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FROM PROPOSED TO FINAL: EVALUATING THE REGULATIONS FOR THE NATIONAL SECURITY PERSONNEL SYSTEM

HEARING

BEFORE THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

NOVEMBER 17, 2005

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FROM PROPOSED TO FINAL: EVALUATING THE REGULATIONS FOR THE NATIONAL SECURITY PERSONNEL SYSTEM

THURSDAY, NOVEMBER 17, 2005

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:03 a.m., in room SD–342, Dirksen Senate Office Building, the Hon. Susan M. Collins, Chairman of the Committee, presiding.

Present: Senators Collins, Voinovich, Warner, Levin, and Akaka.

OPENING STATEMENT OF CHAIRMAN COLLINS

Chairman COLLINS. Good morning. Today, the Committee will examine the final regulations for the National Security Personnel System.

When fully implemented, this system will cover approximately 650,000 civilian employees of the Department of Defense. In 2003, the Department sought legislation to establish a new personnel system. The Department's initial proposal, however, went too far and did not include important provisions to protect good employees.

I worked hard with Senator Levin, Senator Voinovich, and other Members of this Committee to craft an alternative that addressed many of these concerns. In the end, Congress adopted a third version, a compromise that granted the Department considerable authority to craft a system to meet its national security mission while protecting the fundamental rights of the Department's civilian employees.

Our witnesses today will help the Committee understand whether or not the system set forth in the final regulations is consistent with congressional intent and whether it will achieve our goal of helping the Department of Defense recruit, reward, and retain the highest quality workforce.

The civilian workforce of the Department is one of its most important assets. It is critical that the National Security Personnel System recognize that employees are vital to the accomplishment of the Pentagon's mission. I have always maintained that the Department must work in partnership with its employees and their elected representatives for the NSPS to succeed.

If the new system is to be "a win for employees," as Secretary England clearly hopes, employees must see it as fair and based on merit principles. Some employees have told me that they continue

to be frustrated by the lack of detail in the regulations. Until these employees have the information that enables them to fully understand how NSPS will work, they are likely to remain skeptical.

While I understand that many details are under development and will be provided in the coming weeks, it is difficult to provide employees with the reassurances that they are seeking when much of the new system remains subject to further development. In many instances, the final regulations provide only a framework for the new system.

It appears that the Department and the Office of Personnel Management appreciate the need to establish processes for a number of areas and the need to provide employees with additional guidance on how the system will work in practice. Transparent implementation and the active participation of employees in the development of these details will help ensure the efficacy and fairness of the new system. I look forward to hearing what actions the employee representatives recommend should be taken to ensure a smooth transition to the new system.

During the formal comment period, I expressed my concerns concerning some of the provisions of the proposed regulations, such as the scope of collective bargaining and the new system for employee appeals. The Department, to its credit, did make some changes in response to the concerns that I and others raised. The final regulations, for example, now appropriately reflect the standard for review for employee appeals of adverse actions by the full Merit Systems Protection Board that was included in the authorizing legislation.

After reviewing the final regulations, however, I believe that there is still room for continued improvement. For example, the current proposal gives the Secretary of Defense sole discretion to appoint the members of the Homeland Security Labor Relations Board with input from the labor unions. I believe that it would be wise to actually designate one of the slots for an employee representative.

Despite the Department's efforts to reach out to the unions during the meet and confer period, the coalition of employee representatives appears to have rejected pretty flatly the final regulations. I hope that as we continue to move forward, some common ground can be found.

While there are real differences of opinion at this time over several of the provisions, shutting down the collaborative process is not the solution. Ultimately, the success of the new system will depend on the acceptance by the workforce. I hope that the employee representatives will continue to work with the Department and with OPM to strengthen the system and to build confidence in it.

Implementation of the new system will be dependent on good management, proper execution, and robust training. I need to hear more from the Administration on how the Administration is going to assure that there are adequate resources to ensure that we have good management, proper execution, and robust training. This is an issue that I have talked with Secretary England about. I know that he is very committed to the training of managers as well, as is Ms. Springer.

As the Department moves forward, the Committee will look for tangible evidence of the system's success. There is no better guarantor of the success of any new personnel system than acceptance by the employees.

I am very pleased that we have the two leaders on civilian workforce issues with us today. And indeed, Senator Voinovich is going to be taking over the gavel at some point. He has been such a leader in workforce areas. We have talked many times that it really comes down to having the right people understanding their responsibilities, supported by management, and able to carry out their mission.

Similarly, Senator Akaka is such a leader and cares so deeply about these issues. So now I will turn to Senator Akaka for his opening statement.

OPENING STATEMENT OF SENATOR AKAKA

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

It is a pleasure working with you. As you know, I enjoy working with you and also with Senator Lieberman and Senator Voinovich on these important human capital issues, as well as Senators Warner and Levin, whose leadership on this Committee and the Armed Services Committee has been invaluable.

Before I give my statement, I want to add my welcome to the panelists. I look upon you as good friends, and I enjoy working with you. I really appreciate what you are doing for our country.

Today's hearing provides us an opportunity to review the final regulations crafted by the Department of Defense and Office of Personnel Management for the National Security Personnel System. Since the enactment of legislation providing for NSPS, it has been my hope that DOD and OPM would engage in meaningful discussions with employee representatives to produce a personnel system that would be mutually agreeable.

Although I voted against the creation of NSPS because I believed employee rights and protections would be greatly diminished, I kept open the possibility that I would be wrong. Sadly, the final regulations, mirroring most of the provisions in the proposed regulations, do great harm I feel to the civilian DOD workforce.

I am extremely disappointed by the failure of DOD to comply with congressional intent and by the Department's disregard for the welfare of the civilian employees. We should never forget that the civilian workforce at DOD is critical to our national security.

The Department has taken the broad flexibility granted by Congress to create a system that eliminates employee collective bargaining rights, creates an unfair appeals process, and permits DOD to act without accountability. For example, Congress clearly stated that under NSPS, collective bargaining would be preserved and that Chapter 71 of Title 5 could not be waived.

However, the Department has gone out of its way to erode the collective bargaining rights of employees. Under the regulations, collective bargaining is authorized at the discretion of the Secretary with no single issue immune from being eliminated from collective bargaining.

The regulations also fail to provide a fair appeals process. Under NSPS, the independent Merit Systems Protection Board has limited review of DOD cases, and decisions by MSPB administrative judges will be reviewed by certain Department employees. Moreover, the regulations fail to identify the employees or list the qualifications of the individuals who will second-guess the findings of the independent AJ.

I question how this change strengthens national security and why DOD alone, without a meaningful review by the agency charged with protecting merit system principles, is best able to determine the most appropriate penalty for misconduct or unacceptable performance.

Last, the regulations provide few details as to how DOD will establish its compensation and performance management systems. While the current general schedule pay system is not perfect, there are clear rules on how employees are paid and under what circumstances pay increases are awarded. Without a detailed, transparent, accountable, and employee-supported system, which has adequate funding and training for employees, I am not convinced that the NSPS pay system will be an improvement.

DOD has significant management challenges and has more programs on the GAO high-risk list than any other Federal agency. I am pleased to work with Senator Voinovich on addressing these issues. But I fear that given the limited checks on the Department under the final regulations, NSPS will become just another item on the high-risk list.

Employees throughout the Federal Government, especially those charged with defending the Nation, deserve compensation, appraisal, labor management, and appeals systems that are fair. NSPS, I believe, is not fair. It gives DOD significant flexibility and authority without any real accountability. DOD employees deserve better.

Thank you, Madam Chairman. I look forward to hearing our witnesses. I ask that my full statement be included in the record.

Chairman COLLINS. Without objection.

[The prepared statement of Senator Akaka follows:]

PREPARED STATEMENT OF SENATOR AKAKA

Thank you, Madam Chairman. It is a pleasure working with you, Senator Lieberman, and Senator Voinovich on these important human capital issues. I also wish to express my appreciation to Senators Warner and Levin whose leadership on this Committee and the Armed Services Committee has been invaluable.

Today's hearing offers an opportunity to review with the Department of Defense (DOD) and the Office of Personnel Management (OPM) the final regulations they crafted which will serve as the framework for the National Security Personnel System (NSPS). I am pleased that we'll also hear from Comptroller General Walker, two union leaders, and the president of the Federal Managers Association.

This hearing is the third hearing I've attended on NSPS in the past year. Since the enactment of legislation providing for NSPS, it has been my hope that DOD and OPM would engage in meaningful discussions with employee representatives to produce a personnel system that would be mutually agreeable. Although I voted against the creation of NSPS because I believed employee rights and protections would be greatly diminished, I kept open the possibility that I would be wrong.

Sadly, the final regulations do great harm to the civilian DOD workforce. I am extremely disappointed by the failure of DOD to comply with congressional intent and by the Department's disregard for the welfare of its civilian employees. We should never forget that the civilian workforce at DOD is critical to our national security.

The Department has taken the broad flexibility granted by Congress to create a system that:

- Eliminates employee collective bargaining rights;
- Creates an unfair appeals process; and
- Permits DOD to act without accountability.

Because a Federal judge has enjoined DHS from implementing the labor-management provisions of MaxHR, I expected to see significant changes from DOD's proposed regulations. However, the introduction to the final NSPS regulations state that there are only 36 written changes from the proposed regulations and 14 clarifications which were a result of the meet and confer process.

One area that saw little change is the labor-management relations provisions. Congress clearly stated that under NSPS collective bargaining would be preserved and that chapter 71 of Title 5 could not be waived. However, the Department has gone out of its way to erode the collective bargaining rights of employees. Under the regulations, collective bargaining is authorized at the discretion of the Secretary and no single issue is immune from being eliminated from collective bargaining.

Moreover, NSPS drastically limits the matters open to collective bargaining—subject to further limits placed on this category by the Secretary—and provides for review of any labor-management issue by an internal board that I believe will not be independent and impartial.

Although employee representatives may make suggestions to improve agency action or recommendations for membership on the National Security Labor Relations Board under NSPS. I fear that employee input will have little impact. The reliance on implementing issuances to flush out the details of this system makes it essential that employees have meaningful collective bargaining rights.

Employees also deserve a fair appeals process. According to the final regulations, it is essential to the success of NSPS to ensure that employees perceive the system as fair. However, DOD is given broad authority to make adverse personnel actions without any accountability. The independent Merit Systems Protection Board (MSPB) has limited review of DOD cases and will only be able to mitigate penalties imposed by the Department when the penalty is totally unwarranted without any justification.

Furthermore, decisions by MSPB administrative judges will be subject to review by certain Department employees, although the regulations fail to identify the employees or list the qualifications of the individuals who will second-guess the findings of the independent administrative judge (AJ). I question how this change strengthens national security and why DOD alone, without a meaningful review by the agency charged with protecting merit system principles, is best able to determine the most appropriate penalty for misconduct or unacceptable performance.

By increasing the mitigation standard to such a high burden and allowing Departmental employees to overturn AJ decisions, the Department is creating an appeals system that is unfair and further erodes any substantive review of its actions for inappropriate conduct.

Lastly, the regulations provide few details as to how DOD will establish its compensation and performance management systems. Although the regulations state that employees will be involved in the design and implementation of the performance management system, it is still unclear how this will be accomplished.

While the current General Schedule (GS) pay system is not perfect, there are clear rules on how employees are paid and under what circumstances pay increases are awarded. Unfortunately, the GS system has not lived up to its potential as envisioned under the Federal Employees Pay Comparability Act. And yet I do not see how a new performance-based pay system will be an improvement given the lack of details on the new system, the lack of meaningful employee involvement in designing the new system, and the limitations on employees' ability to challenge performance reviews and pay decisions.

Training is a key to employee understanding and acceptance. I am further concerned about how the adequacy of training envisioned by DOD for managers and employees on the new pay-for-performance system will ensure fairness when 25 years under a performance-based system, the Civil Service Reform Act, has done nothing in the opinion of DOD to encourage strong performance.

DOD has significant management challenges and has more programs on the Government Accountability Office (GAO) high-risk list than any other Federal agency. I am pleased to work with Senator Voinovich on addressing these issues, but I fear that given the limited checks on the Department under the final regulations, NSPS will become just another item on the GAO high-risk list.

Employees throughout the Federal Government, especially those charged with defending the nation, deserve compensation, appraisal, labor-management, and ap-

peals systems that are fair. NSPS is not fair. It gives the Department significant flexibility and authority without any real accountability. DOD employees deserve better.

Thank you, Madam Chairman. I look forward to hearing from our witnesses.

Chairman COLLINS. Senator Voinovich.

OPENING STATEMENT OF SENATOR VOINOVICH

Senator VOINOVICH. Thank you, Madam Chairman, for calling today's hearing. First of all, I want to thank you for your continued support and partnership in understanding and addressing the needs of the Federal workforce in our human capital crisis.

We are here today to discuss the human capital reforms underway at the Department of Defense. They are the result of 2½ years of work by the Department of Defense, the Office of Personnel Management, Department employees, and their representative organizations to develop a "flexible and contemporary" personnel system that will assist the Department in meeting its national security mission.

My Subcommittee held a hearing on March 15 to evaluate the proposed regulations for the National Security Personnel System. During that hearing, I expressed many concerns about the regulations to the Department and OPM. After reviewing the final regulations, I have to say I have mixed feelings.

First, Secretary England, I congratulate you on the leadership that you have demonstrated throughout this process. You have really given this everything that you said you would give it.

As you know, I have been concerned with the development of NSPS since the beginning. I know Secretary England will recall that I was so concerned that I went over to the Pentagon in March of last year and met with him, Deputy Secretary Wolfowitz, and Deputy Undersecretary Abell to convey to them my concerns that the Department was proceeding much too rapidly and that the massive change envisioned by NSPS would take years to properly implement.

I was pleased to learn they agreed. After a hasty start, they decided to proceed with much greater deliberation. At that time, Secretary England was given a lead role in implementing NSPS. I think things improved tremendously because of your involvement, Secretary.

Director Springer, you assumed your position at OPM as this process was well underway. You have taken over at a tough time. During our meetings and conversations, I have been impressed with your understanding of the issues and am pleased to hear your reassurances that, as Director of OPM, you will continue to be a partner in NSPS.

Madam Chairman, I am pleased to see that the Department has made many revisions to the final regulations to address some of the concerns raised by employees and Members of this Committee. I appreciate the openness of DOD and OPM to make those changes.

But Secretary England, as you and I have discussed, writing these regulations was the easy part and only the beginning. Implementation of what you have put on paper is going to be a lot more challenging. I remain concerned that the NSPS still does not possess a key element needed for successful reform, and I think I just

underscore you, Madam Chairman, about employee participation and support.

Furthermore, I cannot stress enough how important effective training will be as implementation begins, and that includes comprehensive training of supervisors in performance management, not just the nuts and bolts of NSPS, but the related soft skills that are needed. And I intend to spend some time with DOD employees in Ohio to see firsthand the type of training employees are receiving. Also crucial is continued open communication with all employees.

Now that the regulations are final, I look forward to learning from the Federal employee unions their views on the new system and how they intend to work with DOD and OPM going forward. I hope there are some aspects of the system that unions see as positive.

The changes embodied in the National Security Personnel System are vast and their impact great. As I have said before, failure is not an option. And Senator Akaka, you sent a shiver down my spine when you said that you thought this was going to ultimately end up on the high-risk list. We have got to make sure that doesn't happen.

We must continue working together to ensure success, and I do mean "we." Today, I restate my commitment to working with the Department and employee organizations toward that end. This is important to me as Chairman of the Federal Workforce Subcommittee and as a Senator who represents approximately 12,000 Department employees scheduled to transition into NSPS in Spiral One.

The next 6 months to a year are crucial. This Committee will be watching. I anticipate knowing within that time whether or not we are on the road to success. I look forward to a continued dialogue with DOD, OPM, and employees as implementation commences, which continues with the testimony that we are going to hear today.

And Mr. Walker, I also would like to spend some time with you as you monitor what is going on. I think that is very important.

I just want to mention, Madam Chairman, that one of the things that I have been really pleased with in the last 6 months is the work that we are doing on DOD supply chain management. The Office of Budget and Management has come up with a wonderful plan. DOD has participated in it, and Mr. Walker has participated in it. There is a meeting of the minds. They are working on metrics that determine the progress that is being made, and we are doing the same thing with the security personnel clearance that is on the high-risk list.

In these cases, we have laid out a plan. The Department, OPM, and Mr. Walker, are all involved. And so, there is a coordination here. And I think the more that they work together and the more they agree upon the milestones and benchmarks of success, the better off all of us are going to be.

I think the same is true for the National Security Personnel System. I would hate to have a hearing 6 months from now and then have GAO say, what DOD is saying about their accomplishments is not true. I think there should be some meeting of the minds

about how we are going to judge our progress in NSPS implementation.

And we are going to be looking to Mr. Walker's organization to give us their perspective. It would be really nice if everyone agreed on what it is that we were going to use to judge whether we are making the progress that we all would like to make.

Thank you, Madam Chairman.

Chairman COLLINS. Thank you, Senator.

Our witnesses today are no strangers to this Committee, nor to the development of the National Security Personnel System. Our first witness is the Hon. Gordon England, the Deputy Secretary of the Department of Defense.

Secretary England, your personal involvement in the personnel system set a tone of inclusiveness for which I commend you, and it led to a far more collaborative process than otherwise would have been the case. I look forward to hearing your testimony today.

We will then hear from Linda Springer, who is the Director of the Office of Personnel Management. Director Springer, you will continue to play an absolutely critical role in ensuring that the implementation of the new system is consistent with employees' fundamental rights and to the merit system on which our civil service is based.

We will then hear from the Comptroller General, David Walker. Mr. Walker, you have been a leader in personnel reform, both within the GAO and also across the Federal Government. We very much appreciate your efforts to ensure that government manages its human capital effectively.

I notice that our witnesses have brought advisors with them, and I will have you each introduce them, mainly because I always mispronounce George's last name. Secretary England, please proceed.

TESTIMONY OF HON. GORDON R. ENGLAND,[1] ACTING DEPUTY SECRETARY OF DEFENSE, U.S. DEPARTMENT OF DEFENSE, ACCOMPANIED BY BRAD BUNN, DEPUTY PROGRAM EXECUTIVE OFFICER, NATIONAL SECURITY PERSONNEL SYSTEM

Secretary ENGLAND. Madam Chairman and Members of the Committee, thanks very much.

First, I want to tell you I do appreciate the hearing and the opportunity to be here. I will tell you the hearings that we have had have been very beneficial to us, and our discussions with the members privately, with your staffs, have been very beneficial in formulating the NSPS system. And I do thank you, and I thank you again today because, once again, this will be helpful to us as we move forward.

You will, I believe, be impressed with the final regulations. I disagree, obviously, with Senator Akaka in terms of the final regulations. I believe they are very broad based, and they balance very well the needs of our employees, the needs of our Department, and frankly, the needs of our Nation. So we have worked very hard on this collaborative, open process to do the very best job we can for our employees, for the Department, and for the Nation.

[1] The prepared statement of Secretary England appears in the Appendix on page 39.

I am pleased that Linda Springer is here. She is our partner. OPM has been our partner since the very beginning, will continue to be so. And I appreciate the cooperation. We could not have done this without that partnership with OPM.

I also appreciate the fact that David Walker is here. The General Accountability Office actually started this process well before us in their own organization. So they have a lot of experience and lessons learned, and that has been very beneficial to us. Professionally, David and his staff have been most helpful.

I do have with me Brad Bunn, who is on my left. He is the Deputy Program Executive Officer for NSPS in the Department of Defense. And George Nesterczuk, who I also mispronounce his name, but he has gotten used to it from me. He is the principal advisor at OPM and has worked with us on a daily basis, and they have, frankly, a lot of the detailed knowledge and are here and available to answer detailed questions of the Committee.

I thought it would be appropriate to give everyone an update of where we are on the NSPS system because it has been a rather dynamic event. The final regulations, as you know, Madam Chairman, were published in the *Federal Register* on November 1. And that publication initiated a 30-day period that the act prescribed for congressional review prior to implementation.

As you probably also know, several unions recently filed a lawsuit challenging some aspects of NSPS. Yesterday, the DOD, OPM, Department of Justice, and the unions announced an agreement. That agreement is a timeline for the legal actions and how NSPS will proceed as the lawsuit is adjudicated. Again, I believe it is indicative of this collaborative process we have to work together.

So, for example, while the lawsuit is in process, we have all agreed that DOD will continue the training on NSPS and will continue collaboration with them on implementation details. So we will continue some aspects of this as we move through the legal process. And working together, hopefully, we will get through that process quickly.

We have agreed at DOD to delay implementing the NSPS until February 1, 2006—so, basically, 2½ months—and again, with the understanding that we would continue this collaborative process in terms of implementation details, and that can start any time after December 1, 2005, those collaborative discussions.

Also those implementing details, the issuances which everybody, of course, is anxious to hear about, they would not be effective until after February 1 also. So we have basically moved the program to the right while we work our way through the legal processes but, in the meantime, have agreed on certain things to work together regarding implementation.

So, frankly, I feel that is a step forward in terms of proceeding with the program and not just being stopped by the courts. So I believe that is a beneficial move for both of us.

Now, importantly, by the way, I will also say when Senator Voinovich came over and discussed the program with us, that was about 18 months ago—we said then this would be an event-driven and not a schedule-driven program. So while we have schedules on the programs, we do not proceed until we have completed all of the events.

And this is the same situation. When we get through the lawsuit, we will be ready to go in February. So it is event-driven. We are not just forcing dates on the program. And that will continue to be fundamental premise of the program. When we are ready, we continue to proceed to the next step.

I am not going to repeat all of the collaborative processes. We have had those discussions in the past. I mean, literally, all of the town hall meetings and everything. And I am not going to go through all of the benefits of NSPS. Rather, I will just wait for the discussion and the questions.

But I do want to comment to the Members of the Committee that the Department has over 20 years of experience with these transformational personnel demonstration projects, and that has covered almost 45,000 employees. So this is not something that is new for us. We do have a significant background and experience in bringing about these kinds of personnel changes.

Now those projects have clearly shown that the fundamental workforce changes being implemented will have positive results on the individual career growth and opportunities of our people on the workforce responsiveness and innovation. It will have a multiplier effect on mission effectiveness, and it will be good for our employees.

It is a performance-based culture, and in that kind of a culture, the contributions of the workforce, frankly, are more fully recognized and rewarded, which is very important in terms of motivation of our people.

Now let me mention one major incentive that the Congress has in the act, and I would like to mention it because, frankly, I believe it is very important in all of these discussions. The Congress wisely included in the NSPS enabling statute that in November 2009 the authority for the labor relations provisions expires, unless it is extended by the Congress. So all of the pressure, frankly, is on the Department of Defense to perform.

I mean the consequence is that, frankly, the Department has 4 years to demonstrate to the Congress that we can exercise the authorities you have given us and the flexibilities you have given us in a very responsible manner or the labor relations portion will revert back to the current Chapter 71 rules. So there is a very large check and balance in this system.

And as I said before, it is a huge incentive. I mean, it puts the pressure on the Department of Defense to do this right. And we intend to demonstrate to you on an ongoing basis, we are pleased to do this in this open environment that we have fostered, that we will demonstrate to you, effectiveness and fairness, of the new system over the next 4 years.

Now there is still much work to do. As everyone has mentioned, it has been hard work getting to where we are with the final regulations. But frankly, that has been the easy part. The hard part is still to come, and that is the implementation, and we know that. We know all of the challenges lie ahead, and we are preparing for that.

But again, we have had pilot programs that have helped us over the past 2 decades. I am confident. I am also convinced that this is a win-win-win program. I mean, this is a win for DOD. It is a

win for our employees, and it is a win for our Nation. And I am just pleased to have been able to have had a role in bringing this about.

So, Madam Chairman and Members of the Committee, again I thank you for the opportunity to be here today. We do look forward to this continuing dialogue. You will find us completely open, completely responsive. Our sole objective is to have a system that is better for the Nation.

So, again, I thank you for the opportunity to be here. I look forward to your questions today, and also I look forward to this continuing relationship as we all go forward on this journey.

Thank you very much.

Chairman COLLINS. Thank you, Mr. Secretary.

Before calling on Director Springer, I would like to turn to Senator Levin, who has joined us. As I mentioned in my opening statement, Senator Levin worked extremely hard on these personnel issues, and we collaborated on a bill in 2003. Senator Levin brings a great deal of expertise to this issue, and I would like to call on him for some opening remarks.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Madam Chairman, thank you for your extraordinary leadership in this area. I may have collaborated with you, and I did so and do so proudly. But you are truly the one who has played the instrumental role in shaping what we had hoped would be a positive advance.

I am afraid that it has not yet turned out that way. And despite hard work over many months devoted to this project by so many people, I just don't believe the Department has met the challenge which we laid out for it.

And I am also afraid that when we look back over the years ahead, the chances are real that we are going to find the Congress and the Department scrambling to try to patch up the problems that are arising out of the flawed implementation of the National Security Personnel System.

The final regulation, so called, published by the Department of Defense earlier this month is very incomplete. It states that a long list of critical issues will be addressed in future so-called implementing issuances. These issues include the establishment of specific career groups and pay bands, the procedures for assigning pay to individuals, the procedures for the assignment, reassignment, reinstatement, detail, transfer, and promotion of employees within the personnel system.

We were told as long ago as last May that the Department had prepared a huge package of implementing issuances, which would be made available in the near future. That was the near future back in May. Now, more than 6 months later, the Department is preparing to implement the system in a matter of weeks, and these implementing issuances are yet to be published.

The Department's approach of waiting until the last minute to release the nuts and bolts of how the system will work is not a sensible or a rational approach. These issuances are an essential part of the establishment of the system. That is the bottom line.

And in my judgment, this is not consistent with the statutory requirement that the new system be planned, developed, and implemented "in collaboration with and in a manner that ensures the participation of employee representatives." And it is going to make it difficult also for the Department, in my judgment, to train the thousands of managers and the tens of thousands of employees who are going to need to operate under a new system in just a matter of a few weeks.

The first test, as a number of us have said over the years, of any new personnel system is how it is going to be received by the people who live under it and who have to operate it. And I just don't believe the proposed system is likely to be successful without the broad support of the employees of the Department.

The Department has insisted on including new rules that would deprive its civilian employees and their representatives of many of the rights that they enjoy today. And the first thing that happened when the Department issued its final regulation implementing this system is that it was sued by its own employees. That is not much of an indication that the new system has the broad support that it is going to need.

The lawsuit challenging similar regulations issued by the Department of Homeland Security has resulted in a court order enjoining the Department from implementing its proposed new labor relations system. And despite some cosmetic changes in the final regulation, the Department of Defense's regulation contained that same flaw.

Even if the District Court's order is overturned on appeal, the District Court judge's words, I am afraid, speak volumes about both the Department of Homeland Security's regulations as well as the Department of Defense's regulations, and this is what the District Court judge wrote.

"The regulations fail because any collective bargaining negotiations pursuant to its terms are illusory. The Secretary retains numerous avenues by which he can unilaterally declare contract terms null and void without prior notice to the unions or employees and without bargaining or recourse. A contract that is not mutually binding is not a contract," she wrote.

"Negotiations that lead to a contract that is not mutually binding are not true negotiations," she said. "A system of collective bargaining that permits the unilateral repudiation of agreements by one party is not collective bargaining at all." That was Judge Collyer.

So regardless of whether the Department's regulations are ultimately upheld or overturned in the courts, I think it would be a mistake to believe that a system that deprives employees and representatives of those employees of that kind of meaningful participation, as described by Judge Collyer, will succeed in gaining the widespread acceptance which is so important to a successful personnel system.

Again, I am very sorry that I arrived late, Madam Chairman, and I appreciate your allowing me to insert this opening statement in the middle of the other presentations. And I do want to, though, say that I think the people who have been involved in this process have personally been open. And I appreciate, for instance, Sec-

retary England's willingness to have a long dialogue, and he has done that. I commend him for it.

Even though the product is not one that I think is acceptable, I think I would be the first to acknowledge that there has been a spirit at least of openness in the process, although the product is not one that I find acceptable.

Thank you.

Chairman COLLINS. Thank you.

We will now proceed to Director Springer's testimony.

TESTIMONY OF HON. LINDA M. SPRINGER,[1] DIRECTOR, U.S. OFFICE OF PERSONNEL MANAGEMENT, ACCOMPANIED BY GEORGE NESTERCZUK, SENIOR ADVISOR ON DEPARTMENT OF DEFENSE, OFFICE OF PERSONNEL MANAGEMENT

Ms. SPRINGER. Thank you, Madam Chairman and Members of the Committee.

I am pleased to be here this morning to discuss the development of the final regulations that would establish the National Security Personnel System (NSPS) at the Department of Defense (DOD) and the continuing role of the Office of Personnel Management (OPM).

Our collaboration with the Department has been a joint effort, and I do thank Secretary England and his staff for his leadership during this undertaking. As many have mentioned, it really was a turning point in the process and in the openness.

I also want to acknowledge and thank OPM's principal participant in that process, George Nesterczuk. He joins me here today, and his work on this effort really has been, I think, instrumental in leading to a product that OPM feels preserves the protections that the employees deserve.

I would also like to express my gratitude, Madam Chairman, to you, to Senators Voinovich, Lieberman, and Akaka, as well, for your continued interest and involvement in this process. And we will look forward to an ongoing involvement to help ensure that this contemporary and flexible human resources (HR) system maintains the proper balance between the mission requirements of the Department and the needs of the workforce.

From the outset, OPM has been interested in using an open and inclusive process to develop these regulations, and we joined the Department of Defense in reaching out to a broad community of interests. Before the regulations were even proposed, we met extensively with labor organizations to solicit their views.

The Department held extensive town hall meetings with employees. They had over 100 focus groups with both bargaining and nonbargaining unit employees, with representative groups of managers and supervisors, and with various subsets of human resources practitioners and labor and employee relations specialists.

When the NSPS proposal was published, we received over 58,000 public comments. We had in-depth meetings with the DOD unions, and OPM participated in all of those for nearly 2 months, about twice the amount of time provided for the meet-and-confer period of 30 days in the statute.

[1] The prepared statement of Ms. Springer appears in the Appendix on page 50.

We held numerous meetings and briefings with congressional staff, and we have met with veterans groups, public interest groups, and other stakeholders. All of these meetings and sources of input were of great benefit as the final changes were crafted to the regulations.

The NSPS authorizing statute called for the creation of a contemporary and flexible system to support the DOD mission. Putting mission first is a fundamental guiding principle inherent in the design of NSPS. But at the same time, OPM's role was to make sure that there was a proper balance between that requirement and the needs of the workforce. After all, it is the people in government who make the government work.

We also recognize that the government's HR system must protect and promote fairness and transparency and guarantee equal access for all. In modernizing the HR system for the Department, we made sure that these core values are sustained.

So, in that regard, NSPS not only guards against prohibited personnel practices, it continues to protect whistleblowers from recriminations. It maintains all of the safeguards against discrimination. It fully ensures employee rights to due process, and it maintains their right to representation and to bargain collectively. Finally, the NSPS honors and promotes veterans' preference, a privilege that has been dearly earned through personal sacrifice by our men and women in uniform.

The enabling legislation also seeks to ensure that the NSPS supports the DOD mission and does so with a pay-for-performance system that meets a number of objectives. I think we have accomplished these objectives.

NSPS promotes accountability. It does so through a performance management system that is linked to the agency mission that encourages excellence and rewards achievement. NSPS streamlines staffing and workforce-shaping rules that put the right person in the right place at the right time. NSPS promotes compensation based on market-sensitive means to pay-setting and adjustments that reflect performance and reward results.

NSPS is flexible. It allows the Department to compete for talent, and it provides greater latitude in making changes as mission priorities evolve. With DOD, we have blended these features into NSPS while fully preserving, and I say this again, the due process rights of the employees. It achieves the balance of employees' rights to representation and collective bargaining with the mission requirements of the Department.

Secretary England mentioned earlier that many of these concepts and elements crafted into the regulations have come from previously tried and true ideas. In crafting the NSPS, we were mindful of the challenges inherent in transforming a new organization the size of the Department of Defense, and to help mitigate that, we turned to many of the ideas that have already been used for decades, in some cases, in the Department.

DOD has been a laboratory, in effect, for testing new concepts in personnel management for years. Over 45,000 DOD employees have been covered under various alternative personnel systems. Many of the lessons that we have learned from those experiences helped to inform the NSPS regulations. OPM has documented

many of those lessons, and we have recently commented on those at hearings, and that document is available publicly.

As we move into the implementation phase for NSPS, we are anxious for DOD to succeed. Implementing it is a huge undertaking, and the Department civilian staff comprises roughly 40 percent of the Federal employee workforce. But in light of DOD's years of experience, we are confident the Department will succeed.

Many of the elements already necessary for success are in place. In effect, they have a running start on this process. Training is of the utmost importance, and ultimately, it will be a major key to success.

DOD is well versed in developing training strategies and training methodology. They probably do it as well, if not better, than almost any other Cabinet agency. They do it routinely. They do it well. And they have a robust existing training infrastructure.

Furthermore, they are uniquely situated in being able to draw on the in-house expertise that they have developed during those previously established alternative personnel systems. They don't have to go out and just buy expertise. It is already in place.

OPM will support the Department in every way, throughout the entire process. Our job didn't stop with the issuance of regulations. It has just begun. And we will make sure that this implementation occurs smoothly and fairly in the coming months and years.

While we are enthusiastic and supportive of DOD, we are nevertheless mindful at OPM of our broader responsibilities as the central human resources management agency in the Federal Government. Accordingly, we stipulated in the regulations a number of specific matters that are subject to continuing coordination between us and the Department in such areas as classification, establishing qualification standards, creating new appointing authorities, and in setting and adjusting pay, just to cite a few examples. The complete list is actually found in Section 105 of the regulations.

Furthermore, the statute restricts initial coverage of the NSPS to no more than 300,000 Department employees. That is the first spiral. Before that can be extended, the regulations require the Department to coordinate with OPM on certification that the Department is, in fact, ready to continue to extend that. OPM's role as a guarantor of the merit system will never change. That is an assurance role that we have and that you look to us for, and we take it very seriously.

Our partnership with DOD has given OPM a valuable experience as we learned firsthand what aspects of our current human resources management systems may not be in the best interests of the men and women of the Federal workforce. The enhancements gained by the Department of Defense will be sought, we believe, by many other agencies and members both at the leadership level and the employee level. They deserve the same benefits, and we believe that there are many benefits for employees in this new system. We believe that other agencies will look to us to extend those, and we are ready to help to do just that.

We look forward to working with the Congress to help ensure that all Federal workers will have the same advantages of a contemporary personnel system that the DOD employees will have.

That concludes my remarks, and I look forward to your questions, Madam Chairman.

Chairman COLLINS. Thank you very much.

I am now going to turn the gavel over to Senator Voinovich, who will be the Chair for the remainder of the hearing.

I want to apologize to Mr. Walker and also to the second panel that I am going to have to leave now. I do want to assure all of the remaining witnesses that I have read your written testimony.

And I also want to tell my friends in the audience from the Portsmouth Naval Shipyard in Kittery, Maine, that I have spotted you out there, and I am very aware of your deep interest in this issue and in this hearing. So thank you for coming down from Maine to be here today as well.

Senator VOINOVICH [presiding.] Thank you, Madam Chairman.

Mr. Walker.

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

Mr. WALKER. Madam Chairman, Senator Voinovich, Senator Levin, and Senator Akaka, it is a pleasure to be back before you again, this time to talk about the final regulations for the Department of Defense's National Security Personnel System.

I would note at the outset that DOD has made a number of positive changes from the proposed regulations. We believe that DOD's final regulations contain many of the basic principles that are consistent with proven approaches to effective and modern human capital management practices. For instance, the final regulations provide for a flexible, contemporary, market-based, and performance-oriented compensation system, such as pay bands and pay-for-performance approaches.

They also give greater priority to employee performance in retention decisions in connection with workforce right-sizing and reductions-in-force. They also provide for the involvement of employee representatives throughout the implementation process, such as having opportunities to participate in the development of implementing issuances. However, as we all know, future actions will determine whether such labor relations efforts will be meaningful, effective, and credible.

Despite these positive aspects of the regulations, there are several areas of concern that I would bring to the Committee's attention. First and foremost, DOD has significant work ahead of itself to define the important details necessary for effectively implementing this new system, such as how employee performance expectations will be aligned with the Department's overall mission and goals and other measures of performance.

Also what safeguards DOD will incorporate into the new system in order to assure consistency and provide general oversight of the performance management and pay-for-performance systems to assure that they are implemented in a fair and transparent manner. These and other critically important details must be defined in conjunction with key stakeholders.

[1] The prepared statement of Mr. Walker with attachments appears in the Appendix on page 60.

Second, the regulations merely allow, rather than require, the use of core competencies that can help to provide consistency and clearly communicate to employees what is expected of them.

Third, although the regulations do provide for continuing collaboration with employee representatives, they do not identify a process for continuing involvement of and feedback from individual employees in the implementation of NSPS.

Going forward, GAO believes that the Department of Defense would benefit from developing a comprehensive communication strategy. We also believe that DOD should assure that it has the necessary institutional infrastructure in place, including adequate safeguards to assure the fair, equitable, and nondiscriminatory implementation of the program, before this new authority is operationalized.

We believe that DOD should develop procedures and methods to initiate implementation efforts relating to the NSPS on an installment basis. And, in fact, it is my understanding they plan to do so through a so-called spiral process.

We do, however, believe that it would be prudent for certain of the key implementation issuances to be subject to notice and comment. There are a lot of very important details that have yet to be defined. We have gone through this process, Mr. Chairman, and I can tell you that while not every important issue should be subject to notice and comment, there are a number of significant gaps here that I believe should be subject to notice and comment rather than just consultation.

While GAO strongly supports human capital reform in the Federal Government, how it is done, when it is done, and the basis on which it is done can make all the difference as to whether or not such efforts are successful. DOD's regulations are especially critical and need to be implemented properly because of the potential implications for related government-wide reform.

In this regard, as I have testified before, in our view, classification, compensation, critical hiring, and workforce restructuring reforms should be pursued on a government-wide basis both before and separate from any broad-based labor management or due process reforms.

Thank you, Mr. Chairman. And I am happy to answer any questions that you and the other Senators may have.

Senator VOINOVICH. Thank you very much, Mr. Walker.

One thing I would like to point out is that this Committee had real concern that OPM would not be involved with the NSPS. Just to refresh everyone's memory, when the NSPS system was considered by Congress, it went through the Armed Services Committee, went to the floor, and there was a great deal of concern on the part of this Committee that we didn't have an opportunity to participate in developing the legislation.

We did have a hearing and made some revisions. Senator Akaka, I don't know whether you were on the conference committee or not, but I know that our Chairman was, and she really worked hard to make sure that our input was folded into the final legislation. I just want to say that our concern of OPM not being involved didn't happen.

I think everyone should understand that the regulations being discussed today have been published by the Department of Defense and the Office of Personnel Management.

Second, I think I should underscore the point that Secretary England made today, that if in November 2009, the labor-management system is not working, it will revert back to Title 5. So there is going to be a great deal of pressure, I think, on the Department of Defense to make sure that this is a successful endeavor.

I think I should underscore also that you have the ball, Secretary England. But the fact is that whether this is a success or failure is going to really rest upon your shoulders and on the shoulders of the Office of Personnel Management.

Secretary England, monitoring of the NSPS by DOD and OPM from the initial stages of implementation is imperative. We must identify and address any deficiencies in the system before they become actual problems. In other words, problems will occur. We know that, and changes will have to be made. Being prepared to make adjustments will have a major impact on the receptivity of the employees to the new system. And early on, it is going to be very important.

I tell folks that you never get a chance in this business to make a second impression. So the first impression about how this is going to work is going to have a lot to do with how successful you are, particularly about some of the concerns that have been expressed by Senator Akaka in his opening statement. I am sure we are going to be hearing a lot more concerns when the union representatives come to the table.

