD WORKERS' COALITION

BEFORE

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

SENATE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS

REGARDING

THE NATIONAL SECURITY PERSONNEL SYSTEM OF
THE DEPARTMENT OF DEFENSE

MARCH 15, 2005

Mr. Chairman and Members of the Subcommittee: On behalf of the more than 600,000 federal employees in the Department of Defense (DoD) represented by the United DoD Workers' Coalition, we thank you for the opportunity to testify today.

We are sorry to report to you that in spite of prodigious efforts on the part of union representatives over the past year to engage with the Department of Defense (DoD) in discussions over how best to implement the authorities Congress granted to establish a new so-called "National Security Personnel System" (NSPS), the proposed regulations published by DoD reflect that we made virtually no progress. At times, the Coalition sensed that many of the concerns we voiced fell on deaf ears as DoD's clear intention was to mirror the system proposed by the Department of Homeland Security. As such, we believe that many of the concepts advanced by DoD fail not only to protect employee and union rights, but also fail to advance the public's interest in protecting national security and defense.

The Union Coalition offered DoD numerous "options" and alternatives during the past year and we have attached to this testimony a copy of the comments we have submitted in response to DoD's Federal Register publication of its proposed regulations. These options would have changed and enhanced current procedures without sacrificing important employee rights that Congress intended to be safeguarded by the law. As a result of our comments on the

proposals and the continued oversight and participation of this Subcommittee, we continue to hope that these options will be included in the final regulations.

For example, the unions repeatedly indicated our willingness to speed up the discipline and adverse action process. While we have very strong concerns about a pay for performance system, we 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. 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.

Labor Relations

Notwithstanding the substantive arguments in our attached comments, our Union Coalition believes that the procedures for generating changes in the Labor Management Relations system have, thus far, been contrary to the statutory scheme proscribed in the National Defense Authorization Act for Fiscal

Year 2004, Section 9902 (m), LABOR MANAGEMENT RELATIONS IN THE DEPARTMENT OF DEFENSE.

This portion of the law describes a very specific manner of statutory collaboration with time lines, which has not been followed. The law requires that employee representatives participate in, not simply be notified of, the development of the system. We ask that the Subcommittee investigate DoD's failure to enforce or observe this aspect of the law.

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

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

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

5. Eliminate mid-term impasse resolution procedures, which would allow agencies to unilaterally implement changes to conditions of employment.

6. Set and change conditions of employment and void collectively bargained provisions through the issuance of non-negotiable departmental or component 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.

Our unions have expressed strong objections to DoD's total abandonment of Chapter 71, along with the law associated with the statute's interpretation. We ask that the Subcommittee join us in reaffirming to DoD that Congress intended to have Chapter 71 rights upheld so that DoD cannot hide behind its false contention that Congress' intent was unclear. Chapter 71 should be the "floor" of any labor relations system DoD designs. However, the design of DoD's plan is to minimize the influence of collective bargaining so as to undermine the statutory right of employees to organize and bargain collectively. We know that when Congress enacted provisions to protect collective bargaining rights, it did not intend that those rights be eviscerated in the manner that DoD's proposed regulations envision. Indeed, any regulation reflecting any of the issues listed above will be entirely unacceptable to us, and we strongly believe, unfounded in either the legislation or the law.

Performance Management

The law required any new DoD system to be "contemporary." The labor relations and performance management concepts set forth in DoD's proposed regulations are, however, remarkably regressive. By proposing to silence frontline employees and the unions that represent them, DoD appears to have decided that employees and their unions can make no contribution 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 Government Accountability Office (GAO) recognized in Congressional testimony concerning the Department of Homeland Security's proposed regulations:

> [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 proposed DoD 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 his/her 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 its proposal suggests that DOD will be able to avoid the credibility problems that have plagued other federal agencies and departments. These problems are even more pronounced in view of the proposal to link employee pay to performance ratings.

Employee Appeals

Public Law 108-13 reflects Congress's clear determination that DOD employees be afforded due process and be treated fairly in appeals they bring with respect to their employment. When it mandated that employees be treated fairly and afforded the protections of due process, and authorized only limited changes to current appellate processes, Congress could not have envisioned the drastic reductions in employee rights that DoD's proposed regulations set forth.

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

regulations fall far short of that ideal, and can fairly be described as undermining it for all practical purposes. The system they envision will instead result in a demoralized workforce comprised of employees who know that 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, with consequent impact on its effectiveness. That is the real tragedy.

Pay and Classification

DoD's proposed regulations indicate its desire for radical change to pay and classification systems, and, as the law requires, creation of a pay-for-performance system "to better link individual pay to performance, and provide an equitable method for appraising and compensating employees." No objective data or reliable information exists to show that such a system will enhance the efficiency of DOD operations or promote national security and defense. As with the proposed system at the Department of Homeland Security, most of the key components of the system have yet to be determined.

One thing, however, is clear. The design, creation and administration of the concept DoD has proposed will be complex and costly. A new level of bureaucracy would have to be created, and given DoD's ideology and proclivities, it is highly likely that this costly new bureaucracy would be outsourced to provide some lucky private consultants with large and lucrative contracts. This private consultant would then make the myriad, and yet-to-be

identified, pay-related decisions that the new system would require. Although the contractors who anticipate obtaining this new "make-work" project are undoubtedly salivating over the prospect, our country would be better served if the resources associated with implementing and administering these regulations were dedicated more directly to protecting national security and defense.

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

Accordingly, we have recommended to DoD 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 widespread basis. It is simply wrong to ask us to accept systems that establish so few rules and leave so much to the discretion of current and future officials. As the representatives of DOD employees, it is our responsibility to protect them from vague systems, built on discretionary authority that is subject to abuse.

Regardless of the ultimate configuration of the pay proposal, we believe that any proposed system must contain the transparency and objectivity of the General Schedule. Critical decisions on pay rates for each band, annual adjustments to these bands and locality pay supplements and adjustments must be made in public forums like the U.S. Congress or the Federal Salary Council, where employees and their representatives can witness the process and have the opportunity to influence its outcome through collective bargaining. 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 on which to predict their salaries from year to year. They will have no way of knowing how much of an annual increase they will receive, or whether they will receive any annual increase at all, despite having met or exceeded all performance expectations identified by DOD. The "pay-for-performance" element of the proposal will pit employees against one another for *allegedly* performance-based increases.[2] Making DOD employees compete among

[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.

themselves for pay increases will undermine the spirit of cooperation and teamwork needed to keep our country safe at home and abroad.

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

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. It is our contention that with respect to pay and classification, any conversion of GS employees in non-competitive career path must include pay adjustments for time already accrued toward a career ladder promotion or within grade increases. 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.

Conclusion

The fundamental bases for DoD's proposed system, as described in the proposed regulations, are unacceptably flawed, and we object to it in its entirety. Accordingly, we do not acquiesce to the implementation of any part of the system and DoD should consider any individual proposal not expressly accepted in the comments and recommendations we submitted and which are attached for the Subcommittee's consideration to have been rejected. We recommend that all current provisions of law be retained until such time as all of the numerous defects of DoD's proposal can be cured.

During the statutorily prescribed consultation process, we will attempt, again, to work with DoD to devise a human resource system that meets legitimate management needs without sacrificing important employee rights and union protections. Such a system should, at a minimum, include the following elements:

1. It should provide for collective bargaining over the design of the pay, performance, and classification systems. It should provide for pay, performance, and classification systems that operate through collective bargaining with bargaining unit employees. 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.

2. 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.

3. It should retain the provisions of 5 U.S.C. Chapter 43 and 5 C.F.R. Part 430, governing performance management.

4. 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.

5. It should provide for impartial review of labor relations disputes by an independent entity like the Federal Labor Relations Authority.

6. 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.

7. 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.

8. 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 action 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.

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Remarks of Gregory J. Junemann

President, International Federation of Professional & Technical Engineers, AFL-CIO & CLC

Prepared For:

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

Hearing: Critical Mission: Ensuring the Success of the National Security Personnel System

Tuesday, March 15, 2005 - 10 a.m.

342 Dirksen Senate Office Building, Washington, DC 20510

Testimony of Gregory Junemann
President, International Federation of Professional and Technical Engineers

I would like to thank the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia for holding today's hearing. I would also like to extend a special note of appreciation to both Chairman Voinovich and Ranking Member Akaka for giving me an opportunity to testify today.

Before I begin with my personal remarks, I would like to join my good friend, AFGE President John Gage, in submitting for the official record the comments of the United DoD Workers Coalition (UDWC), of which IFPTE is a member. The document represents the official testimony of the UDWC, a coalition of 36 unions working together on this NSPS issue. I would like to directly associate myself with this UDWC document, which was delivered to this committee last week.

I will restrict my comments for the record to the Department's subparts on Appeals and Labor Relations. The features of these two sections are critically important if we want preserve fairness and equity for the civilian workforce of the Department of Defense, and the accountability of management. But the National Security Personnel System does not preserve fairness or equity in the process laid out for appeals of adverse actions like suspensions or discharges, and it does not preserve basic labor relations protections that have been successful throughout the public and private sector.

The Department has insisted that it requires 'flexibility' in its personnel system, and that this is necessary to better our Nation's security. But so far we have seen no evidence that this system, despite its title, was developed with our national security in mind.

The Appeals Subpart of the Regulations Deprives Employees of Fair and Impartial Review

DOD states that the current appellate system is complex, legalistic, and slow. But gutting the current procedures and effectively starting over simply won't work. First, it strikes at the heart of a system of justice that is crucial to assuring employees that they work in an environment where 'their side of the story' is heard and not ignored. Second, in some ways it will not streamline the system but make it more complex. The new system adds new, untested and vague legal standards and creates additional steps in the appeals process - steps which only increase management's ability to fire or suspend employees. Third, it will push good employees out of government service and discourage qualified employees from even applying.

Furthermore, since the new features of the National Security Personnel System will introduce pay banding and merit pay increases, any adverse actions taken along these lines should be subject to impartial review. As in the rest of the federal workforce, suspensions of 14, rather than 30, days should be appealable. Under the current proposal, employees without a labor organization to protect them will apparently have no ability to appeal a suspension of less than 30 days to a neutral party. It appears that employees subject to reductions in force or "internal placement programs" will also not be to appeal to an impartial arbiter. Without impartial review of these actions, managers with a personal axe to grind, without consideration of an employee's merit, will be able to avoid accountability, because employees won't be able to appeal to a neutral party.

Section § 9901.807 provides numerous additional steps over the current appeal process so that management may in one way or another deprive an employee of a fair

process. The Director of OPM is granted the authority to intervene "at any time." § 9901.807(e). Time periods for appeals have been drastically shortened, meaning that employees who have trouble finding or affording representation may lose out on their chance to save their job. Payment of attorneys' fees for employees who *do* succeed in an appeal is only awarded under vague and unresolved terms; this will obviously discourage employees from taking meritorious appeals.

At every juncture in these regulations one may find that the Department is seeking to avoid being held to any objective standards. Even third parties like the MSPB are required to afford DOD "great deference" in interpretation of the regulations. (§ 9901(a)(2).) The MSPB is also obligated to give deference to DOD's mission requirements "as defined by the Secretary" when considering whether to reduce or overturn a disciplinary action. This creates an entirely new legal standard when an established body of law under the MSPB already exists, and is yet another loophole for managers to escape accountability for their actions. The principle of "just cause" has been applied by many arbitrators in private sector cases for the past 40 years, and provides the correct balance between the legal burden appropriately placed upon the employer in disciplinary and discharge matters, and the right an employee has to defend him/herself in such actions.