I would like to know how you are going to monitor the implementation to make sure that you have got a finger on the pulse as it moves on. I would also like to hear from Linda Springer on the same issue.

Secretary ENGLAND. Senator, it is a very key point, and I thank you for the opportunity to discuss it because, recognizing that the implementation, we do have to make sure that this works when we pull the trigger. We put together a spiral implementation program, and that spiral program is designed for feedback. I agree with Mr. Walker in this case. Employee feedback is very valuable.

So we are going through a spiral process specifically to get feedback so that we can make that a learning experience, and we will do that throughout 2006. And we do not then actually implement like pay-for-performance, the HR system, until the following year. So if we have issues as we proceed, again, we will listen to our employees. I mean, we will get that feedback, and we will plug it into the system.

Now also you mentioned the soft skills. And frankly, to me it is always the "soft stuff" is the "hard stuff." Now recognizing that, we have been training people in the soft skills literally for the last year and a half, and we are now in training of the trainers to be ready for this.

So we have had extensive training programs to be ready. We have spiral programs designed for feedback, and we are looking forward and expecting to get feedback from employees that we can then use to modify the system appropriately. So we have those checks and balances built into the system.

We also have vehicles for employees to communicate with us. And we have Web sites. We have training tools on the Web. So we have opportunities for them to feed back directly into the system.

And as Ms. Springer commented earlier, we received 58,000 comments just during our preliminary regulations, which we evaluated and considered at that time. So this whole system has literally been put together for collaboration and feedback because we know that we need to learn as we go. And I just want to tell you, we are very receptive to do that. We want this system to work, and those venues are built into the program, Senator.

Senator VOINOVICH. Have you sat down with the employee representatives to talk about a formalized consultation so that not only do you get feedback from the employees, but also from the folks that represent them?

Secretary ENGLAND. I don't know how formalized because, again, we will be in the issuances. We have a collaboration period between now and February 1 that we have agreed to in terms of the issuances to collaborate on that.

Senator, I will comment, I am not sure that ever in the history of the Department we have had the kind of collaboration and discussion between the leadership of the Department and the leadership of our unions that we have had during the past 2 years. We have had open channels of communication at every level, and our plan is to continue that. So, we will continue this program the way we have been doing it for the past 2 years, which is open dialogue.

Senator VOINOVICH. I would just like to ask one more question to follow up with Mr. Walker. You have led GAO through this. I don't know whether you have unionized employees at the Government Accountability Office, but do you have a formalized process for communication so that you get regular feedback, particularly in the initial stages when you implemented the new system?

Mr. WALKER. Senator, none of our employees are covered by a collective bargaining agreement. However, we have a very inclusive process for determining what our policies are going to be. We have a very rigorous employee feedback and evaluation process with regard to these types of changes.

Candidly, one of the concerns that I have is there are a lot of very important details that have not been defined in these regulations. For example, the nature of the performance appraisal and management system and what type of safeguards will be put in place to make sure that it is fairly, equitably, and credibly implemented.

Second, how the performance-based compensation system will work, what type of methodology will be used? If these issues haven't been addressed, it is hard to really get a sense for this full program. Furthermore, if they are not going to be subject to notice and comment, then I have a little bit of concern about whether or not you are going to have as much input as is appropriate to make informed judgments.

I note that not all of the individuals who will be subject to this new system are covered by collective bargaining agreements. My understanding is, a fairly significant percentage of DOD employees are not covered by collective bargaining agreements. How are their

views going to be considered if there is not going to be a notice and comment period?

Importantly, irrespective of what you finally decide to do—it is not going to be universally popular. I can tell you that right now; ultimately, you have to do what you think is right, not what is popular. You need to have feedback mechanisms to understand how it is being received and to try to continue to make improvements in future cycles.

Senator VOINOVICH. I would like to know what programs that you are going to put in place to get feedback. What mechanisms are in place for those in the initial stages?

And it would be interesting also to have you review what Mr. Walker has done. I am interested in metrics and determining whether or not NSPS is really working.

Secretary ENGLAND. We agree. Could I have Brad Bunn discuss a little bit some of the specifics in place? I think it might be useful.

Senator VOINOVICH. I am way beyond my time here.

Secretary ENGLAND. OK. So, Senator, we will follow up——

Senator VOINOVICH. No, Senator Akaka says it is OK. Why don't you do that? And then Senator Akaka, you will have 15 minutes or so.

Mr. BUNN. Mr. Chairman, I will be brief. My name is Brad Bunn. I am the Deputy Program Executive Officer for the National Security Personnel Program.

In my role as the deputy PEO, we have a formalized program evaluation process that we are standing up as we speak that will formalize how we are going to assess, evaluate how the NSPS is implemented and whether it is meeting the requirements set out both in statute as well as set out in our requirements document that we developed as part of the design process.

And that will include feedback mechanisms that are more formal than simply doing employee feedback sessions. It is also doing formal employee surveys, statistically valid surveys. It is monitoring the data systems so that we can monitor how the performance appraisal system is actually working out there, whether there is consistency, whether there are trends that are troubling. And we are standing that up as we speak.

We are also working with the Office of Personnel Management. They have a lot of experience in that area, as they did the evaluations for our demonstration projects. We are using a lot of the same methodologies that they used in evaluating those programs.

Thank you.

Senator VOINOVICH. Senator Akaka.

Senator AKAKA. Yes, thank you very much, Mr. Chairman.

Secretary England, it seems as though employee feedback certainly plays a part in this. Secretary England, Director Springer, and Mr. Walker, I have the deepest respect for you, and I look forward to continuing to work with you on this. I just want to speak my mind here on this particular subject.

Secretary England, I have been receiving feedback from constituents as well. And I know you have mentioned, and I thank you for this, that there are opportunities to receive feedback from employees. My question to you, after considering the kind of feedback I

have received, is why is there a strong opposition to NSPS by so many employees?

Secretary ENGLAND. Senator, I am not sure there is all that opposition from so many employees. I mean, there may be a small vocal number. But frankly, I find in my discussions with employees that a lot of employees are very excited about this.

This is an opportunity for us to, frankly, streamline the system. We have pay for performance, which is very positive. We can hire people, frankly, at more competitive rates. We can do it faster. There are a lot of attributes of this system, which is a very modern personnel system.

I mean, frankly, change is difficult. And no matter what this system was, no matter how we did it, frankly, people would be worried and concerned because it is a change to the system, and we understand that. So it will take a lot of interface with our employees for them to truly appreciate the benefits of this program.

But I am convinced this is a program that is good for all of the employees. We would not proceed if this was not good for our employees. At the end of the day, it is not about NSPS. NSPS is merely a means to an end. The end is to have a better, more highly motivated workforce, and NSPS is merely the vehicle to get there.

So, I mean, it is not really about NSPS. It is all about providing a personnel system that results in improved performance for the Department and better remuneration for our employees when they perform well.

So I will tell you, I am convinced that our employees will find this system very beneficial as it is rolled out and implemented.

Senator AKAKA. I thank you for your response, Mr. Secretary. You mentioned that this is from a limited group, but I just wanted you to know that I have been receiving feedback from a large group of Federal workers.

Secretary England, witnesses on our second panel state in their written testimony that under the regulations, DOD could institute a RIF, reduction in force, of a work unit and limit the RIF solely to employees with veterans' preference.

If this is true, it is an affront to the veterans the regulations claim to protect. Will you give us your assurance that the Department will not limit RIFs to employees with veterans' preference nor target veterans under the NSPS RIF process?

Secretary ENGLAND. Brad, I think you are more familiar with the specifics as that has been negotiated to conclusion. If I could have Brad answer that, Senator?

Mr. BUNN. Senator Akaka, we do have changes in our regulations with regard to the reduction in force procedures that we absolutely protect veterans' preference in both reduction in force and hiring. Veterans' preference is not diminished at all.

And in fact, if there was a situation where veterans were targeted in such a fashion, we would consider that to be a prohibited personnel practice, which remains illegal. So we have taken great pains to ensure that veterans' preference rights are preserved as they are today.

Senator AKAKA. Thank you so much for that. You know I am the ranking member on the Veterans Affairs. So I am hearing from that sector as well. Thank you.

Mr. BUNN. Yes, sir. I understand and appreciate that.

Senator AKAKA. Director Springer, DOD employees have discussed with me the need to recognize and reward teamwork in any pay-for-performance system. Teamwork is an integral part of the success of the employees working at any shipyard, especially Pearl Harbor Naval Shipyard.

I understand that the final regulations will recognize teamwork under NSPS. Can you explain how teamwork will be rewarded under NSPS and how outstanding members or poor-performing members of the team are appropriately awarded?

Ms. SPRINGER. Senator Akaka, I am going to address that at one level and maybe ask Mr. Nesterczuk to give you some details.

But let me just say I have been in systems where not just my performance increase, my salary increase, but my actual compensation and significant portions of it were affected by the performance of a team of which I was a part. It was not just my own performance. It was the whole team. And the result of that was that the whole team performed at a higher level than it otherwise would have because we had skin in the game, if you will.

And we worked better collaboratively. We had more communication than we ever would have. We had common goals. They were in writing, which was one of the enhancements, incidentally, as a result of our meet and confer. We listened to the requests of the union representatives about having performance requirements in writing that would be done as a team, in this case, as opposed to on an individual basis.

The reward, at the end of the day, was a function of close collaboration within the team structure. And it worked. And I think that in this case, it will as well.

Now I am going to ask Mr. Nesterczuk if he could comment just a bit further on the details?

Mr. NESTERCZUK. The regulations envision team activities on the part of employees, although the performance evaluation is directed at an individual's performance. If the activity is a group activity, that is dealt with in the regulations. It is not a problem. It is recognized as a valid way to do business.

Senator AKAKA. My time has expired, Mr. Chairman. Thank you.

Senator VOINOVICH. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

Pay for performance is required by the law, which we have approved. But it could be a backward step instead of a forward step unless the Department is able to make distinctions in employee performance that are fair and meaningful. This system is vulnerable, bottom line.

It is vulnerable to those who would use it to reward loyalty over quality of performance, if it is used to provide pay and promotions to those who tell senior officials what they want to hear rather than what they need to know. So this is a system which can work either way. It can be a step forward, or it could be a step backward, depending on how it is implemented.

The track record of the Department of Defense has not been particularly good relative to pay for performance, which has been already in law established. The General Accountability Office said the following, that, "Most existing Federal performance appraisal

systems, including a vast majority of the Department of Defense's systems, are not currently designed to support a meaningful performance-based pay system."

In other words, we haven't done that well with existing systems where performance is supposed to be rewarded, and the Department of Defense did not successfully implement a performance management system which was established for senior executives, which is just a few thousand people. Congress had to step in earlier this year, enact special legislation barring the Department from automatically giving higher raises and bonuses to political appointees rather than to career civil servants.

I think you may remember this, Secretary England, where there was an automatic pay increase for political appointees. For everybody else, it wasn't automatic. Political appointees got it automatically. We had to step in and reverse that. That was a misuse of a performance-based system. So trying to implement a performance management system for half a million civil servants is exponentially more difficult than what was permitted there.

So let me first ask you, Mr. Walker, what is the likelihood that the Department of Defense is going to be able to institute a system that makes meaningful distinctions in employee performance and is accepted as fair by the Department's employees in time, and this is a timing question now, for the projected launch of the new system in the next few months?

Mr. WALKER. It is possible to do that, Senator, and it can and has been done. I have not seen the performance appraisal systems that are associated with the Spiral 1 process. We would be happy to take a quick look at them to be able to provide an informed comment on it.

I will tell you this, if you don't have modern, effective, and credible and, hopefully, validated performance appraisal systems that provide meaningful feedback to employees to help them maximize their potential, that result in meaningful distinctions in performance, then you shouldn't implement pay for performance unless and until you have that.

I can't comment on the specific ones here because I haven't seen them. However, I believe it is critically important that they be in place before pay for performance is implemented.

Senator LEVIN. How long before?

Mr. WALKER. We have had a notice and comment period for our employees and at least, in the case of our analysts, used our new performance appraisal system at least one time before we went to a more pay for performance oriented approach.

They may be talking about using the current system they have. I don't know. Importantly, I don't know whether or not the current system would meet those criteria, but I would be happy to take a look.

Senator LEVIN. Let us ask Secretary England. Will that be shared with the GAO?

Secretary ENGLAND. Certainly, it will be shared. Everything we do is shared, Senator.

Senator LEVIN. No, but I mean in advance of them being issued?

Secretary ENGLAND. Certainly. All the time. And they are always welcome to deal with us, and we have an open dialogue with GAO and OPM and everyone, Senator. But let me comment——

Senator LEVIN. Well, no. You are going to be free to comment. I will assure you of that. But I want to get back to what I think is a specific comment that was made by Mr. Walker, which is that they would be willing to critique those issuances, providing they get them. My question is will they get them before you drop them on the employees?

Secretary ENGLAND. Certainly. We would be happy to consult and have them help us in any way they can. We have already had those consultations.

Senator LEVIN. Now I interrupted you. So you go ahead.

Secretary ENGLAND. OK. Senator, I just wanted to clarify, we do not start pay for performance right away. Pay for performance will go through a 1-year spiral process. That is, there is no pay for performance sort of "for keeps" until literally 1 year.

So we will go through a spiral process. We will go through a mock process, so to speak. That is, we will have people go through it with employees so we make sure we have this system proven before we start it.

I also want to comment, we do have a requirement—and your comment about the prior system. You are absolutely right. It did not work. That is part of the reason that we are going to this new system because the old system was fundamentally flawed.

Senator LEVIN. I was talking about the performance-based part of the old system.

Secretary ENGLAND. Fundamentally flawed. I mean, there is no question about it. We were using old rules and trying to implement pay for performance. It didn't work, which is one of the reason we had to modify that system.

But, Senator, we will have a specific criteria. Each employee sits down with their supervisor and discusses specific criteria and how that will be measured. So there are both measurements and criteria to be agreed upon in advance, and then that becomes the basis for decisions later. So it is a quantitative approach, and there is also appeals built into the system.

So just for clarification, Senator, I do believe we have thought this out. And again, we will work closely with the Government Accountability Office in this regard.

Senator LEVIN. I just had one more question. Are you going to have a second round for this panel?

Senator VOINOVICH. No, I am not.

Senator LEVIN. Would it be all right if I add one question? I am over my time.

Senator VOINOVICH. Yes, why don't you? Sure.

Senator LEVIN. The DOD's final regulation provides that, "Any provision of a collective bargaining agreement that is inconsistent with implementing issuances is unenforceable on the effective date of those issuances." And according to your Web site, the term "issuances" includes Department directives, directive-type memorandum, DOD instructions, administrative instructions, and publications including catalogues, directories, guides, handbooks, in-

dexes, inventories, lists, manuals, modules, pamphlets, plans, regulations, and standards.

Now, Judge Collyer—who, by the way, was an appointee of President Bush, current President Bush—who is an expert on labor law, served as general counsel to the National Labor Relations Board in the Reagan Administration, struck down a similar provision in the regulations of the Homeland Security Department last summer. I have read some of what she said in my opening statement.

But I am just wondering, Secretary England, why you are retaining in your regulations a provision which specifically was held by Judge Collyer to make collective bargaining negotiations pursuant to its terms "illusory." I am wondering if you could comment on that, or your lawyer?

Mr. BUNN. I would be happy to. I am not an attorney.

Senator LEVIN. It says "counsel." But you are not?

Mr. BUNN. Yes. It is more like consigliere maybe.

Senator LEVIN. I think we owe you an apology for labeling. I am a lawyer. So I can say this. [Laughter.]

Mr. BUNN. I accept your apology, and I am flattered as well.

Senator Levin, the implementing issuances are those instructions and directives that actually implement the National Security Personnel System. So they are limited to implementing the provisions of the regulation.

They are actually extensions of the regulations that will go through the continuing collaboration process that is actually based in the statute that says that there is an exclusive process for collaborating with employee representatives in the development, further development, and implementation of the system.

In addition, it was necessary to exclude those issuances from provisions of collective bargaining agreements in order to have a comprehensive uniform approach to implementing the system. So that is the purpose of giving that status to implementing issuances.

We did hear the concerns during the meet and confer process about unilaterally overturning collective bargaining agreements, and what we have done in the final regulation is we have limited the authority for issuing those kinds of directives and instructions to very few people in the Department, for example, the Secretary of Defense, the Deputy Secretary of Defense, principal staff assistants, and the secretaries of the military Departments.

So it is a very short list of people who actually have the authority to issue, promulgate those kinds of issuances that will have the effect of overturning provisions of collective bargaining agreements.

Senator LEVIN. I don't think it cures the problem. But nonetheless, thank you for you answer. Thank you, Mr. Chairman.

Senator VOINOVICH. My final comment would be that there is a lot of apprehension surrounding implementing issuances. I think Mr. Walker raised a couple of very good questions. The sooner that we see those, I think the better we will all feel. I think it is real important that in the process of finalizing the issuances, you touch base with some of the folks that are representing the unions.

I want to thank you very much. I still have many more questions I would like to ask. I am going to submit them to you in writing. But I think in fairness to the next panel, we should bring them forward. We also have a vote, Senator Akaka, at 11:45.

I really appreciate your being here today. I appreciate all of the time you have put in. We are looking forward to a successful implementation.

And Mr. Walker, we are going to be looking to you to continue oversight and to give feedback to us about how you view things are progressing. The more dialogue we can get between GAO and DOD, I think, the better. Thank you very much.

Secretary ENGLAND. Senator, thank you, sir.

Senator VOINOVICH. Testifying on our second panel today is Michael Styles, National President of the Federal Managers Association. Testifying on behalf of the United DOD Workers Coalition are John Gage, President of the American Federation for Government Employees, and Ron Ault, President of the Metal Trades Department of the AFL–CIO.

We are very pleased to have you appear today. And Mr. Schember is here to act as counsel for Mr. Gage.

Mr. SCHEMBER. Senator, thank you. I am here on behalf of the United DOD Workers Coalition and, in particular, my long-time client, a member of that coalition, the Association of Civilian Technicians.

Senator VOINOVICH. Thank you very much. And thank you for coming today. Mr. Styles, we will start with your testimony.

TESTIMONY OF MICHAEL B. STYLES,[1] NATIONAL PRESIDENT, FEDERAL MANAGERS ASSOCIATION

Mr. STYLES. Thank you, Mr. Chairman.

As we begin, I would like to echo Madam Chairwoman's remarks regarding your leadership, and your leadership also, Senator Akaka. Both of you have been staunch supporters of the Federal employee, and we certainly appreciate your dedicated work on our behalf.

I thank you for this opportunity to come before you today to present the views of managers and supervisors in the Department of Defense who will be subject to the final regulations for the National Security Personnel System. I am the National President of the Federal Managers Association. Our organization represents a preponderance of managers and supervisors at agencies throughout the Department, including naval shipyards, Air Force materiel commands, naval aviation depots, Marine Corps logistics bases, Army depots and arsenals, and so on.

The premise for creating any new HR system should be based on a mission-oriented approach which enhances the agency's overall operational capabilities. Too often we dwell on the negative aspects of why we need a new personnel system. Poor performance of employees or managers. Even the statement that we have to get the drunks out of the Federal workforce in an appropriate fashion.

I have traveled around the country and observed the men and women of America's workforce. They are an incredibly talented group of individuals who are doing a great job of supporting our war fighters. These individuals are fully engaged in fighting the war against tyranny in Afghanistan, Iraq, and many other locations throughout the world.

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

We talk often about hiring the best and the brightest. Quite frankly, just looking around this room, you can see that many of the best and brightest are represented here. My thanks to them for the work that they do for America on a daily basis. To keep knocking them all of the time is rhetoric we don't need. It only serves to undermine the morale of our employees and the good work that is being done throughout the Department of Defense and the Federal Government.

Our mission should not only be to hire the best and brightest, but to retain them as well. Market-based pay and pay banding lend themselves to these goals. One of the false assumptions in the critique of the current system is that employees receive an automatic increase in pay whether they are performing well or not. This simply is not the case.

Any supervisor who has an employee whose performance is not up to standard has the ability to deny that person a pay increase. We also have a process of rewarding high-performing employees. However, if there is not enough money in the budget, you can't adequately reward deserving individuals in any system.

The anticipation of the release of the final regulations that will govern the management system for human capital in DOD is over. The National Security Personnel System has finally been outlined, with many details yet to come. As the regulations even stipulate, detailed accounts of the classification, pay and pay administration, performance management, staffing and employment, and workforce shaping or reductions in force remain to be seen.

However, we remain concerned with two key additional components that could make or break the new system, training and funding. Developing a human resources system from the macro view provides a good framework for analyzing the final regulations. But successful implementation comes from providing managers and employees with the skills necessary to manage the new system. In order to do this, we need a comprehensive ongoing training program that is funded at appropriate levels.

While the training plan is in place and we have been assured that funding is available for that training, given our current state of affairs, we are still apprehensive about the availability of those funds. Even this year, Congress cut DHS's request for the personnel system funding by $20 million, despite the efforts of many Members of this Committee.

Further, we must stress the fact that this must be an ongoing training and not just a one-time hit. Managers and employees must be aware of their new responsibilities, and the leadership within agencies and from Congress must reassure the men and women on the ground that they support their efforts through adequate funding.

When we talk about funding, we are talking about the entire budget. We want to ensure that the dollars allocated for HR training are not diverted for other purposes, such as skills or vocational training and vice versa.

We support the idea of pay for performance. We always have and always will. Employees and managers should be compensated properly for their performance. Nonperformers should not receive any

pay increase for their lack of performance, and high performers should be rewarded accordingly.

The DOD has long been a proponent of total quality processes throughout all agencies. All stakeholders must work in a collaborative manner in order to ensure that we create the most efficient organization and provide the American public with the finest goods and services.

Managers and employees must work together in determining what mission-oriented goals and objectives an employee is responsible for. By working together on these objectives, you have included the people closest to the process and the strategic vision—our employees and our managers.

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

Evaluations must be objective in nature and utilized as a positive tool in increasing the effectiveness and efficiency of the organization. We support the Administration's proposal under job classification for positions to be grouped in broad career clusters and pay schedules based on the nature of work, career patterns, and competencies.

We are especially pleased with the design of pay bands, specifically for managers and supervisors, and a separate pay band for science and technical professions. Too often people move into management ranks from highly technical arenas for the sake of upward mobility. Within this system, however, we will be able to reward high achievers in those fields to prevent a worst-case scenario of creating an ineffective manager and losing a highly competent technician in the field.

However, if we just combine two GS levels into one pay band, that can be helpful for initial hiring, but it doesn't allow us to compete at the highest levels, nor is it true market-based pay if you don't raise the levels of funding. We cannot compete with companies like Hughes Aircraft, General Dynamics, McDonnell Douglas, or Lockheed Martin for exceptional talent unless we are willing to raise our own bar.

According to the Bureau of Labor Statistics, the average pay gap still remains at 32 percent between public and private sector. While we recognize that some jobs in the Federal sector may exceed the private sector wage, the majority of Federal sector jobs does not. Market-based pay should compare like occupations in order to combat this.

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. In fact, we have met with our union counterparts on numerous occasions to discuss common areas of concern regarding the proposed regulations. We have shared those concerns with OPM, DOD, and in testimony presented before Congress.

The new system has relegated the authority for determining collective bargaining rights to the Secretary. Toward this end, rec-

ognition of management organizations such as FMA is a fundamental part of maintaining a collaborative and congenial work environment.

Title 5 CFR 251 allows FMA, as an example, to come to the table with DOD leadership and discuss issues that affect managers and supervisors like these regulations. While this process is not binding arbitration, the ability for managers and supervisors to have a voice in the policy development within the Department is crucial to its long-term vitality.

There has also been a commitment on the part of OPM and DOD to hold close the merit system principles and allow for employees and managers to seek out the independent third-party review of grievances in cases. We cannot stress adherence to and the importance of these time-tested standards and the Merit Systems Protection Board enough.

We, at FMA, are cautiously optimistic that the new personnel system will be dynamic, flexible, and helpful in allowing DOD to respond to emerging threats when it needs to. While we remain concerned with some areas at the dawn of the system's rollout, the willingness of OPM and DOD 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 OPM, department and agency officials, union representatives, and Members of Congress.

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 have any questions, we would be glad to provide assistance.

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

TESTIMONY OF JOHN GAGE,[1] NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO, ACCOMPANIED BY DAN SCHEMBER, COUNSEL, ASSOCIATION OF CIVILIAN TECHNICIANS

Mr. GAGE. Thank you, Mr. Chairman. It is a pleasure to appear before you again today.

Mr. Chairman, you have our written testimony.

Senator VOINOVICH. And it will be made part of the record.

Mr. GAGE. And I would like to deviate from my remarks this morning to talk about some things that Secretary England said and especially with regard to an agreement that was made just yesterday. And I think it is illustrative of the frustration that the unions have, and also it is very illustrative of the assault on collective bargaining.

I met with Secretary England and his staff the night before the regulationss were put into the *Federal Register*. We were told that there were minimal changes to the draft regulations. For instance, on the mitigation, the standard for mitigation was changed from "wholly without justification" to "totally unwarranted." Clearly, a distinction between the two that my members don't understand.

[1] The prepared statement of Mr. Gage appears in the Appendix on page 118.

We were told that on December 7, the labor relations regulations would be implemented and our contracts would be void. I asked what parts of the contracts, and I received rather a flip answer that "read the regs." Obviously, I objected to Secretary England and said that it would be much more collaborative if we could sit down and go through these contracts and decide what provisions would remain.

Secretary England said that he thought that would be a good idea. Then we received our first issuance, which was the procedures for the new board, this board that is not set up yet. We were told that the board would be set up by December 7.

These regulations were incredible. They say that, first of all, they turned the whole process into one that would just gut additional union rights, for instance, and contradicted even the final NSPS regulations. For instance, in the final regulations, it comes down that the unions have a 60-day period to receive management's declarations of things that are not negotiable and given within this period to try to make our contracts in conformance, whatever that means, with the new regulations.

But then these competing issuances say that when the union is told that something is nonnegotiable right on December 7, they have 20 days to contest this to the new board. However, in the regulations, the whole idea of how negotiability is overturned. Under the FLRA right now, the union, when it is told that something is nonnegotiable, we put in a form, a filing with the FLRA, and then management is asked to deliver why the provision is nonnegotiable. This is completely turned on its head with these new issuances.

The union has 20 days to submit a brief of why an issue is negotiable before even being told why it is not being negotiable. It turns the whole due process around. Plus, with 357 locals, for us to respond in a 20-day period to really a large amount of issues that will be unclear and needing to be contested is simply impossible, and I believe the regulations were set up that way to make it impossible.

So I called, specifically, over to Mr. Curry, who put out these regulations, and explained to him the controversy between the NSPS and these new board issuances. He could not explain it.

We asked for an immediate meeting. We did not receive it. And finally, our attorneys had to go through the Justice Department attorneys handling the lawsuit to finally look at what the union was saying, and they agreed to move for a stipulation with the judge to postpone the implementation of the labor part from December 7 to February 1.

Senator not only do the regulations reduce the scope of bargaining, the implementing regulations further cut into the unions to be able to make any type of collective bargaining approach with management. And with the 60-day provision in the NSPS, when it says you have only that period to bring your contracts into conformance and implies that if you don't, that issue is gone forever from collective bargaining.

Senator this is a set-up. Our people are extremely concerned about it. There is no way for us to provide representation to our members in such a scheme. And I really resent Secretary England talking about collaboration when the regulations, the face of them,

come down to a set-up to take away the unions' rights in the future. Not only are our future rights taken away, but agreements that we have will be wiped out with the stroke of a pen because of completely unreasonable timeframes.

Senator we continue to urge this Committee to take legislative action to resolve our six flashpoint issues that we describe in our testimony. The scope of collective bargaining must be fully restored. DOD must not be permitted the ability to unilaterally void provisions of signed collective bargaining agreements. Any DOD specific labor management board must be independent from DOD management. Standards for mitigation of penalties need to be fair.

Performance appraisals must be subject to grievance and arbitration in order to ensure fairness. Strong and unambiguous safeguards must be established to prevent either a general reduction or stagnation in DOD salaries. And finally, sir, RIF procedures must be based beyond factors of a worker's single performance appraisal.

Senator, I wish I could relay to you the indignation of our members across the country because of these regulations and how they have been put out. The meet and confer, all the efforts we put into trying to make this process work have simply been discarded. I don't believe we have even been listened to.

Yet we have put very strong, practical suggestions on how bargaining could be speeded up, how we could do post implementation bargaining, how we could speed up adverse actions and discipline issues, how we would sit down and work out a pay-for-performance system. And we simply, the final regulations do not indicate any of these suggestions and show that it was truly a waste of time for us to work and try to deal with the Department on these very important issues.

Sir, again, we need congressional action. These regulations will hurt DOD. They will hurt employees. They will take away from the great mission in national security for years to come.

Thank you, sir.

Senator VOINOVICH. Thank you, Mr. Gage.

The only comment I have is that, at least from my perspective, we will take your concerns and ask the Department to respond. It is too bad that in hearings we have these groups separate.

Mr. GAGE. I would appreciate that, Senator. It is a very immediate issue.

Senator VOINOVICH. We will be glad to look into that. I know there is a great deal of apprehension surrounding the implementing of the issuances. So I just want to assure you that we will look into that.

Mr. GAGE. Thank you.

Senator VOINOVICH. Mr. Ault.

TESTIMONY OF RONALD AULT,[1] PRESIDENT, METAL TRADES DEPARTMENT, AFL–CIO

Mr. AULT. Good morning, sir. Good morning, Senator Warner. It has been a long time since you and I have had the opportunity to say hello, since the days that I was the President of the Tidewater,

[1] The prepared statement of Mr. Ault appears in the Appendix on page 148.

Virginia, Federal Employees Metal Trades Council, and I appreciate you being here this morning.

Senator Voinovich, the folks from Ross, Ohio, at the Fernald Atomic Trades and Labor Council told me this morning to make sure we passed along our greetings to you as well.

Senator Akaka, Matt Hamilton, our president from Pearl Harbor, said the same. So it is good to be here.

And Senator Voinovich, I want to just expound a little bit on what you just said a second ago, and it is a shame that there are just two completely different versions of events when you have a varied group of people testifying. And maybe some time in the future we could kind of have a debating society of actually what went on because I like their version a lot better than the version I was in for almost 2 years. [Laughter.]

Mr. AULT. I have got a 5-year-old daughter, believe it or not. And she comes and sits in my lap at night, and she asks me to read her books. And one of the books I read the other night was "The Emperor's New Clothes." And NSPS is the emperor's new clothes.

And the version I hear put forth in all those great spin words—and I am just an old country boy from Arkansas, so you have to forgive me. I am not as smooth and polished as some of the other speakers, and I am pretty direct. And if I offend anyone, it is not on purpose.

Senator VOINOVICH. May I interrupt you? The emperor's new clothes? That can describe a lot of stuff that we do here in Congress. [Laughter.]

Senator WARNER. But I have to say, Mr. Chairman, the NSPS may be taking off all your clothes with regard to pay. [Laughter.]

Mr. AULT. I do feel somewhat naked, Senator Warner.

But I do want to thank you folks for having an opportunity for the Department, the United Defense Workers to have an opportunity to address this Committee. We are a large and varied group of folks from 36 different labor organizations that are historic. I think the fact that DOD united organizations that have never been united before into a common cause is indicative of the way that we see things coming forth on NSPS.

They had a spin on the 58,000 public comments that was kind of interesting, like there was an outreach program that they went out and talked to all these folks. But I think the 58,000 public comments that I read, it was only 12 of them in favor of NSPS, and those 12 appeared to be from a group of retirees up in Columbia, Maryland, of all places. So the other 58,000 were people who were outraged that the system was being so radically changed from the present system that they know.

One of the things that I think is interesting in all of this is the National Security Personnel System is not about security. It is about control. As you know, the blueprint for NSPS was written by the Heritage Foundation folks in January some 9 months before September 11. The principal architect is George Nesterczuk. It was proposed not as a result of anything having to do with national security, but it is social engineering, and we are seeing some of that happening in the Gulf Coast as we speak, when different groups are trying to socially re-engineer the rebuilding of New Orleans.

There is a fundamental disconnect in the leadership of the Pentagon, embodied in the views of Secretary Rumsfeld, and the workers that we represent. Secretary Rumsfeld holds workers in disdain. He distrusts our motive. He demeans our knowledge and contribution. He clearly believes in command and control supervision. These are the views held widely within the Executive Branch, clearly articulated by Mr. Nesterczuk, the key architect of NSPS, reflecting a broad suspicion of unions—us guys—as interlopers at the work site.

Mr. Nesterczuk described unions in government, "At worst, they represent the permanent government, acting on its own self-interest rather than the desires of the electorate."

We have heard Secretary England, Secretaries Chu and Rumsfeld repeatedly defend the NSPS by describing what it is not. But we have also had in their own words a description of what it is, and that description should give lawmakers and citizens alike a substantial cause for alarm.

Again, in the words of Mr. Nesterczuk, "The core Federal workforce would include expert, highly compensated individuals who serve as executives and managers. The spokes of the new system would be a new class of temporary employees to deal with increased workloads or changing priorities of government and the professional experts to do the specific jobs or projects in-house. The rim would be contractors performing the great majority of the work on the rim of Federal Government."

A new class of temporary employees? These are the folks that we are supposed to represent. There is no description in our unit recognition of those employees, and we believe that is exactly the objective, is to get rid of these career civil service employees.

We strenuously disagree with the viewpoints. Giving voice to workers to both exercise their inherent rights and to express insight and experience about how work is accomplished can increase productivity and efficiency. Furthermore, and importantly, that attitude disparages the concept of freedom of association and representation as a fundamental workplace right and a significant element of a democratic society.

The Metal Trades Department's experience in the collaborative work process within the Department of Defense supports our contention. For example, we have negotiated with the Navy to develop a wide-ranging cross-training program within Federal shipyards a few years ago to improve efficiency and reduce downtime.

We collaborated with the Navy to establish an innovative safety and training program for crane operations, which standardized all crane operations Navy wide. We have also negotiated a highly regarded apprenticeship training program with the Navy to address the chronic problem of our aging workforce in the area of ship repair and maintenance.

And let me just say something about that really quickly. We represent wage-grade expert craft and trades people who are 65 percent ready to retire today. And I think that is something that needs to be looked at very carefully is you start messing with these folks' pay, and they can walk across the street to Newport News. They can go down the street to all these other shipyards that we represent, and we are 1,600 employees short right now at Avondale

and Ingalls—you can quickly get yourself in lots of trouble when you start messing with people's money.

Second, the institutions of collective bargaining and union representation present no threat to national security. Consequently, there is no reason to reduce or further limit the union representation for Defense Department personnel.

Senator WARNER. If you want to go ahead? Yes, we will do that. Sure. Why don't you announce how we are going to do this?

We didn't mean to interrupt you, but given our vote, we only have but 7 minutes left to make it. Mr. Chairman, you are going to go now. I am going to remain a few minutes to receive his testimony, and then you will be back. Is that correct?

Senator VOINOVICH. I think we are going to have to end the hearing.

Senator WARNER. Oh, I see.

Senator VOINOVICH. Yes.

Senator WARNER. Well, I would like a few minutes, if I may, Mr. Ault? I don't want to invade your time.

Mr. AULT. My time, we only get one shot at it. So I would like to finish.

Senator VOINOVICH. Let me inform them. I am sorry about the time, and I really wished that I had even terminated the first panel earlier than we did.

Mr. AULT. I like that term. [Laughter.]

Senator VOINOVICH. Well, there is certainly a difference of opinion about this new system. So I would assure the witnesses that I am going to follow through on some of the points that you made here today.

And Mr. Gage, I will get something back from them in writing.

And what I would like to do then is turn the gavel over to Senator Warner.

OPENING STATEMENT OF SENATOR WARNER

Senator WARNER [presiding.] Well, I would just say a few words. But I would say to my friends here—and they are friends. I have known you, Mr. Ault, and I have spent many a day with John Gage, and I have the highest personal and professional regard for your leadership and what you are trying to do.

But I would say about this Senator, when he makes a commitment, he keeps it. He is one of the most tenacious, hard-working Members of this body. Now, with that, you can leave. [Laughter.]

Mr. AULT. That is what Gene Branham says about him, from Ross, Ohio, too.

Senator WARNER. Yes, well, he is tough. Let me tell you.

Senator VOINOVICH. I refer to Senator Warner as "Squire." Thank you, Squire.

Senator WARNER. But you know, I have to draw on my own experiences in the Department of Defense, 1969 through 1974, 5 years as Under Secretary and Secretary of the Navy. It might surprise you, I had over 600,000 civil servants in the Department of the Navy, just the Department of the Navy. And we had a real rough war going on. We have got a rough war going on now.

I just remember, as I traveled through the halls of the Pentagon, that you would go into any office, and there is a uniformed person

and a civilian. They are side by side. There were partnerships. They worked together as a team.

And we cannot, as a consequence of NSPS or whatever we end up in the final phase of this, have that civilian feeling somewhat disenfranchised. Nor would the military person want that civilian to feel disenfranchised and not properly represented. And I can speak to the Department of Defense. I mean, I have devoted my life to it, and it is the greatest institution I have ever seen. Just magnificent. And we can't have that.

So we have here in the Congress to weigh in on this situation. It is very important. I also take note, and I just left the floor giving a speech about Iraq with Senator Stevens. The two of us old-timers teamed up over there just now. Our military people are at one of the highest OPTEMPOs ever experienced with a substantially lower number in uniform. And I could foresee fewer uniformed people in those desks and, therefore, having more reliance on the civilian team to fill those gaps.

So this is not a time to bring into the system any feeling that would result in a less than magnificent operation we have had all these years in the Department of Defense. So that is where I come from.

I will submit my questions which I have for the record. What I am concerned about, this pay thing, and the law prevents this reduction in a way, and I don't want to see us circumvent that. We can't do that.

I might add that the bill that we passed here, the Armed Services bill, which I have been working on with my colleagues on the Committee for a year, 98–0. That was a record vote in the history of the Senate. Every single senator supporting the men and women in the Armed Forces and their civilian partners of the Department of Defense. So let us take heart and see if we can't work this thing out and give us a shot at it.

Thank you for coming today. Sorry I haven't had more time to be here. But the Senate and the Congress have a wonderful way of trying to do everything at once, and we are all trying to do everything at once this week.

So this hearing stands in recess subject to the call of the Chair.

[Whereupon, at 11:59 a.m., the Committee was recessed subject to the call of the Chair.]

APPENDIX

PREPARED STATEMENT OF SENATOR CARPER

Thank you, Madam Chairman, for holding this hearing. It's important that we review this proposed new personnel system for the Department of Defense before it goes into effect. Like many of us on this Committee, I have major defense installations in my State and am eager to learn more about how the new system will affect my constituents.

I'd like to start out by thanking everyone at the Department of Defense, OPM, GAO, and the various organizations and unions representing the employees who'll be working under the new system for all of the work they put into these regulations. I don't know that any of us up here think the regulations are perfect—I have some serious concerns about parts of them myself—but I appreciate the dedication on the part of everyone involved in this process to getting it right.

I don't think I need to remind anyone in this room that the proposed regulations we're examining today represent a massive change in the way personnel at the Department of Defense are managed. Some of the changes may very well be worthwhile and could serve as an example for other departments and agencies.

Based on the feedback my staff and I have heard from Delawareans working at the Dover Air Force Base and elsewhere, however, some key parts of the regulations don't appear to be very fair. Fear of their upcoming implementation appears to be creating significant morale problems among Department of Defense employees—at least those I've been in contact with.

I mentioned the Dover Air Force Base, Madam Chairman. My colleagues and I from the Delaware Congressional delegation just spent months of our time keeping that base and the Delaware Air National Guard base in New Castle off of the final closing and realignment recommendations submitted by the BRAC commission. I know others on this Committee just finished similar work on behalf of defense installations in their States.

During that time—and during my entire time in the Senate, frankly—I haven't heard about a single instance in which a provision or procedure enshrined in current personnel law has hindered the ability of the Delawareans working in Dover, New Castle, or elsewhere to carry out their important national security missions.

This isn't to say that we don't need personnel reform at the Department of Defense. I'd be among the first to tell you that we'd be foolish not to look at how we can do things better government-wide as we look to recruit, retain, and effectively manage the most qualified Federal workforce we can find.

Part of what I hope to hear then, Madam Chairman, is at least some solid justification for the more controversial parts of this new personnel system.

Thank you again for holding this hearing. I look forward to hearing from our witnesses.

PREPARED STATEMENT OF SENATOR LAUTENBERG

Madam Chairman: Thank you for convening this Committee hearing to examine the final regulations for the new personnel system of the Department of Defense—the National Security Personnel System (NSPS).

The centerpiece of NSPS is "pay for performance" and the virtual elimination of Federal workers' right to bargain collectively.

The Administration "sold" this personnel system to Congress using the argument that the post September 11 period 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 September

11 is that there must be better communication between the senior levels of management and the rank-and-file.

I also question the apparent prejudice against workers who belong to labor unions.

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

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.

The GAO put out a report last summer stating that the Pentagon had not done enough to reach out to the 700,000 Defense civil service workers who would ultimately be affected by NSPS.

Several member unions last week announced a lawsuit against the Pentagon for doing away with collective bargaining rights for workers.

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 isn't going to build the DOD workforce—we need to keep America safe. I hope we can work together to fit the problems with this new plan.

Finally, Madam Chairman, I believe that our current whistleblower protection system is not working.

All too often, when devoted Federal employees make the hard choice to courageously report wrongdoing that threatens us all, they are viciously attacked by the bureaucracy and their careers are ruined.

Retaliating against whistleblowers is illegal, but the current system is so rigged in favor of management that whistleblowers prevail less than 10 percent of the time. That is wrong, and I will soon introduce legislation to do something about it.

I'm interested from hearing more from our witnesses on this issue as well. I welcome our witnesses and look forward to hearing their testimony about it. Thank you, Madam Chairman.

Statement of

The Honorable Gordon R. England

Acting Deputy Secretary of Defense

Senior Executive for the National Security Personnel System

Madam Chairman and members of the committee. Thank you for the opportunity to appear before you to discuss the final design of the National Security Personnel System (NSPS). More importantly, thanks to the Congress for granting the Department the authority to establish, in partnership with the Office of Personnel Management (OPM), a new civilian human resources management system to support our critical national security mission. Madam Chairman and the members of this Committee, my special thanks to you for your constant support. DoD and OPM have worked hard to balance our vital national security mission with protecting the interests of the Department's most valuable resource, our people.

Linda Springer, Director of the Office of Personnel Management and our partner in the development of NSPS, joins me today. DoD is grateful for Linda's leadership and the assistance of the OPM team, and we look forward to continuing to work with OPM during the transition to the next steps in this process. Also with me today are Brad Bunn, Deputy Program Executive Officer for NSPS, and George Nesterczuk, Linda Springer's principal advisor on NSPS at OPM, who will be pleased to answer your detailed implementation questions.

My thanks also go to David Walker and the Government Accountability Office for sharing GAO's experience with us throughout the development process. We look forward to their continued insight as we begin the implementation of NSPS.

Madam Chairman, you asked that we (1) address the process used to involve employees in developing the final regulations, (2) provide information on our training and communications programs and (3) other details associated with implementation.

Let me first give you an update on the status of NSPS implementation. As you are likely aware, several unions have recently filed a lawsuit challenging certain aspects of NSPS, including the process leading to the regulations. DoD is currently in dialog with the Department of Justice and the unions. As you are aware, NSPS is event driven, and the Department looks forward to working with everyone on the next steps.

NSPS development has been a broad-based, participative process involving not only employees, managers and supervisors, but also union partners, OPM, Congress, and numerous public interest groups. Prior to publication of the proposed regulations, over 100 focus groups were conducted involving hundreds of DoD employees. Over 50 town hall meetings were held all over the world to seek employee input into the system. Additionally, a series of meetings were held with our labor organizations. Following publication of the proposed regulations, the Department received over 58,000 comments during the public comment period from employees, managers, labor organizations, numerous public interest groups, and Congress. Many of the Congressional views, special concerns, and recommendations have been incorporated.

During almost two months of meetings with our unions during the meet and confer process, their concerns and comments were solicited to find common ground. As might be expected, all differences were not resolved. However, DoD and OPM gained a great deal from the process and, as a result, made meaningful changes to the regulations.

The culmination of this process was the issuance of the final regulations, published in the Federal Register on November 1. Preserving the fundamental rights of DoD employees was a critical design principle throughout the process. The final regulations preserve all core civil service protections, veterans' preference, and due process. NSPS leaves untouched the protections against discrimination, retaliation against whistleblowers, and other prohibited personnel practices, and ensures that employees may organize and bargain collectively. In the Department's judgment, the regulations strike a balance between employee interests and DoD's need to accomplish its mission effectively and to respond swiftly to ever-changing national security threats.

A core NSPS objective is to provide an environment where employees will be encouraged to excel, challenged with meaningful work, and ultimately recognized for their contributions. NSPS will also provide Department leadership with much needed flexibilities to properly compensate, reward, and develop employees based on performance and contribution to mission.

DoD has over 20 years of experience with transformational personnel demonstration projects, covering nearly 45,000 DoD employees. These projects

have shown that the fundamental workforce changes being implemented will have positive results on individual career growth and opportunities, workforce responsiveness, and innovation with a multiplying effect on mission effectiveness.

The unique national security challenges facing DoD today clearly point to the need for civilian workforce transformation: civilians are being asked to assume new and different responsibilities, to be more innovative, agile, and to be more accountable than ever before. It is essential that DoD provides the entire civilian workforce with modern management systems – particularly a new human resources system to support and protect their critical role in DoD's total force effectiveness. NSPS provides the Department the opportunity to meet this transformation challenge.

The NSPS regulations are designed to promote a performance culture in which the performance and contributions of the DoD civilian workforce are more fully recognized and rewarded. This new system offers the civilian workforce a contemporary pay-banding construct, which will include performance-based pay. As a result, the Department will be more competitive in offering salaries, and it will be able to adjust salaries based on various factors, including labor market conditions, performance, and changes in duties. The human resources system is designed to be a leaner, more flexible support structure to help attract skilled, talented, and motivated people, while also providing for retaining and for improving the skills of the existing workforce.

A key to the success of NSPS is to ensure that employees perceive the system as fair with trust between employees and supervisors. The Department repeatedly heard concerns about ensuring that fairness be addressed in the design of NSPS. The Department listened and responded. The Department and OPM addressed fairness in NSPS in several dimensions of the system design, including the right to seek review of important management decisions, such as performance appraisals; ensuring due process in carrying out disciplinary actions; and ensuring that employees know and understand what is expected from them; and building accountability at all levels.

For instance, important changes to the final regulations include (1) an explicit requirement that performance expectations be in writing; (2) a mandate that employee performance evaluations will be conducted annually; (3) establishment of a minimum 6 percent salary increase for promotions; (4) use of multiple years of performance ratings for reduction in force; (5) prohibition on probationary employees from displacing career employees during reduction in force; and (6) a specification that there may only be one reduction per year in an employee's basic pay due to performance or conduct problems, just to name a few.

Furthermore, NSPS continues employees' and labor organizations' rights to challenge or seek review of key decisions. All employees will be able to request reconsideration of their performance ratings through an administrative reconsideration process. Bargaining unit employees will have the option of using

a negotiated grievance procedure. Labor organization officials may still file unfair labor practice claims or grievances.

In our judgment, NSPS is a fair system and it protects the rights of our employees. While the final regulations streamline some processes, they do so without compromising due process for our employees. Employees will still receive notice of a proposed adverse action, will still have the right to reply, will still be given a decision notice that includes the reason for the decision, and will still have the right to appeal actions they feel were taken wrongfully. While NSPS tightens the standard under which MSPB Administrative Judges and arbitrators may mitigate penalties to give greater deference to the DoD mission, your concerns and those of employee representatives on the mitigation standards in the proposed regulations have been recognized. Accordingly, that standard in our regulations will be similar to the standard recognized by the Federal Circuit Court of Appeals while still ensuring that appropriate consideration is given to the Department's national security mission when mitigating any management determined penalty.

Collective bargaining was an area where valuable insight from you and our labor organizations was heard. Based on these concerns, NSPS preserves the right to bargain over many matters. However, bargaining is limited with regard to operational matters that impact DoD's ability to act and to act swiftly. The ability to act quickly is central to the Department's national security mission – not just during emergencies but, more importantly, to prepare for or to prevent

emergencies and to meet day-to-day operational demands. Your concerns and the concerns of the unions during the meet and confer process were heard, and the regulations therefore recognize that there are times when it will be in the best interests of the Department to allow for bargaining in certain situations in which it would not otherwise be required. As a result, the final regulations allow for bargaining when the Secretary of Defense makes that determination. Even where bargaining is restricted, the regulations require consultation with the unions on such matters, ensuring that employee representatives continue to have a voice on workplace matters.

A provision has been included to establish a National Security Labor Relations Board (NSLRB) that will function as an independent third party review board with members who are known for their integrity, impartiality and expertise in labor relations and/or national security matters appointed by SECDEF.

On this issue, the Department again heard your concerns as well as those of our employee representatives relative to union input into the Board composition. The final regulations include a provision to allow DoD labor unions the opportunity to submit nominations for consideration as members of the Board. Hopefully, the unions will take advantage of this opportunity to submit nominees that meet common criteria that will be used by the Secretary. Such nominations will be given full consideration. While all suggestions related to the NSLRB have not been adopted, the final regulations ensure that NSLRB members will discharge their duties in a fair and impartial manner.

And Madam Chairman, while the Department has designed a labor management relations system that provides appropriate checks and balances to ensure employee rights are protected, let me mention an additional check that Congress wisely included in the NSPS enabling statute. In November 2009, our authority for the labor relations provisions expires, unless it is extended by Congress. The consequence of this statute is that the Department has four years to demonstrate to the Congress that we can exercise these authorities and flexibilities in a responsible manner, or the labor relations portion of NSPS will revert back to current Chapter 71 rules. That is a powerful incentive for DoD.

Some have recommended that the regulations should include far greater specificity. DoD does not agree. Of all the objectives set by Congress for NSPS in the enabling legislation, flexibility was the very first enumerated. Including detail in regulations would not provide requisite flexibility the Department requires and as envisioned by the Congress. As a result of the meet and confer process, and to be fully collaborative, the Department has added greater detail to certain sections. However, even with added detail, the subparts retain their original structure in the final regulations, establishing a general policy framework to be supplemented by detailed Departmental implementing issuances. The regulations require the Department to provide employee representatives an opportunity to participate in the development of Department-level implementing issuances through continuing collaboration. This will provide the unions with an opportunity to have even greater involvement in workforce issues where they have

no role under current rules. The Department looks forward to this collaborative, issue-based approach to labor relations.

DoD also agreed that the authority to issue policies that implement NSPS and supercede conflicting provisions of existing collective bargaining agreements should be limited to a very few senior officials in the Department. As a result, the final regulations specify that only the Secretary, Deputy Secretary, Principal Staff Assistants (as authorized by the Secretary), or Secretaries of the Military Departments may issue such policies. This authority is expected to be limited to fewer than 20 people in DoD who are at senior management positions.

Concerns have also been raised relative to ensuring that sufficient resources are available to fund pay pools at adequate levels. Proper funding of pay pools is fundamental to the success of NSPS. As such, to make meaningful distinctions in performance, funding will not be less than the amount that would have gone to step increases and promotions to make the pay decisions equally as meaningful. DoD is committed to this funding.

LOOKING AHEAD

Today, DoD is preparing for implementation of NSPS. Among the first steps will be development of the implementing issuances. Issuances will provide the details for NSPS implementation. Many of these implementation details were shared with the unions during the meet and confer process. The Department looks forward to continuing this exchange as part of a continuing collaboration process.

As discussed on numerous occasions, both in testimony and during individual meetings with the Congress, training is paramount to the success of NSPS. Fortunately, training is a core competency of DoD. For NSPS, DoD is tapping into that infrastructure to deliver a robust training program that features both web-based and classroom instruction. All employees will have training opportunities on the fundamentals of NSPS as well the behavioral-based training referred to as "soft skills," such as communication skills, team building, and coaching for supervisors, which are critical to succeed in changing the culture to one that is performance-based and results-driven.

Ongoing communication with our employees is also critical. Employees deserve nothing less than to be fully informed. DoD will provide them with information as it becomes available through commanders and supervisors, human resource practitioners, NSPS and Component websites. Printed material will be a constant source of information about NSPS. DoD is committed to transparency in the process and committed to transparency in implementation. Open and ongoing communication is paramount at all levels.

There is still much work to do -- hard work. As challenging as the design of NSPS has been, the greatest challenges lie ahead. Please know that DoD is committed to an event-driven approach to NSPS and this will continue during the next phases. Our iterative approach to implementing NSPS has been detailed. Assessment and evaluation is the cornerstone of the implementation plan. Mistakes will be identified and corrected.

The Department will use human resources management accountability reviews to identify and address issues regarding the observance of merit system principles and regulatory and policy requirements. The Department will also monitor the outcomes of administrative and negotiated grievances, performance rating reconsiderations, equal employment opportunity complaints, and whistleblower complaints to correct chronic problems or particular failings. Greater flexibility requires greater accountability, and DoD is committed to that accountability.

Finally, the NSPS Program evaluation findings will be used to determine whether the design of NSPS and the pattern of its results meet statutory requirements, like fairness and equity, and the specific performance expectations of a credible and trusted system.

Thank you again for the opportunity to testify. Your questions and observations are most welcome.

Statement of
The Honorable Linda M. Springer
Director
Office of Personnel Management

before the

Committee on Homeland Security and Governmental Affairs
United States Senate

on

"From Proposed to Final:
Evaluating Regulations for the National Security Personnel System"

November 17, 2005

Madam Chairman and Members of the Committee:

I am pleased to be here this morning to discuss the development of final regulations establishing the National Security Personnel System (NSPS) at the Department of Defense (DOD) and the continuing role of the Office of Personnel Management (OPM) in the implementation of the NSPS.

Our collaboration with the Department truly has been a joint effort, with many months of hard work by both agencies. I must thank Secretary England and Secretary Rumsfeld for their leadership throughout this undertaking. They helped to foster and encourage the necessary cooperation between our agencies at all levels.

I also want to thank Chairman McPhie of the Merit Systems Protection Board and Chairwoman Cabaniss of the Federal Labor Relations Authority for their cooperation, their valuable insight and helpful suggestions. Having their timely reviews of our proposals was important in keeping the process moving ahead.

In the course of this effort, we learned about the special needs of DOD in fulfilling its national security mission. This is invaluable experience for a central management agency in better understanding some of the shortcomings and trade-offs inherent to standardized, uniform rulemaking. As a result, I believe OPM is better positioned to share with other Federal agencies the insights we gained from this experience.

And I would be remiss if I did not express my gratitude to Chairmen Collins and Voinovich and Senators Lieberman and Akaka for your continued interest and involvement. Your ongoing attention has helped to ensure that as we create a contemporary and flexible human resources system for the Department we do not compromise merit system principles, veterans' preference and other special protections extended to employees in their service to the public.

Outreach and open communications

From the outset of our involvement in the NSPS effort, OPM has been interested in using an open and inclusive process to develop the regulations. We joined DOD in reaching out to a broad community of interests – managers and employees, DOD unions, members of Congress and staff, veterans' groups, public interest groups, and other Federal agencies.

Before regulations for the NSPS were even proposed, we met extensively with labor organizations representing DOD employees to share the concepts and ideas that were under consideration. We shared broad policy options with the unions, before they were narrowed to decision options, in order to solicit their views early in the decision-making process.

The Department embarked on extensive Town Hall meetings with its employees, a workforce dispersed literally around the world. They held over 100 focus groups with bargaining and non-bargaining unit employees, with representative groups of managers and supervisors, and with various subsets of human resources (HR) practitioners, and labor and employee relations specialists.

From the initial development of the system to publication of the proposed regulations, we kept the lines of communication open with all the constituencies of interest. When the NSPS proposal was published we received over 58,000 public comments that were systematically analyzed and given consideration when finalizing the regulations. We held intensive in-depth meetings with DOD unions for nearly 2 months, longer than the statute required. We held numerous meetings and briefings with Congressional staff; we met with veterans' groups, public interest groups, and other stakeholders.

Throughout the process the NSPS website kept the workforce and the general public informed of the latest developments, and provided details and tutorials on new concepts being considered. Through the website employees and other interested parties were given the

opportunity to send in comments and raise questions, and the Department effectively maintained an open dialogue by publishing responses to frequently asked questions.

These multiple sources of input were of great benefit as OPM and DOD crafted the final changes to the proposed NSPS.

OPM's Role

The NSPS authorizing statute called for the creation of a contemporary and flexible system to support the DOD mission. The primary purpose of any modern human resource system is to enhance the organization's ability to accomplish its mission. Putting "mission first" is a fundamental guiding principle inherent in our design of the NSPS. This principle recognizes the need for the Department's new HR system to be responsive to an ever-changing environment.

OPM's role in the partnership with DOD was to balance the "mission first" requirement with the needs of its workforce. It is, after all, the people in Government who make Government work.

The recognition that public service is deserving of special considerations is a concept that evolved over our nation's history, at times through bitter lessons. While some aspects of the current civil service system must change, other core values are essential to ensure that Government continues to serve all the people, not narrow special interests, and that the system remains protected against corruption. The Government's HR system must promote

fairness and transparency, and guarantee equal access for all. These core values of the civil service will endure; they will not change.

In modernizing the HR system for DOD, we made sure these core values are sustained and that the protections of the civil service extend to the employees covered by the NSPS. Thus the NSPS not only guards against prohibited personnel practices, it protects whistleblowers from recriminations, it maintains all the safeguards against discrimination, it fully ensures employee rights to due process and maintains their right to representation and to bargain collectively. Finally, the NSPS honors and promotes veterans' preference, a privilege earned by our men and women in uniform through personal sacrifice.

NSPS – a contemporary and flexible HR system

The enabling legislation also seeks to ensure that as the NSPS supports DOD's mission it does so with a pay-for-performance system that meets a number of objectives desirable of any modern contemporary HR system. In the recently published final regulations I believe we have accomplished these objectives.

NSPS is a contemporary HR system in that it promotes accountability at all levels of DOD through a performance management system linked to agency mission that promotes excellence and rewards achievement.

NSPS is contemporary with its streamlined staffing processes, simplified rules, and workforce shaping provisions that serve mission needs – putting the right person, in the right place, at the right time.

NSPS is contemporary with a compensation architecture that is based on market sensitive means to pay setting and adjustment that recognizes and rewards performance.

NSPS is flexible in its ability to respond to the dictates of competition for talent in the Nation's labor pool.

NSPS is flexible in allowing the Department greater latitude to make changes in support of its evolving mission priorities.

Together with DOD we blended these features into NSPS while fully preserving the due process rights of employees.

Together with DOD we achieved a balance of employees' right to representation and to bargain collectively with the "mission first" requirements of the Department – a very special mission – the security of our nation.

DOD's invaluable experience with HR innovation

Many of the concepts and critical elements designed into the NSPS came from previously tried and tested ideas. While we recognized the authority granted in the legislation to

consider truly innovative approaches in crafting the NSPS we were mindful of the challenges inherent in transforming an organization of the magnitude of the Department of Defense. To mitigate the risks in a transformation of this size, we turned to many of the ideas tested within the Department itself.

DOD has long been a key laboratory for testing and evaluating new concepts in Federal HR management. The Department has over two decades of experience developing and implementing demonstration projects and alternative personnel systems. Over the years, 45,000 DOD employees have been covered under various alternative personnel systems. Some of these concepts, such as crafting career paths using occupational groups and pay bands, have already been adopted by other agencies.

Many lessons learned from these experiences were adapted to the NSPS. Many of these lessons were documented by OPM, and we were pleased to discuss this at the recent hearing on alternative personnel systems conducted by Chairman Voinovich.

Next Phase – Implementation

We are as anxious for DOD to succeed as they are. There is no question that implementation of the NSPS is a large undertaking. After all, with over 700,000 civilian employees the Department comprises nearly 40 percent of Federal employees. But, in light of DOD's years of experience with the concepts adopted by the NSPS, we are confident the Department will succeed in the implementation of the system. Many of the elements necessary for success are already in place – advanced planning, sound program management, and training for all.

From the Department's strategic pause early last year to the current stage of development we have followed a well-executed "acquisition" plan. The program management team that developed the regulatory construct of the NSPS is expanding to encompass project management teams in various components and commands of the Department to cover detailed aspects of the implementation. NSPS will be rolled out in stages or "spirals" over several years, giving DOD the opportunity to make adjustments in its implementation strategy.

Training is important; it is the ultimate key to success. Here, again, DOD is well versed in developing training strategies and training methodology; they do it routinely and they do it well through a robust existing training infrastructure. Furthermore they are uniquely situated, under current precepts, in being able to draw on the in-house expertise they developed during the implementation of previous alternative personnel systems.

OPM will support the Department in every way to make sure that the phasing in of NSPS proceeds smoothly during the coming years.

Quality Assurance and Oversight

While we are enthusiastic and supportive of DOD, we are nevertheless mindful of our broader responsibilities as the central HR management agency of the Federal Government. Even as we remain partners with the Department in this endeavor, we have a dual role to provide both quality assurance in the exercise of the flexibilities the Department acquires in

the NSPS and continued oversight in adherence to merit principles and the core values of the civil service. Accordingly, we stipulated in the regulations a list of specific matters that are subject to continued coordination between us in areas such as classification, establishing qualification standards, creating new appointing authorities, and in setting and adjusting pay, just to cite some examples. The complete list is found in section 105 of the NSPS regulations.

This stipulated coordination will provide quality assurance for the Department in providing external input as the NSPS evolves, and it will afford OPM the opportunity to maintain a balance in these important areas against practices in the rest of Government.

Further, the statute restricts initial coverage of the NSPS to no more than 300,000 Department employees. Before coverage can be expanded beyond this limit DOD is required to certify that the pay-for-performance system meets the requirements established in the legislation. NSPS regulations require the Department to coordinate this certification with OPM.

OPM's role as guarantors of the Merit System will continue. We maintain our oversight responsibilities and we will participate in the program evaluation of the NSPS. The evaluation of the NSPS has been expressly stipulated in the regulations.

I believe we have achieved the right balance between the flexibility for DOD to manage its human resources and the role of OPM in maintaining government wide policy that protects the merit system principles inherent to public service.

Close and a Look Forward

Our partnership with DOD has provided OPM with valuable experience in synchronizing HR management with operational mission requirements in the agencies. We have learned first hand what aspects of our current HR system may not suit the needs of all agencies. We have a better appreciation of the need by Government agencies for greater flexibility in today's environment.

We are ready to share this experience with other Government agencies. The upgrades and flexibility gained by the Department of Defense in managing human resources will be sought by other Cabinet agencies. The rest of Government is watching and waiting for their turn. We stand ready to help them, and I know the Congress will continue to be attentive to these challenges as well.

That concludes my remarks. I would be pleased to respond to any questions the Committee may have.

United States Government Accountability Office

GAO

Testimony
Before the Committee on Homeland Security and Governmental Affairs, U.S. Senate

For Release on Delivery
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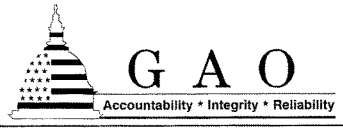
HUMAN CAPITAL

Observations on Final Regulations for DOD's National Security Personnel System

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



GAO-06-227T

November 17, 2005

GAO
Accountability·Integrity·Reliability
Highlights

Highlights of GAO-06-227T, a testimony to the Committee on Homeland Security and Governmental Affairs, U.S. Senate

HUMAN CAPITAL

Observations on Final Regulations for DOD's National Security Personnel System

Why GAO Did This Study

People are critical to any agency transformation because they define an agency's culture, develop its knowledge base, promote innovation, and are its most important asset. Thus, strategic human capital management at the Department of Defense (DOD) can help it marshal, manage, and maintain the people and skills needed to meet its critical mission. In November 2003, Congress provided DOD with significant flexibility to design a modern human resources management system. On November 1, 2005, DOD and the Office of Personnel Management (OPM) jointly released the final regulations on DOD's new human resources management system, known as the National Security Personnel System (NSPS).

Several months ago, with the release of the proposed regulations, GAO observed that some parts of the human resources management system raised questions for DOD, OPM, and Congress to consider in the areas of pay and performance management, adverse actions and appeals, and labor management relations. GAO also identified multiple implementation challenges for DOD once the final regulations for the new system were issued.

This testimony provides GAO's overall observations on selected provisions of the final regulations.

www.gao.gov/cgi-bin/getrpt?GAO-06-227T.

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.

What GAO Found

GAO believes that DOD's final NSPS regulations contain many of the basic principles that are consistent with proven approaches to strategic human capital management. For instance, the final regulations provide for (1) a flexible, contemporary, market-based and performance-oriented compensation system—such as pay bands and pay for performance; (2) giving greater priority to employee performance in its retention decisions in connection with workforce rightsizing and reductions-in-force; and (3) involvement of employee representatives throughout the implementation process, such as having opportunities to participate in developing the implementing issuances. However, future actions will determine whether such labor relations efforts will be meaningful and credible.

Despite these positive aspects of the regulations, GAO has several areas of concern. First, DOD has considerable work ahead to define the important details for implementing its system—such as how employee performance expectations will be aligned with the department's overall mission and goals and other measures of performance, and how DOD would promote consistency and provide general oversight of the performance management system to ensure it is administered in a fair, credible, transparent manner. These and other critically important details must be defined in conjunction with applicable stakeholders. Second, the regulations merely allow, rather than require, the use of core competencies that can help to provide consistency and clearly communicate to employees what is expected of them. Third, although the regulations do provide for continuing collaboration with employee representatives, they do not identify a process for the continuing involvement of individual employees in the implementation of NSPS.

Going forward, GAO believes that (1) DOD would benefit from developing a comprehensive communications strategy, (2) DOD must ensure that it has the necessary institutional infrastructure in place to make effective use of its new authorities, (3) a chief management officer or similar position is essential to effectively provide sustained and committed leadership to the department's overall business transformation effort, including NSPS, and (4) DOD should develop procedures and methods to initiate implementation efforts relating to NSPS.

While GAO strongly supports human capital reform in the federal government, how it is done, when it is done, and the basis on which it is done can make all the difference in whether such efforts are successful. DOD's regulations are especially critical and need to be implemented properly because of their potential implications for related governmentwide reform. In this regard, in our view, classification, compensation, critical hiring, and workforce restructuring reforms should be pursued on a governmentwide basis before and separate from any broad-based labor-management or due process reforms.

Madame Chairman Collins, Senator Lieberman, and Members of the Committee:

I appreciate the opportunity to be here today to provide our observations on the Department of Defense's (DOD) final National Security Personnel System (NSPS) regulations, which the Secretary of Defense and the Director of the Office of Personnel Management (OPM) published earlier this month.[1] NSPS will not only affect the roughly 700,000 DOD civilian employees, but it could have far-reaching implications for civil service reform across the federal government.

As I have previously testified, we support moving forward with appropriate human capital reform, but how it is done, when it is done, and the basis on which it is done can make all the difference in whether such efforts are successful. Human capital reforms to date recognize that the "one-size-fits-all" approach is not appropriate to all agencies' demands, challenges, and missions. However, we have reported that a reasonable degree of consistency across the government is desirable and that broader reforms should be guided by a common framework consisting of principles, criteria, and processes.[2] The final NSPS regulations, if implemented properly, could go a long way in the area of helping to shape such a framework and serve, along with GAO's, the Department of Homeland Security's, and other reform efforts, as a potential model for governmentwide reform in the area of human capital management.

Summary

My statement today makes three overall points. First, DOD has considerable work ahead to define the details of the implementation of its system, and understanding these details is critical to the overall success of the system. We find that the final regulations contain many of the basic principles that are consistent with proven approaches to strategic human

[1] Department of Defense Human Resources Management and Labor Relations System, 70 Fed. Reg. 66116 (Nov. 1, 2005).

[2] 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)

capital management, including several approaches used by GAO.[3] DOD has plans to issue a number of issuances that will contain detailed policies and procedures for the new system. These issuances will be of critical importance and their content will include important details that can serve to either enhance or reduce the likelihood of a successful implementation. These critically important details must be defined in conjunction with applicable key stakeholders and certain steps should be taken before any new authorities are implemented.

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

Second, DOD has stated that it is committed to continuing to involve employees, including employee representatives, throughout the implementation process, another critical ingredient for success. For instance, under the final regulations, employee representatives are to have opportunities to participate in developing the implementing issuances, as outlined under the "continuing collaboration" provisions. However, future actions will determine whether such employee and labor relations efforts will be meaningful and credible. In this regard, despite extensive efforts by many, DOD's attempts 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 the labor relations system, and that the new adverse actions process and labor relations system are unlawful.[4]

[3] GAO, *Human Capital: Preliminary Observations on Proposed Regulations for DOD's National Security Personnel Systems*, GAO-05-559T (Washington, D.C.: Apr. 14, 2005); GAO, *Human Capital: Preliminary Observations on Proposed Department of Defense National Security Personnel System Regulations*, GAO-05-517T (Washington, D.C.: Apr. 12, 2005); GAO, *Preliminary Observations on Proposed DOD National Security Personnel System Regulations*, GAO-05-432T (Washington, D.C.: Mar. 15, 2005).

[4] See *American Federation of Government Employees, AFL-CIO et al v. Rumsfeld et al*, No. 1:05cv02183 (D.D.C. filed Nov. 7, 2005).

We believe that sustained and committed leadership can provide the continuing, focused attention needed to successfully complete this multiyear conversion to the new human resources management system, and an ongoing two-way communication strategy can help ensure the quality of that involvement.

Third, and finally, recent actions, as evidenced by these DOD final regulations, may have significant, precedent-setting implications for the rest of the government. They represent both progress and opportunities, but also raise legitimate concerns. We are fast approaching the point where "standard governmentwide" human capital policies and processes are neither standard nor governmentwide. Human capital reform should avoid further fragmentation within the civil service, ensure reasonable consistency within the overall civilian workforce, and help maintain a reasonably level playing field among federal agencies when competing for talent. Further, human capital reform should maintain key merit principles and appropriate safeguards against discrimination and other prohibited personnel practices. While we strongly support human capital reform in the federal government, how it is done, when it is done, and the basis on which it is done can make all the difference in whether such efforts are successful. In our view, classification, compensation, critical hiring, and workforce restructuring reforms should be pursued on a governmentwide basis before and separate from any broad-based labor- management or due process reforms.

This morning I would like to (1) provide some 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. Lastly, I will suggest next steps for human capital reform.

Observations on DOD's Final Human Capital Regulations

DOD's final NSPS regulations establish a new human resources management system within the department that is intended to ensure its ability to attract, retain, and reward a workforce that is able to meet its critical mission. Further, the human resources management system is to provide DOD with greater flexibility in the way employees are to be paid, developed, evaluated, afforded due process, and represented by employee representatives while reflecting the principles of merit and fairness embodied in the statutory merit systems principles.

As with any major change management initiative, the final regulations have raised a number of concerns among employees, employee representatives, and other stakeholders because they do not contain many of the important details of how the system will be implemented. We have reported that individuals inevitably worry during any change management initiative because of uncertainty over new policies and procedures.[5] A key practice to help address this worry is to involve employees and their representatives to obtain their ideas and gain their ownership for the initiative throughout the development process and related implementation effort.

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

Pay and Performance Management

Earlier this year, we testified that DOD's proposed NSPS regulations reflected 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.[6] To this end, DOD's final regulations take another valuable step toward a modern performance management system that provides for elements of a more market-based and performance-oriented pay system. For instance, the final regulations provide for the creation of pay bands for most of DOD's civilian workforce that would replace the 15-grade General Schedule (GS) system now in place for most civil service employees. Specifically, DOD, after coordination with OPM, may define occupational career groups and levels of work within each career group that are tailored to the department's missions and components. The final regulations also give DOD considerable discretion, after coordination with OPM, to set and annually adjust the minimum and maximum rates of pay for each of those career

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

[6] GAO-05-559T, GAO-05-517T, and GAO-05-432T.

groups or bands, based on national and local labor market factors and other conditions such as availability of funds. In addition, the regulations provide that DOD may, after coordination with OPM, set and annually adjust local market supplements for different career groups or for different bands within the same career group. We strongly support the need to expand pay reform in the federal government and believe that implementing more market-based and performance-oriented pay systems is both doable and desirable. The federal government's current pay system is heavily weighted toward rewarding length of service rather than individual performance and contributions, including requiring across-the-board annual pay increases, even to poor performers. It also compensates employees living in various localities without adequately considering the local labor market rates applicable to the diverse types of occupations in the area.

Regarding performance management issues, we identified several issues in earlier testimonies that DOD will need to continue to address as it moves forward with the implementation of the system. These include aligning individual performance to organizational goals, using competencies to provide a fuller assessment of employee performance, making meaningful distinctions in employee performance, and continuing to incorporate adequate safeguards to ensure fairness and guard against abuse.

Aligning Individual Performance to Organizational Goals

Consistent with leading practices, the DOD final regulations stipulate that the performance management system will, 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. DOD's performance management system can be a vital tool for aligning the organization with desired results and creating a "line of sight" showing how team, unit, and individual performance can contribute to overall organizational results. To this end, an explicit alignment of daily activities with broader results is one of the defining features of effective performance management systems in high-performing organizations. In our previous testimony on DOD proposed NSPS regulations,[7] we testified that the regulations did not detail how DOD was to achieve such an alignment. The final regulations were not modified to provide such details. These details do matter and are critical issues that will need to be

[7] GAO-05-517T.

addressed as DOD's efforts in implementing a new personnel system move forward.[8]

Using Competencies to Provide a Fuller Assessment of Performance

In the final 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. In a previous testimony, we reported that DOD needed to define, in more detail than was provided in the proposed regulations, how performance expectations will be set. In addition, public comments to the proposed regulations expressed concerns about the variety of forms that performance expectations could take. In response to public comments to its proposed regulations and feedback obtained during the meet and confer process with employee representatives, DOD modified the proposed regulations, so that the final regulations state that the basic performance expectations should be provided to employees in writing.

As DOD develops its implementing issuances, the experiences of leading organizations suggest that DOD should reconsider its position of merely allowing, rather than requiring, the use of core competencies as a central feature of its performance management system.[9] Based on our review of others' efforts and our own experience at GAO, core competencies can help reinforce employee behaviors and actions that support the department's mission, goals, and values and can provide a consistent message to employees about how they are expected to achieve results.[10] By including competencies such as change management, achieving results, teamwork and collaboration, cultural sensitivity, and information sharing, DOD could create a shared responsibility for organizational success and help ensure accountability for the transformation process.

Making Meaningful Distinctions in Employee Performance

High-performing organizations make meaningful distinctions between acceptable and outstanding performance of individuals and appropriately

[8] GAO-05-517T.

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

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

reward those who perform at the highest level.[11] These organizations seek to create pay, incentive, and reward systems that clearly link employee knowledge, skills, and contributions to organizational results. As in the proposed regulations, DOD's final regulations stated that DOD supervisors and managers are to be held accountable for making meaningful distinctions among employees based on performance and contribution, fostering and rewarding excellent performance, and addressing poor performance.

Consistent with the proposed regulations, the final regulations provide for a multilevel rating system for evaluating employee performance. However, the final regulations do not specify exactly how many rating levels will be used. 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 reward employee contributions and achieve the highest levels of individual performance.[12]

Providing Adequate Safeguards to Ensure Fairness and Guard Against Abuse

As DOD develops its implementing issuances, it needs to continue building safeguards into its performance management system to ensure fairness and guard against abuse. A concern that employees often express about any pay for performance system is supervisors' ability and willingness to assess performance fairly. Using safeguards, such as having an independent body to conduct reasonableness reviews of performance management decisions, can help allay these concerns and build a fair, credible, and transparent system. In our previous testimonies,[13] we noted that although DOD's proposed regulations provided for some safeguards, additional safeguards should be developed. However, the final regulations do not offer details on how DOD would, among other things, (1) promote consistency and provide general oversight of the performance management system to ensure it is administered in a fair, credible, and

[11] GAO-03-488.

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

[13] GAO-05-559T, GAO-05-517T, and GAO-05-432T.

transparent manner; and (2) incorporate predecisional internal safeguards to achieve consistency and equity, and ensure nondiscrimination and nonpoliticization of the performance management process. As DOD moves forward, it will need to commit itself 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. Direct-hire authority allows an agency to appoint candidates to positions without adherence to certain competitive examining requirements (such as veterans' preference or numerically rating candidates based on experience, training, and education) when there is a severe shortage of qualified candidates or a critical hiring need.

In our previous testimonies, we noted that 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 merit principles, the protection of employee rights, and results. Hiring flexibilities alone will not enable federal agencies to acquire the personnel necessary 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

Similar to the proposed regulations, the final NSPS regulations allow DOD to reduce, realign, and reorganize the department's workforce through revised reduction-in-force (RIF) procedures. For example, employees would be placed on a retention list in the following order: tenure group (i.e., a career employee, including an employee serving an initial probationary period and an employee serving on a term appointment), veterans' preference eligibility (disabled veterans will be given additional priority), level of performance, and length of service. In a change from the proposed regulations, employees serving in an initial probationary period

have a lower retention standing than career employees (i.e., permanent will be listed first, followed by employees serving an initial probationary period, and then followed by employees on temporary appointments). In another change, the final regulations reflect the use of more than one year's performance ratings in placing employees on the retention list. Under current regulations, length of service is considered ahead of level 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.[14]

DOD's approach to reducing, realigning, and reorganizing 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 final regulations include some changes that would allow DOD to rightsize the workforce more carefully through greater precision in defining competitive areas, and by reducing the disruption associated with RIF orders as their affect ripples through an organization. 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 final NSPS 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 final 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. Under the current GS system, DOD can establish competitive groups based only on employees (1) in the excepted and competitive service, (2) under different excepted service appointment authorities, (3) with different work schedules,[15] (4) in the same pay schedule, or (5) in trainee status. The new reforms could help DOD approach rightsizing more carefully; however, as I have stated, 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.

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

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

Adverse Actions and Appeals

Similar to DOD's proposed regulations, the final regulations are intended to streamline the employee adverse action process. While the final regulations contain some features meant to ensure that employees receive due process, such as advance written notice of a proposed adverse action, they do not require DOD managers to provide employees with performance improvement periods, as is required under existing law for other federal employees. It is too early to tell what affect, if any, these final regulations will have on DOD's operations and employees or on other entities involved in the adverse action process, such as the Merit Systems Protection Board (MSPB). Close monitoring of any unintended consequences, such as on the MSPB and its ability to manage adverse action cases from DOD and other federal agencies, is warranted.[16]

Similar to the proposed regulations, DOD's final regulations also modify the current federal system by providing the Secretary of Defense with the sole, exclusive, and unreviewable authority to identify specific offenses for which removal is mandatory. In our previous testimonies, we noted that DOD's proposed regulations only indicated that its employees would be made aware of the mandatory removal offenses. We also noted 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 suggested that DOD exercise caution when identifying specific removable offenses and the associated punishment, and noted that careful drafting of each removable offense is critical to ensure that the provision does not have unintended consequences. In a change from the proposed regulations, DOD's final regulations explicitly provide for publishing a list of the mandatory removal offenses in the Federal Register.

Similar to its proposed regulations, DOD's final regulations generally preserve the employee's basic right to appeal mandatory removal offenses and other adverse action decisions to an independent body—the MSPB—but retain the provision to 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

[16] Ten federal labor unions have filed suit alleging that, among other things, DOD's adverse actions and appeals process is unlawful. See *American Federation of Government Employees, AFL-CIO et al v. Rumsfeld et al*, No. 1:05cv02183 (D.D.C. filed Nov. 7, 2005).