DOD has not even provided evidence why the MSPB's authority to provide impartial review should be usurped. We do not think that it is required to protect our Nation's security, since under the current personnel system, separation or removal already may be effected rapidly if "in the interests of national security." 5 U.S.C. § 7532. When such a provision already exists, how can the Department justify such drastic restrictions on employees' rights?

The regulations also propose mandatory removal offenses (§9901.712), but do not specify what they are and, incredibly, simply reserve to the Secretary the right to delineate whatever offenses may result in immediate separation without review. 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's credibility. Employees will have no confidence that their due process rights will be protected because the outcome of any "hearing" will be pre-determined. No impartial party will hear their cases, but a panel hand-picked by the same employer that imposed the penalty will decide these cases. (See §9901.808.)

The use of mandatory removal offenses runs contrary to the direction taken by Congress and the Administration in H.R. 1528, a bill that would repeal statutory mandatory termination offenses currently applicable to Internal Revenue Service employees. H.R. 1528 was drafted by the Administration and has already passed the House with strong bipartisan support. If implemented, your concept would have the same negative effect as that targeted for repeal in H.R. 1528. This concept must be dropped.

Finally, DOD claims that the complexity of the existing system deters managers from taking the necessary action against poor performers and those engaged in misconduct. If those managers are not fulfilling their responsibilities, why is the chain of command within DOD not taking the appropriate steps to address its management performance problems? We have long maintained that proper training and resource management within the *existing* personnel system would allow managers to maintain discipline, ensure efficiency and good performance while maintaining fairness and esprit de corps for the workforce. Certainly, it would be cheaper than creating an entirely new and untested system.

The Process By Which the Department Developed The Labor Relations Regulations Was Unlawful

As members of this Committee are no doubt aware, a coalition of DOD labor organizations had brought suit to challenge the unlawful process by which the Departme has constructed its labor relations regulations. The court complaint in *AFGE v. Rumsfel* Civ. A. No. 05-367 (EGS) (U.S. Dist. Ct. D.C. complaint filed February 23, 2005) states part:

> 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.

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).

In short, the Department conducted meetings and working groups in secret without divulging its plans for the system in any detailed or substantive manner. No "meaninful discussions" occurred as required by the statute, nor did the Department respond to requests for information with anything but generalized statements. This violates the statutory process set forth by Congress.

The Labor Relations Provisions of the Regulations Gut Employees' Rights and Shed the Department of Accountability for Its Actions

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.

Despite the plain meaning of the statute, the Department is attempting to eradicate existing labor law protections. Again, the sole purpose appears to avoid accountability, not protect national security. The regulations drastically limit subjects of bargaining, radically expands management "right" to act unilaterally and against the interests of employees without any recourse, restricts the right of employees to have a union representative attend meetings with employees and speak on their behalf, and eliminates the right of union representatives to information under Chapter 71 of Title 5.

By far the most outrageous feature of Subpart I is the creation of what can only be described as a kangaroo labor board – the National Security Labor Relations Board. Board members are to be appointed by the Secretary, and will essentially replace the FLRA, which just celebrated 25 years of success in the federal labor relations business. For 600,000 civilian employees of the Department of Defense, that is 25 years of carefully-balanced and thoughtful labor law down the drain. For management, it is an invitation to act irresponsibly and without accountability.

Conclusion

Every civil service system - at least, every successful one - ensures a few basic and critical concepts: flexibility, yes, but also fairness, consistency, and accountability. The Department has taken a straightforward mandate from Congress and abused it; it has reserved to itself a great deal of "flexibility" while shedding accountability and making a mockery of fairness. Employees will not accept a personnel system in which management can act without, at some point, being held accountable for the actions it takes that harm employees. They will not tolerate working in a personnel system that does not give them a fair opportunity to have their grievances heard. And if these regulations go into effect they will

not understand why Congress allowed the Department to deprive them of basic civil service protections.

The United DOD Workers Coalition strongly urges Congress to step in. Any new personnel system should preserve, at the very least, the following attributes:

It should provide, as does the current system, for a choice between the Merit Systems Protection Board and the negotiated grievance/arbitration procedure for ***all*** serious adverse actions.

It should provide for impartial review of labor relations disputes by an independent entity like the Federal Labor Relations Authority. We recommend that the FLRA's current role be preserved in its entirety.

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.

Statement for the Record of Elmer L. Harmon, president, AFGE Local 2635
NCTAMS LANT DET Cutler Maine
before the
Senate Governmental Affairs Committee
March 15, 2005

On

Defense Department's National Security Personnel System

The proposed regulations cannot be understood as written. It is necessary in my view that the Defense Department put their entire proposal on the table in the beginning. All throughout the proposal DoD refers to implementing issuances. Those issuances are integral to a complete and thorough understanding of what the Department is trying to accomplish. If I, as a Federal employee cannot understand the proposal, how can the United States Congress?

Once all have a clear understanding on the Defense Department's goals and objectives then the unions, who have exclusive recognition should have an opportunity to respond on behalf of those they represent. This needs to happen before the proposal(s) are published in the Federal Register for public comment. The current public comment period which began on February 14, 2005 is a by-pass under the Federal Labor Management Relations Statute. The unions' are the exclusive representative of the affected employees, not the public. (See section 9902(f) of the law)

I believe that the current human resources management system needs improvements and I believe that most Federal employees agree with that. But in order to effectuate change such as proposed here (not in its entirety) will require honesty, integrity and a willingness of all parties. This is not an issue to rush through; there is no immediate threat to National Security. The Federal workers and the American Taxpayers deserve a thoughtful and deliberative approach to this change.

Thank you for the opportunity to provide these brief remarks.

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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

April 29, 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: *Post-hearing Questions Related to the Department of Defense's National Security Personnel System*

On March 15, 2005, I testified before your Subcommittee at a hearing entitled "Critical Mission: Ensuring the Success of the National Security Personnel System."[1] This report responds to requests from each of you that I provide answers to questions for the record from the hearing. The questions, along with my responses, follow.

Question from Chairman Voinovich

What recommendations or suggestions do you have for the Department of Defense and the Office of Personnel Management in order for them to earn employee acceptance of NSPS?

Human capital reform is a critical element in the Department of Defense's (DOD) overall business transformation effort. Therefore, top DOD leadership must play a direct and continuing role in this effort. Appropriate presidential appointees need to take the lead in selected meetings and communications. This will be necessary in order to assure that top union and other officials also participate in key activities (e.g., selected meet and confer sessions).

As we noted in our statement, the active involvement of employees and employee representatives will be critical to the success of DOD's National Security Personnel System (NSPS). We have reported that the involvement of employees and their representatives both directly and indirectly is crucial to the success of new initiatives, including implementing a pay-for-performance system. High-performing organizations have found that actively involving employees and stakeholders, such as unions or other employee associations, when developing results-oriented performance management systems helps improve employees' confidence and belief

[1] GAO, *Human Capital: Preliminary Observations on Proposed DOD National Security Personnel System Regulations*, GAO-05-432T (Washington, D.C.: Mar. 15, 2005).

in the fairness of the system and increases their understanding and ownership of organizational goals and objectives. This involvement must be early, active, and continuing if DOD employees are to gain a sense of understanding and ownership of the changes that are being made through NSPS. Further, we believe that this involvement needs to be meaningful, not just pro forma.

Implementing large-scale change management initiatives, such as the Department of Homeland Security's (DHS) new personnel system and DOD's NSPS, are not simple endeavors and require the direct involvement and concentrated efforts of both leadership, including top political leadership, and employees to realize intended synergies and to accomplish new organizational goals. People are at the center of any serious change management initiative. People define the organization's culture, drive its performance, and embody its knowledge base. Experience shows that failure to adequately address—and often even consider—a wide variety of people and cultural issues is at the heart of unsuccessful transformations. Recognizing the "people" element in these two initiatives and implementing strategies to help individuals maximize their full potential in the new organization, while simultaneously managing the risk of reduced productivity and effectiveness that often occurs as a result of the changes, is the key to a successful transformation.[2]

We have found that because people are the drivers of any transformation, it is vital to monitor their attitudes. Especially at the outset of the transformation, obtaining employees' attitudes through pulse surveys, focus groups, or confidential hotlines can serve as a quick check of how employees are feeling about the large-scale changes that are occurring. While monitoring employee attitudes provides good information, it is most important for employees to see that top leadership not only listens to their concerns, but also takes action and makes appropriate adjustments to the transformation in a visible way. By not taking appropriate follow-up action, negative attitudes may translate into actions, such as employee departures, among other things, that could have a detrimental effect on the transformation.[3] According to the Office of Personnel Management (OPM), alternative personnel systems require employee buy-in to be effective.[4] Thus, DOD employees and their representatives should be involved from the beginning, and without early consultation with DOD employees and their representatives, NSPS buy-in probably will not occur.

Questions from Senator Akaka

1. **The Government Accountability Office (GAO) has often reported on the importance of employee buy-in for any reorganization to be successful. However, the four largest unions at the Department of Homeland Security have filed a lawsuit to stop implementation of the new personnel system, and, based on testimony from Mr. Gage and Mr. Junemann, employees are not supportive of the new National Security Personnel System (NSPS)**

[2] GAO, *Results-Oriented Cultures: Implementation Steps to Assist Mergers and Organizational Transformations*, GAO-03-669 (Washington, D.C.: July 2, 2003).

[3] GAO-03-669.

[4] OPM, *Demonstration Projects and Alternative Personnel Systems: HR Flexibilities and Lessons Learned* (Washington, D.C.: September 2001).

either. In your opinion, can either of these systems be successful given the lack of employee support?

ive and ongoing engagement and communication is critical for the successful velopment and implementation of both DHS's new personnel management syste l DOD's human resources management system. Like DHS, DOD's efforts to date olve labor unions have not been without controversy. In fact, 10 federal labor ons also have filed suit alleging that DOD failed to abide by the statutory uirements to include employee representatives in the development of DOD's ne or relations system authorized as part of NSPS.[5] Since these suits currently are ding in federal court, I do not believe it would be appropriate to comment furth them at this time.

including employees and their representatives in the planning process, anizations can increase their acceptance of organizational goals as well as rove motivation and morale.[6] For NSPS to be a successful transformation, it m olve DOD employees and their representatives from the beginning of the proces gain their ownership for the changes that are occurring within the department. ployee involvement strengthens the transformation process by including frontli spective and experiences. Further employee involvement helps to create the ortunity to establish new networks and break down existing organizational silo rease employees' understanding and acceptance of organizational goals and ectives, gain ownership for new policies and procedures, and reduce related lementation risks.

r prior work also indicates that engaging employee unions is a key practice to h olve employees and is crucial to achieving success.[7] Thus, obtaining DOD unior peration and support through effective labor-management relations can help ieve consensus on the planned changes, avoid misunderstandings, and more editiously resolve problems that occur. Organizations we studied involved unic l incorporated their input before finalizing decisions in such areas as redesignin rk processes, changing work rules, or developing new job descriptions.

have found that organizations undergoing a transformation should establish a nmunications strategy that creates shared expectations and seeks to genuinely olve stakeholders in the process. As we have noted in our prior testimonies on S's personnel management system and DOD's human resources management tem,[8] both departments will face multiple implementation challenges that inclu ablishing overall communications strategies and involving employees in

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e *American Federation of Government Employees, AFL-CIO et al v. Rumsfeld et al*, No. cv00367 (D.D.C. filed Feb. 23, 2005).

O, *Human Capital: Practices that Empowered and Involved Employees*, GAO-01-1070 shington, D.C.: Sept. 14, 2001).