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 effect on the department's national security mission.[17] In our previous testimonies on the proposed regulations, we expressed some concern about the department's internal review process and pointed out that 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 it. We noted that 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. However, the final regulations were not modified to include such details.

Similar to DOD's proposed regulations, the final regulations shorten the notification period before an adverse action can become effective, provide an accelerated MSPB adjudication process, and continue to give the MSPB administrative judges (AJs) and arbitrators less latitude to modify DOD-imposed penalties than under current practice. Under the current system, MSPB reviews penalties during the course of a disciplinary action against an employee to ensure that the agency considered relevant prescribed factors and exercised management discretion within tolerable limits of reasonableness. MSPB may mitigate or modify a penalty if the agency did not consider prescribed factors. In a change from the proposed regulations, which precluded the MSPB from modifying a penalty imposed on an employee by DOD for an adverse action unless such a penalty was so disproportionate to the basis of the action as to be "wholly without justification," under the final regulations the MSPB AJs and arbitrators will be able to mitigate a penalty only if it is "totally unwarranted in light of the pertinent circumstances" while the full MSPB Board may mitigate penalties in accordance with the standard prescribed in the NSPS authorizing legislation.[18] As stated by DOD in the supplementary

[17] 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 of decision of the full MSPB may seek judicial review.

[18] The full MSPB Board may order such corrective actions, including the mitigation of penalties, as the board considers appropriate where the Board determines a decision was: arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. 5 U.S.C. § 9902(h)(5).

information to the final regulations, the "totally unwarranted in light of all pertinent circumstances" standard is similar to that recognized by the federal courts and is intended to limit mitigation of penalties by providing deference to an agency's penalty determination.

The final regulations continue to encourage the use of alternative dispute resolution (ADR) and provide that this approach be subject to collective bargaining to the extent permitted by the final 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 ADR approaches, including the use of ombudsmen as an informal alternative to addressing conflicts. As we have reported, ADR helps lessen the time and the cost burdens associated with the federal redress system and has the advantage of employing techniques that focus on understanding the disputants' underlying interests rather than techniques that focus on the validity of their positions. For these and other reasons, we believe that it is important to continue to promote ADR throughout the process.

Labor-Management Relations

The final regulations recognize the right of employees to organize and bargain collectively. Similar to the proposed regulations, the final regulations would reduce the scope of collecting bargaining by removing the requirement for DOD management to bargain on matters considered to be management rights—such as the policies and procedures for deploying personnel, assigning work, and introducing new technologies. However, in a departure from the proposed regulations, the final regulations provide that the Secretary of Defense may authorize bargaining on these management rights if the Secretary in his or her sole, exclusive, and unreviewable discretion determines that bargaining would be necessary to advance the department's mission or promote organizational effectiveness.[19]

Our previous work on individual agencies' human capital systems has not directly addressed the scope of specific issues that should or should not be subject to collective bargaining and negotiations. At a forum we co-hosted exploring the concept of a governmentwide framework for human

[19] Ten federal labor unions have filed suit alleging that, among other things, DOD's labor relations system is unlawful. See *American Federation of Government Employees, AFL-CIO et al v. Rumsfeld et al*, No. 1:05cv02183 (D.D.C. filed Nov. 7, 2005).

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.

DOD's final regulations create its own internal labor relations board—the National Security Labor Relations Board—to deal with most departmentwide labor relations policies and disputes rather than submit them to the Federal Labor Relations Authority. DOD's proposed regulations did not provide for any employee representative input into the appointment of board members. However, DOD's final regulations require that for the appointment of two of the three board members, the Secretary of Defense must consider candidates submitted by employee representatives. However, the Secretary retains the authority to both appoint and remove any member.

DOD Faces Many Challenges to Successful Implementation

With the issuance of the final regulations, DOD faces multiple challenges to the successful implementation of its new human resources management system. We highlighted multiple implementation challenges at prior hearings and in our July 2005 report on DOD's efforts to design the new system.[20] For information about these challenges identified in our prior work, as well as 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.

We continue to believe that addressing these challenges is critical to the success of DOD's new human resources management system. These challenges include establishing an overall communications strategy, ensuring sustained and committed leadership, providing adequate resources for the implementation of the new system, involving employees in implementing the system, and evaluating the new system after it has been implemented.

Establishing an Overall Communications Strategy

Another significant challenge for DOD is to ensure an effective and ongoing two-way communications strategy, given DOD's size, geographically and culturally diverse audiences, and the different

[20] GAO, *Human Capital: DOD's National Security Personnel System Faces Implementation Challenges*, GAO-05-730 (Washington, D.C.: July 14, 2005).

command structures across DOD organizations. While we have reported that developing a comprehensive communications strategy is a key practice of a change management initiative,[21] we reported in July 2005 that DOD lacks such a strategy.[22] We recommended that the Secretary of Defense take steps to ensure that its communications strategy effectively addresses employee concerns and their information needs, and facilitates two-way communication between employees, employee representatives, and management. In prior testimonies, we also suggested that this communications strategy must involve a number of key players, including the Secretary of Defense.

Providing Adequate Resources for Implementing the New System

DOD also is challenged to provide adequate resources to implement its new personnel system, especially in times of increased fiscal constraints. OPM reports that the increased costs of implementing alternative personnel systems should be acknowledged and budgeted for up front.[23] Based on the data provided by selected OPM personnel demonstration projects, we found that direct costs associated with salaries and training were among the major cost drivers of implementing pay for performance systems. Certain costs, such as those for initial training on the new system, are one-time in nature and should not be built into the base of DOD's budget. Other costs, such as employees' salaries, are recurring and thus should be built into the base of DOD's budget for future years. DOD estimates that the overall cost associated with implementing the new human resources management system—including developing and delivering training, modifying automated personnel information systems, and starting up and sustaining the National Security Labor Relations Board—will be approximately $158 million through fiscal year 2008. Since experience has shown that additional resources are necessary to ensure sufficient planning, implementation, training, and evaluation for human capital reform, funding for NSPS will warrant close scrutiny by Congress as DOD's implements the new system.

We plan to evaluate the costs associated with the design and implementation of NSPS and look forward to sharing our findings with Congress upon completion of our review.

[21] GAO-03-669.

[22] GAO-05-730.

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

Ensuring Sustained and Committed Leadership

One challenge DOD faces is the need to elevate, integrate, and institutionalize leadership responsibility for large-scale organizational change initiatives, such as its new human resources management system, to ensure success. A chief management officer or similar position could effectively provide the sustained and committed leadership essential to successfully completing these multiyear business transformation initiatives. Especially for an endeavor as critical as DOD's new human resources management system, such a position could serve to

- elevate attention to overcome an organization's natural resistance to change, marshal the resources needed to implement change, and build and maintain organizationwide commitment to new ways of doing business;
- integrate this new system with various management responsibilities so that 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 to sustain the implementation of this critical human capital initiative.[24]

Involving Employees and Other Stakeholders in Implementing the System

DOD faces a significant challenge in involving its employees, employee representatives, and other stakeholders in implementing NSPS. Similar to the proposed regulations, DOD's final regulations, while providing for continuing collaboration with employee representatives, do not identify a process for the continuing involvement of employees in implementation of NSPS. 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. Consistent with DOD's proposed regulations, its final NSPS 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

[24] On September 9, 2002, we convened a roundtable of government leaders and management experts to discuss the chief operating officer 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).

submit written comments to DOD officials. In addition, DOD's final 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 final regulations will give designated employee representatives an opportunity to be briefed and to comment on the design and results of the new system's implementation.[25]

The active involvement of all stakeholders will be critical to the success of NSPS. Substantive and ongoing involvement by employees and their representatives both directly and indirectly is crucial to the success of new initiatives, including implementing a modified classification and pay for performance system. This involvement must be early, active, meaningful, and continuing if employees are to gain a sense of understanding and ownership of the changes that are being made. The 30-day public comment period on the proposed regulations ended March 16, 2005. During this time period, according to DOD, it received more than 58,000 comments. The public comment period was followed by a period during which DOD and OPM officials met and conferred with employee representatives to resolve differences on any portions of the proposed regulations where agreement had not been reached. Earlier this year, during testimony, we stated that the meet and confer process had to be meaningful and was critically important because there were many details of the proposed regulations that had not been defined. According to DOD, a significant issue raised in the public comments and during the meet and confer process concerned the lack of specificity in the proposed regulations. However, as we noted earlier in this statement, DOD still has considerable work to define the details for implementing its system. These details do matter, and how they are defined can have a direct bearing on whether or not the ultimate new human resources management system is both reasoned and reasonable.

Evaluating DOD's New Human Resources Management System

Evaluating the effect of NSPS will be an ongoing challenge for DOD. This element is especially important because DOD's final regulations would give managers more authority and responsibility for managing the new human resources management system than they have under the existing

[25] Ten federal labor unions have filed suit alleging that, among other things, 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. 1:05cv02183 (D.D.C. filed Nov. 7, 2005).

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 on the costs, benefits, and effects of NSPS will be the fundamental building block for measuring the effectiveness of NSPS in support of the mission and goals of the department.

DOD's final regulations indicate that DOD will evaluate the regulations and their implementation. In our July 2005 report on DOD's efforts to design NSPS, we recommended that DOD develop procedures for evaluating NSPS that contain results-oriented performance measures and reporting requirements.[25] We also recommended that these evaluation procedures could be 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, effects 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 and 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. In commenting on our recommendation, the department stated that it has begun developing an evaluation plan and will ensure that the plan contains results-oriented performance measures and reporting mechanisms. If the department follows through with this effort, we believe that it will be responsive to our recommendation.

Framework for Governmentwide Human Capital Reform

The federal government is quickly approaching the point where "standard governmentwide" human capital policies and processes are neither standard nor governmentwide, raising the issue of whether a governmentwide framework for human capital reform should be established. The human capital environment in the federal government is changing, illustrated by the fact that DOD's new human capital authority joins that given to several other federal departments and agencies—such

[25] GAO-05-730.

as the Department of Homeland Security (DHS), GAO, the National Aeronautics and Space Administration, and the Federal Aviation Administration—to help them strategically manage their human resources management system to achieve results.

To help advance the discussion concerning how governmentwide human capital reform should proceed, we and the National Commission on the Public Service Implementation Initiative co-hosted a forum on whether there should be a governmentwide framework for human capital reform and, if so, what this framework should include.[27] 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. Further, a governmentwide framework should balance the need for consistency across the federal government with the desire for flexibility so that individual agencies can tailor human capital systems to best meet their needs. Striking this balance would not be easy to achieve, but is important for maintaining 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 could serve as a starting point for further discussion in developing a governmentwide framework in advancing human capital reform, as shown in figure 1. We believe that these principles, criteria, and processes provide an effective framework for Congress and other decision makers to use as they consider governmentwide civil service reform proposals.

[27] GAO-05-69SP.

Figure 1: Principles, Criteria, and Processes for a Governmentwide Human Capital Reform Framework

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
- Guaranteed due process that is fair, fast, and final

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

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

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

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

Source: GAO.

Next Steps for Human Capital Reform

Moving forward with human capital reform, in the short term, Congress should consider selected and targeted actions to continue accelerating the momentum to make strategic human capital management the centerpiece of the government's overall transformation effort. One option may be to provide agencies one-time, targeted investments that are not built into agencies' bases for future year budget requests. For example, Congress established the Human Capital Performance Fund to reward agencies' highest performing and most valuable employees. However, the Administration's draft proposed "Working for America Act" proposes to repeal the Human Capital Performance Fund. According to OPM, the provision was never implemented, due to lack of sufficient funding. We believe that a central fund has merit and can help agencies build the infrastructure needed to implement a more market-based and

performance-oriented pay system. To be eligible, agencies would submit plans for approval by OPM that incorporate features such as a link between pay for performance and the agency's strategic plan, employee involvement, ongoing performance feedback, and effective safeguards to ensure fair management of the system. In the first year of implementation, up to 10 percent of the amount appropriated for the fund would be available to train employees who are involved in making meaningful distinctions in performance. These features are similar to those cited in the draft proposal as the basis for OPM's certification for agencies to implement their new pay and performance management systems.

In addition, as agencies develop their pay for performance systems, they will need to consider the appropriate mix between pay awarded as base pay increases versus one-time cash bonuses, while still maintaining fiscally sustainable compensation systems that reward performance. A key question to consider is how the government can make an increasing percentage of federal compensation dependent on achieving individual and organizational results by, for example, providing more compensation as one-time cash bonuses rather than as permanent salary increases. However, agencies' use of cash bonuses or other monetary incentives has an effect on employees' retirement calculations since they are not included in calculating retirement benefits. Congress should consider potential legislative changes to allow cash bonuses that would otherwise be included as base pay increases to be calculated toward retirement and thrift savings benefits by specifically factoring bonuses into the employee's base pay for purposes of making contributions to the thrift savings plan and calculating the employee's "high-three" for retirement benefits.

Concluding Observations

Consistent with our observations earlier this year, DOD's final NSPS regulations take another valuable step toward a modern performance management system that provides for a more market-based and performance-oriented pay system. DOD's final NSPS regulations are intended to align individual performance and pay with the department's critical mission requirements; provide meaningful distinctions in performance; and give greater priority to employee performance in connection with workforce rightsizing and reductions-in-force. However, how it is done, when it is done, and the basis on which it is done will be critical to the overall success of the new system. That is why it is important to recognize that it is critically important that DOD define the details for implementing its system and that DOD does it in conjunction with applicable key stakeholders. It is equally important for DOD to ensure

that is has the necessary infrastructure in place to implement the system. DOD's regulations are especially critical and need to be implemented properly because of their potential implications for related governmentwide reform. However, compensation, pay, compensation, critical hiring, and workforce restructuring reforms should be the first step in any governmentwide reforms.

Contact and Acknowledgments

For further information, please contact Derek B. Stewart, Director, Defense Capabilities and Management, at (202) 512-5559 or stewartd@gao.gov. For further information on governmentwide human capital issues, please contact J. Christopher Mihm, Managing Director, Strategic Issues, at (202) 512-6806 or mihmj@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Individuals making key contributions to this statement include Sandra F. Bell, Renee S. Brown, William J. Doherty, George M. Duncan, Barbara L. Joyce, Julia C. Matta, Susan W. Tieh, and John S. Townes.

July 2005

GAO
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Highlights

Highlights of GAO-05-730, a report to Congressional Committees

HUMAN CAPITAL

DOD's National Security Personnel System Faces Implementation Challenges

Why GAO Did This Study

The Department of Defense's (DOD) new personnel system—the National Security Personnel System (NSPS)—will have far-reaching implications not just for DOD, but 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.

This report (1) describes DOD's process to design its new personnel management system, (2) analyzes the extent to which DOD's process reflects key practices for successful transformations, and (3) identifies the most significant challenges DOD faces in implementing NSPS.

What GAO Recommends

GAO is making recommendations to improve the comprehensiveness of the NSPS communication strategy and to evaluate the impact of NSPS. DOD did not concur with one recommendation and partially concurred with two others.

www.gao.gov/cgi-bin/getrpt?GAO-05-730.

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.

What GAO Found

DOD's current process to design its new personnel management system consists of four stages: (1) development of design options, (2) assessment of design options, (3) issuance of proposed regulations, and (4) a statutory public comment period, a meet and confer period with employee representatives, and a congressional notification period. DOD's initial design process was unrealistic and inappropriate. However, after a strategic reassessment, DOD adjusted its approach to reflect a more cautious and deliberative process that involved more stakeholders.

DOD's NSPS design process generally reflects four of six selected key practices for successful organizational transformations. First, DOD and OPM have developed a process to design the new personnel system that is supported by top leadership in both organizations. Second, from the outset, a set of guiding principles and key performance parameters have guided the NSPS design process. Third, DOD has a dedicated team in place to design and implement NSPS and manage the transformation process. Fourth, DOD has established a timeline, albeit ambitious, and implementation goals. The design process, however, is lacking in two other practices. First, DOD developed and implemented a written communication strategy document, but the strategy is not comprehensive. It does not identify all key internal stakeholders and their concerns, and does not tailor key messages to specific stakeholder groups. Failure to adequately consider a wide variety of people and cultural issues can lead to unsuccessful transformations. Second, while the process has involved employees through town hall meetings and other mechanisms, it has not included employee representatives on the working groups that drafted the design options. 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. A successful transformation must provide for meaningful involvement by employees and their representatives to gain their input into and understanding of the changes that will occur.

DOD will face multiple implementation challenges. For example, in addition to the challenges of continuing to involve employees and other stakeholders and providing adequate resources to implement the system, DOD faces the challenges of ensuring an effective, ongoing two-way communication strategy and evaluating the new system. In recent testimony, GAO stated that DOD's communication strategy must include the active and visible involvement of a number of key players, including the Secretary of Defense, for successful implementation of the system. Moreover, DOD must ensure sustained and committed leadership after the system is fully implemented and the NSPS Senior Executive and the Program Executive Office transition out of existence. To provide sustained leadership attention to a range of business transformation initiatives, like NSPS, GAO recently recommended the creation of a chief management official at DOD.

April 14, 2005

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Highlights

Highlights of GAO-05-559T, a testimony before the Committee on Armed Services, U.S. Senate

HUMAN CAPITAL

Preliminary Observations on Proposed Regulations for DOD's National Security Personnel System

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 civil service reform across the federal government. The 2004 National Defense Authorization Act gave DOD significant flexibilities for managing more than 700,000 defense civilian employees. Given DOD's massive size, NSPS represents a huge undertaking for DOD. DOD's initial process to design NSPS was problematic; however, DOD adjusted its approach to a more deliberative process that involved more stakeholders. NSPS could, if designed and implemented properly, serve as a model for governmentwide transformation in human capital management. However, if not properly designed and 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, DOD and the Office of Personnel Management (OPM) released for public comment the proposed NSPS regulations. This testimony provides GAO's preliminary observations on selected provisions of the proposed regulations.

What GAO Found

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. The 30-day public comment period on the proposed regulations ended March 16, 2005. DOD and OPM have notified the Congress that they are preparing to begin the meet and confer process with employee representatives who provided comments on the proposed regulations. The meet and confer process is critically important because there are many details of the proposed regulations that have not been defined, especially in the areas of pay and performance management, adverse actions and appeals, and labor-management relations. (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 several 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.

Also, GAO believes that DOD (1) 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 (2) should complete a plan for implementing NSPS to include an information technology plan and a training plan. Until such a plan is completed, the full extent of the resources needed to implement NSPS may not be well understood.

www.gao.gov/cgi-bin/getrpt?GAO-05-559T.

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.

April 12, 2005

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Highlights

Highlights of GAO-05-517T, a testimony to the Subcommittee on the Federal Workforce and Agency Organization, Committee on Government Reform, House of Representatives

HUMAN CAPITAL

Preliminary Observations on Proposed Department of Defense National Security Personnel System Regulations

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 civil service reform across the federal government. The 2004 National Defense Authorization Act gave DOD significant flexibilities for managing more than 700,000 defense civilian employees. Given DOD's massive size, NSPS represents a huge undertaking for DOD. DOD's initial process to design NSPS was problematic; however, DOD adjusted its approach to a more deliberative process that involved more stakeholders. NSPS could, if designed and implemented properly, serve as a model for governmentwide transformation in human capital management. However, if not properly designed and 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, DOD and 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.

www.gao.gov/cgi-bin/getrpt?GAO-05-517T.

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.

What GAO Found

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. The 30-day public comment period on the proposed regulations ended March 16, 2005. DOD and OPM have notified the Congress that they are preparing to begin the meet and confer process with employee representatives who provided comments on the proposed regulations. The meet and confer process is critically important because there are many details of the proposed regulations that have not been defined. (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, including a modern performance management system and an independent, efficient, effective, and credible external appeals process, 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. 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.

March 15, 2005

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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

HUMAN CAPITAL

Preliminary Observations on Proposed DOD National Security Personnel System Regulations

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.

www.gao.gov/cgi-bin/getrpt?GAO-05-432T.

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.

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.

June 2004

GAO
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Highlights

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

DOD CIVILIAN PERSONNEL

Comprehensive Strategic Workforce Plans Needed

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.

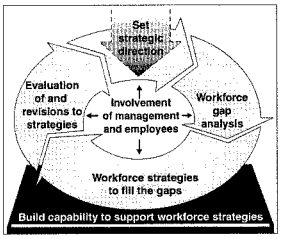
To view the full product, including the scope and methodology, click on the link above. For more information, contact Derek Stewart at (202) 512-5559 or stewartd@gao.gov.

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.

June 4, 2003

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Highlights

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

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.

GAO
Accountability·Integrity·Reliability
Highlights

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

May 1, 2003

DEFENSE TRANSFORMATION

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

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.

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.

April 29, 2003

GAO
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Highlights

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

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.

May 2003

GAO
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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

HUMAN CAPITAL

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

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.

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 2005. 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.

March 2003

GAO
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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

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.

April 2003

GAO
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Highlights

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

DOD CIVILIAN PERSONNEL

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

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.

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	35,563	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).

Testimony
Before the United States Senate
Committee on Homeland Security and Governmental Affairs
Thursday, November 17, 2005

From Proposed to Final: Evaluating the Regulations for the National Security Personnel System

Department of Defense National Security Personnel System Final Regulations: On the Precipice of Implementation

Statement of
Michael B. Styles
National President
Federal Managers Association

1641 Prince Street ■ Alexandria VA 22314-2818 ■ Tel: (703) 683-8700 ■ Fax: (703) 683-8707
■ E-mail: info@fedmanagers.org ■ Web: www.fedmanagers.org

Chairman Collins, Ranking Member Lieberman and Members of the Senate ɔmmittee on Homeland Security and Governmental Affairs:

My name is Michael B. Styles and I am the National President of the Federal anagers Association (FMA). On behalf of the nearly 200,000 managers, ıpervisors, and executives in the Federal Government whose interests are ɜpresented by FMA, I would like to thank you for allowing us to express our views ɜgarding the final personnel regulations outlining the National Security Personnel ystem (NSPS) within the Department of Defense (DOD).

Established in 1913, FMA is the largest and oldest Association of managers ıd supervisors in the Federal Government. FMA originally organized within the epartment of Defense to represent the interests of civil service managers and ıpervisors, and has since branched out to include some 35 different Federal ɜpartments and agencies. We are a non-profit advocacy organization dedicated ı promoting excellence in government. As those who will be responsible for the nplementation of the Department's proposed personnel system and subjected to s changes, managers and supervisors are pivotal to ensuring its success. I am ere today to speak on behalf of those managers with respect to the process of eveloping the regulations, the proposed changes themselves, and the eventual ɔllout of the new system. In particular, I would like to thank you for inviting us ack to present critical testimony on this issue, and let you know how pleased we re to be here today.

This is a historic step in the history of the civil service. The final regulations ɜleased by the largest employer within the federal government signify the largest ıange in the culture of federal service in nearly thirty years. The Department of efense's National Security Personnel System will affect roughly 700,000 of its mployees, nearly half the 1.8 million members of the Federal civil service. As as used in the initial reasoning for the change in the personnel management ystem, the critical mission and sheer size of DOD makes the success of the evelopment and implementation of the new personnel system vital. Our Nation is

:urrently engaged in military operations in Iraq and Afghanistan as well as :ountless number of clandestine activities fighting the war on terrorists. With an mpending Base Realignment and Closure (BRAC) process to reduce Defense nfrastructure, the civilian employees of the Pentagon must be reassured of the :ommitment by the Secretary and Congress to ensuring a positive and successful mplementation of the new regulations that take into account manager and :mployee protections.

This hearing represents the fourth time FMA has presented our views before :ongress on the NSPS. We have also submitted public comments during the equisite period of time to the Department on the proposed regulations. The egulations elude to taking into consideration the public comments and in many :ases going against them. We appreciate the role of the many hard working ›ersonnel at the Pentagon, OPM and OMB who have worked diligently to finalize he 10,000 foot view of the system, and continue to look forward to their oversight ınd insight as the system is initiated. However, as we said in our initial public :omments and testimony previously submitted before this Committee, the egulations remain vague. The devil, as the aphorism goes, is in the details. Vithout greater detail, it is difficult to comment on likely outcome of the nplementation of the final regulations. However, we believe many of our initial :oncerns remain the same.

As we move towards the implementation phase, we already know that there will ›e:

- 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 support the retention of these provisions. We at FMA also recognize that ıange does not happen overnight. However, we are still optimistic that the new ɜrsonnel system known as NSPS may help bring together the mission and goals the Department with the on-the-ground functions of the homeland security ɔrkforce.

RAINING AND FUNDING

Recent congressional action leads us to believe that further reiteration on the ɔint of training and funding needs dominate our concerns. Earlier this year, the ɔuse approved an amendment to the Department of Homeland Security ɔpropriations bill for fiscal year 2006 (H.R. 2360) that cut the requested funding vel by the Administration for the design and implementation of the MAX^{HR} system ɜarly in half. The funding was restored in the Senate thanks to the strong adership of Senator George Voinovich. However, the ultimate number was duced to a mere $33 million or $20 million less than the Administration's $53 illion request. This precedent exemplifies our concerns for the development and ıplementation of a new system at the Department of Defense.

The two key components to the successful implementation of NSPS and any her major personnel system reforms across the Federal government will be the oper development and funding for training of managers and employees, as well overall funding of the new system. As any Federal employee knows, the first ɜm to get cut when budgets are tightened is training. Ms. Chairman, you have ɜen stalwart in your efforts to highlight the importance of training across ɔvernment. It is crucial that this not happen in the implementation of NSPS. aining of managers and employees on their rights, responsibilities and ɜpectations through a collaborative and transparent process will help to allay ncerns and create an environment focused on the mission at hand.

Managers have been given additional authorities under the final regulations the areas of performance review and "pay-for-performance". We must keep in

ind that managers will also be reviewed on their performance, and hopefully ›mpensated accordingly. A manager or supervisor cannot effectively assign ıties to an employee, track, review and rate performance, and then designate ›mpensation for that employee without proper training. As a corollary, if there is ›t a proper training system in place and budgets that allow for adequate training, ıe system is doomed to failure from the start. The better we equip managers to ıpervise their workforce, the more likely we are to ensure the accountability of ıe new system – and the stronger the likelihood that managers will be able to ırry out their non-supervisory responsibilities in support of the Department's ·itical mission.

For employees, they will now be subject in a much more direct way to their ıanager's objective determination of their performance. Employees would be ıstified in having concerns about their manager's perception of their work product any performance review if they felt that the manager was not adequately ained to be objective and accurate in their review and assessment. Conversely, employees have not been properly trained on their rights, responsibilities and xpectations under the new human resources requirements, they are more apt to ıisunderstand the appraisal process. This contradiction does not create the ıvironment of performance based pay and results oriented productivity. Rather, creates an environment of mistrust and conflict in opposition to the intended fforts of the proposed regulations.

Our message is this: as managers and supervisors, we cannot do this alone. ollaboration between manager and employee must be encouraged in order to ebunk myths and create the performance and results oriented culture that is so esired by the final regulations. Training is the first step in opening the door to ıch a deliberate and massive change in the way the government manages its uman capital assets. We need the support of the Department's leadership, from ıe Secretary on down, in stressing that training across the board is a top priority. /e 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. As we mentioned earlier, the initial budget request for the implementation of the DHS MAX^{HR} system that included training for managers and employees has now been slated for underfunding two years in a row by Congress. 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.

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. Additionally, FMA supports the creation of a position to implement and oversee the proper usage of the appropriated training dollars.

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 government. Without proper training, and funding for training, we cannot hope to effectuate expansive human resources changes and fully achieve them at the Department of Defense or elsewhere in the federal government.

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 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. DOD plans to begin implementation of the new system with Spiral 1.1 in January of 2006 with slightly less than 100,000 employees. By the end of 2006 and Spiral 1, the Department proposes to include more than 300,000 employees. We want to strongly recommend a more deliberate and reflective process move forward. 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. Since then, the NSPS staff has 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 and included in the briefing overview upon the release of the final 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.

In the following years, we believe that management and employee groups should be represented at the table of discussion about changes and assessment of the success of the programs. 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 both sides involved. 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. Once again, we refer back to the approval of an underfunded amount for the DHS system this year. 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.

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. 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 DOD 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 fewer. 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 each individual the 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.

MANDATORY REMOVAL OFFENSES

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 DOD are fully aware of the sensitivity of their position and mission, so we urge the Department to exercise this authority with great care for potential side-effects.

PAY BANDING, COMPENSATION AND JOB CLASSIFICATION

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

Under the final NSPS regulations, applicable employees will no longer be governed by the traditional General Schedule (GS) pay system, which is made up of 15 levels and within level steps. The GS system is based on the premise that an employee who commits themselves to public service will be rewarded for longevity of service and tenure in the system through regular pay raises and promotions as long as the employee is "fully performing" the duties assigned. Under the pay banding system within pay for performance, the employee will be lumped into 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 senior-level management bands).

While the exact determination of the pay range for each pay band has yet to be determined, it is our understanding that the GS salary structure will act as the baseline for moving an employee into the new band as well as act as a guide for determining the low and high ends of each band. Furthermore, we also have received assurances that current employees will not see any reduction in their current pay, and in fact qualified employees could receive higher salaries from this transition. We at FMA believe that this is a sound move on the part of DOD and OPM. The GS system is familiar to federal managers and employees, and moving into a new pay banding system in and of itself creates some consternation. Using the GS system as the foundation will allay concerns that pay rates will be significantly reduced.

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

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

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

Of course, there remain challenges with any proposed pay-band system for that matter. First, simply combining GS levels 12 and 13 into one band, the system will help with recruitment of new talent. However, without changing the top level of pay, a shift to market-based pay and pay banding will continue to maintain a ceiling unable to be broken in federal employment, thus preventing the intended results of being able to compete with the private sector. Further, 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 myriad 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.

The Federal Employee Pay Comparability Act of 1990 attempted to address the inequities in pay between the private and public sector employment. Fifteen years later, we still face considerable disparity. Closing the pay gap between

[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.

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.

The White House has proposed draft legislation to take the reforms underway at DOD and DHS government wide with a measure entitled the Working for America Act. I testified before the House Subcommittee on the Federal Workforce last month to discuss our similar concerns. It is clear that 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 justified. 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 unique Civil Service.

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

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

CONCLUSION

The final regulations on the new personnel system being issued by the Department of 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. We hoped that within these precedent-setting regulations lay the

understanding that managers and employees can work together in creating an efficient and effective Federal workforce that meets the missions of each agency. Unfortunately, they remain vague. We at FMA maintain hope that in the implementing issuances, our suggestions will be taken into account. After all, 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 final 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, Ms. Chairman, for the opportunity to testify before your subcommittee 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

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

REPRESENTING

THE UNITED DEPARTMENT OF DEFENSE WORKERS COALITION

BEFORE

THE SENATE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS

REGARDING

FINAL REGULATIONS: THE DEPARTMENT OF DEFENSE
NATIONAL SECURITY PERSONNEL SYSTEM

ON

NOVEMBER 17, 2005

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

Introduction

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

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

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

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

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

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

The Meet and Confer Process

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

The Installation Level

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

The National Level

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

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

The 2003 Debate

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

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

Six "Flashpoint" Issues

The Final Regulations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Salary Determination and Performance Management

Pay, Performance Management, and Classification

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GAO and AFGE in Agreement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Neutral Scholars' Views of NSPS-like Pay Schemes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Labor Relations

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

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

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

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

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

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

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

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

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

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

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

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

Restrictions on Collective Bargaining

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

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

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

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

1. Overtime Policy

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

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

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

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

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

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

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

2. Shift Rotation for Employees

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

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

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

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

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

3. Safety and Health Programs

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

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

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

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

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

4. Flexitime and Compressed Work Schedules

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

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

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

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

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

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

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

5. Deployment Away From Regular Work Location

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

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

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

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

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

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

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

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

Workforce Reshaping

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

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

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

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

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

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

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

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

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

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

Veterans Preference

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

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

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

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

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

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

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

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

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

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

Employee Adverse Actions and Appeals

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

Criteria of Douglas v. Veterans Administration

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

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

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

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

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

Conclusion

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

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

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

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

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

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

Testimony

of

Ronald Ault, President

Metal Trades Department, AFL-CIO

The National Security Personnel System Is Not About Security

INTRODUCTION

Thank you for this opportunity to express the views regarding the National Security Personnel System **(NSPS)** on behalf of the United DOD Workers Coalition **(UDWC)**, the unions affiliated with the Metal Trades Department and the men and women represented by those labor organizations.

SUMMARY

NSPS is driven by disdain for workers and their rights, disregard for justice, disrespect for Congress, and pure arrogance. It is time for Congress to step in and stop this injustice now!

In our testimony today, we wish to emphasize five key points:

First: The National Security Personnel System is not about security: it is about control. As you know, the blueprint for NSPS was written not in the Pentagon, but at the Heritage Foundation. It was embraced by the White House within the first few days after the inauguration of President Bush—a full nine months before 9-11. It was proposed, not as a tool of national security, but as a means for "controlling the bureaucracy." 9-11 was not the reason for NSPS: it was the excuse.

There is a fundamental disconnect between the leadership of the Pentagon—embodied in the views of Secretary Rumsfeld —and the workers that we represent. Secretary Rumsfeld holds workers in disdain. He distrusts our motives. He demeans our knowledge and contributions. He clearly believes in command and control supervision. These are views that are widely held within the Executive Branch, clearly articulated by George Nesterczuk, a key architect of NSPS, reflecting a broad suspicion of unions as interlopers at the work site.

Here is Nesterczuk describing unions in government: *"At worst, they represent the permanent government, acting on its own self interest rather than on the desires of the electorate."*

We have heard Secretaries England, Chu and Rumsfeld repeatedly defend NSPS by describing what it is not. But, we also have, in their own words, a description of what it is, and that description should give lawmakers and citizens alike a substantial cause for alarm. Again, in the words of Mr. Nesterczuk:

"The 'core' federal workforce would include expert, highly compensated individuals who serve as executives and managers. The "spokes" of the new system would be a new class of temporary employees to deal with increased workloads or changing priorities of government and professional experts to do specific jobs or projects in-house. The "rim" would be contractors performing the great majority of the work on the "rim" of government."

A "new class of temporary employees"? There is no reference in that description to the people we represent, and that, we believe, is exactly the objective: to get rid of the career civil service.

We strenuously disagree with those viewpoints. Giving voice to workers to both exercise their inherent rights and to express insight and experience about how work is accomplished can increase productivity and efficiency.

Furthermore, and more importantly, that attitude disparages the concept of freedom of association and representation as a fundamental workplace right, and a significant element of a democratic society.

The Metal Trades Department's experience with collaborative work processes within the Department of Defense supports our contention. The Metal Trades Department, for example, negotiated with the Navy to develop a wide-ranging cross training program within federal shipyards a few years ago to improve efficiency and reduce downtime. We collaborated with the Navy to establish an innovative safety and training program for crane operations. We also negotiated a highly regarded apprenticeship training program with the Navy to address the chronic problem of an aging workforce in the area of ship repair and maintenance. None of those agreements would have been possible under the NSPS, as it has been developed because NSPS systematically restricts opportunities for unions to communicate, negotiate and collaborate with Pentagon management.

Second: The institutions of collective bargaining and union representation present no threat to national security. Consequently, there is no reason to reduce or further limit union representation for Defense Department personnel.

By now, we are familiar with the hackneyed complaints by DOD about the impediments that union representation presents when the Department needs to respond quickly to a crisis. They range from the inability to hire, fire or assign personnel on short notice. We heard the Secretary complain to this Committee that an unspecified number of DOD workers had used government issued credit cards to make illegal purchases.

Let's set aside the sense of proportion that this charge ignores—such as how it compares to the flagrant abuses that Halliburton and KBR perpetrated since the start of the Iraqi war—involving billions, not thousands or even millions, of taxpayer dollars. Let's set aside for a moment the fact that the individuals who flagged this corruption and brought it to the public's attention were federal employees who could much more easily be muzzled under the NSPS system than under the current civil service system.

Let's set those considerations aside and just examine what it would take to achieve the same "flexibility" and "rapid response" capability that the Pentagon says its needs. Let's ask, "What role do unions play in the hiring of new personnel?" The answer, of course, is none. Let's ask, "How does collective bargaining affect the Pentagon's capability for responding to a crisis in real time?" The answer is, we enhance it.

Look, again, at history. We have multiple examples where union agreements have established procedures for setting up tiger teams or special work groups—volunteers with requisite skills and experience—who can be deployed to locations on short notice for vital tasks. A year ago, just such a team was deployed to Kuwait to re-fit vehicles with additional armor for duty in Iraq. The truth is that the only impediment to flexibility and rapid response capabilities within the Pentagon is poor management. If the Pentagon cannot address that issue under the authority it already has, then Congress should hold Secretary Rumsfeld and his subordinates responsible, not the rank and file personnel of the Defense Department.

Union representation and a voice on the job for workers are part of a widely recognized and significant fabric of freedoms that America should foster and

encourage. Ostensibly, these are among the freedoms that our troops are fighting to establish in Iraq and Afghanistan. It is the height of hypocrisy to advance such freedom half way across the world and restrict it at home.

Third: The Department of Defense has been less than candid with Congress about what this NSPS contains and they have been equally duplicitous about their compliance with your instruction to "ensure" that DOD employees would be involved in the development of NSPS.

They claim they have been inclusive and open in the development of NSPS rules. That is simply a lie. I attended 95 percent of all of the NSPS meetings called by the Pentagon. In every case—the meetings served no other purpose except window dressing. Our recommendations were ignored. Our objections were disregarded. I challenge DOD to show one example where a **significant** union proposal was adopted in the final package.

There were some 58,000 comments generated during the public comment period last summer. DOD dismissed **almost** all of those comments with the claim that most were simply form letters.

Similarly, DOD claims that they have not restricted collective bargaining. With all due respect, Senators, I believe it is up to you to refute that lie. The final rules are replete with areas restricting the free operation of unions at every level. They have told us that every collective bargaining agreement is subject to the Secretary's discretion. Given our experience with this Secretary, how can that not be the death knell for any meaningful collective bargaining? I find it ironic that DOD management decries the current picayune nature of bargaining about lines in the parking lot, but they then establish rules that would make such topics virtually the only subject matter that they would cede any authority to negotiate.

Veterans Preference is another glaring example of DOD's failure to acknowledge the authority and the wishes of Congress. By law, those who served in the Armed Forces or "preference eligibles" are to receive superior standing in certain personnel matters, thereby affording them an advantage in being retained over other Employees during a reduction-in-force (RIF).

The UDWC attempted to reaffirm such protections by proposing that a RIF of a work unit comprised solely of veterans be prohibited. In the final regulations, DoD rejected such protections, electing instead to allow maximum flexibility to adjust staffing--including the displacement of veterans-- based on "organizational needs."

Under NSPS, civilian DoD workers with veterans' preference will be able to displace other workers holding the same special status approved by Congress, and DoD management will be able to eliminate an entire work unit of veterans while retaining non veterans in the exact same job titles, duties and pay system by "gerry mandering" these veterans in a specific, geographic area within the same organization. I'll give you an easy to understand example; consider a group of 15 WG-10, inside machinists working at the Norfolk Naval Shipyard in the optic shop area are all veterans and let's go even farther and say they all have 30% compensated service connected disabilities. The shipyard decides to have a Reduction in Force (RIF) in only the optic shop area of the shipyard. Under NSPS, those 15 inside machinists will lose their jobs while the other 650 inside machinists working in other shop areas will not be affected, included those non-veterans with less than three years of federal service. Do you support that sort of "Veterans Preference?"

Moreover, the final NSPS regulations also reduce the appeal rights for DoD workers that veterans throughout the rest of the federal government have to challenge an improper reduction-in-force action. Despite a UDWC proposal that would permit an affected worker to contest a wrongful RIF to either the Merit

Systems Protection Board (MSPS) or through a Negotiated Grievance and Arbitration Procedure, DoD has decided that the MSPB will be the only forum for review of an individual appeal. In doing so, DoD veterans have been deprived of other avenues of redress, including the right of appeal to the Secretary of Labor under the Veterans Employment Opportunity Act of 1998.

I submit that DOD's position here is contrary to the longstanding federal policy blessed by both Congress and the Executive Branch in years past, to provide special consideration to veterans in recognition of their service to the country. Furthermore, it exceeds the authority Congress granted to DOD to establish this system.

In its treatment of veterans and in many other areas, the Defense Department has gone way beyond the charter for change, which you provided.

Senators, you established a bright line regarding the level of authority you were willing to give the Secretary with regard to changing the personnel system within the Department of Defense. The Secretary stepped beyond that line the day after you drew it. Will you stop him, or not?

Fourth: The costs of implementing this system have not been addressed. This is particularly important in light of other much more critical demands for taxpayer funds—including the cost of providing adequate equipment and resources for our troops in Iraq and Afghanistan and for recovery to storm stricken areas around the Gulf states.

The Department of Homeland Security estimated that the transition to a nearly identical personnel system would cost some $10,000 per employee. Additional costs will include training materials and programs for both management and covered workers, the cost of setting up a parallel Federal Labor Relations Authority within the Pentagon and the cost of utilizing outside contractors, as was done by Homeland Security. We generously estimate the Pentagon's cost for this new system will be around $4 billion. In Pentagon terms, that does not look like much. But, when our nation is struggling to deal with a treasury groaning under the weight of three major catastrophes in the Gulf Coast, a growing bill for fighting a war in Iraq and another in Afghanistan in addition to the lost revenues from tax breaks for the nation's wealthiest taxpayers, we must ask—is NSPS worth it?

Fifth and finally: I cannot say this more strongly. We resent, resent, resent, the implication inherent in this National Security Personnel System that the men and

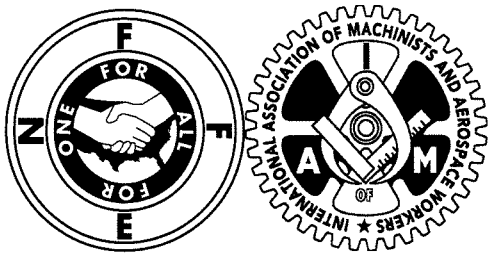
women of the career civil service within the Pentagon are somehow less worthy of the rights of free association, union representation and due process than other American workers.

We resent the inherent implication that to oppose NSPS is to oppose progress. As we have repeatedly asserted, we would embrace positive, progressive change that would make the system more transparent, that would provide a better balance between the rights of workers and the needs of management, that would more effectively address the concerns we have about subjective decision-making, continuing problems of discrimination and injustice on the job. We maintain that a first step in that direction would be to expand rather than to constrict collective bargaining and representation rights for government employees.

As I said, NSPS is driven by disdain for workers and their rights, disregard for justice, disrespect for Congress, and pure arrogance. When we last testified before Congress on NSPS, it was after DOD had issued its proposed NSPS regulations. During that testimony, many of you asked Secretary England direct questions about the very same issues I raise in my testimony today. Do you see any of his assurances to you incorporated in the final NSPS regulations? Neither do we. When thousands of our members wrote, called and visited Capitol Hill seeking

Congressional help combating the removal of workers' rights, you advised us to wait and see the final regulations. Well, I can tell you that the final regulations look every bit as bad if not worse than the proposed regulations. The cosmetic changes made by DOD actually worsen the plight of DOD workers. We believe that the courts will validate our perspective, but it is within your powers to make that happen sooner rather than later. It is now the proper time for Congress to step in and stop this injustice!

Thank you for this opportunity to address you on this important topic.



TESTIMONY BY

RICHARD N. BROWN

NATIONAL PRESIDENT
OF
NATIONAL FEDERATION OF FEDERAL EMPLOYEES
AFFILIATED WITH THE IAMAW, AFL-CIO

PREPARED FOR

THE SENATE HOMELAND SECURITY AND
GOVERNMENT AFFAIRS COMMITTEE

REGARDING

EVALUATION OF REGULATIONS FOR THE NATIONAL
SECURITY PERSONNEL SYSTEM

ON

NOVEMBER 17, 2005

Madam Chairman, Ranking Member Lieberman, and distinguished members of the Committee; I would like to thank you for the opportunity to provide testimony and give our organization's evaluation of the recently-released National Security Personnel System (NSPS) regulations.

I am the National President of the National Federation of Federal Employees (NFFE). Our organization is affiliated with the International Association of Machinists and Aerospace Workers, AFL-CIO. As national president of the oldest union representing non-postal federal employees, I have the honor of speaking for 90,000 federal employees, approximately half of whom are directly impacted by NSPS, the new personnel system at the Department of Defense (DoD).

In broad terms, our organization is extremely dissatisfied with the NSPS regulations as released by the Pentagon just days ago. Since DoD first proposed NSPS, our union, and all others participating in meet-and-confer, continually attempted to carry out "meaningful discussions" with DoD regarding the new personnel system, only to have our good-faith efforts rebuffed with public claims that we would not budge from the status quo. In our discussions behind closed doors we were stone-walled by DoD and the Office of Personnel Management (OPM) who refused to put proposals on the table for discussion, not in a collective bargaining atmosphere, but under the terms spelled out clearly

by Congress instructing meaningful discussions to take place. Instead, DoD and OPM distributed papers entitled "potential options" for NSPS, with each containing language specifically stating it was not a proposal. The agency representatives made clear at each meeting they had no authority to bind their respective agencies to any agreements that might be reached. DoD and OPM even acknowledged that the meetings did not meet the statutory obligation for meaningful discussions, yet they did nothing to change that. Considering the agency's refusal to carry out the directives of Congress, it is not surprising that the final NSPS regulations remain largely unchanged from the proposed regulations, save a few insignificant details that the agency may tout as evidence of true collaboration. The dearth of substantive changes to the regulations, despite 30-plus days of meet-and-confer and 58,000 comments from concerned DoD employees, clearly demonstrates that the voice of DoD workers was not heard in the development of NSPS. Although our organization will use every avenue available to correct this wrong done to DoD workers, the appropriate venue for this matter to be rectified is in Congress. The law authorizing the establishment of NSPS (National Defense Authorization Act for Fiscal Year 2004) was written in the Houses of Congress, and it was here that the law's authors later made clear their intent for the agency to work collaboratively with employee representatives. David M. Walker, Comptroller General at the US Government Accountability Office (GAO) summed up the importance of involving DoD employees in a letter dated April 29, 2005 to the Subcommittee on Oversight of

Government Management, the Federal Workforce, and the District of Columbia. "For NSPS to be a successful transformation, it must involve DoD employees and their representatives from the beginning of the process to gain their ownership for the changes that are occurring within the department," said Walker.[1] I urge this body to stand by their legislation. Ensuring the steps necessary for a successful transformation to occur should be demanded by Congress.

Collective Bargaining

On June 4, 2003, Secretary of Defense Donald Rumsfeld was clear as day on what his proposed new personnel plan would do with regard to collective bargaining. "Here is what the National Security Personnel System will not do, contrary to what you may have read:... It will not end collective bargaining. To the contrary, the right of Defense employees to bargain collectively would be continued. What it would do is bring collective bargaining to the national level," said Rumsfeld.[2] The law authorizing the establishment of NSPS left collective bargaining rights guaranteed in Chapter 71 intact. The only changes to Chapter 71 were to allow for national level bargaining and for the Department's labor relations system to provide for independent third party review of decisions. Despite the Secretary's testimony guaranteeing Congress that collective

[1] http://www.gao.gov/new.items/d05641r.pdf
[2] http://www.defenselink.mil/speeches/2003/sp20030604-0263.html

bargaining would be maintained, and regardless of law clearly stating collective bargaining would be preserved, the final regulations have virtually eliminated collective bargaining at the Department. The management rights clause has been greatly expanded, rendering core issues that are most important to Defense workers non-negotiable. Some of these core issues include: overtime policy, shift rotation for employees, flextime and compressed work schedules, deployment away from regular work locations, and safety and health programs. The NSPS regulations also allow for DoD to override provisions of existing collective bargaining agreements through "issuances." Further, the agency reserves the right to take entire issues "off the table." Management's right to implement issuances as allowed for in the final regulations would make collective bargaining that has any meaning for employees impossible. Congress never gave DoD the authority to cripple collective bargaining in this fashion. Federal employee unions during meet-and-confer put forth proposals to begin discussions on national level bargaining as described in Secretary Rumsfeld's testimony. In response, agency representatives simply said "...the administration remains extremely rigid and inflexible on this subject." I urge Congress to make certain provisions of the NSPS regulations pertaining to collective bargaining are consistent with the testimony provided by the Secretary and the intent of Congress.

Employee Adverse Action and Appeal

The final NSPS regulations have drastically altered the standard by which the Merit Systems Protection Board (MSPB) can modify an unjust form of discipline imposed on a Defense worker. The law authorizing the establishment of NSPS clearly maintains fair treatment and due process for employees; however, the final regulations deny workers these staples by forcing an extraordinarily high standard on MSPB Administrative Judges when overturning or reducing a penalty.

Under the regulations, an Administrative Judge is prohibited from modifying a penalty imposed by DoD unless it is "totally unwarranted in light of all pertinent circumstances." In fact, the underlying law says that the board may order corrective action if it determines that the decision was arbitrary, capricious and abuse of discretion or otherwise not in accordance with law, obtained without procedures required by law having been followed or unsupported by substantial evidence. The new standard, which prohibits Administrative Judges from applying the law, is contrary to the statute and was never authorized by Congress.

Applying this standard will also have the undesirable effect of eliminating the Douglas Factors; the 12 factors managers consider when determining an appropriate penalty for employee misconduct. These factors include: the seriousness of the offense, whether it was intentional or not, if it was repeated frequently, the employees past disciplinary record, the employees work record,

etc. Under the current regulations, an Administrative Judge will have no authority to use these factors when considering the fairness of a disciplinary action.

To make matters worse, DoD can issue its own final decision after an Administrative Judge has made a ruling, making the judge's decision obsolete. This new procedure would leave the full MSPB as the only avenue of recourse in a case where the agency disagrees with the Administrative Judge's ruling. This would result in a much longer period of time for a wronged employee to get relief. This process takes much longer, is far more bureaucratic, is more expensive, and is unfair to Department workers.

Finally, I would like to address the absurdity of changing the standard by which MSPB can modify a penalty from "wholly without justification," the standard in the proposed NSPS regulations to "totally unwarranted in light of all pertinent circumstances," the standard in the final regulations. On April 14, 2005 in the Senate Armed Services Committee, Deputy Secretary of Defense Gordon England was informed that the wholly without justification standard was contrary to law. It is an affront to Congress and to all the workers in the Department for the agency to respond by issuing a second standard that is completely synonymous to the first. Maybe they will go back to the drawing board again and come back with "entirely baseless," or perhaps "completely unfounded." The critical stakeholders in this transformation deserve better than to be mocked on an issue as important as this.

Conclusion

NFFE greatly appreciates the Committee's decision to hold this hearing and listen to the views of DoD employee representatives. It is our opinion that the authorities granted to DoD under the new regulations are overly-broad and excessive. More importantly, they are not in compliance with the National Defense Authorization Act for Fiscal Year 2004 on a number of accounts. The sum total of Defense's overhaul will certainly have a demoralizing effect on department employees, and it is likely that implementing this personnel system will have a harmful influence on the ability of the Department to carry out its mission. To this day, the coalition of unions representing DoD workers is committed to reaching progressive and collaborative change that will help the Department address the challenges it will face in the post-9/11 world and throughout 21st century. Our hope is that Congress will not allow the Pentagon to turn its back on the most important resource it will need to carry out the mission of protecting this country: the dedicated Defense workers.

Hearing Date: November 17, 2005
Committee: Homeland Security & Government Affairs
Member: Senator Akaka
Witness: Secretary England
Question 1

Question 1: As you know, United States District Court Judge Rosemary Collyer issued an injunction against the personnel system to be established at the Department of Homeland Security (DHS), which is very similar to the final regulations for the National Security Personnel System (NSPS). Specifically, Judge Collyer said that the DHS labor management system failed to ensure that employees may bargain collectively because of the lack of unenforceable contracts and that the appeals system was not fair. Did the Department of Defense (DoD) take into consideration Judge Collyer's decision, and if so, what changes were made to the final NSPS regulations to address concerns raised by Judge Collier?

Answer: We were certainly aware of, and informed by, Judge Collyer's decision. However, the statutory authority for NSPS is different than the statutory authority provided to DHS. Ultimately, changes that were made to the final regulations were a result of the many public comments received, as well as input from the unions during the meet and confer process.

Question 2. The NSPS regulations state that issues related to premium pay, including compensatory time off for travel, will be addressed through implementing issuances. What changes are being considered for the compensatory time off for travel provisions?

Answer: The NSPS implementing issuances have not yet been finalized, and are subject to the continuing collaboration process with the unions. However, the draft issuances regarding compensatory time off for time in a travel status generally mirror the provisions in current government-wide regulations, but have been developed with the goal of simplifying administration. One change under consideration is to remove the requirement to deduct meal time from creditable travel time.

Question 3. At the March 15, 2005, Oversight of Government Management Subcommittee hearing on the NSPS proposed regulations, the Government Accountability Office (GAO) outlined three primary areas of concern. GAO testified that the proposed regulations do not:

3-1: define the details of the implementation of the system, including such issues as adequate safeguards to help ensure fairness and guard against abuse;

Answer 3-1: We agree that some aspects of these regulations are relatively general in nature, providing broad policy parameters but leaving much of the details to implementing issuances (which have now been provided to employee representatives). We believe this structure, patterned after the chapters in title 5 that they replace, is appropriate. By providing for detailed implementing issuances, the regulations provide the Department with the flexibility mandated by Congress, and they do so without compromising the Department's commitment to preserve and provide for safeguards to help ensure fairness and guard against abuse.

3-2: require, as GAO believes it should, the use of core competencies to communicate to employees what is expected of them on the job; and

Answer 3-2: Over the past few months the Department has been engaged in NSPS transition preparations which included aligning individual performance objectives with mission objectives and measurable outcomes. The NSPS Program Executive Office (PEO) received much feedback in this area that led us to conclude we need more time to focus on simplifying the performance management design, getting performance objectives right, and ensuring the performance management system is simple, clear, and understandable. Ensuring that we "take the time to do this right" has always been a principle in our event-driven implementation approach. We want to ensure that our employees, supervisors, and leaders fully understand this performance management system, and have the tools to succeed in a results-focused, performance-based environment.

3-3: identify a process for the continuing involvement of employees in the planning, development, and implementation of NSPS. These same concerns were expressed about the final regulations by Comptroller General David Walker at this hearing. What is your response to GAO's concerns and how will the concerns be addressed?

Answer 3-3: The continuing collaboration process offers many opportunities for employee representatives to participate in the process. It can include advance copies of the implementing issuances prior to any discussions occurring; informational briefings to explain the details of the implementing issuances; face-to-face meetings and telephone conference calls to provide opportunities for questions to be asked and views and recommendations to be offered; opportunities to submit written views and recommendations regarding the implementing issuances; and a written response by DoD to employee representatives which provide the rationale and reasons for taking any final action regarding implementing issuances. The continuing collaboration process is a very robust process that provides employee representatives an opportunity for greater involvement in workforce issues, including areas previously excluded by law or other agency rules.

Employees at all levels across the Department, including non-bargaining unit employees, managers, Congress, and members of the public are kept informed of program plans and changes through town hall briefings, Component chain of command, and the NSPS web site (http://www.cpms.osd.mil/nsps). The Program Executive Office (PEO) has a comprehensive communications program that includes a variety of briefings, publications, videos, an Employee Fact Sheet, Frequently Asked Questions, and articles in local and base newspapers. Further, once the proposed regulations for NSPS were published in the spring of 2005, we received over 58,000 comments from civilian and military personnel, DoD organizations, labor organizations, other Federal agencies, Members of Congress and the general public. DoD and the Office of Personnel Management reviewed and carefully considered all the comments received and where appropriate, changes were made to the final regulations.

Question 4: At your October 26, 2005 press conference on NSPS, you said that existing training dollars would pay for training on NSPS.

How much is DoD's overall training budget for FY 06 and what portion is being used for NSPS training?

Answer: Generally, the Department budgets for training as part of the overall operations and maintenance requirements, and not as a separate line item. Training required by law and mission essential training, including NSPS training, will continue to be the Department's top priorities.

If you are using existing training dollars for NSPS, what impact will this have on existing training programs employees rely on to do their jobs?

Answer: A portion of Component training dollars has traditionally been set aside to address new program requirements. NSPS is a new program and workforce training is critical if DoD employees are going to successfully adapt to the new system. As such, DoD managers and supervisors will ensure NSPS training is given equal focus and attention with other mission related training priorities.

How will you address concerns that training for NSPS will overshadow work training programs, thus risking employees' performance scores and pay increases?

Answer: DoD managers and supervisors are responsible for ensuring sufficient resources are available to train their employees consistent with total workforce requirements. NSPS training is considered mission essential and will be accomplished within existing resources. The Department's robust training infrastructure affords us the opportunity to achieve NSPS training objectives in an efficient and comprehensive manner.

Question 5: In response to my question at a Senate Armed Services hearing on April 5, 2005, Secretary Chu stated that the Department estimates converting 39,000 to 42,000 positions from military to civilian positions by fiscal year 2011, which is far different from the 300,000 positions Secretary Rumsfeld said could be converted with the establishment of NSPS. What criteria will be used to convert the military positions to civilian positions and what is a realistic number for total conversions?

Answer: Military billets are identified for conversion during our annual inventory of the Defense workforce and during special studies of DoD functions and activities. Our annual inventory of the Defense workforce identified over 300,000 active military in commercial activities. These are positions that can be considered for DoD civilian or private sector performance and the minimum number the Department is committed to reviewing. So far, over 42,000 billets have been earmarked for conversion. As the Department implements its plans for Active/Reserve Rebalancing and BRAC, the number of military conversions could change significantly. Also, as NSPS is implemented, it will greatly expedite the hiring process and aid us in converting additional positions. However, even as we identify additional areas for conversion, there are several reasons why not all of the military in commercial activities can be converted. A sizable portion is needed for overseas and sea-to-shore rotation, career progression, wartime assignments, and other similar requirements. Decisions to convert depend on the merits of each situation within the 300K+ positions under review. Also, a military to civilian conversion is only one of many tools the Department uses to shape the Defense workforce and manage its resources. As a result, the "total number" of conversions will change from year to year as Defense priorities, threat levels and technologies change how

Question 6: The majority of employees paid under the Federal Wage System are employed by DoD, and 45 percent of those employees have veterans' preference status. As you know, the protection of our veterans is very important to me. How will wage-grade employees' compensation be affected by NSPS? Will you adhere to the Monroney amendment, and if not, why?

Answer: Currently, Federal Wage System (FWS) employees are not scheduled to be brought into NSPS until Spiral 2 (no earlier than 2007). The basic NSPS compensation features for FWS employees have not yet been developed.

The Department is initiating a review of current FWS classification and pay practices to identify how best to incorporate FWS employees into NSPS. We will also be identifying the best way to implement a pay for performance system that recognizes the unique characteristics of that workforce.

Section 5343(d) of title 5, United States Code (referred to as the Monroney Amendment), was enacted in 1968 and provides for possible use of wage data from outside a local area as a basis for establishing wages in areas with "specialized industries". The Department intends to include this provision in our review of current FWS pay practices. However, at this time the Department cannot specify how we will utilize the options available under section 5343(d).

Question 7: The final NSPS regulations call for holding managers accountable for their actions. However, it is unclear what impact the number of grievances against the manager, the number of outstanding ratings given by the manager, and the number of adverse actions taken by the manager will have on the manager's performance. To what extent will these factors impact a manager's performance evaluation?

Answer: Among other important considerations, managers under NSPS will be evaluated based on how effectively they carry out their supervisory and managerial functions, including use of the flexibilities afforded by NSPS. We are asking our managers to exercise more discretion and giving them the tools they need to increase mission effectiveness through management of human resources. They will be held accountable for how they do that. The measures you cited (number of grievances, adverse actions, etc.) are not appropriate performance metrics, rather they are indicators of how the managers are exercising their authorities, and may be used to assist in evaluating performance. In addition, all supervisors and managers will receive extensive training on necessary skills for effective performance management.

Question 8: Ensuring sufficient funding is essential to the success of any pay-for-performance system. As such, I question how using a pay pool construct with limited funds will adequately motivate high-performing organizations with a large number of employees with high performance ratings. I am also concerned that employees may be ostracized by filing a grievance over a performance rating, which, if successful, could lower the value of performance pay shares of other employees.

Under NSPS, what options are available to a manager to adequately reward high-performing employees in an organization with a large number of high-performing employees?

Answer: One of the key requirements of the NSPS pay-for-performance system is providing meaningful financial rewards to high-performing employees. Without the proper funding, this requirement cannot be realized. This issue was the subject of my testimony to the Armed Services Committee in April 2005. As I stated then, the Department views this as a basic covenant issue with our employees, and we are taking steps to protect pay pool funding. These include:

- The Department will mandate a minimum composition and expenditure of pay pool funds.
- Appropriate senior-level officials are required to certify that funds allocated to performance-based pay pools have been used only for that purpose.
- Any exception to the minimum funding of the pay pool will be based on stringent criteria, along with higher-level approval.
- Mechanisms will be in place to monitor compliance.

Under the draft implementing issuance, increases to an employee's payout due to a successfully challenged performance rating will not result in recalculation of the payout made to other employees in the pay pool.

In addition, exceptionally high-performing employees may be rewarded with an Extraordinary Pay Increase (EPI). An EPI is an increase to employee base salary, bonus or a combination of these and is intended to reward employees when the payout formula does not adequately compensate them for their extraordinary performance and results. The EPI payment is in addition to the annual performance payout and is made in conjunction with the annual performance payout. An increase to basic pay resulting from an EPI is permanent and does not require future revalidation.

In executing their duties under NSPS, supervisors and managers are required to adhere to merit system principles and rules against prohibited personnel practices set forth in title 5, United States Code, chapter 23. In addition, all supervisors and managers will receive extensive training on the necessary skills required to effectively and fairly exercise their performance management responsibilities under NSPS.

What safeguards will be in place to ensure that employees are not discouraged from appealing performance ratings?

Answer: We do not agree that employees will be ostracized for exercising their right to challenge a performance rating. Any decisions made through the performance reconsideration process or negotiated grievance procedures will not result in recalculation of the performance payout made to other employees in the pay pool as you suggest. Also, challenges are not made public, so other employees that do not have a need to know will not know of the challenge unless the employee elects to share with others.

Question 9: The regulations provide for either a negotiated grievance procedure or an administrative procedure for challenging a performance evaluation, but no process for challenging a performance pay decision. Why is there no process for challenging a performance pay decision? Under this system it appears that an employee could successfully challenge his or her performance evaluation but receive the same performance pay amount. If so, why?

Answer: Under NSPS, if an employee challenges a performance appraisal and it is subsequently raised, the corresponding payout will change, not stay the same. This is a function of a performance-based payout model in which the rating is linked to the shares.

Question 10: According to the regulations, a reviewing official may not conduct an independent evaluation of the employee's performance, determine the appropriate share payout, or otherwise substitute his or her judgment for that of the rating official. What can the reviewing official consider upon review? What remedy can the reviewing official order for the employee if the rating is found to be invalid?

Answer: The regulations restrict any individual or panel reviewing a rating of record under the negotiated grievance procedure from conducting an independent evaluation of the employee's performance, determining the appropriate share payout, or otherwise substituting his or her judgment for that of the rating official. Under the negotiated grievance procedure, the reviewing official (normally an independent arbitrator) may consider documents, testimony, and other relevant information entered into the record by the parties. If the rating of record is adjusted, DoD will make any pay adjustments required by the new rating.

Question 11: The regulations state that performance expectations will be communicated in writing, but may be amplified through particular work assignments or other instructions which need not be in writing. Please define what you mean by "amplified" and explain how will be employees be held accountable, and how will employees be able to adequately appeal any performance rating, if expectations are "amplified" orally?

Answer: In the context of performance expectations, "amplified" may be defined as further clarification or refinement of expected outcomes that, in turn, can help employees understand what the organization is trying to accomplish and how they are expected to contribute to that goal. For example, if the performance expectation were to heighten customer awareness of available services, amplification might be to update the list of customers and stakeholders for communication and marketing efforts. Although the work assignments or other amplifying instructions do not need to be in writing, the performance expectations themselves must be communicated to the employee in writing prior to holding the employee accountable for them.

Question 12: The regulations state that employees rewarded for their performance may receive compensation in the form of an increase to basic pay or as a one-time bonus. Because bonuses do not count toward retirement, do you support changing the law to include cash bonuses in the computation for employees' retirement?

Answer: Under title 5, United States Code, and title 5, Code of Federal Regulations, employees receive various types of cash compensation that are not included in an employee's retirement computation. Nonrecurring payments, such as bonuses under chapter 45, are among the types that are not included in retirement computations. We support Congress's choice to exclude chapter 45 cash compensation from retirement computations, and believe a similar exclusion of bonuses under NSPS is appropriate.

Question 13: In response to my questions at a September 27, 2005 Oversight of Government Management hearing on alternative pay systems, Mr. Michael Styles, National President of the Federal Managers Association, said that it is imperative for training to take place face-to-face, not self-paced on-line training, as supervisors and employees will need questions addressed in person by knowledgeable instructors.

What percentage of training on the NSPS pay-for-performance system will be face-to-face?

Answer: Approximately 85 percent of NSPS employee training will be conducted in the classroom where knowledgeable instructors can interact with employees, respond to their questions and concerns and ensure learning on key concepts takes place. With the exception of two web-based training courses of approximately 1 hour each in length, all of the NSPS training will be face-to-face. In addition to the on-line courses, DoD employees will receive up to 12 hours of instruction on the NSPS Human Resources elements and the Performance Management system. Managers will receive additional training to ensure they are prepared to take on the responsibilities of supervising in the new system.

What percentage of training will be conducted on-line?

Answer: Web based training accounts for approximately 15 percent of the NSPS training employees will receive. Two web-based training courses, each approximately 1 hour in length, will be offered. ***NSPS Fundamentals*** provides and overview of the NSPS Federal Regulation. ***NSPS 101*** is designed as an orientation course and a recommended pre-requisite for the classroom courses to follow.

Question 14: Under the regulations, the Secretary can remove from the bargaining table any and all subjects through an issuance. As such, it seems to me that there is no statutory right to bargain on any issue because any and all subjects can be eliminated by the Secretary. Are there any areas that cannot be waived from collective bargaining by an issuance? If there are none, how does this preserve collective bargaining as required by law?

Answer: It is incorrect to state that bargaining on any and all subjects can be eliminated by the Secretary. This suggests that there will never be any bargaining regarding Department issuances and this is not true. Issuances will continue to be subject to national consultation, unless national level bargaining occurs on the issuance. And there will be bargaining over impact and arrangements on the issuance, but not the content. Even today, there are limits on bargaining over Department issuances. The Department's interest in limiting bargaining over Departmental issuances is to ensure that DoD wide policies are consistently and efficiently applied across the organization.

Question 15: I am pleased to see that the regulations allow for employee unions to recommend members for the National Security Labor Relations Board (NSLRB), although I still question the Board's independence. I understand that employee unions suggested a proposal, which is commonly used in arbitration, where management and employee representatives each select a member and then the two members select a chairman. This approach appears to be more independent than the current selection process under NSPS. Why was the unions' proposal rejected?

Answer: This was certainly considered. In fact, during the meet and confer discussions on the proposed regulations, some employee representatives advocated such an approach. Others were stridently opposed to a union "seat" on the National Security Labor Relations Board (NSLRB). There was no clear consensus among employee representatives on this matter. The requirement that the Secretary consider labor organization nominations for two of the Board members is fair and assures labor organizations a voice in the NSLRB selection process. Finally, while the Secretary makes the final determination, appropriate safeguards have been provided for in the regulations to ensure that the NSLRB operates independently and members will discharge their duties in a fair and impartial manner.

Question 16: The regulations state that the NSLRB will use a single, integrated process to address all matters associated with negotiation disputes, including unfair labor practices, negotiability disputes, and bargaining impasses. Can you please describe this single integrated process and explain how it will differ from the current system?

Answer: Under today's system, a single negotiation could result in an unfair labor practice, a negotiability appeal, and a negotiations impasse. An unfair labor practice charge is initiated with the appropriate regional office of the Federal Labor Relations Authority (FLRA) under the jurisdiction of the FLRA Office of General Counsel. A negotiability appeal is initiated with the FLRA board located in Washington, D.C. A negotiations impasse is initiated with the Federal Service Impasses Panel (FSIP) located in Washington, D.C. In many instances, any one of these bodies will decline jurisdiction on a dispute if another dispute related to the negotiations is pending before one of the others. This contributes to delays in resolving all negotiation disputes. All negotiation disputes under NSPS will be filed in one place with the NSLRB, which will resolve all disputes at the same time when appropriate.

Question 17: The regulations state that the NSLRB cannot issue *status quo ante* remedies when not intended to cure egregious violations or impose an economic hardship. This appears to cover almost any improper action and would allow the Department to ask forgiveness rather than permission. How does this allow for independent third party review if the reviewer is severely limited in what can be remedied?

Answer: We believe that the limitations on the award of statute quo ante remedies appropriately recognize the Department's national security mission and the unique role that DoD civilian employees play in supporting the mission. While there are limitations placed on what can be remedied, these limitations are not so severe to deny employees independent third party review. The limitations are appropriate.

Question 18: The regulations state that the Secretary may determine the effective date for the establishment of NSLRB. I understand that the new Labor Management System at DoD will apply to all employees on the effective date of the regulations and that labor unions can appeal unenforceable provisions in collective bargaining agreements to the NSLRB within 60 days. Will you agree to establish the NSLBR at a time that affords employee unions fairness in appealing decisions affecting collective bargaining agreements?

Answer: The regulations establishing the NSLRB (5 CFR 9901.907(a)-(f) became effective on February 1, 2006. The Board will provide employee unions a fair and impartial venue for raising concerns regarding the interpretation of the regulations with respect to provisions of collective bargaining agreements.

Question 19: How are members of the NSLRB selected? Under what circumstances would the Secretary have more than three members on the NSLRB?

Answer: The members of the NSLRB are selected by the Secretary, with the two non-Chair members selected after consideration of nominees from employee unions. Members are appointed to fixed terms of three years, and can be extended for two additional one-year appointments. Members will be distinguished citizens known for their integrity, impartiality and expertise in labor relations and/or the DoD mission, and/or related national security matters. It is expected that the Board will normally operate with three members, but the Secretary could appoint additional members if needed. For example, significant spikes in labor dispute caseloads may create a need for additional board members in order to ensure decisions are rendered in a timely manner.

Question 20: Legislation creating NSPS states that the Department cannot waive or modify any provision of law, right, or remedy related to protections against discrimination. Your written testimony also states that NSPS does not touch protections against discrimination. However, the final regulations would change the MSPB procedures for handling discrimination cases. Please identify what provision in the statue grants DoD the authority to make this change.

Answer: The Department's authority to modify 5 USC 7702 is found in 5 USC 9902(h) which authorizes the establishment of a new appeals process. Consistent with section 9902(h)(7) the Department may modify or adopt the mixed case process in these regulations, provided employees' rights and remedies are preserved. The final regulations modify some of the procedures for processing mixed cases while preserving rights and remedies as required by 9902(h)(7). The Department believes that the NSPS regulations fully retain the right of employees to have allegations of discrimination adjudicated. Under these regulations, employees can raise allegations of discrimination as part of any appeal or grievance of an adverse action and, if dissatisfied with the final DoD decision, obtain full MSPB and EEOC review of such allegations. The regulations also preserve judicial review.

Question 21: The regulations fail to state who at DoD will be given authority to review and overturn a Merit Systems Protection Board (MSPB) administrative judge decision.

Who will be authorized to review the MSPB decisions?

Answer: The Department is committed to establishing an internal entity that adheres to merit system principles. This review will occur at the DoD level.

What qualifications will these individuals be required to possess?

Answer: The Department will select those individuals with sufficient experience and adequate expertise to review initial administrative judge decisions.

Will employee representatives be able to nominate or select individuals for this position?

Answer: No, as this is an internal review office that will render final decisions of the Department. However, information regarding the DoD appeals review office will be contained in an NSPS implementing issuance. This implementing issuance will be subject to the continuing collaboration with employee representatives. During that process the Department will consider the views and recommendations of employee representatives.

Will these individuals be present at the administrative judge hearing to have access to all information and be able to judge the credibility of the witnesses?

Answer: No, these individuals will not be present at the administrative judge's hearing. This is no different than what occurs today with the full MSPB reviewing administrative judge decisions – they are not present at the hearing.

Question 22: The final regulations heighten the burden of proof to "totally unwarranted in light of all applicable circumstances" for the MSPB to mitigate penalties imposed by DoD against the employee. Although this is a change from the "wholly without justification" standard found in the proposed regulations, the standard is higher than that found in current law. Please answer the following questions:

A. How is the "wholly without justification" standard different from "totally unwarranted" standard?

Answer: The final regulations provide that an Administrative Judge may not reduce a penalty unless "the penalty is totally unwarranted in light of all pertinent circumstances." This change in the final rule was a result of the concerns expressed during the public comment and meet-and-confer periods. This legal standard ensures deference is provided to management's penalty determinations along with the requirement that Administrative Judges and arbitrators give consideration to the Department's national security mission.

The primary difference between this standard and the proposed "wholly without justification" standard is the Department is adopting a standard similar to that recognized by the Federal courts. This standard will require all managers to determine on a case-by-case basis the "pertinent circumstances" that should be considered when making a penalty determination, where the "wholly without justification" standard did not specifically provide for this.

B. In a briefing to Senate staff in October, DoD explained that the mitigating standard used by an MSPB administrative judge and for the Federal Circuit would be "totally unwarranted in light of all pertinent circumstance" and that the Board would use the standard stated in the NSPS statute. The NSPS statute states that the Board may order corrective action if the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. However, the Federal Circuit uses the same statutory standard in reviewing employee appeals and developed the "totally unwarranted" standard under case law.

Does this mean that the MSPB administrative judge, the Board, and the Federal Circuit will all use the "totally unwarranted" standard?

Answer: No. Only the MSPB Administrative Judges and arbitrators are required to use the "totally unwarranted in light of all pertinent circumstances" standard. The pertinent circumstances may vary depending on each situation as determined by the management official taking the action. MSPB Administrative Judges would then consider those circumstances when reviewing the agency's penalty determination. The impact on the mission, however, is to be given primary consideration. The enabling legislation already provides criteria for the Board's review. Accordingly, the Board may order corrective action only if the Board determines that the decision was arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. There is no change to the standard for judicial review

C. In *Stanek v. Department of Transportation*, 805 F.2d 1572 (1986), the Federal Circuit said that the MSPB held under *Douglas v. Veterans Administration* that it has the authority to mitigate a penalty when it is clearly excessive in proportion to the sustained charges, violates the principle of like penalties for like offenses, or is otherwise unreasonable under all the relevant circumstances. The Federal Circuit then held, after considering the *Douglas* factors, that the court will not disturb a choice of penalty within the agency's discretion unless the severity of its action appears totally unwarranted in light of all relevant factors.

Does this mean that the standard used by MSPB in mitigating penalties under NSPS will still rely on the *Douglas* factors?

Answer: No. The mitigation standard requires managers to consider the "pertinent circumstances" of each situation when taking an adverse action. While these circumstances may in some cases be similar to the Douglas factors, these circumstances will vary depending on each situation. MSPB Administrative Judges would then consider those circumstances when reviewing the agency's penalty determination. The impact on the mission, however, is to be given primary consideration. As an example, consider a situation where an employee smokes at the work site in violation of agency policy. The pertinent circumstances considered by the managers would be very different for an employee violating this policy in an office environment compared to an employee violating this policy in an industrial environment that specializes in explosive ordnance disposal. Violation of the policy in the industrial environment would be placing the worksite at greater harm likely resulting in a greater penalty. Ultimately, these situations will require a case-by-case determination and we anticipate that a body of case law will evolve to guide the parties. As stated above, the enabling legislation establishes the full Board's review standard.

D. According to its FY 04 Annual Report, MSPB mitigated the penalty in a mere 31 cases last year, constituting only two percent of cases decided by the Board. Why then has the Department significantly increased the mitigation penalty when MSPB uses this authority sparingly?

Answer: The Federal Circuit precedent 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. 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." However, as noted above the standard established in the NSPS regulations will only be applied by MSPB Administrative Judges (and arbitrators), who will adjudicate cases in the Department's appeals process. The standards of review for the full MSPB are provided in law.

E. If the "totally unwarranted" standard is used by the Federal Circuit Court of Appeals, a reviewing court, can you explain why the MSPB administrative judge, who hears the case before it is even a final agency decision, must also apply the stringent burden used by the court of appeals?

Answer: The Department bears full accountability for national security, and therefore is in the best position to determine the most appropriate adverse action for unacceptable performance or misconduct. The Department has statutory authority to establish new legal standards. In this case, the Department is electing to adopt a legal standard that meets the need of the Department by ensuring deference is provided to the Department's penalty determinations along with the requirement that Administrative Judges give consideration to the Department's national security mission.

Question 23: The regulations will allow for longer probationary periods for employees in certain occupations or positions. However, MSPB reported earlier this year that agencies treat employees in their probationary period like they are federal employees who have been with the agency for years by making managers jump through hoops to fire a poor performer. Almost half of the participants in the MSPB report came from DoD components. If the agency is preventing the manager from taking action, why are extensions in the probationary period required when a change in agency directives could address the problem?

Answer: The extended probationary periods authorized by the final regulations will apply to categories of employees (e.g., occupations), not individuals, and will apply throughout the Department. Therefore, establishing probationary periods in excess of one year will only occur when sufficient and significant circumstances exist to warrant a longer probationary period. We do not agree that a change in agency directives alone can always create a situation that provides sufficient time to observe and evaluate employee performance.

Question 24: How does the use of Alternative Dispute Resolution affect time limits imposed on the MSPB to hear and adjudicate cases?

Answer: Although the Department encourages the use of alternative dispute resolution (ADR), its use does not affect the time limits imposed on the MSPB to hear and adjudicate cases. Additionally, the NSPS regulations prohibit MSPB from requiring ADR or settlement in connection with an appealable adverse action. The Department believes that ADR and settlement efforts are most successful when voluntary. Once either party decides that settlement is not desirable, the matter will proceed to adjudication. Eliminating settlement efforts that are contrary to the expressed wishes of one or both of the parties will speed up the adjudication process.

Question 25: In light of the authority granted to the Federal Aviation Administration (FAA) in 1996 to establish its own appeals process and the fact that Congress reinstated MSPB appeal rights four years later after finding the internal process to be unfair and biased, I have asked nominees for the MSPB and others who have come before the committee what they consider to be key elements that should be in any federal appeals system. One common response from respondents is that employees should have the right to a hearing by a neutral, independent adjudicatory body. Since a MSPB administrative judge decision can be overturned by a DoD employee, please explain how the appeals process ensures an independent adjudicatory process.

Answer: The Department believes that the process provides for appropriate review and safeguards. The enabling legislation authorizes an appeals process resulting in a final Department decision that is subject to full MSPB review. The use of MSPB Administrative Judges goes a long way to ensuring fairness and impartiality in the appeal system under NSPS. The Department's review of an initial Administrative Judge decision will be limited to those where either party has timely filed a request for review. While the Department may modify or reverse MSPB Administrative Judges' initial decisions, modification or reversal is based on very stringent criteria. As reflected in those criteria, it is anticipated that relatively few initial decisions will be changed by the Department. This review will occur at the DoD level. This reinforces that the highest levels of the Department wish to ensure that this process is applied fairly and consistently across the Department. Ultimately, any decision of the Department is subject to review by the full MSPB and the federal courts. The Department believes that this process affords employees full and fair opportunity for redress, as well as adjudicative independence, and deference to DoD's critical mission needs, consistent with the NSPS statutory authority.