O, *A Model of Strategic Human Capital Management*, GAO-02-373SP (Washington, D.C.: Mar. 2).

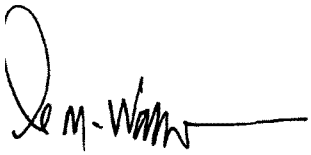
O, *Human Capital: Observations on Final DHS Human Capital Regulations*, GAO-05-391T shington, D.C.: Mar. 2, 2005) and GAO-05-432T.

›lementing the new systems. We believe that one of the most relevant
›lementation steps is for DHS and DOD to enhance two-way communication
ween employees, employee representatives, and management, including
ıancing communication between top political appointees and labor leaders.
›quent and timely communication cultivates a strong relationship with
nagement and helps gain employee ownership for a transformation like NSPS. I
nmunication is not about just "pushing the message out" or seeking information
hout any meaningful response. It should facilitate a two-way honest exchange
h and allow feedback from employees, employee representatives, customers, ar
keholders. Once employee feedback is received, it is important to acknowledge
ısider, and use it to make any appropriate changes to the implementation of the
ısformation.

Mr. Junemann's written testimony proposes that GAO audit the trainin program for managers and employees for the performance appraisal process. What is your opinion of this recommendation, and would GAO open to auditing the performance management training offered by all agencies?

ɜ recommendation that GAO audit the training program for managers and
ployees has merit. GAO is willing to entertain a congressional request to evalua
D's training plan for the implementation and operations of NSPS. As part of ou
ɡoing reviews of agencies' efforts to address their human capital challenges, we
'eloped a framework to serve as a flexible and useful guide in assessing how
ncies plan, design, implement, and evaluate effective training and development
ɡrams.[9] We believe that these guides could prove helpful to DOD as it develops
PS training and development program.

: additional information on our work on human capital issues at DOD, please
ıtact me on (202) 512-5500 or Derek B. Stewart, Director, Defense Capabilities a
nagement, on (202) 512-5559 or stewartd@gao.gov. For further information on
'ernmentwide human capital issues, please contact Eileen R. Larence, Director,
ategic Issues, at (202) 512-6510 or larencee@gao.gov.



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ıO, *Human Capital: A Guide for Assessing Strategic Training and Development Efforts in the eral Government*, GAO-04-546G (Washington, D.C.: March 2004) and *Human Capital: Selected ncies' Experiences and Lessons Learned in Designing Training and Development Programs*,)-04-291 (Washington, D.C.: Jan. 30, 2004).

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Voinovich
Witness: Mr. Abell
Question #1

Question: The proposed regulations leave many details to be determined through "implementing issuances." Please describe more clearly the role employees and organizations that represent them will have in this process.

What has been the Department's communication strategy with employees and employee organizations?

Please provide a detailed comparison between existing law and the proposed regulations of the application of veterans' preference during a reduction in force.

Answer: The National Security Personnel System (NSPS) law provides that the Secretary of Defense and Director of the Office of Personnel Management (OPM) develop a process to involve employee representatives in the further planning, development, and/or adjustment of the system. To that end, Section 9901.106 of the proposed regulations establishes a process by which employee representatives will be provided an opportunity to review, comment, and participate in discussions regarding further adjustments to the system, including DoD implementing issuances. This process is called "continuing collaboration" and is separate and distinct from the provisions found in subpart I, Labor-Management Relations. During the ongoing meet and confer process we are discussing how the continuing collaboration process will work.

The Department recognizes the critical need to communicate with its employees throughout the design and implementation of NSPS. Our communications objectives include: (1) demonstrate the rationale for and benefits of NSPS; (2) demonstrate openness and transparency in the design and process of converting to NSPS; (3) express DoD's commitment to ensuring NSPS is applied fairly and equitably; and (4) address potential criticism of NSPS. We have used various means for communicating and getting input from our employees and employee organizations throughout the process, including print and electronic media, brochures and pamphlets, e-mail, town hall meetings, focus groups, speeches and briefings.

The NSPS website (www.cpms.osd.mil/NSPS) has been the primary tool for providing all our stakeholders with the most up-to-date information on matters relative to NSPS. It includes an immediate feedback feature for direct responses to email inquiries. Furthermore, each of the Components has its own website as well as newsletters that include the Component-specific information on NSPS.

During the summer of 2004, we conducted over 100 employee focus groups at installations throughout the world as well as over 50 town hall meetings to inform our employees and to gain insight into their concerns. We continue to conduct town hall meetings even as we progress in the process. Additionally, senior DoD leaders have addressed numerous employee groups as well as public interest groups on NSPS.

Throughout the design process, the Department held a series of meetings with our employee representatives to discuss design elements, options, and proposals under consideration and to solicit their feedback. Their input was valuable and resulted in inclusion of some of their suggestions in the proposed regulation.

The proposed NSPS reduction in force rules are designed to increase the impact of performance, minimize disruption, and simplify the process. The retention order gives more weight to performance than to service time. However, NSPS gives veterans the same level of preference over non-veterans that they have in today's system. Non-veterans cannot displace veterans with preference regardless of their relative performance ratings as long as the veteran's performance rating is above unsatisfactory.

Current law requires employees to be ranked on a retention register on the basis of their tenure of employment, veterans' preference, length of service, and performance in descending order as follows:

(1) Tenure group (permanent career employees, career conditional employees, other competing employees (not including temporary));
(2) Veterans' preference (veterans with a service-connected compensable disability of 30% or more, all other veterans, and all non-veterans); and
(3) Years of service (which includes creditable civilian and military service), as augmented by credit for performance ratings, beginning with the earliest service date.

The NSPS proposal will rank employees on a retention register on the basis of the same retention factors in descending order as follows:

(1) Tenure group (all permanent employees, then all other competing employees, not including temporary employees);
(2) Veterans' preference (veterans with a service-connected compensable disability of 30% or more, all other veterans, and all non-veterans);
(3) Performance rating (based on the average of the last three ratings of record in a 4-year period); and
(4) Years of service (which includes creditable civilian and military service).

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Witness: Mr. Abell
Question #1

Question: In testifying before the Homeland Security and Governmental Affairs Committee in 2003, Secretary Rumsfeld said that the National Security Personnel System (NSPS) "will not end collective bargaining." To the contrary, the right of Defense employees to bargain collectively would be continued. However, the proposed regulations severely restrict collective bargaining by eliminating all bargaining on procedures and allowing the Department of Defense (DoD) to cancel unilaterally any Collective Bargaining agreement provision through implementing issuances. Please explain why the proposed regulations fail to reflect Secretary Rumsfeld's testimony.

Answer: The proposed regulations are consistent with Secretary Rumsfeld's testimony in that they strike a balance between employee interests and DoD's need to accomplish its mission effectively and expeditiously. For example, while the proposed regulations eliminate bargaining on procedures regarding operational management rights, they do not eliminate all bargaining on procedures. The proposed regulations continue to provide for bargaining on procedures for personnel management rights. The proposed regulations also continue to provide for bargaining on impact and appropriate arrangements for all management rights, and provide for consultation on procedures regarding the operational management rights, which lie at the very core of how DoD carries out its mission.

With regard to an "implementing issuance" superceding a conflicting collective bargaining agreement provision, our interest is to provide for consistent, standard application of DoD and Component policies in implementing NSPS. Unions at the national level are provided an opportunity during the meet and confer process, as well as continuing collaboration, to be involved in the development and implementation of the NSPS regulations that will supercede conflicting collective bargaining agreements.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #2

Question: In response to my question in 2003 on NSPS, Secretary Rumsfeld said that any new appeals system should be both fair and perceived as fair by employees. However, given the many letters I have received from DoD employees and the testimony given by Mr. Gage and Mr. Junemann at the hearing, the appeals system is not perceived as fair by DoD employees, falling far short of Secretary Rumsfeld's stated goal. What steps will the Department take to meet this goal?

Answer: We recognize the concerns about the perception of fairness. Nothing in the proposed NSPS regulations infringes on the due process rights of employees in adverse action cases (right to notice, right to reply, and the right to appeal). Using the Merit Systems Protection Board (MSPB) administrative judges to try DoD cases goes a long way to ensuring fairness in the proposed appeals system. Also, any final DoD decision is still reviewable by the full MSPB and the Federal Circuit Court of Appeals. During the meet and confer process we are discussing with the unions what additional steps can be taken to address concerns about the perception of fairness in the process.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #3

Question: In response to my questions on employee training on NSPS in June 2003, Secretary Rumsfeld inferred that DoD would use current training dollars to fund training programs on the NSPS and that no additional money would be needed.

A. Is this currently the position of DoD, and if so, how much money does DoD currently spend on employee training each year?

Answer: The plan is to use current training dollars to fund training programs. To address new requirements generated by NSPS, the Department's Program Executive Office allocated $2 million in Fiscal Year 2005 and plans to allocate another $3 million in Fiscal Year 2006 to fund development of core NSPS training modules and delivery of "train-the-trainer" sessions.

Regarding Component spending on NSPS training, currently DoD does not have visibility of training funds as a discrete line item in Component training budgets. However, Components recognize the high priority of NSPS training and are committed to funding delivery of that training within existing resources.

B. Please describe the training employees will receive under NSPS.

Answer: The NSPS training plan presents a comprehensive, well-planned learning strategy to prepare the DoD workforce for the transition to NSPS. Participants need to be informed and educated about NSPS and trust and value it as a system that fosters accountability, respects the individual, and protects employee rights under the law. The plan focuses on four target audiences: DoD employees, supervisors and managers, and human resources (HR) practitioners. We estimate the employee training will take approximately a day and a half. Supervisors and managers will receive additional training so that they can fairly manage, appraise and rate employees. That training is expected to take a minimum of 18 hours. The notional design of the pay for performance system includes the use of pay pools and we will provide training for pay pool managers. Specialized training for HR practitioners will cover the new labor relations and appeals systems, as well as the implementation of the HR system for HR practitioners. This specialized training is expected to take up to 40 hours. The plan incorporates a blended learning approach featuring web-based and classroom instruction supplemented by a variety of learning products, informational materials, and workshops to effectively reach intended audiences with engaging, accurate and timely content.

C. How many employees will receive training each year under the funds allocated and what types of employees will receive training?

Answer: All DoD employees will receive training to coincide with their conversion into NSPS beginning as early as summer 2005. Spiral 1.1, the first increment of employees scheduled to convert, involves approximately 60,000 employees. Spiral 1.2 and 1.3 will involve 100,000 and 114,000 DoD employees, respectively.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #4

Question: The regulations state the Department's intent to make the labor relations proposals effective 30 days after the issuance of final regulations while the rest of the NSPS system will be implemented in spirals. However, the Fiscal Year 2004 Defense Authorization Act explicitly states that the Department may only apply the NSPS to no more than 300,000 employees until a credible performance management system is in place. Will the Department have a credible performance management system in place by that time?

Answer: The NSPS labor relations system is not covered by the requirement related to the performance management system.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #5

Question. Please explain how NSPS will be applied to Federal Wage System (FWS) employees. Would they participate in a pay for performance system? Would this be similar to the PACERSHARE demonstration project? Is there another analogous demonstration project the Department is considering as a model for FWS employees? Will the Monroney Amendment be applied in determining the market-based pay for FWS employees?

Answer: The Department will not cover FWS employees in the initial implementation phases of the NSPS human resources management system. Prior to including FWS employees in the system, the Department will do additional analysis and studies to determine the appropriate application of NSPS to the trade and craft environment. Part of that analysis will include reviewing current wage survey approaches, including the Monroney Amendment.