Question 26: The regulations give DoD the authority to establish new hiring authorities. However, I am interested in knowing how DoD is streamlining its hiring process under existing authority.

A. Is the Department using category rating, and if not, why?

Answer: On July 19, 2004, the Deputy Under Secretary of Defense (Civilian Personnel Policy) outlined Department of Defense (DoD) policy and procedures for the optimal use of category rating and selection procedures and permitted use of category rating by all DoD Components. However, based on our monitoring of DoD Component operations, category rating is not being actively used in the Department. To address that, we are taking a variety of steps to promote its use, including providing further DoD-wide guidance on how to use this flexibility, and developing training materials to assist personnel offices implement category rating.

B. If the Department is using category rating, what has been the impact on hiring veterans, and how many veterans have been hired under this process?

Answer: Once we have sufficient experience with category rating, we will do the appropriate analysis.

C. Last year OPM implemented a 45-day hiring model for the federal government. Is the Department meeting this 45 day goal? If not, why?

Answer: The Department is meeting the requirements of the 45-day OPM hiring model. The Departments of Army, Navy and Air Force averaged 27, 31, and 27 days respectively during the 4th Quarter of Fiscal Year 2005. The Defense Agencies achieved similar results.

D. What reforms has DoD made to the time lines for writing vacancy announcements and planning for vacancies?

Answer: The Department has significantly reduced the time for writing vacancy announcements through use of automated staffing programs, such as *Resumix* and *USA Staffing*. Posting vacancy announcements electronically and using an electronic library approach has greatly reduced the time from several days to one or two. Traditionally, the applicant rating and ranking process was time-consuming and involved a laborious manual analysis by Human Resources Specialists and subject matter experts. The use of electronic applications and electronic rating and ranking of applications has reduced candidate identification time so significantly that certificates of eligible candidates are often issued to selecting officials within 24 hours.

The Department continues to pursue remedies for recruitment challenges, including the use of direct hire authority for certain occupations, the Federal Career Intern Program, and recruitment and relocation incentives where appropriate and within funding constraints.

Member: Senator Collins
Witness: Secretary England
Question 1

Question 1: The final regulations provide the Secretary of Defense authority to permit collective bargaining on certain operational matters on a case-by-case basis, such as the assignment of overtime. It appears that the decision is not subject to review. How can labor unions be assured that the decision will be exercised in a fair and impartial manner across all bargaining units, regardless of their size, geographic location, or leadership?

Answer: Collective bargaining on certain operational matters will be based on the Secretary's determination that bargaining is necessary to advance the Department's mission or promote organizational effectiveness. The Department bears full accountability for national security; therefore, the Secretary is in the best position to determine when it is appropriate to permit bargaining under these circumstances. Size, geographic location, or leadership of the unions are not factors when making this determination. Ultimately, this determination is based on what is best for the mission of the Department of Defense.

Question 2: The current federal labor relations system requires the General Counsel of the Federal Labor Relations Authority (FLRA) to investigate charges of unfair labor practices. The final regulations place resolution of unfair labor practices under the jurisdiction of the National Security Labor Relations Board. What steps will the Department take to ensure impartial investigations of unfair labor practices?

Answer: The National Security Labor Relations Board (NSLRB) will be an independent board. The law and the regulations require the members to be distinguished citizens known for their integrity, impartiality and expertise in labor relations and/or the DoD mission or relevant national security matters. Decisions of the NSLRB are generally reviewable by the FLRA and the United States Courts of Appeals. This ensures that impartial investigation and resolution of unfair labor practices will occur under the Board's jurisdiction. The purpose of placing resolution of unfair labor practices with the Board is to provide for faster resolution of disputes under a simplified and streamlined process that will continue to afford all parties the opportunity to have their issues heard by adjudicators familiar with the Department's structure and mission. Moreover, the Board's decisions on unfair labor practice (ULP) allegations are also subject to FLRA and judicial review; and the system is ultimately subject to Congressional oversight when the Congress takes up the issue of extending the NSPS labor relations provisions or allowing those provisions to sunset in 2009.

Question 3: The final regulations obligate the Department to bargain over certain procedural matters only if the effect of the change in policy is "foreseeable, substantial, and significant in terms of impact and duration." How will the Department define "foreseeable, substantial, and significant?"

Answer: The intent of these terms is to focus bargaining on those matters that are of significant concern and impact and relieve the parties of potentially lengthy negotiations over matters that are limited in scope and effect. Also, the requirement that an adverse effect be foreseeable is merely a codification of existing case law. It would be difficult for the parties to negotiate arrangements if the parties cannot foresee the adverse effect on employees of, for example, the introduction of new technology. Ultimately, these situations will require a case-by-case determination and we anticipate that a body of case law will evolve to guide the parties.

Question 4: The final regulations require the Secretary to seek nominees to the National Security Labor Relations Board from the unions, but do not bind the Secretary to select individuals from such lists. The final regulations presume that the Secretary will make appointments to the Board in good faith, with strong consideration given to the list of names provided by the Department's unions. Given the tremendous amount of attention that has been placed on the need for a fair and credible system, should the Department consider designating one of the three slots for a union appointee?

Answer: This was certainly considered. In fact, during the meet and confer discussions on the proposed regulations, some employee representatives advocated such an approach. Others were stridently opposed to a union "seat" on the National Security Labor Relations Board (NSLRB). There was no clear consensus among employee representatives on this matter. The requirement that the Secretary consider labor organization nominations for two of the Board members is fair and assures labor organizations a voice in the NSLRB selection process. Finally, while the Secretary makes the final determination, appropriate safeguards have been provided for in the regulations to ensure that the NSLRB operates independently and members will discharge their duties in a fair and impartial manner.

Question 5: The proposed regulations stated that a proposed penalty against an employee could not be reduced unless the penalty was "so disproportionate to the basis for the action as to be wholly without justification." The final regulations state that a proposed penalty may not be reduced on appeal by an administrative judge unless "the penalty is totally unwarranted in light of the circumstances." Please provide the Committee with an explanation of the difference between the two standards.

Answer: This provision is necessary to address the Department's unique national security mission. The standard recognizes that the Department's management, who are accountable for the mission, are in the best position to assign the appropriate penalty in disciplinary matters. With this in mind, the standard is similar to a standard currently recognized by the Federal courts and does indeed permit meaningful review.

The final regulations provide that a penalty may not be reduced unless "the penalty is totally unwarranted in light of all pertinent circumstances." This change in the final rule was a result of the concerns expressed during the public comment and meet-and-confer periods. This legal standard ensures deference is provided to management's penalty determinations along with the requirement that Administrative Judges and arbitrators give consideration to the Department's national security mission. The primary difference between this standard and the proposed "wholly without justification" standard is the Department is adopting a standard similar to that recognized by the Federal courts. This standard will require all managers to determine on a case-by-case basis the "pertinent circumstances" that should be considered when making a penalty determination, where the wholly without justification standard did not specifically provide for this. To illustrate the difference, consider a situation where the "pertinent circumstances" of a particular case are persuasively mitigating. Under the final rule standard, the Administrative Judge or arbitrator could consider these circumstances in determining whether the Department's penalty determination was "totally unwarranted." Ultimately, these situations will require a case-by-case determination and we anticipate that a body of case law will evolve to further guide the parties.

Question 6: Even the most well designed systems are dependent on good management. I continue to hear legitimate concerns from individual employees about the ability of their manager to "manage." The current system has not always produced the managers it needs. Although this problem may be due in part to the legacy pay and classification system, in which employees were promoted to supervisory positions based on longevity, it remains a problem that must be resolved. What assurances will the new system provide to those employees who are concerned about the ability of their managers to implement the performance management system in a fair and impartial manner?

Answer: All managers and supervisors will receive extensive training on necessary skills for effective performance management. The final regulations provide that the performance expectations for supervisors and managers will include the assessment and measurement of how well they exercise their performance management responsibilities under NSPS.

The performance assessment process provides for evaluation of performance and contribution through a pay pool panel. Meetings, chaired by a senior manager, allow supervisors and managers to explain the reasoning for recommended performance ratings which facilitates greater consistency among performance ratings across organizations in the pay pool. The level of visibility combined with the need to make dependable recommendations means that supervisors must be prepared to support their recommendations with facts and solid examples of performance and contribution. The pay pool process allows for additional opinions and perspectives for an employee's performance creating a more accurate final rating.

Additionally, employees may challenge a rating of record. A non-bargaining unit employee may do so through an administrative reconsideration process. Bargaining unit employees may choose either a negotiated grievance procedure that ends in arbitration or the administrative reconsideration process.

Question 7: While performance-based pay is widely recognized as an effective way to manage employees, it is a relatively new concept for a majority of the Department's civilian workforce. Effective training is one means to help build employee trust in the system. Please provide the Committee with a detailed description of the Department's training plan, the costs associated with the training, and the accounts from which the resources will be drawn.

Answer: Training our employees on the behavioral and functional aspects of NSPS is key to the success of NSPS. The NSPS training plan is a comprehensive, robust learning strategy to prepare the DoD workforce for transition to NSPS. The plan is grounded in the belief that 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 his and her rights under the law. 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. All employees will be provided training that covers the basics of the NSPS human resources management system including information on career groups, the pay band structure, as well as appeals procedures.

A course on the performance management system will train employees on how a performance-based system operates and help them understand their roles and responsibilities. Supervisors and managers will receive additional training so they can fairly manage, appraise and rate employees.

Over the past few months the Department has been engaged in NSPS transition preparations. This includes a wide variety of activities and events including working on the implementing issuances, soft skills training for the workforce, and aligning individual performance objectives with mission objectives and measurable outcomes. Major undertakings these last few months have been piloting training classes and preparing instructors to teach the NSPS basics to all employees, managers, and supervisors, and collaborating with the unions on implementing issuances.

The PEO received much feedback in the course of all these activities that led us to conclude we need more time to focus on simplifying the performance management design, getting performance objectives right, and ensuring the system is simple, clear, and understandable. We have asked the Components to press ahead on their communication, alignment of strategic plans/goals with performance objectives, and soft skill training initiatives, but put January NSPS-specific content training (including train-the-trainer) on hold, with one exception. The PEO has requested the Navy "flight test" some of the training in a representational environment and serve as the DoD training pilot. The results will provide an opportunity to evaluate the methodologies, products, and practices in a realistic setting, and make adjustments to the training. We want to ensure we take the time to do this right; that our employees, supervisors, and leaders fully understand the system; and have the tools to succeed in a results-focused, performance-based environment.

The Department's Program Executive Office (PEO) executed $3.3 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 deliver "train-the-trainer" sessions.

The DoD Components will fund the delivery of training to their personnel. While funds do not currently have visibility as a discrete line item in their budgets, the Components recognize the high priority of NSPS training, and are committed to funding delivery of that training within existing resources.

Question 8: It is my understanding that the Department plans to provide training on the new labor relations system to human resource practitioners only. Has the Department considered the need to provide at least basic awareness training on the labor relations system at the employee level?

Answer: Due to the highly technical nature of labor relations, in-depth training historically has been limited to human resource practitioners and labor attorneys. However, basic awareness regarding the changes to labor relations is already available to the workforce. Employees are attending town hall briefings regarding the NSPS regulations which include an overview of the changes to the labor relations system. Informational materials have been provided and made available to employees regarding the NSPS regulations including an overview of the changes to the labor relations system. The NSPS website includes information that highlights the NSPS regulations including changes to the labor relations system.

Member: Senator Lieberman
Witness: Secretary England
Question 1

Question 1: <u>Curtailment of collective bargaining by issuing Departmental directives</u>
It is my understanding that the regulations would allow certain top officials in the Department to prohibit collective bargaining on any subject simply by issuing internal directive, called "implementing issuances," dealing with the subject. I have heard concerns expressed that this authority could even be used to invalidate provisions of collective bargaining agreements that the managers do not want to comply with.

A. Doesn't it undermine the whole point of collective bargaining, as a means for giving employees a voice in resolving workplace disputes, if the Department has unilateral power to take issues off the bargaining table?

B. How can employees rely on bargaining agreements to serve their intended purpose, of governing relationships between employees and managers, if the Department has unfettered power to override existing agreements?

Answer:
A. Collective bargaining is not undermined. Employees continue to have a voice in resolving workplace disputes under NSPS. The final regulations preserve collective bargaining, but restrict the scope of bargaining on certain matters, including implementing issuances. The scope of an implementing issuance is extremely narrow. Implementing issuances apply <u>only</u> to policies or procedures implementing the National Security Personnel System, primarily in the area of human resources management. Congress authorized the Department to establish and implement the human resources (HR) system. It expressly provided an alternative to collective bargaining for involving employee representatives in the planning, development, and implementation of the HR system. It would be impossible to implement the HR system authorized by Congress without overriding conflicting provisions of existing collective bargaining agreements. The process by which NSPS was designed has been robust, collaborative, and broad-based, with participation by our employee representatives. Their voice has been and will continue to be a part of this process.

B. Collective bargaining agreements will continue to exist under NSPS and will continue to be important contracts between management and labor. Although those agreements will have to conform to the NSPS implementing issuances, the Department will not issue a directive simply to override an agreement. Additionally, section 9902 (m) (8) of the statute specifically provides that the "labor relations system" developed under section 9902 (m) "shall supersede all other collective bargaining agreements for bargaining units in the Department of Defense." The employee representatives have a voice in the planning, development, and implementation of these implementing issuances through the continuing collaboration process. Also, it should be noted that this authority is not unfettered. One check on this power is the Department's authority for the labor relations provisions expires in November 2009. This is a strong incentive to use this authority in a responsible manner.

Question 2: Lack of Specific Elements in Performance-Management System
The pay and performance regulations appear to be skeletal outlines of a program, but leave the specific policies and procedures for subsequent development in implementing issuances.

Of course, the Department should use internal directives to lay out the fine print of how the NSPS will be implemented. But what is left out of the regulations goes far beyond fine print. For example, the statute requires that any the NSPS must incorporate specific elements to ensure fairness and guard against politicization and other abuse in performance management. These must include —

A. "a fair, credible, and transparent employee performance appraisal system,"

B. "a means for ensuring employee involvement in the design and implementation of the system," and

C. "effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance."

D. I am concerned that, by setting forth key safeguards in "implementing issuances," rather than in regulations, the Department is circumventing the statutory process required by Congress for development of the NSPS regulations.

E. For example, will OPM need to be fully satisfied before the Department adopts the specific procedures to ensure fairness and guard against politicization and other abuse in performance management?

F. To what extent will managers and employees at all levels, Congress, and members of the public have an opportunity to engage with DOD and OPM about these vital provisions?

Answer: DoD partnered fully and cooperatively with OPM in creating the final regulations, and those regulations provide a coordination role for OPM on significant portions of DoD's implementing issuances and on-going provisions of NSPS. The Federal Register process provided the opportunity for comment from all stakeholders and members of the public. In addition, employee representatives were engaged in the "meet and confer" process provided for by the NSPS statute following issuance of the proposed regulations. Subsequently, the continuing collaboration process allows for substantive union involvement in finalizing the implementing issuances. On November 22, 2005, we provided copies of draft implementing issuances to the unions and posted these draft implementing issuances to our website for all stakeholders, including employees.

The continuing collaboration process offers many opportunities for employee representatives to participate in the process. It may include advance copies of the implementing issuances prior to any discussions; informational briefings to explain the details of the implementing issuances; face-to-face meetings and telephone conference calls to provide opportunities for questions to be asked and views and recommendations to be offered; opportunities to submit written views and recommendations regarding the implementing issuances; and a written response by DoD to employee representatives which provides the rationale and reasons for taking any final action regarding the implementing issuances. The continuing collaboration process is a very robust process that provides employee representatives opportunity for greater union involvement in workforce issues, including areas previously excluded by law or other agency rules.

Employees at all levels across the Department including non-bargaining unit employees, and managers, as well as Congress and members of the public, are kept informed of program plans and changes through town hall briefings, Component chain of command, and the NSPS web site (http://www.cpms.osd.mil/nsps). The Program Executive Office (PEO) has a comprehensive communications program that includes a variety of briefings, publications, videos, an Employee Fact Sheet, Frequently Asked Questions, and articles

in local and base newspapers. Further, once the proposed regulations for NSPS were published in the spring of 2005, we received over 58,000 comments from civilian and military personnel, DoD organizations, labor organizations, other Federal agencies, Members of Congress and the general public. DoD and the Office of Personnel Management reviewed and carefully considered all the comments received and, where appropriate, changes were made to the final regulations.

Question 3: Standard of review of employee penalties
Under the final rules, when an employee appeals a penalty imposed for alleged misconduct, neither the administrative judge nor a Department reviewing official may mitigate the penalty unless is it so disproportionate as to be "totally unwarranted" in light of all pertinent circumstances.

A. I am concerned that this extraordinarily deferential standard would shield excessive penalties from meaningful review. Why do you believe this provision is necessary?

B. Under the proposed rules published in February 2005, penalties could be reduced only if they were so extreme as to be "wholly without justification." Could you explain why this "wholly without justification" standard of review in the proposed rules was changed to a "totally unwarranted" standard of review in the final rules? What is the practical difference between these two standards of review? To help me understand the difference, could you provide specific hypothetical examples of penalties and explain why they would be treated differently under the "wholly without justification" standard of review than under the "totally unwarranted" standard of review.

Answer:
A. This provision is necessary to address the Department's unique national security mission. The standard recognizes that the Department's management, who are accountable for the mission, are in the best position to assign the appropriate penalty in disciplinary matters. With this in mind, the standard is similar to a standard currently recognized by the Federal courts and does indeed permit meaningful review. Further, this standard requires managers to consider all of the pertinent circumstances of each situation when taking an adverse action including pertinent mitigating factors. Consequently, administrative judges would then consider those circumstances when reviewing management's penalty determination. In addition to the specific regulation governing the review of the propriety of the penalty, the Administrative Judge may sustain a penalty imposed by the Department only if the Department establishes by a preponderance of the evidence that the employee engaged in misconduct or poor performance. In the case of an action based upon poor performance, the standards established by the regulation are more stringent than those applied under the existing law as the MSPB is currently required to apply a more deferential "substantial evidence" standard in determining whether an action based on poor performance is warranted. Lastly, NSPS regulations are more stringent because under existing law, the MSPB has no authority at all to review the penalty imposed for poor performance.

Answer:
B. The final regulations provide that a penalty may not be reduced unless "the penalty is totally unwarranted in light of all pertinent circumstances." This change in the final rule was a result of the concerns expressed during the public comment and meet-and-confer periods. This legal standard ensures deference is provided to the Department's penalty determinations along with the requirement that Administrative Judges and arbitrators give consideration to the Department's national security mission. The final rule standard is similar to that recognized by the Federal courts. This standard will require all managers to determine on a case-by-case basis the "pertinent circumstances" that should be considered when making a penalty determination, where the wholly without justification standard did not specifically provide for this.

Question 4: Restrictions on scope of bargaining
John Gage testified that the following are five examples of current Defense Department labor-management contract provisions that would no longer be negotiable under the final NSPS rules: *(1)* overtime policy, *(2)* shift rotation of employees, *(3)* safety and health programs, *(4)* flextime and compressed work schedules, and *(5)* deployment away from regular work location. Do you agree that those areas would no longer be negotiable? If so, please explain why you believe preventing collective bargaining in all of these areas is necessary.

Answer: The final regulations preserve the right to bargain collectively and provide DoD with a workforce that is sufficiently agile and flexible to execute its current and future national security mission. The regulations narrow the scope of bargaining to provide the Department the authority to take actions quickly to confront threats in an ever-changing national security environment without unnecessary delay. With this in mind, overtime policy, shift rotation of employees, safety and health programs, and deployment away from regular work locations deal with operational matters that are core to the accomplishment of the Department's national security mission. While the final regulations eliminate bargaining on procedures regarding these operational matters, they do not eliminate all bargaining on procedures. The final regulations continue to provide for bargaining on procedures for personnel management rights. The final regulations also continue to provide for bargaining on impact and appropriate arrangements except for those that include proposals on matters such as routine assignments to specific duties, shifts or work on a regular or overtime basis. The final regulations provide for consultation on procedures regarding the operational matters listed by Mr. Gage, such as deployment. Finally, flextime and compressed work schedules are covered by provisions of title 5 that are nonwaivable under NSPS. The unions were advised during meet and confer that scope of bargaining on these particular topics is not impacted by NSPS.

Question 5: Training
It is important that DOD's plan for implementing NSPS include training for both supervisors and employees. What planning have you done in developing a training program to support the NSPS? How much will the Department need to spend in order to train supervisors to evaluate employees properly?

Answer: Training our employees on the behavioral and functional aspects of NSPS is key to the success of NSPS. The NSPS training plan is a comprehensive, robust learning strategy to prepare the DoD workforce for transition to NSPS. The plan is grounded in the belief that 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 his and her rights under the law. 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. All employees will be provided training that covers the basics of the NSPS human resources management system including information on career groups, the pay band structure, as well as appeals procedures.

A course on the performance management system will train employees on how a performance-based system operates and help them understand their roles and responsibilities. Supervisors and managers will receive additional training so they can fairly manage, appraise and rate employees.

Over the past few months the Department has been engaged in NSPS transition preparations. This includes a wide variety of activities and events including working on the implementing issuances, soft skills training for the workforce, and aligning individual performance objectives with mission objectives and measurable outcomes. Major undertakings these last few months have been piloting training classes and preparing instructors to teach the NSPS basics to all employees, managers, and supervisors, and collaborating with the unions on implementing issuance.

The PEO received much feedback in the course of all these activities that lead us to conclude we need more time to focus on simplifying the performance management design, getting performance objectives right, and ensuring the system is simple, clear, and understandable. We have asked the Components to press ahead on their communication, alignment of strategic plans/goals with performance objectives, and soft skill training initiatives, but put January NSPS-specific content training (including train-the-trainer) on hold, with one exception. The PEO has requested the Navy "flight test" some of the training in a representational environment and serve as the DoD training pilot. The results will provide an opportunity to evaluate the methodologies, products, and practices in a realistic setting, and make adjustments to the training. We want to ensure we take the time to do this right; that our employees, supervisors, and leaders fully understand the system; and that all have the tools to succeed in a results-focused, performance-based environment.

The Department's Program Executive Office (PEO) executed $3.3 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 deliver "train-the-trainer" sessions.

The DoD Components will fund the delivery of training to their personnel. While funds do not currently have visibility as a discrete line item in their budgets, the Components recognize the high priority of NSPS training and are committed to funding delivery of that training within existing resources.

Question 6: <u>Pay levels</u>
In moving away from pay levels defined in statute, what assurances can you give that limited appropriations or other budget pressures will not result in pay levels too low to truly pay for performance?

Answer: The Department views this as a basic covenant issue with its employees. The need to protect pay pool money must be balanced against the need for fiscal flexibility. The Department is taking concrete steps to ensure achievement of the NSPS key performance parameter to have a credible and trusted system. The Department is taking action to protect pay pool funding through its internal issuances. For example, the Department will mandate the minimum composition and expenditure of pay pool funds. In addition, the Department will require certification of the allocation and expenditure of those pay pool funds by an appropriate senior official. Finally, the Department will determine the appropriate mechanism(s) to ensure compliance.

Question 7: <u>Defense Laboratory Demonstration Projects</u>
I have been concerned to be sure that the defense laboratories have the ability to hire and retain top quality scientists and engineers to enable us to develop and utilize the advanced technologies necessary to protect our troops. I have also been concerned that the department has never allowed the labs to exploit fully the innovative personnel authorities granted to them by Congress.

As you know, the original NSPS authorizing legislation requires the Secretary of Defense to make a decision as to whether these laboratories should retain their existing personnel demonstration programs or become part of the National Security Personnel System (NSPS). The language of 5 U.S.C. § 9902(c) requires that the Secretary determine by October 1, 2008, the extent to which the NSPS personnel system should apply based on an objective analysis of whether that system provides greater flexibilities that are best for the laboratories.

A. Please explain in detail the similarities and differences between the features of the NSPS and those of the Laboratory Demonstration System for the defense laboratories.

B. I realize that the schedule for issuing the implementing regulations for NSPS has already been delayed, and may face further delays as a result of legal challenges and for other reasons. These delays may preclude you from making an appropriate comparison between the ongoing successful laboratory personnel demonstrations and the NSPS before October 1, 2008, because there may not be sufficient data on the operation of the NSPS to make a comparison. In this light, shouldn't the decision date on the labs be extended so as to allow for an adequate assessment of both personnel systems?

Answer:

A. Defense laboratory personnel demonstration projects differ among themselves and the features of NSPS are not yet final. In addition, the laboratory demonstration projects will be able to evolve and may change under the plan that the Department is submitting on effective utilization of personnel management authorities for science and technology reinvention laboratories, as required by Section 1107 of Public Law 108-375.

Many characteristics of NSPS are similar to those of some or most laboratory demonstrations. For example, proposed NSPS hiring, placement, promotion, and pay-setting flexibilities are similar to those being used by laboratories. NSPS and the demonstration projects are pay banded systems that group selected occupations together in pay plans that have fewer levels but wider ranges of pay than characterize the General Schedule grade and pay system. Laboratory pay plan groupings and bands differ one from one another. NSPS, covering a much wider range of missions and key occupations than laboratories have, will differ from the demonstration projects.

Both NSPS and laboratory demonstrations use a performance or contribution-based approach to increases in pay in place of longevity-based step increases of the General Schedule. NSPS proposes to make direct use of performance rating levels to determine retention standing in case of reduction in force; laboratories generally follow the common federal civil service practice of translating ratings into length of service credit.

Finally, laboratories currently use the government-wide labor relations system under 5 U.S.C. chapter 71. This subjects the laboratories to Federal Labor Relations Authority rules and decision criteria. Once the NSPS labor relations system is implemented, laboratories will be covered by the NSPS labor relations rules at the same time as the rest of the Department. Laboratories also use the current statutory appeals process under MSPB rules and decision criteria. Once the laboratories are eligible and become covered by the NSPS human resources management system, the laboratories will then be covered by the NSPS appeals process.

B. The Department will compare personnel management system flexibilities of Defense laboratories with those of NSPS once NSPS is in place and sufficiently mature to allow for productive comparison. We understand October 1, 2008 to be the earliest date NSPS can be applied to some of the Defense laboratories if the Secretary of Defense determines that NSPS provides more flexibility than the laboratories have. The determination will be event driven. If the Department needs more time for NSPS to mature beyond FY 2008, the Secretary of Defense may defer a determination. No statutory extension of the October 1, 2008 date is necessary.

Member: Voinovich
Witness: Secretary England
Question 1

Question 1: As DoD continued working to develop the final regulations, the Department began preparing and executing its training program. What training has been completed to date?

Answer: In October 2005, the DoD Program Executive Office (PEO) sponsored a series of train-the-trainer sessions in Columbus, Ohio, for Human Resources (HR) practitioners, supervisors, and managers to familiarize them with the NSPS framework and prepare them for their role as trainers. Sessions included training on HR elements, appeals and adverse actions, and labor relations. Additional train-the-trainer sessions were held in December, with future sessions planned in Southbridge, MA. Follow-up workforce training for HR practitioners and supervisors has begun on a limited basis at some Spiral 1.1 activities, with the majority of workforce training to begin in the spring of 2006.

Over the past few months the Department has been engaged in NSPS transition preparations. This includes a wide variety of activities and events including working on the implementing issuances, soft skills training for the workforce, and aligning individual performance objectives with mission objectives and measurable outcomes. Major undertakings these last few months have been piloting training classes and preparing instructors to teach the NSPS basics to all employees, managers, and supervisors, and collaborating with the unions on implementing issuance.

The PEO received much feedback in the course of all of these activities that led us to conclude we need more time to focus on simplifying the performance management design, getting performance objectives right, and ensuring the system is simple, clear, and understandable. We have asked the Components to press ahead on their communication, alignment of strategic plans/goals with performance objectives, and soft skill training initiatives, but put January NSPS-specific content training (including train-the-trainer) on hold, with one exception. The PEO has requested the Navy "flight test" some of the training in a representational environment and serve as the DoD training pilot. The results will provide an opportunity to evaluate the methodologies, products, and practices in a realistic setting, and make adjustments to the training. We want to ensure we take the time to do this right and that our employees, supervisors, and leaders fully understand the system, and have the tools to succeed in a results-focused, performance-based environment.

Question 2: Representative organizations of the department's employees, continue to express opposition to the National Security Personnel System. If find this troubling because I agree with Comptroller General Walker's observations that employee understanding and acceptance of a new personnel system is a prerequisite for success. What plans does DoD have to address this situation?

Answer: The Department recognizes the critical need to communicate with its employees throughout the design and implementation of NSPS. This is key to successfully helping employees understand and accept this new system. 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 and will continue to use various means for communicating with 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 with senior DoD officials and local commanders, focus groups, speeches and briefings.

The NSPS website (www.cpms.osd.mil/NSPS) has been the primary tool for providing all our employees and 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 and newsletters that include the Component-specific information on NSPS.

During the summer of 2004, we conducted over 100 focus groups at installations throughout the world as well as over 50 town hall meetings to keep our employees informed 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 and 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 several of their suggestions in the NSPS regulation. The meet and confer process and the continuing collaboration process outlined in the regulations, have also provided ongoing venues for communicating with employee unions.

Question 3: A report just released by the National Academy of Sciences describes a critical need for scientists and engineers in this country. The DoD labs will have to compete in a tight labor market in order to attract and retain their highly skilled workforce. The labs should continue to be innovative in their approach to their human resources system. The statute authorizing NSPS permits Defense Department labs to enter NSPS only after October 2008, and only if the Secretary has determined NSPS provides greater flexibility than what was authorized for the labs. Please provide detail on what, if any, coordination is underway between the various lab personnel systems and NSPS.

Answer: NSPS is being designed to be mission-focused throughout the Department. Science and engineering are among the Department's critical mission occupations in which we must be able to recruit, retain, and reward a highly effective workforce. Although NSPS cannot apply to the Defense laboratories specified in PL 108-136 before October 2008, NSPS is being designed to offer greater flexibilities than currently found in the Science and Technology Reinvention Laboratory (STRL) Personnel Demonstration Projects. STRL representatives have been on NSPS working groups at the Department and Component levels since the summer of 2004, including the initial human resource design teams and today's groups working on NSPS training and performance management. General and Flag Officer members of the NSPS PEO Senior Advisory Group come from Commands with major research and development missions. At NSPS conferences, officials from laboratories with demonstration projects have attended and served as presenters of lessons learned about performance-based pay systems.

The PEO also has been in formal coordination with senior staff of the Under Secretary of Defense for Acquisition, Technology, and Logistics and senior staff of the Under Secretary of Defense for Personnel and Readiness, to determine the Department's approach to the comparison of system flexibilities, in connection with the Under Secretaries' plan under section 1107 of Public Law 108-375, for effective utilization of the personnel management authorities in STRLs.

Reflecting this extensive interaction, NSPS features will support many of the laboratory workforce needs. For example, in identifying occupational groups with unique compensation and career advancement patterns, the Department plans to establish NSPS career groups and pay schedules specifically for scientific and engineering personnel. NSPS local market supplements will be sensitive occupationally and geographically considering market factors, the Department will be able to pay a different supplement to a scientist than to an administrative specialist at a particular duty station, or a different supplement to an astrophysicist than a civil engineer. This is a flexibility not currently available to STRL that they may find as a desirable feature.

Similarly, in structuring NSPS pay schedules and performance-based pay progression, the Department considered that 40 percent of our student employees are in science and engineering -- often in masters and doctoral programs. NSPS therefore includes a pay schedule for the Student Educational Employment Program that will enable laboratories to offer starting salaries up to the GS-11 step 10 level. In addition, the NSPS performance management system provides for accelerated compensation increases for employees in developmental positions, in addition to annual performance adjustments.

Question 4: I continue to hear concerns from employee organizations over the appeals process available to employees if management initiates an adverse action. Please identify what has not changed in the process. Please describe what has changed and how this will be better for employees.

Answer: What is not changing is very important. Under the NSPS statute, DoD is prohibited from waiving or modifying any provision relating to prohibited personnel practices or merit system principles, including reprisal for whistleblowing or unlawful discrimination. Although we have made some changes from the proposed regulations, due process and other legal protections are preserved.

One change is a shorter advance notice period of at least 15 days (rather than the current 30 days). The shortened notice supports the NSPS goal of streamlining the adverse action process and provides adequate time for consideration of evidence. We have also changed the opportunity to reply time period to 10 days. Both the 15 day notice period and the 10 day reply period represent minimums and may be extended as necessary at the Department's discretion.

Another change is the single standard of proof under NSPS. The final regulations adopt a single burden of proof – "preponderance of the evidence" standard for all actions whether based on unacceptable performance or misconduct. Under current law, agencies must only meet a "substantial evidence" burden of proof in performance cases taken under chapter 43 of title 5. This is a lower burden than preponderance of the evidence. The single ("preponderance") standard for all cases, whether taken for reasons of performance, or conduct, or a combination of both, simplifies the appeals process and assures consistency without compromising fairness or burdening the employee.

Another change is time limits for Merit Systems Protection Board (MSPB) administrative judges and the full Board to render decisions. There are currently no statutory or regulatory time limits for decisions. However, the MSPB has previously advised the Department that the current average number of days for an administrative judge to make a decision is 89 days. Under NSPS, the MSPB administrative judge must make an initial decision no later than 90 days after the date on which the appeal is filed. Additionally, the full MSPB has 90 days to render a decision.

Changes to the appeals process are necessary for the orderly and fair resolution of the adverse action. A quicker, orderly and fair resolution of an employee appeal is certainly better for employees as well as the Department.

Question 5: Following is a list of six issues that have been identified by federal employee unions as critical areas of concern under NSPS. Please provide a detailed response to the concerns expressed.

A. The regulations radically reduce the scope of bargaining.

Answer: While the final regulations reduce the scope of bargaining, the final regulations preserve the right to bargain collectively as provided for under the law and provide DoD with a workforce that is sufficiently agile and flexible to execute its current and future national security mission. In response to concerns raised by the unions, we have revised the regulations to permit collective bargaining on procedures management follows or impact of actions related to routine assignments of operational matters if the Secretary determines that bargaining would advance the Department's mission accomplishment or promotes organizational effectiveness.

B. The National Security Labor Relations Board will be biased towards management.

Answer: We disagree and have instituted several measures to ensure the independence of the Board. The regulations require the members to be distinguished citizens known for their integrity, impartiality and expertise in labor relations and/or the DoD mission or relevant national security matters. In addition, decisions of the NSLRB are generally reviewable by the Federal Labor Relations Authority (FLRA) and the United States Courts of Appeals. Finally, we have included in the final regulations an explicit requirement that the Secretary consider labor organizations' nominations in selecting the two non-chair members of the NSLRB. All these safeguards ensure a fair review of labor disputes will be made by the NSLRB without undue influence by the Secretary or DoD management.

C. The new standard for mitigation of penalties by the Merit Systems Protection Board will be impossible to meet.

Answer: We disagree. The standard for MSPB administrative judges has been revised to preclude mitigation except when the action is "totally unwarranted in light of all pertinent circumstances." This standard is similar to that recognized by the Federal courts and is intended to limit mitigation of penalties by providing deference to an agency's penalty determination. The standard for review for the full MSPB is established in the enabling legislation.

D. The limited ability of arbitrators to review performance appraisals.

Answer: The regulations simply codify existing case-law that place limitations on arbitrators when adjudicating grievances concerning performance appraisals.

Member: Senator Warner
Witness: Secretary England
Question 1

Question 1: In prior hearings held in this Committee and the Senate Armed Services Committee on NSPS, officials from the Department of Defense, the Office of Personnel and Management, the General Accountability Office, and labor groups have all emphasized the importance of training for NSPS to be successful. However, the framework and details of the training program have not been provided.

With the first group of DoD employees entering the performance management system early next year, I think that it would be beneficial if you would provide some of the specific fundamental characteristics of the Department's training program, its time line for training managers, and any assurances that the proper resources will remain available for training throughout the implementation of NSPS and beyond.

Answer: The NSPS training plan is 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.

Employees will receive training through: 1) print materials – directed to various targeted audiences to raise awareness and educate them on key NSPS elements and performance management concepts; 2) web-based training – two hour-long courses, "Fundamentals of NSPS" and "NSPS 101" providing introductory, on line training delivered in a consistent manner in a self-paced, on-demand format; 3) classroom sessions – the primary vehicle to communicate critical information, classroom sessions are under development for employees, managers and supervisors, and human resources practitioners, and labor relations practitioners. The sessions will provide key operational information on all NSPS systems elements with particular emphasis on performance management. Topics will include the performance management cycle, developing performance objectives, performance evaluation and assessment, performance coaching, and performance-based communication. Supervisors and managers will receive additional training so they can fairly manage, appraise and rate employees.

Over the past few months the Department has been engaged in NSPS transition preparations. This includes a wide variety of activities and events including working on the implementing issuances, soft skills training for the workforce and aligning individual performance objectives with mission objectives and measurable outcomes. Major undertakings these last few months have been piloting training classes and preparing instructors to teach the NSPS basics to all employees, managers, and supervisors, and collaborating with the unions on implementing issuances.

The PEO received much feedback in the course of all these activities that led us to conclude we need more time to focus on simplifying the performance management design, getting performance objectives right, and ensuring the system is simple, clear, and understandable. We have asked the Components to press ahead on their communication, alignment of strategic plans/goals with performance objectives, and soft skill training initiatives, but put January NSPS-specific content training (including train-the-trainer) on hold, with one exception. The PEO has requested the Navy "flight test" some of the training in a representational environment and serve as the DoD training pilot. The results will provide an opportunity to evaluate the methodologies, products, and practices in a realistic setting, and make adjustments to the training. We want to ensure we take the time to do this right and that our employees, supervisors, and leaders fully understand the system, and have the tools to succeed in a results-focused, performance-based environment.

The Department's Program Executive Office (PEO) executed $3.3 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 deliver "train-the-trainer" sessions.

The DoD Components will fund the delivery of training to their personnel. While funds do not currently have visibility as a discrete line item in their budgets, the Components recognize the high priority of NSPS training, and are committed to funding delivery of that training within existing resources.

Question 2: The civilian mariners have a long tradition of supporting our military forces – operating at the call of a combatant commander on Navy vessels – carrying combat equipment and supplies to fighting forces during World War II, Korea, Vietnam and our current military operations. They also have a unique legal status as excepted employees – whose compensation is tied to prevailing wage rates for commercial crews.

To what extent did the Department examine the appropriateness of the NSPS authorities governing labor relations for certain unique segments of the workforce, such as the civilian mariners? Is legislation needed to permit the Secretary to exempt any DoD unit from the labor relations provisions if the Secretary thought it necessary to do so?

Answer: The Department did consider the impact of NSPS labor relations authorities for unique segments of the workforce, such as the civilian mariners. Labor organizations representing civilian mariners raised their concerns early in the process. While we agree that some of the human resources rules governing these employees are unique within the Department and as a result these employees are not covered by the NSPS human resources management system, these employees are presently covered by 5 U.S.C. chapter 71. Given that fact, we found no compelling argument that these employees should not now be covered under the labor relations provisions of the NSPS regulation. Additional legislation is not necessary on this matter.

Question 3: The GAO, as part of its ongoing review of the Department's implementation efforts, has emphasized the importance of employee buy-in to the new system, and also of evaluating its success throughout implementation.

What are the specific mechanisms that will be in place for continuous employee involvement, and for evaluation of the NSPS system? How will the Department know whether or not the new system is "getting it right"?

Answer: The Department is preparing a plan that will guide data collection, studies, and analyses for the next five years to determine if NSPS meets the goals and objectives outlined in the NSPS Requirements Document and achieves expected operational capabilities and outcomes. The plan, coordinated among DoD components and with the Office of Personnel Management, will lay out the basic metrics by which we measure NSPS in order to make near-term adjustments and to determine when the system is effective and stable. The principal mechanisms supporting NSPS evaluation will be semi-annual workforce attitude surveys that enable comparisons between NSPS and non-NSPS employees; ongoing analyses of workforce and personnel transaction status and trends from personnel system data; special studies and surveys, interviews, or focus groups; and "after action" implementation reviews. For NSPS program evaluations, the Department will provide employee representatives the opportunity to comment on design and results.