Although the Air Force PACERSHARE demonstration project did cover FWS employees in a pay banding system, other aspects of the project were different than those envisioned under NSPS. For instance, PACERSHARE used productivity gain sharing to determine the "payout" for all employees. The Department will certainly take into account the PACERSHARE experience as it considers the appropriate application of NSPS to FWS occupations.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #6

Question. The proposed regulations state that when employees are converted to the new system, they will not suffer a reduction in their rate of pay. However, there are no assurances in the regulations that employees will be made whole and given pro-rated amounts towards their next step or career ladder promotion once they are converted to the NSPS. Will you state for the record whether DoD employees will in fact receive these pro-rated amounts?

Answer: During the conversion to NSPS, the Department intends to provide a prorated pay increase based on the amount of service an employee performing at an acceptable level has completed toward the next within-grade increase. However, there is no plan to provide a comparable increase for prospective career ladder promotions. After employees have converted to NSPS, the new system will provide sufficient capability to recognize the progression of trainees through pay increases.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #7

Question: Under the NSPS, DoD is required to provide due process to employees seeking to appeal DoD personnel actions. As you know, due process requires that decisions be made by a neutral and independent adjudicator. However, permitting the Department to review and reverse Merit Systems Protection Board (MSPB) administrative judge decisions appears to be analogous to a prosecutor single-handedly overturning the factual findings of a jury. Given this appearance of bias in the appeals process, combined with the limited ability of the full MSPB and federal courts to overturn these decisions, please explain how this system meets due process requirements.

Answer: The proposed appeals process is consistent with fundamental due process and the NSPS statute. Specifically, the NSPS statute provides for the right of an employee to petition the MSPB on the Department's final decision in the appeals process. Therefore, the law itself anticipated that the Department would render decisions on employee appeals. With this in mind, the Department is proposing to retain MSPB administrative judges as initial adjudicators of employee appeals. While the Department may review these initial decisions, this review is based on very stringent criteria. Eventually, a decision of an MSPB administrative judge could become the Department's final decision on the appeal, consistent with the requirements of NSPS law. Finally, the full MSPB and federal courts still retain jurisdiction to review decisions of the Department. We are discussing with the unions during the ongoing meet and confer process what additional steps can be taken to address concerns about the perception of fairness in the process.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #8

Question: Section 9901.322 of the proposed regulations, which discusses setting and adjusting rate ranges, states that the rate ranges may be set and adjusted based on mission requirements, labor market conditions, availability of funds, pay adjustments received by other federal employees, and any other relevant factors. Will any of these factors have more influence than the others? What data will be used to determine labor market conditions? What are "other relevant factors"?

Answer: The proposed NSPS regulations do not give any one factor greater weight than others. Given the circumstances of a particular year, any factor may have a greater or lesser effect in the decisions on setting adjustments in rate ranges.

The sources of data on labor market conditions that will be used have not yet been determined, but possibilities include: use of salary data from the Bureau of Labor Statistics, development of data through Department-led salary surveys, and/or use of commercially available data.

"Other relevant factors" could include any number of indicators. Examples include recruitment and retention rates for specific occupations/locations, the incidence of recruitment and retention bonuses by occupation and location, and the projected availability of candidates for particular occupations compared to projected vacancies in those occupations.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
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the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #9

Question: The regulations give DoD the authority to develop new hiring authorities in the future. What are some of the authorities that DoD is considering implementing?

Answer: At this time, the Department, in collaboration with the Office of Personnel Management (OPM), is considering three new hiring authorities: Scholastic Achievement Authority, Career Entry Authority, and Scholarship for Service Authority. To establish these authorities (and others which may be developed in the future), DoD and OPM will jointly publish a notice in the Federal Register that will provide a public comment period before the authorities are implemented.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #10

Question: Similar to the Department of Homeland Security regulations, the DoD regulations allow the MSPB to mitigate penalties for cases, except Mandatory Removal Offenses, only when the discipline against employees is wholly without justification. This appears to be an impossible standard for employees to meet. Please define the term "wholly without justification."

Answer: The standard is consistent with Federal Circuit precedent, which holds that the court will normally defer to the judgment of the agency as to the appropriate penalty for employee misconduct unless the severity appears totally unwarranted. Despite Federal Circuit precedent, the MSPB has not applied its mitigation standard as strictly as the court has mandated. The court has had to remind the Board not to substitute its judgment for that of agency officials in determining the appropriate penalty in such cases. With this in mind, the NSPS statute authorizes the Secretary to "establish legal standards and procedures for personnel actions, including standards for applicable relief, to be taken on the basis of employee misconduct or performance that fails to meet expectations." This proposed standard is consistent with this authority. However, the Department has determined that this standard will only be applied to MSPB administrative judges who will adjudicate cases in the Department's proposed appeals process. The standards of review for the full MSPB are provided in law.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #11

Question: In response to my question on cases where you believe that MSPB administrative judges did not take the Department's mission into account in ruling on a particular case, you provided the Subcommittee with four examples. In each of those cases, the Department's proposed personnel action in response to the misconduct or poor performance was removal. Is DoD considering these examples as possible Mandatory Removal Offenses?

Answer: The Department is considering various ways to resolve these problematic decisions, including identifying certain offenses as Mandatory Removal Offenses. We expect to discuss Mandatory Removal Offenses with the unions during the meet and confer process.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #12

Question: The Department requested flexibility in the area of appeals because the current MSPB process allegedly takes too long. As such, the proposed regulations attempt to streamline the process with shorter time limits for MSPB review. However, the regulations add an extra layer of review by permitting DoD to review an MSPB administrative judge (AJ) decision. If timeliness is such an important issue, despite the fact that several outside groups have praised MSPB for its timeliness, why did DoD add the extra layer of review?

Answer: In authorizing the establishment of the NSPS appeals system, Congress specifically required that the full MSPB may order corrective action as it considers appropriate only if MSPB determines that the final Department decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) obtained without procedures required by law, rule or regulation having been followed; or (c) unsupported by substantial evidence. These standards are an adoption of the standards for judicial review of a final MSPB decision currently provided in 5 U.S.C. 7703. Although these standards are appropriate for judicial review, we believe they are too high for an administrative review of adverse actions. That is, such standards would significantly weaken the opportunity to correct an erroneous MSPB AJ decision, whether the employee or the Department petitions the Board for review. The proposed regulations provide that the Department may review an initial MSPB AJ decision, and correct such decision as appropriate by applying a standard that provides for meaningful corrective action and preserves statutory requirements of fairness and due process.

It should be noted that while this additional step is added to the process, all of the proposed changes to appellate procedures would contribute to a swifter and more expedient appeals system. In addition to reduced time limits for AJs and the full MSPB, the ability for AJs to render summary judgment and limits on depositions are just two examples of proposed changes that will contribute to quicker decisions in the overall appeals process.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #13

Question: The proposed regulations state that the National Security Labor Relations Board (NSLRB) may issue advisory opinions on matters within its jurisdiction that will be binding on the Department. Please provide more information on this provision, including how this would work with unfair labor practices. Would this procedure allow a ruling on a case without a hearing?

Answer: As proposed, the NSLRB is authorized to issue advisory opinions on important issues of law that are binding on the parties. These opinions will help both labor and management understand how key provisions of the regulations will be interpreted without the time and expense of years of litigation. These opinions are intended to minimize the possibility of labor disputes of all types concerning the interpretation of these regulations, including unfair labor practices and negotiability appeals. We expect to discuss this and other aspects of the NSLRB with the unions during the meet and confer process.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #14

Question: According to the regulations, for DoD to overturn a MSPB administrative judge decision, it must meet certain criteria. One such criterion is that the decision must have a "direct and substantial adverse impact on the Department's national security mission." Please define the meaning of this term.

Answer: In light of the Department's mission and the variety of employees in the workforce, consideration would be given to the type and nature of the work performed by the employee and the resulting or potential consequences of their misconduct on the Department's national security mission, which led to the agency taking an adverse action. Changing world events and the Department's evolving mission will ultimately determine what is considered national security for purposes of these regulations.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #15

Question: According to the Senior Executives Association, MSPB affirms agency disciplinary action approximately 80% of the time. However, the Department insists that the MSPB does not give deference to an agency's mission in making decisions. In order to provide that MSPB is considering an agency's mission in reviewing agency disciplinary actions, does the Department require MSPB to rule in favor of the Department 100% of the time?

Answer: No. In some of the cases the Department lost, had MSPB given greater deference to the Department's mission, it is likely the Department would have prevailed.

In other cases the Department lost, greater deference to the Department's mission would not have changed the outcome.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #16

Question: The Department has often cited its vast experience with demonstration projects as part of the business case for NSPS.

A. Please list the demonstration projects in which DoD participated.

Answer:

- DoD Civilian Acquisition Workforce Personnel Demonstration Project
- Laboratory Personnel Management Demonstration Projects at:
  - Army Aviation and Missile Research Development and Engineering Center
  - Army Research Laboratory
  - Army Medical Research and Materiel Command
  - Army Engineer Research and Development Center
  - Army Communications-Electronics Research, Development and Engineering Community
  - Naval Sea Systems Command Warfare Centers
  - Naval Research Laboratory
  - Air Force Research Laboratory
- Alternative Personnel Systems
  - Naval Air Warfare Center Weapons Division, China Lake
  - Space and Naval Warfare Systems Command

B. Which ones involved pay for performance and pay banding?

Answer: All of the projects were successful in implementing an integrated approach to job classification, compensation and performance management. Broad banding schemes were designed to fit the career paths most beneficial to each organization's structure and mission. Each of the projects implemented pay for performance or contribution.

C. What was the level of employee satisfaction with the demonstration projects?

Answer: According to the 2002 Summative Evaluation, DoD Science and Technology Reinvention Laboratory Demonstration Program report developed by the Office of Personnel Management (OPM), historic data show that support grows gradually over time and that it takes at least five years to gain the support of two thirds of the participating employees. Overall support for the demonstration projects continues to rise and has reached 55% in Wave 1 labs (demonstration projects that where implemented in 1997/1998). Management support of the individual projects ranges from a low of 39% to a high of 83% compared to 34% and 63%, respectively for non-supervisors. The DoD Civilian Acquisition Workforce Personnel Demonstration Project, which represents

approximately 10,000 employees, reports a major positive trend in overall workforce approval of the program. The overall favorable response rate increased from 25% in 1998 to over 50% in 2003.

D. What was the cost of those projects and how do these amounts correlate to the funding requested by the Department for implementing NSPS.

Answer: Both the DoD Civilian Acquisition Workforce Personnel Demonstration Project and the Laboratory Personnel Management Demonstration Projects are based on a smaller and more homogenous population than NSPS. In their Summative Evaluation Report 2002, OPM provided the following historical costs:

	(Thousands)								
	FY95	FY96	FY97	FY98	FY99	FY00	FY01	FY02	FY03
• Training	170	233	1327	3772	179	19	19		
• Automation		390	501	1563	952	285	190	180	
• Internal Evaluation	20	150	510	724	642	673	884	628	378
Total	190	773	2338	6059	1773	977	1093	808	378

The estimate provided for NSPS includes design and implementation costs and program office operation costs, whereas the figures shown above do not. Further, the NSPS estimate covers a four-year implementation period (Fiscal Year 2005 through Fiscal Year 2008), while the lab and acquisition projects span a longer period.

E. Will the best practices used in these demonstration projects, which included employee support, be used in NSPS?

Answer: Yes. The innovations and experimentations over many years that covered nearly 30,000 employees have shown us that communication is critical, training is essential, leadership is paramount, transition planning reduces risk, and continuous assessment and evaluation pays off.