With 700,000 employees covered by some part of NSPS, in 700 different occupational series in a wide array of mission organizations, the Department's workforce is very large, diverse, and dispersed worldwide. We therefore involve employees through a mix of communications, training, and opportunities to ask about and comment on NSPS.

- Employee representatives participate in continuing collaboration on implementing issuances.

- Employees can use the Department's NSPS web site both to acquire current information about the system and to contact the NSPS Program Executive Office with questions or suggestions.

- The NSPS Program Executive Office and Component Program Management Offices meet with functional communities like laboratories, financial managers, and National Guard civilian technicians to discuss NSPS and the particular interests and needs of those communities.

- Training feedback in the form of questions and course feedback is used to clarify system details as well as to continuously improve NSPS training.

- Senior leaders and Commanders hold town hall meetings to talk to the workforce about NSPS, answer employees' questions, and learn about employees' concerns that they need to pass along the chain for Departmental consideration.

- Employee representatives and individual employees can comment on proposed NSPS rules published in the Federal Register.

- The Department regularly surveys employees about their opinions concerning NSPS as well as the work climate, their jobs, leadership, and other matters. NSPS survey questions evolve in pace with NSPS implementation.

Question 4: The level of employee and employee representative participation will help determine the success of this personnel system for DoD, and ultimately, possible extensions throughout the federal government. GAO Comptroller General Walker underscored the need for DoD to continue to involve employees, including employee representatives, throughout the implementation process. The "implementing issuance" process, which remains under the sole authorization of the Secretary of Defense and other principal partners, will provide the ultimate framework and details for important aspects of implementing NSPS. While final regulations specify that employee representatives will have the opportunity to participate in this process, could you elaborate on some of the ways you will seek to request and include suggestions from employees and their representatives in the implementing issuances?

Answer: The continuing collaboration process offers many opportunities for employee representatives to participate in the process. It may include advance copies of the implementing issuances prior to any discussions occurring; informational briefings to explain the details of the implementing issuances; face-to-face meetings and telephone conference calls to provide opportunities for questions to be asked and views and recommendations to be offered; opportunities to submit written views and recommendations regarding the implementing issuances; and a written response by DoD to employee representatives which provides the rationale and reasons for taking any final action regarding implementing issuances. The continuing collaboration process is a very robust process that provides employee representatives an opportunity for greater union involvement in workforce issues, including areas previously excluded by law or other agency rules.

Question 5: As Chairman of the Senate Armed Services Committee and as a veteran of World War II and the Korean War, I have a profound respect and gratitude for our nation's veterans. During my 27 years in the Senate, I have supported efforts to provide veterans with employment opportunities in the federal government. Concerns have been expressed that the final regulations modify the current rules governing workforce reshaping, and consequentially could negatively impact DoD's veteran employees. What assurance can you provide my colleagues and I that the changes will not have a detrimental impact on veterans?

Answer: While the NSPS reduction in force rules are designed to increase the impact of performance, minimize disruption, and simplify the process, the Department and the Office of Personnel Management took great care in developing the NSPS regulation to ensure that veterans' preference is preserved under the new system. NSPS gives veterans the same level of preference over non-veterans that they have in today's system.

Question 6: During my service as Secretary of the Navy – during which I was privileged to have some 650,000 civilian employees working side by side with the uniformed Navy, – I valued very highly the sense of *teamwork* between the civilian and uniformed members of the United States Navy. *Teamwork* is an intrinsic military value, in my judgment, and essential to mission accomplishment. Some have been concerned that NSPS could undermine that sense of teamwork, by increasing the competition between individuals for recognition of their performance. How can we safeguard this essential element of national service – teamwork – as we move forward in changing the personnel systems of the Department of Defense?

Answer: We agree teamwork is critical to the DoD mission. Civilian employees are a critical part of the Department's Total Force. Through communication, ongoing feedback, performance planning and performance rewards, including team achievement awards, the importance of information sharing, cultural sensitivity, teamwork and collaboration will be impressed upon all employees.

Question 7: In preparation for a hearing of the Armed Services Committee which I chaired in April, 2005, I asked my good friend John Gage to whittle down the scores of issues that he identified with the draft regulation to a few flashpoint issues – a handful of things that had the highest priority from his perspective. He did that, and in his testimony to the SASC on April 14, 2005, identified six "flashpoints" of concern:

1. **The scope of bargaining**
2. **Composition of the National Security Relations Board**
3. **The standard for mitigation of adverse actions by the Merit Systems Protection Board**
4. **The requirement for written standards for employee performance**
5. **A general lowering of pay for the DoD civilian workforce; and**
6. **Procedures for identifying who will be affected by a Reduction in Force.**

It is my understanding that the final regulations reflect progress on some of these issues. How far has the Department come in addressing these issues to ensure the success of NSPS?

Answer:

1) The scope of bargaining - The final regulations preserve the right to bargain collectively as provided for under the law and provide DoD with a workforce that is sufficiently agile and flexible to execute its current and future national security mission. In response to concerns raised by the unions, we have revised the regulations to permit collective bargaining on procedures management follows or impact of actions related to routine assignments of operational matters if the Secretary determines that bargaining would advance the Department's mission accomplishment or promotes organizational effectiveness. Under the proposed regulations, all agreements over procedures and appropriate arrangements were not precedential. The final regulations narrow this restriction to mid-term agreements.

2) Composition of the National Security Labor Relations Board - As a result of concerns expressed during the public comment and meet-and-confer periods, the final regulations were modified to assure unions a voice in the NSLRB selection process. Specifically, the final rule requires the Secretary to consider union nominations in selecting the two non-Chair members. In addition, the regulations also provide that the Secretary may consult with unions to obtain additional information regarding any nominee submitted. I would also like to emphasize that the regulations ensure the independence and impartiality of the NSLRB by adopting the same stringent criteria for removal applicable to the removal of Federal Labor Relations Authority (FLRA) members, as well as setting a high qualifications standard, requiring publication of NSLRB decisions to allow for public scrutiny, and including provisions for review of NSLRB decisions by the FLRA and the courts.

3) The standard for mitigation of adverse actions by the Merit Systems Protection Board - Based on comments and concerns, we have revised the "wholly without justification mitigation standard" proposed for MSPB Administrative Judges used as part of the Department's appeal process, as well as by arbitrators. The final regulation ensures deference to the Department's penalty determination and requires that in evaluating the appropriateness of the penalty, the AJ or arbitrator will give primary consideration to the impact of sustained misconduct or poor performance on the Department's national security mission. This standard is similar to that recognized by the U.S. Court of Appeals for the Federal Circuit. The standard for mitigation by the full Board was also changed to that stipulated in the NSPS statute.

4) The requirement for written standards for employee performance - We have revised the final regulations to require written performance expectations.

5) A general lowering of pay for the DoD civilian workforce – This is simply incorrect. No employee will lose money when he or she moves under NSPS. In addition, proper funding of pay pools is fundamental to the success of NSPS. In fact, the law requires that the aggregate amount of money allocated for civilian compensation for organizations under NSPS cannot be less than the amount that would have been allocated under the existing system. DoD is committed to this funding.

6) RIF - Based on comments received during the meet and confer process, we have changed the final regulations to include "ratings of record" and our draft implementing issuances explain our proposal for giving credit to employees for their multiple ratings under NSPS. Under NSPS, we have proposed that an employee's three most recent ratings of record received during the 4-year period prior to the established cut-off date for receipt of performance ratings will be utilized.

Post-Hearing Questions for the Record
Submitted to Linda Springer
"From Proposed to Final: Evaluating the Regulations for the National Security Personnel System"
November 17, 2005

From Senator George Voinovich

1. As implementation of the National Security Personnel System begins OPM will have a vital role in monitoring progress. How is OPM structured to handle this added responsibility?

   OPM: OPM continues to meet its responsibilities in monitoring the Department of Defense (DOD) National Security Personnel System (NSPS). An OPM team has been put in place to maintain an ongoing understanding of DOD progress, and to recommend refinements as appropriate. DOD and OPM staff have met on evaluation-related matters.

2. Representative organizations of the Department's employees continue to express opposition to the National Security Personnel System. I find this troubling because I agree with Comptroller General Walker's observations that employee understanding and acceptance of a new personnel system is a prerequisite for success. What plans does OPM have to address this situation?

   OPM: OPM continues to advise DOD on the importance of ongoing communication and involvement of employees and management as a prerequisite for success.

   As the leader in setting Human Resources (HR) policy for the Federal Government, we will monitor the implementation and effectiveness of NSPS and related employee and labor relations changes. As we begin to assess DOD's progress, OPM will leverage lessons learned from prior demonstration projects and recommend course correction as appropriate.

From Senator Joseph Lieberman

Curtailment of collective bargaining by issuing Departmental directives

1. It is my understanding that the regulations would allow certain top officials in the Department to prohibit collective bargaining on any subject simply by issuing internal directive, called implementing issuances, dealing with the subject. I have heard concerns expressed that this authority could even be used to invalidate provisions of collective bargaining agreements that the managers do not want to comply with.

   - Doesn't it undermine the whole point of collective bargaining, as a means for giving employees a voice in resolving workplace disputes, if the Department has unilateral power to take issues off the bargaining table?

   OPM: No, the authority to issue implementing issuances is not a means for undermining collective bargaining. Implementing issuances will be issued to carry out a policy or procedure implementing NSPS and not for the purpose of prohibiting collective bargaining. Only those provisions of collective bargaining agreements that conflict with implementing issuances will be rendered unenforceable. In addition, it is important to note that unions will have an expanded role through continuing collaboration to participate in the planning, development, and implementation of the Department's implementing issuances. These implementing issuances cover a range of subjects from the pay and performance management systems to staffing and classification. The NSPS statute established continuing collaboration as the exclusive process by which the Department's unions are able to participate in the planning, development and implementation of the NSPS.

   - How can employees rely on bargaining agreements to serve their intended purpose, of governing relationships between employees and managers, if the Department has unfettered power to override existing agreements?

   OPM: This authority is not unfettered. The authority is limited to a small number of most senior officials in the Department who are far removed from individual bargaining unit dynamics. The authority is further restricted to issuances dealing exclusively with implementation of the NSPS. This authority is grounded in section 9902(m)(8) of the enabling legislation.

Lack of Specific Elements in Performance-Management System

2. The pay and performance regulations appear to be skeletal outlines of a program, but leave the specific policies and procedures for subsequent development in implementing issuances. Of course, the Department should use internal directives to lay out the fine print of how the NSPS will be implemented. But what is left out of the regulations goes far beyond fine print. For example, the statute requires that the NSPS must incorporate specific elements to ensure fairness and guard against politicization and other abuse in performance management. These must include:
   - a fair, credible, and transparent employee performance appraisal system,

- a means for ensuring employee involvement in the design and implementation of the system, and
- effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance.

OPM (response to questions 2 and 3): OPM worked jointly with DOD to ensure adherence to the statutory process required by Congress for the development of the NSPS regulations, which are patterned after the statutes they replace. The regulations establish a general policy framework that will be supplemented by detailed Departmental implementing issuances. Both the regulations and the implementing issuances contain safeguards to ensure fairness and guard against politicization.

3. I am concerned that, by setting forth key safeguards in implementing issuances, rather than in regulations, the Department is circumventing the statutory process required by Congress for development of the NSPS regulations.

   - For example, will OPM need to be fully satisfied before the Department adopts the specific procedures to ensure fairness and guard against politicization and other abuse in performance management?

   - To what extent will managers and employees at all levels, Congress, and members of the public have an opportunity to engage with DOD and OPM about these vital provisions?

   OPM: Please see response to question 2 above.

Standard of review of employee penalties

4. Under the final rules, when an employee appeals a penalty imposed for alleged misconduct, neither the administrative judge nor a Department reviewing official may mitigate the penalty unless it is so disproportionate as to be totally unwarranted in light of all pertinent circumstances.

   - I am concerned that this extraordinarily deferential standard would shield excessive penalties from meaningful review. Why do you believe this provision is necessary?

   OPM: This standard is similar to that adopted by the U.S. Court of Appeals for the Federal Circuit, the court that reviews Merit Systems Protection Board (MSPB) decisions. Given the nature of the Department's national security mission, it is important that the Department's penalty determination be given deference and that the impact of sustained misconduct or poor performance on the Department's national security mission is given primary consideration. This standard requires managers to consider all of the pertinent circumstances of each situation when taking an adverse action, including any pertinent mitigating factors. Administrative Judges (AJ's) would then consider those circumstances when reviewing the agency's penalty determination.

- Under the proposed rules published in February 2005, penalties could be reduced only if they were so extreme as to be wholly without justification. Could you explain why this wholly without justification standard of review in the proposed rules was changed to a totally unwarranted standard of review in the final rules? What is the practical difference between these two standards of review? To help me understand the difference, could you provide specific hypothetical examples of penalties and explain why they would be treated differently under the wholly without justification standard of review than under the totally unwarranted standard of review?

OPM: The standard of review was changed to "totally unwarranted in light of all pertinent circumstances" in the final rule as a result of the concerns expressed during the public comment and meet-and-confer periods. The final rule standard is similar to that recognized by the Federal courts.

Restrictions on scope of bargaining

5. John Gage testified that the following are five examples of current Defense Department labor-management contract provisions that would no longer be negotiable under the final NSPS rules: *(1)* overtime policy, *(2)* shift rotation of employees, *(3)* safety and health programs, *(4)* flextime and compressed work schedules, and *(5)* deployment away from regular work location. Do you agree that those areas would no longer be negotiable? If so, please explain why you believe preventing collective bargaining in all of these areas is necessary.

OPM: We disagree. Flextime and compressed work schedules remain negotiable. Overtime, shift rotation, safety and health programs (while not specifically identified in the regulations), and deployment are nonnegotiable under NSPS. The routine assignment to specific duties, shifts, or work on a regular or overtime basis would also be non-negotiable. All other appropriate arrangements for these matters remain negotiable. The new rules also allow the Secretary to authorize bargaining over procedures and appropriate arrangements covering these topics in order to advance the mission or promote organizational effectiveness. The intent is to relieve both employees and management of potentially lengthy negotiations over matters that are limited in scope and effect.

Training

6. It is important that DOD's plan for implementing NSPS include training for both supervisors and employees. What planning have you done in developing a training program to support the NSPS? How much will the Department need to spend in order to train supervisors to evaluate employees properly?

OPM: We believe the question is more appropriate for the Department of Defense, and we would defer to them for a response.

Pay levels

7. In moving away from pay levels defined in statute, what assurances can you give that limited appropriations or other budget pressures will not result in pay levels too low to truly pay for performance?

OPM: We believe the question is more appropriate for the Department of Defense, and we would defer to them for a response.

From Senator Daniel Akaka

1. As you know, Congress granted agencies the authority to implement a pay-for-performance system for members of the Senior Executive Service (SES) in 2003. However, OPM certification of the performance management system at the Department of Defense (DoD) was just approved. What factors prolonged certification for DoD and what aspects of the DoD performance management system needed adjustments?

   OPM: DOD did not request certification in 2004 because several components had appraisal programs that did not meet the criteria. DOD subsequently designed a new SES appraisal system and submitted a request for certification in 2005 to OPM. While the design of the system met all certification criteria, the sample of performance plans for the 2005 rating cycle did not. Many of the performance plans did not include measurable results and did not appropriately hold executives accountable for the performance management of subordinates. OPM and DOD worked together, with staff and executives, to improve the performance plans for the 2006 rating cycle. Those plans were submitted to OPM and the DOD system was certified for calendar year 2006.

2. Because DoD is considering an employee's occupation in addition to geographic location in determining whether an employee receives locality pay, what impact will this have on employees who do not receive locality pay but rather non-foreign cola, which is based on the employees' geographic locations? Will pay bands remain stagnant due to the mandatory non-foreign COLA increase? If no information is available yet, when do you expect we will receive details on this issue?

   OPM: Nonforeign cost-of-living allowances (COLAs) remain untouched. DOD has no authority to waive or modify them. We do not expect pay bands to remain "stagnant," since the joint final DOD/OPM regulations require that, for any pay band, a common base rate range applies in all locations—including the nonforeign COLA areas. However, in considering the establishment of "local market supplements" outside the 48 States, DOD is required to take into account the fact that nonforeign area employees already are entitled to COLAs. No final decisions have been made regarding whether such supplements will be established by DOD for employees in the nonforeign areas. Any such determination must be coordinated in advance with OPM.

3. Director Springer, you and I have had positive meetings about the protection of veteran's rights in federal employment, and I thank you for your commitment to veterans' preference. However, the written testimony of Mr. Ron Ault, President , Metal Trades Department, AFL-CIO, contends that the NSPS regulations reduce appeal rights for DoD veterans because the Merit Systems Protection Board (MSPB) will be the only forum for review of an individual appeal, thus eliminating appeal rights to the Secretary of Labor under the Veterans Employment Opportunity Act. What is the rationale for eliminating veterans' appeal rights to Labor?

   OPM: Mr. Ault's written testimony is incorrect. The regulations do not eliminate veterans' rights to appeal to the Department of Labor under the Veterans Employment Opportunity Act

(VEOA) and do not establish MSPB as the only forum for review of an individual appeal. Under NSPS, as is the case today, veterans *must* first file a complaint with the Secretary of Labor and receive the Secretary's decision before filing a VEOA appeal with MSPB.

4. Similar to the proposed Working for America Act, the NSPS regulations change the definition of a grievance to cover any claimed violation of any law, rule, or regulation issued *for the purpose of* affecting conditions of employment. This seems to limit the type of matters that can be subject to a grievance given that the Department's purpose comes into play rather than the actual adverse impact on conditions of employment. Can you explain why this change is needed?

   OPM: This change adopts existing case law of the U.S. Circuit Court of Appeals for the District of Columbia that any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation constitutes a grievance if it was issued for the purpose of affecting conditions of employment. This change is necessary to ensure stability in the Department's labor-management relations because the FLRA, which will review National Security Labor Relations Board (NSLRB) decisions, is not required to follow the precedent of any Federal court except the U.S. Supreme Court. Thus, without this change, there would be no assurance that this precedent will be followed in the future.

5. The employee representatives testifying on the second panel of this hearing claim that veterans' preference will be reduced in a reduction-in-force (RIF) by allowing a veterans' preference to be considered only after performance and tenure.

   OPM: That is not correct. In a RIF under the NSPS final regulations, veterans' preference will be considered *before* performance, in the same order as under OPM's present RIF regulations.

   - Under NSPS, would a three-year non-veteran with the highest rating be retained over a 25-year veteran with the second highest rating, based solely on the most recent performance evaluation?

   OPM: No. NSPS workforce shaping regulations retain a career preference eligible employee over a career employee who is not eligible for veterans' preference.

   - Would a three-year non-veteran in one work group be retained over a 25-year veteran of another work group, if the 25-year veteran's work group was being disbanded or reduced, without first providing the 25-year veteran the opportunity to be reassigned?

   OPM: While that could happen, this same situation could also arise under today's Governmentwide RIF rules. For example, regardless of preference eligibility only a qualified employee may displace a lower standing employee.

From Senator John Warner

1. The civilian mariners have a long tradition of supporting our military forces operating at the call of a combatant commander on Navy vessels carrying combat equipment and supplies to fighting forces during World War II, Korea, Vietnam and our current military operations. They also have a unique legal status as excepted employees whose compensation is tied to prevailing wage rates for commercial crews. To what extent did the Department examine the appropriateness of the NSPS authorities governing labor relations for certain unique segments of the workforce, such as the civilian mariners? Is legislation needed to permit the Secretary to exempt any DoD unit from the labor relations provisions if the Secretary thought it necessary to do so?

   OPM: The Department did examine the appropriateness of covering unique workforces, such as civilian mariners, under the NSPS labor relations system. Because civilian mariners are presently covered by chapter 71 of title 5, United States Code, there is no compelling argument for excluding them from the NSPS labor relations system. Additional legislation is not necessary.

2. The GAO, as part of its ongoing review of the Department's implementation efforts, has emphasized the importance of employee buy-in to the new system, and also of evaluating its success throughout implementation. What are the specific mechanisms that will be in place for continuous employee involvement, and for evaluation of the NSPS system? How will the Department know whether or not the new system is getting it right?

   OPM: OPM cannot answer for DOD. As to OPM, specifically, we are upholding our statutory, regulatory and legal responsibilities. OPM, as the leader in setting HR policy for the Federal Government, will monitor the implementation and effectiveness of NSPS and its related employee and labor relations changes. As we begin to assess DOD's progress, OPM will leverage lessons learned from prior demonstration projects and recommend course correction as appropriate.

3. The level of employee and employee representative participation will help determine the success of this personnel system for DoD, and ultimately, possible extensions throughout the federal government. GAO Comptroller General Walker underscored the need for DoD to continue to involve employees, including employee representatives, throughout the implementation process. The implementing issuance process, which remains under the sole authorization of the Secretary of Defense and other principal partners, will provide the ultimate framework and details for important aspects of implementing NSPS. While final regulations specify that employee representatives will have the opportunity to participate in this process, could you elaborate on some of the ways you will seek to request and include suggestions from employees and their representatives in the implementing issuances?

   OPM: The Department will obtain comments and suggestions from the unions through continuing collaboration. In fact, that effort has already begun. At the end of November, the Department provided the unions with advance copies of the draft implementing issuances for the human resources portion of the NSPS and the drafts were placed on the NSPS website for anyone to review. Informational briefings were then provided in early December to employee representatives where the parties began a dialogue on the content of the draft implementing

issuances. Additional briefings have been scheduled in December and January. Employee representatives also will be afforded the opportunity to submit written comments and suggestions that the Department will consider before finalizing the implementing issuances. At the end of the process, the Department will provide a written statement to the employee representatives of the reasons for taking final action on an implementing issuance.

4. As Chairman of the Senate Armed Services Committee and as a veteran of World War II and the Korean War, I have a profound respect and gratitude for our nation's veterans. During my 27 years in the Senate, I have supported efforts to provide veterans with employment opportunities in the federal government. Concerns have been expressed that the final regulations modify the current rules governing workforce reshaping, and consequentially could negatively impact DoD's veteran employees. What assurance can you provide my colleagues and I that the changes will not have a detrimental impact on veterans?

   OPM: Under NSPS regulations, veterans' preference retains the same weight as a retention factor as under OPM's Governmentwide regulations. The Supplementary Information section of the NSPS regulations includes the following table at 70 FR 66116, 66161:

Table. Relative Weight of Retention Factors

Order of Retention Factors From Highest to Lowest	OPM's 5 CFR part 351 RIF Regulations	NSPS 5 CFR 9901 subpart F Workforce Shaping Regulations
1	Tenure (i.e., type of appointment)	Tenure (i.e., type of appointment)
2	Veterans' Preference	Veterans' Preference
3	Creditable Federal Service	Performance Ratings
4	Performance Ratings	Creditable Federal Service

5. During my service as Secretary of the Navy during which I was privileged to have some 650,000 civilian employees working side by side with the uniformed Navy, I valued very highly the sense of *teamwork* between the civilian and uniformed members of the United States Navy. *Teamwork* is an intrinsic military value, in my judgment, and essential to mission accomplishment. Some have been concerned that NSPS could undermine that sense of teamwork, by increasing the competition between individuals for recognition of their performance. How can we safeguard this essential element of national service teamwork as we move forward in changing the personnel systems of the Department of Defense?

   OPM: DOD is planning to include cooperation and teamwork among the factors to be considered in rating individual employees' peformance. In addition, DOD is establishing a special pay adjustment/award authority called the "Organizational/Team Achievement Recognition" (OAR) to recognize groups of employees who are successful in achieving organizational goals. The OAR will supplement individual performance-based pay adjustments.

6. In preparation for a hearing of the Armed Services Committee which I chaired in April, 2005, I asked my good friend John Gage to whittle down the scores of issues that he identified with the draft regulation to a few flashpoint issues a handful of things that had the highest priority from his perspective. He did that, and in his testimony to the SASC on April 14, 2005, identified six flashpoints of concern:

- The scope of bargaining
- Composition of the National Security Relations Board
- The standard for mitigation of adverse actions by the Merit Systems Protection Board
- The requirement for written standards for employee performance
- A general lowering of pay for the DoD civilian workforce; and
- Procedures for identifying who will be affected by a Reduction in Force.

It is my understanding that the final regulations reflect progress on some of these issues. How far has the Department come in addressing these issues to ensure the success of NSPS?

- The scope of bargaining

OPM: Changes were made to the proposed rules as a result of union concerns – providing a greater role for unions. Under the proposed regulations, no agreements over procedures and appropriate arrangements were precedential. The final regulations narrow this restriction to mid-term agreements. The regulations also permit the Secretary to authorize bargaining over the procedures and appropriate arrangements that are otherwise prohibited subjects of bargaining, such as the routine assignment to specific duties, shifts, or work on a regular or overtime basis, if the Secretary determines that bargaining would advance the Department's mission accomplishment or promotes organizational effectiveness. If the Secretary does not elect to bargain over these matters, still management is obligated to consult at the request of the unions.

- Composition of the National Security Relations Board

OPM: As a result of concerns expressed during the public comment and meet-and-confer periods, the final regulations were modified to assure unions a voice in the NSLRB selection process. Specifically, the final rule requires the Secretary to consider union nominations in selecting the two non-Chair members. In addition, the regulations also provide that the Secretary may consult with unions to obtain additional information regarding any nominee submitted. I would also like to emphasize that the regulations ensure the independence and impartiality of the NSLRB by adopting the same stringent criteria applicable to the removal of Federal Labor Relations Authority (FLRA) members for NSLRB members, setting a high qualifications standard, requiring publication of NSLRB decisions to allow for public scrutiny, and including provisions for review of NSLRB decisions by the FLRA and courts.

- The standard for mitigation of adverse actions by the Merit Systems Protection Board

OPM: As a result of concerns expressed during the public comment and meet-and-confer periods, the standard of review for mitigation of adverse actions by MSPB AJ's and arbitrators was changed to "totally unwarranted in light of all pertinent circumstances." The final regulation ensures deference to the Department's penalty determination and requires that in evaluating the appropriateness of the penalty, the AJ or arbitrator will give primary consideration to the impact of sustained misconduct or poor performance on the Department's national security mission. This standard is similar to that recognized by the U.S. Court of Appeals for the Federal Circuit.

The standard for mitigation by the full Board was also changed to that stipulated in the NSPS statute.

- The requirement for written standards for employee performance

OPM: The final NSPS regulations require performance expectations to be in writing.

- A general lowering of pay for the DoD civilian workforce

OPM: We disagree. The law guarantees that DOD's aggregate spending on civilian compensation under NSPS may not be less than it would have been if the employees had not been converted to NSPS.

- Procedures for identifying who will be affected by a Reduction in Force.

OPM: With respect to reduction in force, the underlying premises in the NSPS final rules remain the same as they are today for the rest of Government: management may only abolish a position for valid organizational reasons rather than for personal reasons, RIF is a last resort tool in workforce shaping, and those with veterans' preference retain their preferential retention rights.

G A O
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

March 24, 2006

The Honorable Susan M. Collins
Chairman
The Honorable Joseph I. Lieberman
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate

Subject: *Post-Hearing Questions for the Record Related to the Department of Defense's National Security Personnel System (NSPS)*

On November 17, 2005, I testified before your Committee at a hearing entitled: "From Proposed to Final: Evaluating the Regulations for the National Security Personnel System".[1] This letter responds to your requests for my response to questions for the record.

Questions from Senator John Warner

1. The civilian mariners have a long tradition of supporting our military forces—operating at the call of a combatant commander on Navy vessels—carrying combat equipment and supplies to fighting forces during World War II, Korea, Vietnam and our current military operations. They also have a unique legal status as excepted employees—whose compensation is tied to prevailing wage rates for commercial crews.

To what extent did the Department examine the appropriateness of the NSPS authorities governing labor relations for certain unique segments of the workforce, such as the civilian mariners?

In supplementary information to the final regulations, DOD and OPM responded to comments suggesting that certain groups of employees, including teachers, public safety employees, civilian mariners, be excluded from the labor relations system. In evaluating the merits of excluding these groups of employees from the labor relations system, DOD and OPM noted that the Department considered the employees' unique characteristics but could find no compelling argument that this particular group should not be covered by the new system.

[1]GAO, Human Capital: *Observations on Final Regulations for DOD's National Security Personnel System*, GAO-06-227T (Washington, D.C.: Nov. 17, 2005).

Is legislation needed to permit the Secretary to exempt any DOD unit from the labor relations provisions if the Secretary thought it necessary to do so?

We understand that DOD's interpretation of section 9902(m)(8) of Title 5 is that legislation would be needed to allow the Secretary of Defense to exempt any unit from the labor relations system. If this is DOD's position, then clarifying legislation would be necessary.

2. The GAO, as part of its ongoing review of the Department's implementation efforts, has emphasized the importance of employee buy-in to the new system, and also of evaluating its success throughout implementation.

What are the specific mechanisms that will be in place for continuous employee involvement, and for evaluation of the NSPS system?

As we noted in our statement, DOD faces a significant challenge in involving—and continuing to involve—its employees, employee representatives, and other stakeholders in implementing NSPS. DOD's final regulations, while providing for continuing collaboration with employee representatives, do not identify a process for the continuing involvement of employees and other key stakeholders in implementation of NSPS. DOD's final NSPS regulations on 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 final 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 final regulations will give designated employee representatives an opportunity to be briefed and to comment on the design and results of the new system's implementation. However, the active, visible, and continuous involvement of top key players, including the Secretary and Deputy Secretary of Defense, the military services' secretaries, and presidents of the employee labor unions will be a major factor in determining whether such efforts will be meaningful, successful, and credible.

Our prior statement and work also indicate that evaluating the effect of NSPS will be an ongoing challenge for DOD. As we noted in our statement, DOD's final regulations indicate that DOD will evaluate the regulations and their implementation. In our July 2005 report on DOD's efforts to design NSPS, we recommended that DOD develop procedures for evaluating NSPS that contain results-oriented performance measures and reporting requirements.[2] We also recommended that these evaluation procedures could be broadly modeled on the evaluation requirements of the OPM demonstration projects. If the department follows through with this effort, we believe that it will be responsive to our recommendation.

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[2]GAO, *Human Capital: DOD's National Security Personnel System Faces Implementation Challenges*, GAO-05-730 (Washington, D.C.: July 14, 2005).

How will the Department know whether or not the new system is "getting it right"?

Our answer to question 2 above regarding evaluating the effect of NSPS applies to this question.

3. The level of employee and employee representative participation will help determine the success of this personnel system for DOD, and ultimately, possible extensions throughout the federal government. GAO Comptroller General Walker underscored the need for DOD to continue to involve employees, including employee representatives, throughout the implementation process. The "implementing issuance" process, which remains under the sole authorization of the Secretary of Defense and other principal partners, will provide the ultimate framework and details for important aspects of implementing NSPS. While final regulations specify that employee representatives will have the opportunity to participate in this process, could you elaborate on some of the ways you will seek to request and include suggestions from employees and their representatives in the implementing issuances?

By including employees and their representatives in the planning process, organizations can improve related policies and processes, increase their acceptance within the workforce and minimize any potential adverse morale implications. For NSPS to be a successful transformation, it must involve DOD employees and their representatives from the beginning of the process in order to obtain their input and acceptance, and hopefully their ownership of the changes that are occurring within the department. Employee involvement strengthens the transformation process by including frontline perspective and experiences. Further employee involvement helps to create the opportunity to establish new networks and break down existing organizational silos, increase employees' understanding and acceptance of organizational goals and objectives, gain ownership for new policies and procedures, and reduce related implementation risks.

Our prior work also indicates that involving employees and other stakeholders helps to improve overall confidence and belief in the fairness of the system, enhance their understanding of how the system works, and increase their understanding and ownership of organizational goals and objectives. Organizations have found that the inclusion of employees and their representatives needs to be meaningful, not just pro forma. At GAO, to obtain direct feedback from employees, we created the elected Employee Advisory Council (EAC) to serve as an advisory body to the Comptroller General and other senior executives on a range of management and employee issues. Comprising employees who represent a cross-section of the agency, the EAC's participation is an important source of front-end input and feedback on our human capital and other major management initiatives. Specifically, EAC members convey the views and concerns of the groups they represent, while remaining sensitive to the collective best interest of all GAO employees; propose solutions to concerns raised by employees; provide input to and comment on GAO policies, procedures, plans, and practices; and help to communicate management's issues and concerns to employees while also relaying employees' comments and concerns to management.

We have found that organizations undergoing a transformation should establish a communications strategy that creates shared expectations and seeks to genuinely involve stakeholders in the process. As we have noted in our prior testimonies on DOD's human resources management system, it will face multiple implementation challenges that include establishing overall communications strategies and involving employees in implementing the new systems. We believe that one of the most relevant implementation steps is for DOD to enhance two-way communication between employees, employee representatives, and management, including enhancing communication between top political appointees and labor leaders. To enhance communications, there needs to be visible and ongoing involvement of a number of top-level DOD leaders, including the Secretary and Deputy Secretary of Defense, and the military services' secretaries. Frequent and timely communication cultivates a strong relationship with management and helps gain employee ownership for a transformation like NSPS. But communication is not about just "pushing the message out" or seeking information without any meaningful response. It should facilitate a two-way honest exchange with and allow feedback from employees, employee representatives, customers, and stakeholders. Once employee feedback is received, it is important to acknowledge, consider, and use it to make any appropriate changes to the implementation of the transformation.

4. As Chairman of the Senate Armed Services Committee and as a veteran of World War II and the Korean War, I have a profound respect and gratitude for our nation's veterans. During my 27 years in the Senate, I have supported efforts to provide veterans with employment opportunities in the federal government. Concerns have been expressed that the final regulations modify the current rules governing workforce reshaping, and consequently could negatively impact DOD's veteran employees. What assurance can you provide my colleagues and I that the changes will not have a detrimental impact on veterans?

While GAO cannot provide any assurance that the final NSPS regulations will not have a detrimental impact on veterans, we note that the regulations continue to give veterans' preference the same priority in the event of a reduction-in-force (RIF) as under current regulations.

5. During my service as Secretary of the Navy—during which I was privileged to have some 650,000 civilian employees working side by side with the uniformed Navy, — I valued very highly the sense of *teamwork* between the civilian and uniformed members of the United States Navy. *Teamwork* is an intrinsic military value, in my judgment, and essential to mission accomplishment. Some have been concerned that NSPS could undermine that sense of teamwork by increasing the competition between individuals for recognition of their performance. How can we safeguard this essential element of national service—teamwork—as we move forward in changing the personnel systems of the Department of Defense?

Senior executives need to lead the way to transform their agencies' cultures to be more results-oriented, customer focused, and collaborative in nature. Performance

management systems can help manage and direct this process. As public sector organizations shift their focus of accountability from outputs to results, they have recognized that the activities needed to achieve those results often transcend specific organizational boundaries. Consequently, organizations that focus on collaboration, interaction, and teamwork across organizational boundaries are increasingly critical to achieve results. High performing organizations use their performance management systems to strengthen accountability for results, specifically by placing greater emphasis on competencies and other factors that promote teamwork and collaboration to achieve desired organizational results.

6. In preparation for a hearing of the Armed Services Committee which I chaired in April, 2005, I asked my good friend John Gage to whittle down the scores of issues that he identified with the draft regulations to a few flashpoint issues—a handful of things that had the highest priority from his perspective. He did that, and in his testimony to the SASC on April 14, 2005, identified six "flashpoints" of concern:

1. **The scope of bargaining**
2. **Composition of the National Security Relations Board**
3. **The standard for mitigation of adverse actions by the Merit Systems Protection Board**
4. **The requirement for written standards for employee performance**
5. **A general lowering of pay for the DOD civilian workforce; and**
6. **Procedures for identifying who will be affected by a Reduction in Force.**

It is my understanding that the final regulations reflect progress on some of these issues. How far has the Department come in addressing these issues to ensure the success of NSPS?

Importantly, DOD should move expeditiously to resolve the appeals issue, since it will be critical to the effective, credible, and fair implementation of any major classification, compensation and performance management, and reduction-in-force changes. John Gage is in the best position to judge if his concerns are being addressed. However, as you noted, the final regulations reflect progress on some of the issues John Gage identified as flashpoints. However, 10 federal labor unions filed suit last fall challenging the final NSPS regulations on several grounds. On February 27, 2006, the U.S. District Court for the District of Columbia found that DOD was authorized to establish a labor relations system that differed from the federal labor relations system under Chapter 71 of title 5 of the U.S. Code, and that DOD satisfied their statutory obligation to collaborate with the unions.[3] The court, however, ruled that the final NSPS regulations do not ensure that employees can bargain collectively. The court also ruled that the proposed internal labor relations board at DOD is not an "independent third party" as required by the NSPS authorizing legislation and that the proposed employee appeals process does not provide fair treatment to DOD employees. The court permanently enjoined DoD from implementing the parts of the final NSPS regulations addressing adverse actions, appeals, and labor relations. At

[3]*American Federation of Government Employees*, AFL-CIO, et. al. v. Rumsfeld et al, No. 05-2183, 2006 U.S. Dist. LEXIS 7068 (D.D.C. Feb. 27, 2006).

this point, DOD and OPM officials are continuing to work with the Department of Justice to determine their next steps relative to the court's decision. As such, while DOD can implement the performance management, compensation and classification, staffing, and workforce shaping portions of the regulation, the regulations on the scope of bargaining, composition of the National Security Labor Relations Board, and the standard for mitigation of adverse actions by the Merit Systems Protection Board may not move forward.

In response to public comments to its proposed regulations and feedback obtained during the meet and confer process with employee representatives, DOD modified the proposed regulations, so that the final regulations state that the basic performance expectations should be provided to employees in writing.

Similar to the proposed regulations, DOD's final regulations could not reduce employees' basic rates of pay when converting to pay bands. However, employees' compensation may increase at a rate higher or lower than under the current compensation system because under NSPS compensation is designed to be (1) market-based, with consideration of local market conditions to set pay rates, and (2) more performance-oriented.

Similar to the proposed regulations, the final NSPS regulations allow DOD to reduce, realign, and reorganize the department's workforce through revised reduction-in-force (RIF) procedures. In a change from the proposed regulations, employees serving in an initial probationary period have a lower retention standing than career employees (i.e., permanent will be listed first, followed by employees serving an initial probationary period, and then followed by employees on temporary appointments). In another change, the final regulations reflect the use of more than one year's performance ratings in placing employees on the retention list.

Questions from Senator Joseph Lieberman

Downward pressure on pay levels.

John Gage in his written testimony expresses concern that the NSPS system will create downward pressure on DOD civilian pay. Are there mechanisms that you could suggest to assure that pay levels are adequate for employee recruitment and retention and to truly reward good performance?

We have observed that a competitive, market-based compensation system can help organizations attract and retain a quality workforce. To begin to develop such a system, organizations assess the skills and knowledge they need; compare compensation against other public, private, or nonprofit entities competing for the same talent in a given locality; and classify positions along levels of responsibility. While one size does not fit all, organizations generally structure their competitive compensation systems to separate base salary—which all employees receive—from other special incentives, such as merit increases, performance awards, or bonuses, which are provided based on performance and contributions to organizational results. DOD needs to conduct annual, high-level compensation reviews to determine the competitiveness of the pay ranges, and periodic (every 3 to 5 years) much more comprehensive compensation studies while at the same point in time, monitoring

employee recruiting, retention statistics as well as employee feedback during the interim in order to try to help assure the competitiveness of the system.

We have reported that direct costs associated with salaries were one of the major cost drivers of implementing pay for performance systems, based on the data provided us by selected Office of Personnel Management demonstration projects. We found that some of the demonstration projects intended to manage costs by providing a mix of one-time awards and permanent pay increases. Rewarding an employee's performance with an award instead of an equivalent increase to base pay can help contain salary costs in the long run because the agency only has to pay the amount of the award one time, rather than annually.