The Department's 25 years of experience with transformational personnel demonstration projects has shown that fundamental change in personnel management has positive results on individual career growth and opportunities, workforce responsiveness, and innovation – all of which multiply mission effectiveness. Proven, successful interventions include:

- Broad banded pay systems and simplified classification: streamlined career and pay progression, greater flexibility in setting pay, increased line management authority and involvement in human resource management
- Pay for performance: shift from a longevity based system to a merit based system
- Recruitment and staffing flexibilities: categorical rating of candidates, potential for higher starting pay

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #17

Question: In response to a question from Senator Pryor, you stated that performance expectations will be in writing. However, you also said that there will be instances during the evaluation period where changes occur and that such changes may not necessarily be in writing. How can the Department ensure that changed performance expectations are sufficiently communicated to the employee when there is no requirement that they be made in writing?

Answer: The Department recognizes the importance of communicating performance expectations to employees. In keeping with that view, basic performance standards and requirements will be provided to employees in writing. Implementing issuances and robust NSPS training will emphasize that supervisors must adjust expectations to ensure that to the maximum extent practicable these remain consistent with the competencies expected of the employee, current job duties, mission goals, and work unit goals. In so doing, supervisors will follow requirements for jointly establishing expectations with employees and communicating expectations prior to holding employees accountable to them. Additionally, implementing regulations and training will emphasize that employees have a responsibility to provide input and feedback to supervisors to identify needed adjustments.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #18

Question: DoD is in a unique situation in that it commands both a military and a civilian workforce. While the military expects to be transferred anywhere in the world, civilians do not. However, the regulations appear to allow DoD to transfer civilian workers anywhere with little to no notice. Please explain the justification for this change and state what steps the Department is taking to ensure that employee morale does not suffer as a result of this authority.

Answer: DoD already has the authority to reassign employees, including reassignment to overseas locations, when necessary to support the mission. This authority is not affected by NSPS. DoD is looking for the right balance of its Total Force among military members, civilian employees, and contractors. It needs to put the right person with the right training and skills in the right place at the right time. What NSPS will do is provide DoD with the flexibility to reduce its reliance on military personnel to perform jobs that could be performed by a civilian employee. While the nature of some of these tasks will require the incumbents to be available to travel on short notice to meet the mission, we will consider employee issues and concerns in exercising this authority, just as we do today. This includes the use of mobility agreements, volunteers, and other proactive steps to minimize impact on employees.

This also gives us the authority to deal locally with workload and workforce balancing as well as employee career development. This flexibility will be advantageous to both the employee and management, as it will contribute to the development of a more highly skilled workforce while simultaneously broadening the employee's individual skills and capabilities.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #19

Question: The proposed regulations would exclude attorneys and employees involved in personnel work including clerical and support staff. Please explain the justification for this exclusion.

Answer: The regionalization of DoD's personnel functions has made the clerical nature of personnel work a false distinction for bargaining unit membership. Those individuals are now, and will continue to be, frequently called upon to provide advice and guidance to management officials on personnel functions. Additionally, these individuals have direct access to all confidential personnel records and discussions. By including these individuals in bargaining units, a conflict of interest exists such that management officials risk compromising confidential management information when seeking or accepting guidance from personnelists within the personnel office. Further, inclusion of clerical personnelists in the bargaining unit prohibits the personnel officer from using his or her full staff in areas that are vital to the accomplishment of the mission. The removal of these positions will eliminate unnecessary administrative disputes.

Attorney positions are proposed to be removed due to the nature of their work. Supervisors and managers must be assured that communications with attorneys are confidential and unbiased. These communications go to the heart of the managerial functions and thus inclusion of attorneys in the bargaining unit creates, at a minimum, the perception of a conflict of interest.

We will consider revising the final Federal Register notice to be consistent with the current bargaining unit exclusions provided in 5 U.S.C. Chapter 71 as they relate to clerical personnelists and employees in attorney positions.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #20

Question: Section 9901.605 of the proposed regulations, which discusses the competitive area for reduction in force purposes, does not mention any minimum size requirement for the competitive areas. Will there be any such size requirements so that the competitive areas and groups would not be so small as to increase the probability that employees would be reached for separation through reduction in force (RIF)?

Answer: As is the case under current reduction in force rules, NSPS does not place either minimum or maximum size restrictions on the establishment of competitive areas. However, the Federal Register Notice, Section 9901.605, *Limitations*, specifically directs competitive areas to be established "only on the basis of legitimate organizational reasons" and prohibits establishing competitive areas to target individuals on the basis of non-merit factors. The number of employees actually separated is a direct result of the number of positions abolished and the ability of the activity to use effective pre-RIF tools, such as hiring freezes, stockpiling vacancies, or Voluntary Separation Incentive Programs.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #21

Question: How much does DoD anticipate the total cost of NSPS to be (including funds for training, pay increases, buyouts of pro-rated step promotions, internal boards, etc.)? How much of an increase will this be over funding for the current human resources system?

Answer: DoD estimates the NSPS cost to be approximately $158 million over the Fiscal Year 2005 through Fiscal Year 2008 period. This estimate represents the anticipated costs associated with NSPS design, development, training, program evaluation, and modification of human resources automated information systems. The majority of these costs are not recurring costs.

The Office of the Secretary of Defense (OSD), the Military Departments, and the Defense Agencies will fund the delivery of training to their headquarters and field activity personnel. Funds for Fiscal Years 2005 and 2006 do not currently have visibility as a discrete line item in their budgets. However, the OSD, Military Departments, and the Defense Agencies recognize the high priority of NSPS training, and are committed to funding delivery of that training within existing resources.

This cost estimate does not include the within-grade increase buyouts because they represent an acceleration of a cost that DoD would incur anyway over a three-year period, even in the absence of NSPS authorizing legislation. Within-grade increase buyouts will be a one-time adjustment of an employee's basic pay, but will be paid out over the course of the regular biweekly pay dates, not as a lump sum payment.

There will be some additional costs associated with administering the new human resources system under NSPS when compared against the current system. For example, the continuing operations of the proposed National Security Labor Relations Board, pay pool administration, and ongoing training for manager/supervisors and employees. However, these additional costs are expected to be partially offset by new efficiencies achieved in hiring, classification, streamlined labor appeals, and streamlined reduction in force procedures. It is impossible to associate specific dollar amounts with each of these areas at this juncture. However, the net effect on the Department's budget is not expected to be significant.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #22

Question. The Department has increased its use of student loan repayment authority over the past two years to improve its recruitment and retention efforts. Do you anticipate decreasing the use of student loan repayment upon implementing NSPS given the flexibility in pay and classification for new employees?

Answer: No. We do not anticipate that NSPS implementation will necessarily result in decreased use of student loan repayment authority. NSPS will provide greater flexibility in setting pay for new hires, but there will still be situations where offering student loan repayment instead of a higher starting salary will be the optimum recruiting approach.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #23

Question: Will you agree to engage in the meet and confer process only after sharing with the unions all of the comments received on the proposed regulations?

Answer: The comments have been available on the NSPS website, and most of them were posted before the public comment period ended. We provided the unions all comments on CD-ROMs several weeks prior to the beginning of the meet and confer process.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #24

Question: Will performance expectations take into consideration the impact safety and quality standards will have on production?

Answer: Safety remains a paramount objective throughout the Department and its importance will not diminish under NSPS. In fact, the importance of safety and quality standards can be emphasized in NSPS by attaching pay implications to the achievement of those goals.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #25

Question: In response to my question on cases demonstrating where Merit Systems Protection Board (MSPB) administrative judges (AJs) improperly mitigated penalties, you submitted four cases including Dunn v. Department of the Air Force, MSPB No. DE-0752-03-0333-I-1, 96 M.S.P.R (2004). In Dunn, the appellant Motor Vehicle Operator was removed based on two charges: (1) engaging in conduct unbecoming a federal employee, in that as part of a team responsible for transporting an unarmed ICBM, which was loaded with explosive propellant, he and his teammates left the missile unattended for various lengths of time, and (2) exhibiting a lack of candor, in that he lied under oath about the circumstances of the incident in question. The MSPB AJ sustained each of the charges but not all of the specifications of the charges, and mitigated the penalty to a demotion based on the AJ's consideration of other factors, such as the appellant's 28 years of "spotless" service and the supervisor's statement that the appellant was "otherwise an exemplary employee and quite trustworthy." On appeal by the agency, the MSPB concluded that, notwithstanding the favorable factors relied upon by the AJ to mitigate the penalty, removal is a reasonable penalty, commensurate with the appellant's position and the seriousness of the misconduct. The MSPB sustained the penalty of removal.

Would you agree that the result of this case, the MSPB ultimately sustaining the agency's removal action, indicates that the current appeal procedures adequately protect the agency's interests?

Answer: The Department's goal is to ensure the agency's national security mission is appropriately considered in all cases by the MSPB AJs and the full MSPB. While the Department ultimately prevailed in this case, the AJ failed to consider the Department's national security mission, forcing the Department to continue expending agency resources to litigate a case unnecessarily.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #26

Question: In response to my question on cases demonstrating where MSPB AJs improperly mitigated penalties, you also submitted Woodford v. Department of the Army, MSPB No. DE-0752-96-0189-I-1, 75 M.S.P.R. 350 (1997). In this case, the appellant Supervisory General Engineer and Director, Directorate of Environment and Safety, was removed based on two charges: (1) conduct unbecoming a federal employee, and (2) violation of agency regulations regarding sexual harassment. Both charges arose from a single incident when the appellant asked a subordinate to meet him in a closed room, locked the door, verbally expressed personal emotional and sexual feelings, held her hand, hugged her and kissed her on the forehead after being told not to, and made comments which were perceived to be threatening to her job security if she revealed what he had done. The AJ upheld the charges but mitigated the penalty from removal to a 60 day suspension because the misconduct (1) involved only a single instance of admittedly extremely poor judgment, (2) involved no quid pro quo sexual harassment, and (3) was not overtly sexual in nature but rather primarily romantic. Mitigating factors were his 23 years of federal service with no prior discipline, his strong performance, and his remorse, as well an inference that reprisal against the appellant, because of his vigorous environmental advocacy, played some role in the agency's action to remove the appellant rather than to impose a lesser penalty. Upon appeal by the agency, the MSPB reversed the AJ's finding of reprisal and noted the seriousness of the offense, but substituted the penalty of demotion (to a non-supervisory position) based on these factors: (1) it was appellant's first offense in 23 years of outstanding government service, (2) it was an isolated incident, (3) it did not involve any quid pro quo, (4) the appellant expressed great remorse, (5) his general demeanor as a manager was supportive of women, caring, and humane, and (6) the agency's table of penalties justified removal on a first offense of sexual harassment only where conduct created a hostile or offensive work environment, which was not the case here.

Please state why you believe this case, in which an agency that fails to follow its own regulation in the form of a table of penalties and is correct in a manner which both punishes the misconduct of the employee and preserves the ability of a long term outstanding employee to contribute to the federal service, illustrates the unreasonableness of the current appeals process.

Answer: The MSPB AJ, as well as the full MSPB, failed to appropriately take into account the Department's need to maintain a high standard of conduct and behavior, particularly for its management officials.

Hearing Date: March 15, 2005
Committee: Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management,
the Federal Workforce and the District of Columbia
Member: Sen. Akaka
Question #27

Question: In response to my question on cases demonstrating where MSPB AJ's improperly mitigated penalties, you also submitted Kirk v. Defense Logistics Agency, MSPB No. SF0752930063-I-1, 59 M.S.P.R. 523 (1993). In Kirk, the appellant Material Process II was removed based on three charges: (1) theft of government property (a less than $5 piece of rubber matting); (2) leaving the work area without proper permission; and (3) making derogatory and disrespectful remarks to a supervisor. The AJ sustained only the first change (theft) and mitigated the penalty of removal to a 90 day suspension based on the following factors: (1) the item taken, worth less than $5, had de minimis value, and the appellant did not occupy a position of custody and control with respect to the item; (2) the item taken was part of a non-inventory scrap material with no definite value that was available to employees for governmental use at their discretion without supervisory approval; (3) the appellant was not specifically warned by the agency that taking such scrap material was prohibited; and (4) the appellant had 28 years of service. On appeal by the agency the MSPB reviewed the reasonableness of the penalty and found that, although the appellant's work performance had been poor for the past nine months, and he had been suspended for 14 days in 1990 for misconduct, these factors were outweighed by the facts that the theft was de minimis in value and otherwise minor in nature and that the appellant had 28 years of service. The MSPB agreed with the AJ that a 90 day suspension was appropriate.

A: Please state why you believe it is unreasonable for the MSPB to correct an overly harsh agency action – removal after 28 years of service for a theft of a piece of rubber matting worth less than $5?

B: Please state why you think it is fair to fire an employee for a de minimis offense after 28 years of service?

Answer: In response to both questions, we must emphasize that the employee worked for the Defense Logistics Agency (DLA). DLA supplies the military services with the critical resources they need to accomplish their worldwide national security mission. DLA provides wide-ranging logistical support for peacetime and wartime operations, as well as emergency preparedness and humanitarian missions. It supplies almost every consumable item America's military services need to operate, from groceries to jet fuel. DLA's Contingency Support Teams are consistently among the first to respond to the needs of forces deployed to countries around the world. In light of DLA's critical supply mission, theft of property, regardless of value, is not tolerated. Given that context, DLA's position on property theft is understandable and should have been given appropriate consideration in this case.

Questions for the Record
From Chairman George V. Voinovich
Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
"Critical Mission: Ensuring the Success of the
National Security Personnel System"
March 15, 2005

Questions for George Nesterczuk, Office of Personnel Management

1.) The proposed regulations leave many details to be determined through "implementing issuances." Please describe more clearly the role employees and organizations that represent them will have in this process?

Answer: Employees will have a role in the development of implementing issuances as they are subject to continuing collaboration. This process provides employee representatives an opportunity to participate in the development of Department-level implementing issuances that carry out the provisions of the NSPS regulations. Collaboration consists of providing the unions an opportunity to submit their views, and at the discretion of the Secretary, to meet and discuss their views. OPM also will play a role in the development of implementing issuances as DoD will coordinate the promulgation of certain of its issuances with us. DoD and OPM staff will work closely together on these issuances before they are submitted for formal coordination.

What has been the Department's communication strategy with employees and employee organizations?

Answer: We defer to DoD regarding its communication strategy with employees and employee organizations.

Please provide a detailed comparison between existing law and the proposed regulations of the application of veterans' preference during a reduction in force.

Answer: Current Law: OPM's reduction in force (RIF) regulations are derived from Section 12 of the Veterans' Preference Act of 1944, as codified in 5 U.S.C. 3502(a). Section 3502(a) provides that, under OPM's regulations, an agency determines employees' RIF standing on the basis of four retention factors. The law does not assign any relative weight to the four retention factors. OPM's RIF regulations provide that veterans' preference is the second most important of the four factors (tenure is the most important) while performance receives the least weight among the factors.

In providing veterans' preference under OPM's RIF regulations, section 3502(b) provides that preference eligibles with a compensable service-connected disability of 30 % or higher are retained over both other preference eligibles and employees not eligible for preference.

Section 3502(c) provides that preference eligibles not covered by section 3502(b) are retained over employees not eligible for preference.

Section 3502(a)(A) provides that a preference eligible who is not a retired member of the Armed Forces receives retention credit for all active military service.

Section 3501(a) is derived from the Dual Compensation Act of 1964, and restricts veterans' preference eligibility when retired members of the Armed Forces have 20 or more years of active military service. Section 3502(a)(B) similarly limits retention service credit of active Armed Forces service performed by these employees.

Sections 5 CFR 351.501(c) and (d) of OPM's retention regulations implement these statutory provisions covering veterans' preference in RIF.

Proposed NSPS Workforce Shaping Regulations: Section 9901.607(a) (2) of the proposed NSPS regulations cites 5 CFR 351.501(c) and (d) to retain the same order of retention priority for preference eligibles as found in OPM's RIF regulations. (The Federal Register notice incorrectly cited 5 CFR 351.504(c) and (d) as the source of veterans' preference entitlements in OPM's RIF regulations. The final NSPS regulations will correctly cite 5 CFR 351.**501**(c) and (d). The NSPS retention regulations also cite 5 U.S.C. 3501(a) in explaining that the Dual Compensation Act preference restrictions also apply to NSPS.

The proposed NSPS regulations provide that veterans' preference is still the second most important of the four factors (tenure is again the most important retention factor. However, under NSPS performance is the third most important factor while service receives the least weight among the four retention factors.

2.) The Office of Personnel Management has played an important role in ensuing fairness in the development of NSPS and has provided important insight on how the actions of the Department of Defense may impact other federal agencies. What will be the role of OPM during the remaining design process? What role will OPM play during implementation and evaluation of NSPS?

Answer: OPM officials are working side by side with DoD officials during the meet-and-confer process required by statute in an effort to reach agreement with employee representatives on the design of NSPS. Under the proposed regulations, DoD would be required to coordinate with OPM on major aspects of the new HR system—including the design of career groups, pay schedules, and pay bands; rate range adjustments; local market adjustments; and the design of the NSPS pay-for-performance system—before implementation begins. OPM also plans to work with DoD staff to develop the more detailed implementing issuances that will be needed to give effect to NSPS classification, pay, performance management, staffing, and workforce shaping policies. Finally, we intend to monitor DoD's implementation of these policies through our ongoing oversight program.

Senator Daniel K. Akaka
"Critical Mission: Ensuring the Success of the National Security Personnel System"
Questions for the Record
March 15, 2005

Questions for Mr. George Nesterczuk, Office of Personnel Management

1. Citations in the proposed regulations to 5 C.F.R. 351.504 (c) and (d) seem inconclusive with regards to protecting veterans' preference rights. Omitted in the regulations is reference to 5 U.S.C. § 3501(b) that would compel the Department of Defense (DOD) to apply veterans' preference to all employees in a Reduction in Force. What is the reason that this citation was omitted?

Answer: We did not intentionally omit the reference to 5 U.S.C.3501(b). The proposed NSPS regulations contained an incorrect reference -- "5 CFR 351.504(c) and (d)" instead of "5 CFR 351.**501**(c) and (d)." We will correct this typo when publishing the final NSPS regulations. The correct citation will ensure that veterans' preference in RIF will continue on the same basis as under OPM's retention regulations. The citation will directly link the NSPS regulations to OPM's retention regulations and provide veterans' preference under both 5 U.S.C. 3501(b) and 3501(c).

2. According to the proposed regulations, the reduction in pay band provision could allow a veteran who is a GS-15 to move to a lower paying position involuntarily. Could this be used to single out individuals for adverse personnel actions?

Answer: Anyone, whether a veteran or a non-veteran, is subject to reduction in the pay band on the basis of performance or conduct. Any such action – which would be considered an adverse action – is appealable to the Merit Systems Protection Board. Any such employee would receive due process of notice of the reasons for the action and an opportunity to reply.

3. During the hearing, I noted that DOD's proposed regulations appear to not guarantee veterans' preference rights in regard to the bump and retreat options that preference eligible employees have. I also asked whether it was DOD's intent to circumvent veterans' preference under bump and retreat by offering temporary employment, that is not guaranteed, before subjecting a veteran to separation through reduction in force. However, the response you gave did not directly answer this question. Please provide additional information on this issue.

Answer: The NSPS workforce shaping regulations do not provide employees with bump and retreat rights in a way that is comparable to bump and retreat rights under current OPM's RIF regulations. However, changing how we do RIF – making it less complicated and less costly than the current system for veterans and non veterans alike – does not change the standing of veterans.

In response to your second question, section 9901.608(c) of the NSPS regulations provides that the Department, at its option, may offer a vacant position to a displaced employee. The offered position may be a permanent or temporary position. The Department will consider the employees' veterans' preference status when making such offers.

The other question – about temporary positions – is based on a misunderstanding about the proposed DoD system. The question implies that a supervisor could simply offer a veteran a temporary job and be done with it. That is not true. A reduction in force starts with a displacement process involving permanent jobs. That's the same as today. Veterans continue to have the first right to vacancies. If there are not permanent jobs, a veteran may be offered a temporary position.

4. The regulations provide greater opportunity for the Office of Personnel Management (OPM) to intervene in cases brought by DOD employees before the MSPB. Why does OPM need this authority, and what are some examples where OPM would request this authority for other agencies?

Answer: This change makes OPM's intervention authority consistent with its existing reconsideration authority which allows OPM to seek reconsideration in any case in which the Board's decision would have a substantial impact on civil service law, rule, regulation or policy directive. Under the proposed NSPS, the Director of OPM may intervene in such cases after consultation with the Secretary. An amendment to make OPM's intervention and reconsideration authorities consistent for all executive branch agencies we believe would be appropriate.

5. The written testimony submitted by Mr. Oppedisano of the Federal Managers Association made an interesting point regarding the role of performance and tenure during a reduction in force. He stated that one year of an exceptional rating is not a blue print for a lifetime of exceptional work. How do you respond to this concern and the fact that under the proposed regulations, a long-term employee with three years of a rating above fully successful will compare with a one-year employee with a rating of exceptional?

Answer: The proposed NSPS regulations provide that the RIF tenure for permanent employees includes both probationary employees and employees who have completed a probationary period. By comparison, OPM's RIF regulations provide less retention standing for employees serving a probationary period.

The NSPS proposed tenure group construction is consistent with a retention system that places greater weight on proven performance (including performance of a probationary employee) over longevity in determining which employee is retained in a RIF situation. The NSPS proposal provides a preference eligible serving a probationary period with greater potential retention rights than under OPM's regulations. For example, under OPM's regulations a preference eligible serving probation (tenure group II) could be

displaced by a long-term employee (tenure group I) who is- or is not- eligible for veterans' preference.

6. I am concerned about the lack of ceilings and additional information regarding the length of time DOD can place an employee in a probationary period. As a result of the lack of appeal rights given to employees serving in a probationary status, DOD employees may face even fewer rights than the meager ones guaranteed by NSPS. Why are there no limits on the length of serving in a probationary status?

Answer: We intend to provide initial probationary periods of up to 3 years, and existing appeal rights under 5 CFR chapter 315 if an employee in the competitive service is removed during the probationary period.

7. The NSPS regulations regarding labor management relations closely mirror the regulations at DHS. However, the labor-management provisions found in both the Homeland Security Act and the FY04 Defense Authorization Act are drafted very differently. For example, the NSPS requires that chapter 71 of title 5, United States Code, be retained. Please explain why DOD and DHS regulations are so similar given the differences in their statutory construction.

Answer: The statute provides that notwithstanding the provision that prohibits the waiver of chapter 71, DoD and OPM may establish a labor management relations system that recognizes the unique role that DoD civilian employees have in protecting national security. The regulations are similar because, apart from DoD's highly fragmented bargaining unit structure, the labor relations problems of the two agencies are similar -- such as inefficient bargaining processes that needlessly delays implementation of needed changes in conditions of employment; and the need for greater uniformity in order to facilitate personnel administration.

8. OPM worked with both DHS and DOD in developing regulations for the new personnel system, I am interested in the reasons for some of the differences between the two systems that were not specified in law. For example, the proposed regulations for DHS made it more difficult for MSPB to award attorney fees to employees. However in the final regulations, this provision was rescinded. In the DOD proposed regulations, once again we see higher burdens for the awarding of attorney fees. Please explain why provisions initially proposed by DHS but not included in the final regulations are now being proposed by DOD, such as the higher burden for awarding attorney fees.

Answer: Management's action should be judged by the facts that were known at the time of charging. It would be unfair to grant the payment of attorney's fees for the defense of adverse action when management was unaware of facts that would have had a bearing on the decision to charge the employee. However, we understand the other side of the argument and we are willing to discuss attorney's fees during meet and confer as well as any other issues where the provisions do not line-up exactly with the DHS final regulations.

9. According to § 9901.409(g) of the proposed regulations, NSPS provides for an internal process to challenge a performance evaluation and no process for challenging a performance pay decision. Please describe the internal process for challenging a performance evaluation. Why is there no process to challenge a performance pay decision?

Answer: The specific process for challenging a performance evaluation will be contained in the implementing issuances for NSPS, which will be developed through a "continuing collaboration" process with employee representatives. Since the performance pay decision is based primarily on the performance evaluation, the drafters felt there was no need to provide for a second, separate process to challenge those decisions.

Responses to Questions from Senator Akaka
For the United States Senate
Committee on Homeland Security and Governmental Affairs
Subcommittee on the Oversight of Government Management, the Federal Workforce and the District of Columbia
Responses Submitted June 6, 2005

Moving Ahead: Management Perspectives on the New National Security Personnel System at the Department of Defense

Department of Defense NSPS Proposed Regulations: Collaborative Development and Deliberate Implementation Are a Must for Success

Question Responses by
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Questions from Senator Akaka:

Q: Both the Department of Homeland Security and the Department of Defense personnel systems permit managers to convey performance expectations to employees orally. This raises questions as to the clarity of the expectations and the lack of documentation for future litigation. What is your opinion on oral performance expectations and do you have any suggestions to avoid problems with unclear or insufficient oral expectations?

A: Performance expectations should not be some clandestine piece of information that leaves both the manager and employee unaccountable to their performance. I cannot state it emphatically enough: performance standards and expectations need to be written. For example, if a manager no longer supervised an employee, but that employee's evaluation was in part based on the performance expectations of that manager due to a position change or new project assigned to the employee, a verbal assignment of duties would not allow the supervising manager to assess the employee's quality of work properly.

Oral statements leave too much ambiguity for misinterpretation and misunderstanding. I have always stated a manager needs to document, document, document and the best way to do that is in writing with the observation and acceptance of the employee. This protects the manager from retaliation that the employee was unaware of their expectations and it protects the employee from an unreflective performance review.

However, if the Department moves to a verbal communication of job duties and expectations, employees and mangers must be in constant communication of an employee's. At a minimum managers and supervisors must conduct a quarterly review of the employee's performance. This should be detailed to the point of identifying the specific performance of the employee up to that point in time so that any future review will not result in any surprises. The manager must let the employee know where they are succeeding and what areas are in need of improvement. There should be no surprises at the end of the year what an employee's performance rating will be. This will prevent a flood of appeals and decrease a possible work environment fraught with poor morale and subsequently reduced productivity.

Q: Your written testimony notes the federal student loan repayment program is not being fully utilized because of a lack of funding. As you may know, I offered legislation in the 108th Congress to provide funds on a pilot basis for student loan repayment. Do you believe it is beneficial to have specified funding for certain programs?

A: First, let me say thank you for your efforts on behalf of improving recruitment and retention benefits for Federal employees. Your actions in support of our association and civil servants overall are a tremendous help in providing us, as managers, with the resources we need to accomplish the mission of our agencies successfully. Unfortunately, it is true that many of our members do not see program such as the student loan repayment program being used as you intended it. We see your actions to authorize an increase in the annual and aggregate amounts of the student loan repayment program as an incentive to be used for all Federal employees and not just select few employees in select few agencies.

One of the challenges facing managers is allocation from agencies of budgets that reflect the current and future needs of a given division. For example, when a manager or supervisor is recruiting for a position in March that will become vacant in May or June, the manager must budget for the cost in the preceding June or July time frame to have the funds available for that following years vacancy. Many managers do not have the ability to fund this program based on arbitrary funding limitations. Separate funding for programs such as the student loan repayment program will allow managers the opportunity to take advantage of the recruitment and retention flexibilities that you, Congress and OPM intended.

Q: In response to my question on the usefulness of a chief training officer you said that it would depend on how that position is written and what duties and responsibilities would be assigned to such an individual. What duties and responsibilities would you give to a training chief officer?

A: The person in this position must have considerable independence to oversee both the implementation of a training program and the budget of that training program. They must have the authority to run the program and any necessary training within their given budget without ties to Department leadership. As the budgets get tighter, even if appropriations funding does come through, because there is still discretion for the secretary on budgeting, those dollars are in jeopardy of being used in other places. Independent budget authority to allocate necessary resources to ensure that managers and employees have the training necessary to implement the new personnel system at DOD and DHS. Without this proper training and attention to training, there will be seriously undesirable consequences in the new personnel system.

Questions for the Record from Senator Daniel K. Akaka
"Critical Mission: Ensuring the Success of
the National Security Personnel System"
March 15, 2005

Responses by AFGE National President John Gage

1. Both the Department of Homeland Security and the Department of Defense (DOD) personnel systems permit managers to convey performance expectations to employees orally. This raises questions as to the clarity of the expectations and the lack of documentation for future litigation. What is your opinion of the ability of managers to clearly provide oral performance expectations to employees? In your opinion, how can employees be held accountable for performance expectations provided orally?

   Answer: I do not believe that the overwhelming majority of managers will be able to clearly articulate performance expectations to employees. In the rare event that a manager could do so, there is always the possibility that the employee will believe that he understood the manager, yet did not. In addition, it is possible that if ill will exists between the manager and the employee, the manager could always say that the employee had been told the performance expectation, yet did not fulfill it. This ill will could be the result of bias, political differences, or any other reason. It simply is not reasonable for employees to be held accountable for performance expectations provided orally. With written standards, both the manager and employee would be satisfied that communication had been successful.

2. The DOD Workers Coalition made suggestions to DOD and the Office of Personnel Management (OPM) for the National Security Personnel System (NSPS). Please describe some of the proposals that were offered to protect employees while still meeting the Department's national security mission. Did DOD or OPM explain why these suggestions were not taken?

   Answer: The United Defense Workers Coalition (UDWC) made several recommendations over the year leading up to the publication of the proposed NSPS regulations. The recommendations would, we believe, protect the employees we represent while still enabling and even helping the Department meet its national security mission. We were deeply disappointed when DOD rejected these recommendations in its proposed regulations. We are still trying to understand why the Department and OPM did not accept our suggestions, but rather proposed systems that will harm its employees, without any evidence that they will be good for national security.

Here are three examples:

1. DOD has expressed an interest in being able to deploy civilian employees anywhere in the world at a moment's notice. This can include sending a worker to a combat zone, detailing him or her to another state, or simply assigning him or her to another part of the current facility. These assignments may be desirable in that they provide an opportunity to learn new skills, do interesting work, and help towards a future promotion. Other assignments may be undesirable because of their location, the difficulty or dreariness of the job, or other factors. In addition, at any given time, a particular assignment may be adverse for an individual employee because of family or other personal responsibilities.

Our experience has shown that when there is a demonstrated need to send civilian workers away from their normal duty stations, our bargaining unit members volunteer in sufficient numbers that there should be no need to disrupt the rest of the workforce. We have an interest, based on our real world experiences over the years, to ensure that assignments are not made based on supervisors' or managers' rewards to favorites and reprisals to those they do not like.

We fully understand and accept management's right to determine the qualifications necessary for an assignment of work. We want to continue to be able to negotiate the procedures and appropriate arrangements for employees affected by management's actions. This really isn't complicated. DOD can determine what it needs to do and what set of qualifications its employees need to be able to accomplish that. But we, the unions that represent those employees, have had the right to negotiate procedures that ensure that these assignments are fair and not based on rewards to friends and reprisals to others. In addition, we have had the right to negotiate appropriate arrangements for employees who are adversely affected by management's actions. This could include such things as out of pocket expenses an employee incurs or accommodations for single heads of households or employees with medical concerns.

It is hard to overemphasize the importance of these time-honored rights that employees have had up until NSPS. DOD would want you to believe that every time they need to do something, they have to wait until they have negotiated with the unions. This simply isn't true. We have in our collective bargaining agreements procedures that allow managers to quickly select qualified employees for various assignments, while ensuring employees that there is a fair process, not a subjective decision that will govern these assignments. These negotiated procedures prevent delay in selecting employees for quick deployment and prevent abuse of employees in making those selections.

DOD has said that the negotiated procedures may not always give them what they need. We have expressed our willingness to offer expedited negotiations and even post-implementation bargaining when circumstances warrant that. This means that when DOD has to act quickly and cannot abide by the negotiated agreement, it can act. We believe, however, that DOD should develop the procedures its managers will use with the exclusive representatives of their employees before implementation through expedited bargaining. If even that is impossible, DOD managers should meet with the unions after they have taken the action to negotiate ways to deal with any harm caused by their actions.

Not only has DOD rejected our suggestion of expedited bargaining or post-implementation bargaining over procedures and appropriate arrangements, it has prohibited its managers from engaging in such bargaining in most cases. Not only has DOD rejected our involvement in those determinations, it has explicitly exempted itself from even having to follow its own unilaterally developed rules. Section 9901.910(i) says:

Management retains the sole, exclusive, and unreviewable discretion to determine the procedures that it will observe in exercising the authorities set forth in 9901.910(a)(1) and (2) and to deviate from such procedures, as necessary.

DOD has rejected our offer of faster bargaining, and even post-implementation bargain when needed, and has replaced it with an assertion of its right to establish its own rules unilaterally, and then not be bound to abide by them. We have not received any adequate explanation for what we believe is an abusive overreach by DOD that gives it sole authority to do whatever it wants to employees, without even any expectation that it will obey its own rules. Many DOD employees currently can at least count on a grievance procedure that protects them if management violates their contracts or fails to follow its own rules. With regulations that allow DOD to violate its own rules, how could an arbitrator or MSPB find for an employee when DOD does so? Is DOD unwilling to continue to be accountable to its own rules?

2. DOD has proposed to establish a National Security Labor Relations Board that will be chosen unilaterally by the Secretary of Defense. The UDWC has strongly recommended that such a board, if indeed it is necessary to duplicate what is currently done by the FLRA (we believe it is unnecessary and wasteful to create another board), be an independent board that is credible to DOD employees. A board chosen exclusively by DOD, able to be terminated exclusively by DOD, and housed within DOD is not going to be independent in fact or perceived as such by the various stakeholders in the Labor-Management Relations system.

UDWC has offered several recommendations for establishing a board that can truly be independent. We are willing to work with DOD and OPM further on this. Among our suggestions have been a process in which DOD selects one or more members, the unions select an equal number, and the board members select one or more mutually agreeable members. This is a time-honored process for establishing a board that all stakeholders feel is independent, and not unduly weighted towards one side over the other.

Another suggestion offered by the Coalition is a panel of arbitrators that would hear cases and resolve disputes. We are willing to develop criteria for such arbitrators that would be mutually acceptable. We know that it is possible to tailor a panel to the precise needs of the parties. For example, the American Arbitration Association can provide arbitrators that have knowledge of the Department's mission. They can do this by sending arbitrators that the parties accept to a training session put on by the Department, or by sending former DOD officials to special training in how to be an arbitrator. They are even able to put together a panel of members with security clearances. AAA puts together panels regularly that have the expertise to adjudicate cases for particular industries. The special mission that DOD claims to have is no bar to creating a panel that understands and respects that mission.

DOD and OPM have not explained to us why they believe that DOD should be able to make its own rules unilaterally, violate them at will, and not be subject to the adjudication of an independent board that will balance its mission and managerial authority with its responsibilities to its employees and their right to fairness and dignity.

3. UDWC has expressed its concern about pay banding and pay-for-performance. We know that academic scholars and other experts warn that pay-for-performance requires getting many, many details right for it to have a chance to be successful. Get these details wrong, and there is a good chance that such systems will demoralize employees and fail to generate the kind of performance-focused climate the Department says it wants. Do it wrong and it is likely that the workplace environment in DOD will deteriorate -- something this nation cannot afford.

At the same time, UDWC believes in progressive change. We have worked hard over the years to ensure that employees have the training and technology to keep up with and anticipate the modern innovations in their fields. During the months leading up to the publication of the proposed NSPS regulations, we have offered to work with DOD to develop a modern compensation system for DOD employees. We believe that the only way to get the details right in creating and operating a new

compensation system is to involve the employees' exclusive representatives in meaningful ways.

The NSPS law requires that our participation in the establishment of the system, and the adjustments that may be necessary from time to time, be through the participative process that includes the comment period we have completed and the meet-and-confer process we are involved in today. In addition, the law requires that DOD and OPM develop a method for employee representatives to participate in any further planning or development, which might become necessary.

We have offered to be fully engaged in these processes, but are disappointed with DOD's and OPM's interpretation of meaningful participation. We are involved in the so-called "30-30-30" participative process without ever having received the written description of the system that was supposed to kick off that process. The regulations also propose a process the Department calls "Continuing Collaboration" for our participation in any further planning or development that might be necessary. According to the proposed regulations, this process allows DOD to unilaterally decide how many employee representatives to include, what to tell them, and how much time to give them to comment. While we are disappointed with the process for involvement with the initial development of the system and the occasional adjustments and planning that may be required, we are committed to participating in good faith.

UDWC has recommended that the new pay system be operated through collective bargaining for bargaining unit employees to ensure that the Department gets as many of the details right as possible and that the system is credible to the employees who will be affected by it. This would include such things as the amount of the annual increases employees in the various bands would get, local market supplements, pay pool policies and other matters. In other situations in which agencies were able to waive the government-wide laws and regulations regarding pay (which are the only bars to bargaining pay) we have been negotiating these matters successfully for years. In fact, we have negotiated provisions in pay-banding, pay-for-performance systems that have made them not just acceptable, but popular with employees.

DOD and OPM have not only rejected our recommendation that certain elements of the pay system for bargaining unit employees be subject to collective bargaining, they have prohibited their managers from negotiating any of those issues.

UDWC reiterated our recommendations described above, and added others in our formal comments to the NSPS proposed regulations, which covered every subpart and section. Unfortunately, we have received little

constructive feedback from DOD and OPM regarding our suggestions, which were provided in a good faith effort to improve the personnel system for employees and managers alike.

3. Defense Undersecretary Abell submitted four cases for the record in support of the provision in the proposed regulations to limit the ability of the Merit Systems Protection Board (MSPB) administrative judges to mitigate penalties. The cases he cited are: *Dunn v. Department of the Air Force*, MSPB No. DE-0752-03-0333-I-1, 96 M.S.P.R. (2004); *Kirk v. Defense Logistics Agency*, MSPB No. SFO752930063-I-1, 59 M.S.P.R. 523 (1993); *Woodford v. Department of the Army*, MSPB No. DE-0752-96-0189-I-1, 75 M.S.P.R. 350 (1997); and *Jacobs v. Department of the Army*, MSPB No. DE-0752-92-0527-I-2, 62 M.S.P.R. 688 (1994). Do you believe these cases support DOD's position?

Answer: AFGE's response to the four cases from DOD -- that DOD claims justify raising the burden to mitigate penalties – follows the short summary of each case below.

Dunn v. Dept. of the Air Force, MSPB No. DE-0752-03-0333-I-1, 96 M.S.P.R. (2004):

The appellant Motor Vehicle Operator, WG-09, at Hill AFB, Utah, was removed based on two charges: (1) engaging in conduct unbecoming a federal employee, in that as part of a team responsible for transporting an unarmed ICBM, which was loaded with explosive propellant, he and his team mates left the missile unattended for various lengths of time, and (2) exhibiting a lack of candor, in that he lied under oath about the circumstances of the incident in question. The MSPB Administrative Judge (AJ) sustained each of the charges but not all of the specifications of the charges, and mitigated the penalty to a demotion based on the AJ's consideration of other factors, such as the appellant's 28 years of "spotless" service and the supervisor's statements that the appellant was "otherwise an exemplary employee and quite trustworthy." On appeal by the agency the MSPB concluded that, notwithstanding the favorable factors relied upon by the AJ to mitigate the penalty, removal is a reasonable penalty, commensurate with the appellant's position and the seriousness of the misconduct. The MSPB sustained the penalty of removal.

1. Doesn't this case's result – the MSPB ultimately ***sustaining*** the agency's removal action – indicate that the current appeal procedures adequately protect the agency's interests?

Kirk v. Defense Logistics Agency, MSPB No. SFO752930063-I-1, 59 M.S.P.R. 523 (1993):

The appellant Material Processor II was removed based on three charges: (1) theft of government property (a less than $5 piece of rubber matting); (2) leaving the work area without proper permission; and (3) making derogatory and disrespectful remarks to a supervisor. The Administrative Judge sustained only the first charge (theft) and mitigated the penalty of removal to a 90 suspension based on the following factors: (1) the item taken, worth less than $5, had de minimis value, and the appellant did not occupy a position of custody and control with respect to the item; (2) the item taken was part of non-inventory scrap material with no definite value that was available to employees for governmental use at their discretion without supervisory approval; (3) the appellant was not specifically warned by the agency that taking such scrap material was prohibited; and (4) the appellant had 28 years of service. On appeal by the agency the MSPB reviewed the reasonableness of the penalty and found that, although the appellant's work performance had been poor for the past nine months and he had been suspended for 14 days in 1990 for misconduct, these factors were outweighed by the facts that the theft was de minimis in value and otherwise minor in nature and that the appellant had 28 years of service. The MSPB agreed with the AJ that a 90 day suspension was appropriate.

1. Doesn't this MSPB decision affirm the reasonableness of the current appeal process because it corrects an overly harsh agency action – removal after 28 years of service for a theft of a piece of rubber matting worth less than $5?

2. Is it fair to fire an employee for a de minimis offense after 28 years of service?

3. If the offense of theft is considered to be so egregious that it always justifies the penalty of removal, what about the employee who over a period of time takes home in his pocket $10 worth of government pens?

Woodford v. Department of the Army, MSPB No. DE-0752-96-0189-I-1, 75 M.S.P.R. 350 (1997):

The appellant Supervisory General Engineer and Director, Directorate of Environment and Safety, was removed based on two charges: (1) conduct unbecoming a Federal employee, and (2) violation of agency regulations regarding sexual harassment. Both charges arose from a single incident, when the appellant asked a subordinate to meet him in a closed room, locked the door, verbally expressed personal emotional and sexual feelings, held her hand, hugged her and kissed her on the forehead after being told not to, and made comments which were perceived to be threatening to her job security if she revealed what he had done. The Administrative Judge (AJ) upheld the charges but mitigated the penalty from removal to a 60 day suspension, because of the following facts and circumstances of the conduct and mitigating factors. First, the misconduct involved only a single instance of admittedly extremely poor

judgment, involved no quid pro quo sexual harassment, was not overtly sexual in nature but rather primarily romantic, and "as sexual harassment cases go, ... was remarkably mild." Mitigating factors were his 23 years of Federal service with no prior discipline, his strong performance, and his remorse, as well his having suffered from the mental and physical effects of diabetes, his having been affected by a series of personal crises at that time, and an inference that reprisal against the appellant, because of his vigorous environmental advocacy, played some role in the agency's action to remove the appellant rather than to impose a lesser penalty. Upon appeal by the agency, the MSPB reversed the AJ's finding of reprisal and noted the seriousness of the offense, but substituted the penalty of demotion (to a non-supervisory position) based on these factors: (1) it was appellant's first offense in 23 years of outstanding government service, (2) it was an isolated incident, (3) it did not involve any quid quo pro, (4) the appellant expressed great remorse, (5) his general demeanor as a manager was supportive of women, caring, and humane, and (6) the agency's table of penalties justified removal on a first offense of sexual harassment only where conduct created a hostile or offensive work environment, which was not the case here.

1. Doesn't this case's resolution promote the efficiency of the federal service by permitting an outstanding employee, who admittedly made a single serious mistake, to be penalized by a demotion but to continue his 23 years of outstanding service to the government in a different non-supervisory position?

2. Doesn't this case illustrate the reasonableness of the current appeals process in that an agency which fails to follow its own regulation in the form of a table of penalties may be corrected in a manner which both punishes the misconduct of the employee and preserves the ability of a long term outstanding employee to contribute to the federal service?

Jacobs v. Department of the Army, MSPB No. DE-0752-92-0527-I-2, 62 M.S.P.R. 688 (1994):

The appellant Security Guard, GS-7, was removed from his position based on his permanent disqualification by the agency from its Chemical Personnel Reliability Program (CPRP), because he had verbally assaulted a security officer. The agency had unsuccessfully searched for a vacant position to which he could be assigned that did not have the CPRP qualification requirement. The agency argued that the loss of the appellant's qualification for CPRP was akin to his loss of a security clearance and that, as a result, the MSPB's review was limited to the following, pursuant to Navy v. Egan, 484 U.S. 518 (1988)(establishing that the MSPB's review of a loss of security clearance is extremely limited): (1) whether qualification under the CPRP was required for the appellant to remain in his position, (2) whether the appellant was disqualified from the CPRP, and (3) whether the appellant was afforded minimum due process by the agency's

decision to disqualify him from the CPRP? The Administrative Judge (AJ) rejected the agency's contention that the MSPB's scope of review was thus limited, found that the misconduct had occurred, but mitigated the penalty of removal to a 30 day suspension. On the agency's appeal, the MSPB agreed with the AJ that it could review the underlying disqualification of the appellant from the CPRP and that the scope of its review was not limited by Egan, noting that Egan specifically applied only to security clearances, that the agency could have removed the appellant's security clearance and thereby come under Egan but had not, and that there was no justification to expand the scope of the rationale in Egan to divest employees of basic protections against non-meritorious agency actions where national security was not directly involved. The MSPB affirmed the AJ's mitigation of the penalty to a 30 day suspension.

1. Doesn't this case demonstrate the reasonableness of the current appeals system, which permits an agency to revoke an employee's security clearance for legitimate national security reasons in accordance with Egan's guidance and thereby to be subjected to a quite limited MSPB review but permits the normal MSPB scope of review in those cases where a removed employee has a very important role but where agency concerns do not rise to the level of national security, e.g., revocation of a doctor's clinical privileges, revocation of procurement authority for a purchasing agent, or removal of a NASA engineer, a medical researcher at the National Institute of Health, or an Air Traffic Controller?