Safeguards to help ensure fairness and guard against abuse.

Mr. Walker, in your testimony you expressed concern about whether the regulations contain adequate safeguards to help ensure fairness and guard against abuse. This seems particularly relevant with respect to the process for assessing performance.

Could you elaborate on what kinds of safeguards you believe should be considered in this context?

As we noted in our statement, although DOD's proposed regulations provide for some safeguards to ensure fairness and guard against abuse, additional safeguards should be developed. We have developed an initial list of possible safeguards to help ensure that pay-for-performance systems in the government are fair, effective, and credible. The safeguards include, among other things, the following.

- Assure that certain predecisional internal safeguards exist to help achieve the consistency, equity, nondiscrimination, and nonpoliticization of the performance management process (e.g. independent reasonableness reviews by Human Capital Offices and/or Offices of Opportunity and Inclusiveness or their equivalent in connection with the establishment and implementation of a performance appraisal system, as well as reviews of performance rating decisions, pay determinations, and promotion actions before they are finalized to ensure that they are merit-based; internal grievance processes to address employee complaints; and pay panels whose membership is predominantly made up of career officials who would consider the results of the performance appraisal process and other information in connection with final pay decisions).

- Assure that there are reasonable transparency and appropriate accountability mechanisms in connection with the results of the performance management process. This includes reporting periodically on internal assessments and employee survey results relating to the performance management system and publishing overall results of performance management and individual pay decisions while protecting individual confidentiality.

- Assure that the agency's performance management systems (1) link to the agency's strategic plan, related goals, and desired outcomes and (2) result in

meaningful distinctions in individual employee performance. This should include consideration of critical competencies and achievement of concrete results.

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

- Assure that there is an independent and credible employee appeals mechanism.

Do you know of federal agencies where such mechanisms have proven effective to guard against unfairness and abuse in a pay-for-performance system?

The list of safeguards mentioned earlier are based on our own experience at GAO as well as our extensive body of work looking at the performance management practices used by leading public and private sector organizations in the United States. For example, to help provide transparency on how employees' performance compares to the rest of an organization, we previously reported that that Naval Sea Systems Command Warfare Center's Newport division publishes the results of its annual performance cycle. Newport aggregates the data so that no individual employee's rating or payout can be determined to protect confidentiality. Employees can compare their performance rating category against others in the same unit, other units, and the entire division.

IBM built in several accountability mechanisms to help achieve consistency and equity in pay decisions across employee groups and teams. To help ensure there is no discrimination in pay decisions, IBM conducts a base pay equity analysis to review the pay of women or minority employees if their proposed pay is one standard deviation or more away from the mean of the majority of employees and looks for an explanation for these pay differences, such as poor performance, a recent promotion into the pay band, or an extended leave of absence. In addition, IBM built in second-level reviews of pay decisions before employees receive any pay increases to ensure consistency in the compensation process. The first-line managers discuss their proposed pay decisions with managers at the next level—the up-line managers—to ensure the performance assessments and justifications are consistent across groups. Up-line managers can also shift pay allocations across groups if necessary in order to ensure employees who perform similarly are compensated the same regardless of their first-line managers. As a final check, the senior managers sign off on the pay decisions for each employee.

Questions from Senator Daniel Akaka

1. As you know, I was joined by Senators Collins, Lieberman, and Voinovich in asking GAO to review the costs associated with the design, implementation, and training related to the National Security Personnel System (NSPS) so I am very pleased that our request has been elevated to a GAO initiative. Your evaluation will assist us greatly with our oversight of NSPS. What methodologies, mileposts, and timeframes have been established for the review?

As we have noted in our most recent testimony, DOD is challenged to provide adequate resources to implement its new personnel system, especially during a time when some of the department's resources are being directed towards the Global War on Terrorism. By April 2006, we plan to begin an evaluation of the costs associated with the design and implementation of NSPS, and provide Congress with relevant information by September 2006.

2. You have repeatedly testified that safeguards are needed to ensure fairness and guard against abuse in any pay-for-performance system. From your meetings with the Department of Defense (DOD) and the Office of Personnel Management (OPM), do you know why similar safeguards have not been included in the NSPS final regulations?

In our most recent testimony on the final NSPS regulations, we noted several issues that DOD will need to define in more detail than is currently provided. We believe that the details of DOD's system do matter and that they should have been addressed in the final regulations and then further defined in implementing issuances. Importantly, DOD has plans to issue a number of issuances that will contain detailed policies and procedures for the new system. These issuances will be of critical importance and their content will include important details that can serve to either enhance or reduce the likelihood of a successful implementation. Hopefully, these issuances will be responsive to our recommendations with regard to the need for additional safeguards. In any event, these critically important details must be defined in conjunction with applicable key stakeholders and certain steps should be taken before any new authorities are implemented.

3. Mr. Walker, you support revising reduction-in-force (RIF) procedures to emphasize employee performance over tenure. However, union representatives state that the change in RIF procedures will adversely impact veterans by allowing DOD to design a RIF that will affect only veterans. Would you comment on this, and do you have any suggestions as to how this situation can be avoided?

Our answer to Senator Warner's question 4 above also applies to this question.

4. DOD has clearly stated that NSPS must be perceived as fair by employees. However, based on public comment and congressional testimony from employee representatives, it appears that employees believe NSPS is neither fair nor perceived as fair. What would you do to make the NSPS appeals system both fair and perceived as fair by employees?

There is no question that DOD's proposed and final regulations relating to the adverse actions and appeals process has not been without controversy. As you know, 10 federal labor unions filed suit alleging that, among other things, DOD's adverse actions and appeals process is unlawful. In ruling on the labor unions' suit, a federal judge found that DOD's appeals process does not provide fair treatment to DOD

employees, and permanently enjoined DOD from moving forward with implementing the final regulations relating to the adverse actions and appeals process.[4]

As Comptroller General, I have worked with others to make the Government Accountability Office a model federal agency by transforming its organization and operations to address the challenges and opportunities of the 21st century. In other presidentially appointed posts, including public trustee for Social Security and Medicare, I have seen the federal government falter in its attempts at major public policy reforms in those areas. The process one employs to advance major initiatives is critical. Based on my experience, three key process related elements maximize the chances for success: principles, players, and proposals.

With regard to principles, before leaders can achieve major internal or external changes, they need to make a clear and compelling case that the status quo is unacceptable and unsustainable. But that's not enough. Leaders also must provide a set of clear, comprehensive and compelling principles to frame the debate and help others understand the overall direction and objectives.

With regard to players, any major reform effort requires the direct and sustained involvement of an organization's chief executive officer. But the CEO also must recruit champions from various stakeholder groups. For internal reforms, this includes managers, employees and employee organizations. For legislative reforms, it includes businesses, unions, citizen groups, think tanks, the media and members of both major political parties. Champions should be capable, credible, committed and effective communicators. These individuals also should be part of a broad-based "big tent" approach to both crafting and selling reform proposals.

With regard to proposals, a detailed plan should be developed and presented or endorsed for action. The proposal should be consistent with the articulated principles, supported by applicable champions and informed by the "big tent" process. There is always risk in presenting a specific plan, especially in politically charged environments. But realistic leaders recognize that any major reform proposal is likely to be revised before it is enacted. Revisions could include desirable improvements or necessary compromises, but as the old saying goes, "Don't let the perfect be the enemy of the good."

These three steps to reform do not have to be addressed in a particular or guarantee success, but failure to effectively address one or more would likely ensure defeat.

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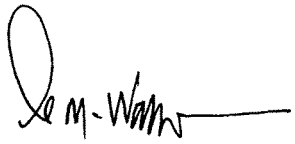
[4]*American Federation of Government Employees*, AFL-CIO, et. al. v. Rumsfeld et al, No. 05-2183, 2006 U.S. Dist. LEXIS 7068 (D.D.C. Feb. 27, 2006).

For additional information on our work on human capital issues at DOD, please contact me on 512-5500 or Derek B. Stewart, Director, Defense Capabilities and Management on 512-5559 or stewartd@gao.gov, or J. Christopher Mihm, Managing Director, Strategic Issues on governmentwide human capital issues at 512-6806 or mihmj@gao.gov.



David M. Walker
Comptroller General
of the United States

(350806)

Questions from Senator John Warner

Q1: During my service as Secretary of the Navy – during which I was privileged to have some 650,000 civilian employees working side by side with the uniformed Navy – I valued very highly the sense of teamwork between the civilian and uniformed members of the United States Navy. Teamwork is an intrinsic military value, in my judgment, and essential to mission accomplishment. Some have been concerned that NSPS could undermine that sense of teamwork by increasing the competition between individuals for recognition of their performance. How can we safeguard this essential element of national service – teamwork – as we move forward in changing the personnel system of the Department of Defense?

A1: I cannot echo your sentiments about teamwork enough. During my tenure as a Marine, teamwork was essential to fulfilling our missions. As a civilian manager in the Department of Defense, I applied the same lessons learned in the field as a Marine to bring my employees into the fold, set a clear agenda and build a successful work environment based on collaboration, independence and interdependence. The trust of teamwork was critical to achieving such success. In bringing about any policy or culture change that affects the work lives of the nearly 700,000 civilian employees of the Department of Defense, transparency, collaboration, inclusion, and teamwork are a must if we are to be successful.

If there is one thing that I learned in the Marines and as a manager, teamwork comes from the top down. Strong leadership at the highest positions in the Department demands strong leadership all the way down through the ranks. For the idea of teamwork to flourish in the new system, there has to be clear goals and a vision from the senior most leaders to empower supervisors, managers and employees to fulfill their part of the larger mission. When the message and the mission are clear, people will come together as a team to meet those high standards.

I believe that increased competition among employees does not inherently undermine the new NSPS program and the necessity of teamwork within the Department. However, in order to foster a work environment that promotes a team environment and instill confidence in each individual employee to feel their work will be judged fairly the Department must develop a comprehensive and collaborative training process. The new performance review mechanisms and standards will apply to both managers and employees. Employees need reassurances that make them feel confident in the abilities of their manager to accurately review their performance – whether that be autonomously, within a group or both – and compensate them accordingly. Managers must also be assured that employees understand their rights and responsibilities under the new system and feel confident in it so the supervisors are assured to have the tools to empower the best performance out of their teams.

These two pieces will help foster the already collaborative and team oriented culture that dominates the Department of Defense. What we must avoid at all costs is a drop in the morale and confidence in the new system. Without that level of security that the employee's work will be accurately reported, there leaves little incentive for them to meet and exceed the high standards required of agency employees that have such a critical mission to accomplish. The best way to combat that is through a strong training and educational program that creates an open dialogue that empowers managers and employees.

Q2: In preparation for a hearing of the Armed Services Committee which I chaired in April, 2005, I asked my good friend John Gage to whittle down the scores of issues that he identified with the draft regulation to a few flashpoint issues – a handful of things that had the highest priority from his perspective. He did that, and in his testimony to the SASC on April 14, 2005, identified six "flashpoints" of concern:

1. The scope of bargaining;
2. Composition of the National Security Relations Board;
3. The Standard for mitigation of adverse actions by the Merit Systems Protection Board;
4. The requirement for written standards for employee performance;
5. A general lowering of pay for the DoD civilian workforce; and
6. Procedures for identifying who will be affected by a Reduction in Force.

It is my understanding that the final regulations reflect progress on some of these issues. How far has the department come in addressing these issues to ensure the success of NSPS?

A2: In the beginning stages of the development and implementation of the National Security Personnel System, we, at FMA, were reticent about the outreach efforts and inclusion of FMA and other employee groups in the process. However, since the matter has come under the capable leadership of Secretary Gordon England and Program Executive Officer Mary Lacey, we have been pleased with the efforts made by NSPS to educate our membership on the new system and reach out to myself and our national office staff. They have even come to our various conference meetings held around the country and provided articles to our magazine with detailed information for managers and supervisors.

We, at FMA, support a fair and open labor relations process. We have expressed concerns regarding the independence of the National Security Labor Relations Board, and the need to adhere very strictly to the merit systems principles especially when you promote any kind of culture change as large as the National Security Personnel System. As far as our position goes for the first three flashpoints, however, our membership is not part of any collective bargaining unit. As managers and supervisors, we engage in consultative agreements with various agencies' leadership as authorized under Title 5 US Code of Federal Register part 251. As a matter of Association policy, we do not believe it appropriate to comment on the first three issues.

As for the remaining three requirements, we are pleased to see the inclusion of a written requirement versus only an oral one in the final regulations. As managers, it is challenging to review an employee's performance without having the clear direction and standard of their performance on paper. This change was encouraged in our earlier public comments and testimony before the House and Senate on the draft regulations and welcomed in the final version.

We support pay-for-performance and market based pay. An employee should be rewarded for the extra efforts and talent that they bring to the table. Exemplar employees should certainly be paid a higher rate for demonstrating the best performance. On the flip side, employees who are not performing up to minimum standards should not be rewarded for a lack in adequate performance.

Our primary concern, however, remains the ability of Congress and the Department to assure managers, supervisors and employees that the resources will be available to properly reward high performing employees. There is considerable room for rewarding performance under the General Schedule pay system, but funds have never been fully available to allow managers the flexibility to do so properly. While we have been given assurances that DoD will make sure the funds are there to reward employees, it remains an issue that concerns us.

Lastly, reductions in force are a challenging task. As a manager, it is a struggle to have to make decisions on letting good employees go. When the draft regulations first were released, we do not believe they took into account seniority nearly as much as was the precedent. The rating system was, and to a large part remains, almost solely based on the past few years performance reviews. In fact, the initial requirements seemed to indicate only one previous year of performance rating would be the basis for retention or termination of an employee. We were very pleased to see some movement on that front to ensure that seniority and veterans' preference have a greater hand in the decision to reduce a portion of the workforce. We remain concerned, however, that there is still not enough weight on an employees overall knowledge and work history; rather, just a few years of service.

Q: Although the regulations would curtail collective bargaining, the rules provide for consultation between unions and the Department. What will be the impact of a shift from bargaining to consultation?

A: As a management organization, our members are not bargaining unit employees. The Federal Managers Association is recognized by each agency through consultative agreements authorized in Title 5 U.S. Code of Federal Register part 251. We engage agency leadership in these consultations, which are non-binding, but allow managers and supervisors to dialogue with senior management on policy decisions that will affect them.

We do not believe that the final regulations will impact our ability to continue to engage in consultative agreements with the Department leadership. Without being bargaining unit employees, we do not believe it appropriate to comment on those changes.

Whistleblower rights

Q: Both the statute and the regulations establishing the NSPS provide that whistle blower rights are not diminished. As a practical matter, do you believe whistleblower rights will be affected by the NSPS program?

A: I am sorry that I cannot provide more feedback on this question. Because of the diversity of our membership in various management positions within the federal civil service, we do not comment on whistleblower rights as a policy of the Association.

1641 Prince Street ■ Alexandria VA 22314-2818 ■ Tel: (703) 683-8700 ■ Fax: (703) 683-8707
■ E-mail: info@fedmanagers.org ■ Web: www.fedmanagers.org

Questions from Senator Daniel Akaka

1. **The final regulations eliminate the performance improvement period for employees. What is FMA's opinion on this change, and do you believe it should be extended government-wide?**

Performance improvement periods offer managers and supervisors the opportunity to give employees a chance to turn things around in their productivity. In many cases, external factors may be the reasons for an employee's poor performance. Much like an initial trial period when an employee is first hired, the performance improvement period allows the employee to know that they are under the microscope for their performance and offer them a chance to remedy past poor performance before termination.

One of the critiques discussed of the current pay and performance review system is the inability of managers and supervisors to terminate poor performers. While many procedures are in place to offer an employee due process in their termination, we do believe that the performance improvement period is not one of those hindrances. In fact, as a manager it is a tool that can be used very effectively in inspiring greater dedication and improved productivity if the employee uses the time wisely. Eradicating that time strips managers of a useful tool in assessing an employee's performance and offering them options.

Based on this response, you can most likely assume that we would not support the removal of a performance improvement period government-wide. In any massive culture or policy change, there is going to be bumps in the road. By stripping managers and supervisors of the ability to account for those bumps with a performance improvement period, the policy straps their hands and inspires less confidence in the effectiveness of the new system.

2. **It has been widely reported that federal managers are hesitant to take disciplinary action against employees. However, under the National Security Personnel System (NSPS), managers will be required to take appropriate action for poor performers or inappropriate conduct. What is your opinion of this proposal?**

Managers and supervisors are up to the challenge of a new system that more directly aligns their employees' performance with their pay. While they have been setting performance goals and conducting performance reviews, this new challenge will determine any eligible pay raises or bonuses based solely on the employee's degree of the rating. This is a culture shift and one that is sure to see significant ebbs and flows.

One of the current challenges of bringing employee's up into the supervisory or management ranks is that employees do not want to be responsible for having to fire or discipline a colleague. However, every manager that enters those ranks understands that as part of their role in their employment, and in most cases, I believe, they are making the hard decisions.

What helps to curb those concerns is adequate training. Through a strong comprehensive training program that educates new managers and supervisors on how to best deal with problem employees, friends or not, helps to alleviate hesitation on the part of a manager or supervisor in disciplining a non-performing employee. Throughout the development of the NSPS program,

1641 Prince Street ■ Alexandria VA 22314-2818 ■ Tel: (703) 683-8700 ■ Fax: (703) 683-8707
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this is one of our primary messages to Congress and the Administration on how to help create and implement a successful new system.

3. **The employee unions have testified that few of their suggestions were incorporated into the final regulations. What suggestions did FMA make to the Department of Defense (DoD) and the Office of Personnel Management (OPM) that were not included in the final regulations, and what explanation was given? What recommendations were included in the final regulations?**

Once again, we, at FMA, cannot stress enough the need for adequate training and funding for the system to be implemented properly. Training of managers and employees on their rights, responsibilities and expectations will help to allay concerns and create an environment focused on the mission at hand. While the final regulations touch on this issue, they are quite vague. The regulations state that DOD is "committed to extensive training for managers, supervisors and employees" and additionally that the Department is "committed to creating a performance culture that sustains a high performance organization." The rhetoric sounds terrific, but the regulations fail describe *how* the Department will carry out this training.

Under NSPS, managers and supervisors will undoubtedly be given additional authorities in the areas of performance review and "pay-for-performance," and should therefore be compensated appropriately. As noted in the final regulations, many commentators suggested putting managers and supervisors into separate pay bands and in response, DOD stated it will address this matter in the Implementing Issuances. While it is disappointing this matter was not addressed in the final regulations, the implementing issuances allow for managers and supervisors to be placed in a separate pay band. We applaud DOD for taking the necessary steps to compensate managers for their added responsibilities.

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. This provision allows FMA, for example, to come to the table with DOD leadership and discuss issues that affect managers, supervisors, and executives. We strongly urged 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; however, similar language was neither included in the final regulations, nor in the implementing issuances.

The Merit System Protection Board (MSPB) was established to allow Federal employees to appeal adverse agency actions to a third- party, independent review board. Prior to the release of the final regulations, we were concerned that the Secretary of Defense would retain ultimate decision making authority on the appeals process, and unfortunately the regulations confirmed our fears. The final regulations list numerous circumstances in which the MSPB AJ or the full MSPB are simply not allowed to reverse a decision made by the Department. While we recognize the desire to streamline the appeals process, the MSPB must retain full authority to make binding independent decisions otherwise the system runs the risk of creating a lack of trust.

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Simply, the Department's decision to remove the MSPB from the appeals process undermines the appeals system and the employees it was designed to protect.

We at FMA fully support the regulations move towards enhancing both increased hiring authorities and retention tools while maintaining the important veterans' preference. While the regulations were slightly vague, they did state that the Department was "confident the extensive training planned for NSPS implementation will educate managers and employees about the new flexibilities NSPS will offer." We believe 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. Although not clearly defined in the final regulations, DOD appears committed to offering new hiring flexibilities to recruit and retain the best and brightest to the federal government. Some commentators also suggested that performance should be considered over veterans' preference as a retention factor. DOD rejected this suggestion, and we support this decision.

4. **Press reports note that countless federal managers have expressed their fears about the effects of NSPS on the workforce and that the FMA has recommended that managers buy insurance against lawsuits that will be inevitable under the new system. Would you please comment on this?**

Without a doubt, there is considerable reticence on the part of managers and employees in the development and roll out of the National Security Personnel System. As we have testified before this Committee before, managers and employees will be subject to a new pay and review system that seeks to change the culture and the ultimate foundation so familiar to career civil servants. Managers will be given greater authority in linking an employee's pay to their performance and increasing the duties that they already have, which they are willing and able to do. Employees will be shifted from the familiar to the foreign. Bumps in the road are inevitable. This presents significant challenges to managers and supervisors on the ground in federal agencies. If an employee does not feel that the system they must now work under was developed in an open, engaging and collaborative way, they will not be confident in its ability to accurately rate their performance and compensate them accordingly.

Furthermore, under the current General Schedule, managers and supervisors have not been allotted the resources necessary for training and rewarding employees for their results. It does not set a strong precedent that the new system will offer them the support needed to meet their tasks and reward employees for their performance.

Unless these issues are addressed through proper channels, it would not be unexpected for an employee to file a grievance against a manager or supervisor causing them professional set backs. As a precaution, many of our members are purchasing liability insurance just in case an employee who is frustrated at the system takes the matter out on their direct supervisor and manager. While many managers and supervisors are confident the new system will succeed, the bumps in the road and the perceived mistreatment of union members fuel concerns that an additional level of protection is needed.

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Post-Hearing Questions for the Record
Submitted to John Gage
From Senator John Warner

"From Proposed to Final:
Evaluating the Regulations for the National Security Personnel System"

November 17, 2006

1. **During my service as Secretary of the Navy -- during which I was privileged to have some 650,000 civilian employees working side by side with the uniformed Navy, -- I valued very highly the sense of *teamwork* between the civilian and uniformed members of the United States Navy. *Teamwork* is an intrinsic military value, in my judgment, and essential to mission accomplishment. Some have been concerned that NSPS could undermine that sense of teamwork, by increasing the competition between individuals for recognition of their performance. How can we safeguard this essential element of national service -- teamwork -- as we move forward in changing the personnel systems of the Department of Defense?**

Teamwork between those in uniform and the civilian workforce has, in fact, been a core value in ensuring the defense of our country. Creating an individualized pay system that separates the value of the service of the civilian workforce will corrode the spirit of teamwork among federal workers and generate low employee morale. Employees will have no way of knowing how much of an annual increase they will receive, if they receive an increase at all. This will ultimately pit employees against one another in pursuit of salary adjustments that are allegedly based on performance. Such a system will not enhance the efficiency of DoD operations or promote national security and defense. Making DoD employees compete among themselves for pay increases will undermine the spirit of cooperation and teamwork needed to accomplish the agency's mission and ultimately keep our country safe at home and abroad.

To ensure that the intrinsic value of teamwork remain the heart of mission accomplishment, the administration, Congress, and the Department of Defense, there must impose constraints on the ability of DoD to lower salaries or withhold salary adjustments generally. These safeguards must be established not only to protect the living standards of the civilian DoD workforce relative to the rest of the federal workforce, but also to guarantee the ongoing economic vitality of communities with DoD installations.

2. **In preparation for a hearing of the Armed Services Committee which I chaired in April, 2005, I asked you to whittle down the scores of issues that he identified with the draft regulation to a few flashpoint issues -- a handful of things that had the highest priority from his perspective. You**

did that, and in your testimony to the SASC on April 14, 2005, identified six "flashpoints" of concern:

1. The scope of bargaining;
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4. The requirement for written standards for employee performance;
5. A general lowering of pay for the DoD civilian workforce; and
6. Procedures for identifying who will be affected by a Reduction in Force.

It is my understanding that the final regulations reflect progress on some of these issues. How far has the Department come in addressing these issues to ensure the success of NSPS?

The Scope of Collective Bargaining

With regard to the Department's stance on collective bargaining, the final rules have made only minor changes pertaining to this issue. The Department has not moved from its original position, and still remains adamant about reducing the employee's rights under the Civil Service Reform Act, allowing only national level bargaining and replacing the union's statutory right to bargain with "consultation."

NSPS will greatly expand the management rights clause as compared to current law, thereby rendering most previously negotiable issues to be "off the table." DoD also has unilateral power to disregard existing agreements in lieu of implementing issuances.

Composition of the National Security Labor Relations Board

Although 5 USC 9902(m)(6) specifies that the board that hears labor-management disputes arising from NSPS must be independent of DoD management, the Department remains fixed on keeping the composition of this board internal to the Department. Both the proposed and final NSPS regulations would establish an internal board made up entirely of individuals appointed by the Secretary. While the Department may claim that they altered the draft so that the unions are permitted to suggest candidates for one of the three positions, the fact is that discretion in selecting an internal board rests entirely with the Secretary.

The standard for mitigation of adverse actions by the Merit Systems Protection Board

In the final regulations, DoD revised the standard for mitigation by the Merit Systems Protection Board (MSPB) of discipline and penalties imposed on employees from "wholly without justification" to "totally unwarranted." The final NSPS regulation denies the employee any meaningful right to have adverse actions mitigated by the MSPB. The new regulations also overturn 25 years of law by refusing to recognize adverse action arbitrations as final and binding. Not only does this add bureaucratic

delay to what is already a lengthy process but it reduces the rule and power of arbitrators and Administrative Judges, who have traditionally ruled in favor of 90% of DoD cases.

The requirement for written standards for employee performance

While the department has indicated that requirements of employee performance be written, the regulations state that this is not mandatory. The final regulations allow supervisors to express standards for employee performance orally. Since performance appraisals will be the crucial determinant of salary, salary adjustment, and job security, it is critical that these performance standards be made in writing.

Although it is generally easier to protect employees against arbitrary performance or disciplinary based actions when there are written expectations against which these actions can be measured, the final regulations have made overturning inaccurate performance appraisals much more difficult. The authority of arbitrators to review and change performance ratings will be greatly limited due to the narrow scope of collective bargaining under NSPS and the potential inability to grieve such violations that flow from "implementing issuances." This narrowed scope is further threatened by the internal, management-dominated National Security Relations Board.

A general lowering of pay for the DoD civilian workforce

The Department has not shown any meaningful progress in resolving this concern. The final regulations permit a general reduction in salaries for all DoD personnel. No objective data or reliable information exists to show that an individualized pay system is a more equitable method for appraising and compensating employees, or that it can better link individual pay to an employee's performance and overall competence.
The Department's unfettered authority to determine an employee's compensation will consequently result in fewer salary increases and lower salaries overall.

Procedures for identifying who will be affected by a Reduction in Force

The final NSPS regulation reflects the Department's unbending position on this issue, allowing an employee with three years of service and three outstanding rating to have superior retention rights to an employee with 25 years of outstanding rating and one year of having been rated merely "above average." Under the final rules, veterans with a service-connected disability of 30% or more will be retained over other veterans who all be retained over non-veterans. However, current RIF rules provide maximum opportunities for retention of those affected by the layoff. Once an employee's name is reached on a RIF list, he or she is then given other placement opportunities. These opportunities are eliminated under NSPS. The overall result will be the retention of junior employees over senior employees and the retention of non-veterans over veterans, resulting in age discrimination suits and complaints of bias.

Defense officials will also be able to establish a much narrower scope of competition than under current Office of Personnel Management regulations resulting in fewer retention opportunities for senior and employees and for veterans. The final regulations call for a drastic workforce reshaping that will depart dramatically from DoD's current practice. The new system will be costly, unreliable, and is highly unlikely to produce the results that the Department claims it will. The subjective system for retaining employees during a RIF will only promote cronyism and favoritism: two factors that do not accurately evaluate an employee's contributions to the Department's mission.

Post-Hearing Questions for the Record
Submitted to John Gage
From Senator Joseph I. Lieberman

"From Proposed to Final:
Evaluating the Regulations for the National Security Personnel System"

November 17, 2006

1. **You have discussed ways in which the NSPS rules would curtail collective bargaining over issues that you believe are important to your members. Could you explain the difference between how you negotiate over these issues under current law, compared with what you believe would occur under NSPS?**

Currently, Title 5 U.S. Code, Chapter 71 allows negotiation of collective bargaining agreements, and negotiation of procedures and appropriate arrangements for adversely affected employees in the exercise of a management right. Under the final regulations, however, the scope of collective bargaining will be extremely restricted. Under the NSPS management rights section, the rules specifically prohibit management from negotiating over the procedures used to exercise its rights, and limits severely the types of provisions that could be negotiated as "appropriate arrangements." Unions will essentially lose the right to bargain over management's right to set and change conditions of employment, such as overtime, shift rotation, safety and health programs, flexitime and alternative work schedules, as well as deployment away from regular work locations.

2. **Although the regulations would curtail collective bargaining, the rules provide for consultation between unions and the Department. What will be the impact of a shift from bargaining to consultation?**

Bargaining requires management to come to the table and discuss issues that affect the worker's employment. When the union makes a demand to bargain, the Department must make a good faith effort to reach a mutual agreement. A consultation places no such requirement on the Department officials. While management may be required to meet with the union and share information about its upcoming plans, it does not have to engage in a meaningful two-way discussion or make a concerted effort to implement the union suggestions. Collective bargaining allows the union and the Department to jointly develop, administer and enforce rules that will affect the employee. If either management or the employee fails to abide by the rules, the dispute will then be resolved by a neutral third party. Under the final regulations, consultation provides for no such joint ownership and does not ensure that the views or interests of workers are protected or even considered.

3. **The Defense Department argues that the provisions in the NSPS regulations are necessary to enable the Department to respond to**

urgent national security needs. How would you respond to that argument?

Since DoD first unveiled the National Security Personnel System, officials have maintained that national security is the guiding force behind the implementation of this new plan. They claim that without the flexibility that NSPS gives them, they will not be able to manage their workforce effectively and simultaneously respond to emerging security threats. DoD has failed to identify how the NSPS is even remotely connected to addressing terrorism or securing national security and when they ever failed their national security mission. The Department has used the excessively broad definition of "national security" to ignore the interests of represented employees and circumvent the patent Congressional mandate to bargain with employees and/or their representatives. The unions have offered post implementation bargaining to address those situations where an employee's job performance has a clear and direct impact on national security matters. Although national security concerns federal workers as well, the Department is using this issue to gain authority and undermine accountability.

4. **Both the statute and the regulations establishing the NSPS provide that whistleblower rights are not diminished. As a practical matter, do you believe whistleblower rights will be affected by the NSPS program?**

The final regulations of NSPS have made it much easier for the Department to retaliate against federal employees who identify illegal or inappropriate actions by agency officials. Under the final regulations, whistleblowers may not see any salary increase or may actually see their salaries reduced, and these employees will have no meaningful recourse to the law because the Department can justify every unwarranted action with regard to pay as being a necessary step in advancing performance management.

Public Law 108-13 reflects Congress' clear determination that DoD employees be afforded due process and be treated fairly in appeals they bring with respect to their employment. The law mandates that employees not only be treated fairly but that they maintain adequate whistleblower rights through due process and the current appellate process. The final regulations diminish these due process rights by limiting the discretion of an arbitrator or MSPB Administrative Judge to change an unfair penalty even if it is 95% unwarranted. The final regulations essentially authorizes DoD to overrule decisions that are currently viewed as final and binding, and view them as being merely advisory.

Post-Hearing Questions for the Record
Submitted to John Gage
From Senator Daniel K. Akaka

"From Proposed to Final:
Evaluating the Regulations for the National Security Personnel System"

November 17, 2006

1. **Comptroller General David Walker lays out safeguards in his testimony to prevent abuse in any pay-for-performance system. What is your assessment of Mr. Walker's proposals and what specific safeguards do you believe need to be in place for the pay-for-performance system under the National Security Personnel System (NSPS)?**

Walker's case against DoD is a practical one because he has correctly identified the Department's failure to prepare for implementation, as well as its failure to establish adequate safeguards for the management system. We believe that there are four specific safeguards that need to be in place for the pay-for-performance system under the National Security Personnel System:

(a) Assure that the agency's performance management systems: (1) link to the agency's strategic plan, related goals, and desired outcomes, and (2) result in meaningful distinctions in individual employee performance.
(b) Involve employees, their representative, and other stakeholders in the design of the system, including having employees directly involved in validating any related competencies, as appropriate.
(c) Assure that certain predecisional internal safeguards exist to help achieve the consistency, equity, nondiscrimination, and nonpoiliticization of the performance management process.
(d) Assure reasonable transparency and appropriate accountability mechanisms in connection with the results of the performance management process.

2. **During the meet and confer process, did you discuss which officials within the Department of Defense (DoD) would be charged with reviewing MSPB administrative judge decisions and their qualifications? Is so, what was your proposal and what did DoD propose?**

The qualifications of the DoD officials that might be reviewing an MSPB administrative judge decision are irrelevant to AFGE since we believe that internal agency representatives should not be reviewing ALJ decisions at all. We never discussed which DoD officials would have the authority to review MSPB decisions because we believed from the inception of the NSPS that this system was not only illegal but extremely unfair to the employee. We believed that the new system contradicted the law under 5 U.S.C.

7703 which states that employees should have the right to appeal ALJ decisions to court. Giving DoD officials the authority to reject decisions that they do not like does not streamline the appeals process but adds a second layer to the appellate review process, and makes it more difficult for the employee to challenge illegal or unfair actions against them.

3. DoD has agreed to require performance management to be in writing. However, the regulations allow amplifications of the expectations to be given orally. In your opinion, what impact will permitting oral changes to performance expectations have on employee's performance evaluations?

Permitting oral changes to performance expectations could have a detrimental impact on an employee's performance evaluation. Employees may be given a set of expectations that can change at any time, making it much easier for the Department to file a performance based action against an employee for any arbitrary reason. Since performance evaluations will be the sole determinant in computing an employee's salary, the employees that are given oral expectations will be vulnerable to their supervisors' whims, rather than Congressional action, to determine whether and how much of a pay raise they will receive. These employees may also face little protection in appealing what they view as an unfair performance appraisal or an unfair disciplinary action because it is generally easier to protect employees against arbitrary performance or disciplinary based actions when there are written expectations against which these actions can be measured.

Post-Hearing Questions for the Record
Submitted to Ronald Ault
From Senator Daniel Akaka

"From Proposed to Final: Evaluating the Regulations for the National Security Personnel System"

November 17, 2005

1. Comptroller General David Walker lays out safeguards in his testimony to prevent abuse in any pay for performance system. What is your assessment of Mr. Walker's proposals—and what specific safeguards do you believe need to be in place for the pay for performance system under the National Security Personnel System "NSPS."

Answer: Senator, this discussion has been hampered from the start, because its focus has been entirely from a management perspective. I have the greatest regard for Comptroller General Walker's management experience and capability. However, his recommendations clearly are framed to apply to management personnel. He has spent many years fine-tuning the GAO system, and he continues to provide close oversight. Additionally, the GAO system has earned credibility with its employees because there is-- unlike the DOD-- an employee oversight board that provides some sense of balance to the process.

From my perspective, a welder is a welder is a welder. The same is true within any craft. If DOD job descriptions are accurate; if DOD job assignments are clear and reasonable, then a welder, a carpenter, a machinist, a pipefitter, or an electrician will perform as expected. They will be given assignments at the start of a shift and either that person will or will not complete those assignments.

Completion of a work assignment is the best measure of success for it recognizes the talent of the individual and takes in to account his or her ability to perform. It not about who's the fastest or the most accurate when we're performing work that someone's life may depend on; it's about producing an accurate and worthwhile product that will function when needed. No soldier wants a rifle to jam when he or she is facing the enemy and requires a split second decision. If products (rifles) are produced with competition as the standard for performance, then I pity the soldier or sailor who will depend on the product that is manufactured in that manner.

Many of the current problems with performance and evaluations today grow out of the failure of supervisors to perform evaluations in a timely fashion, and the failure of budget and management officials to allocate adequate sums for the payment of bonuses and reward schemes. Too often, actual presentation of financial rewards is curtailed arbitrarily because there are not adequate resources to pay all those who qualify, and the

limited funds available go to recognize some top performers, but most is doled out to management's favorites.

The value of any job is in the work, not the individual. Of course, there are some individuals who perform more quickly and to a higher degree of proficiency—and we certainly would have no objection to some form of bonus or financial reward for that type of performance.

The hourly rate, or salary level of an individual should reflect the value of that job, not the subjective judgment of a supervisor. If assignments are completed, then that individual should receive a positive rating. If there are extenuating circumstances that prevent the individual from completing an assignment, then there must be no financial penalty. If that person is capable of independent thinking and decision-making, perhaps additional rewards should be provided.

The unions representing DOD employees have been systematically excluded from the development of this system; without a credible method for assessing performance, the goals of pay for performance cannot be achieved.

2. During the meet and confer process, did you discuss which officials at the Department of Defense (DOD) would be charged with reviewing MSPB administrative judge decisions—and their qualifications? If so, what was your proposal and what did DOD propose?

ANSWER: In repeated testimony before various congressional committees since the passage of NSPS, I have voiced serious concerns over the fact that DOD rarely provided specifics in conjunction with many critical aspects of the new personnel and labor relations system. DOD/OPM only wanted to hear from us as "stakeholders" and they would consider what we had to say along with every other stakeholder's comments.

We attempted to determine how we could memorialize any agreement in principle reached with the DOD/OPM in the meet and confer process. The DOD refused to commit to any particulars or agreements with the UDWC on any method of handling our input. After 28 days of the so-called "meet and confer," we asked DOD Under Secretary Charles Able if there was reserved any single collective bargaining provision, which the Secretary of Defense could not override and supercede with an "issuance." Secretary Able answered that under NSPS there is no such restriction on the Secretary of Defense.

After 29 days of such fruitless and very frustrating meetings, the Metal Trades Department, AFL-CIO, refused to continue under those conditions and left the "meet and confer" along with four other major unions. We did not return. However, the United DOD Workers Coalition (UDWC) gave a full and complete counter proposal to NSPS that addressed every aspect of what DOD claimed were their problems that prompted the legislation. The 300 plus pages of UDWC proposals were completely rejected out of hand by DOD. As a matter of fact, DOD rejected all our proposals, refusing to sign off on any single UDWC proposal and to our knowledge, the 58,000 public comments to its

proposed regulations. So to directly answer your question, I would simply state DOD is not interested in input from the unions as to whom should be carrying out a role they have carved out for themselves.

3. DOD has agreed to require performance expectations to be in writing. However, the regulations allow amplification of the expectations to be given orally. What impact will permitting oral changes to performance expectations have on employee's performance evaluations?

ANSWER: While work assignments and instructions can and should be provided orally, DOD is blurring the lines between what is and is not a performance expectation. The word "amplify" means to enlarge or augment. Therefore, DOD will create ever-expanding expectations that will balloon out of control. The employees should not be subject to mutating standards that may or may not have been adequately communicated, as the UDWC has stated in its comments to the draft implementing issuance on performance management.

Post-Hearing Questions for the Record
Submitted to Ronald Ault
From Senator Joseph Lieberman

"From Proposed to Final: Evaluating the Regulations for the National Security Personnel System"

November 17, 2005

1. Constraints on collective bargaining -- You have discussed ways in which the NSPS rules would curtail collective bargaining over issues that you believe are important to your members. Could you explain the difference–between how you negotiate over these issues under current law, compared with what you believe would occur under NSPS?

ANSWER: Currently, or I should say before NSPS, we were accorded exclusive recognition under 5 U.S.C. Chapter 71, that required collective bargaining over conditions of employment, including impact and implementation bargaining of appropriate arrangements of the exercise of management rights. That bargaining resulted in a binding and enforceable collective bargaining agreement that spelled out the rights and responsibilities of the workers and management. This is distinguished from "continued collaboration", which requires the unions to sit and listen to endless presentations on matters that have not been fully described. NSPS has changed the role of unions in DOD from active representatives of employees through the collective bargaining process to constrained observers with no true opportunity to affect the outcome in a way that ensures fairness to the DOD civilian workforce.

2. Bargaining compared to consultation -- Although the regulations would curtail collective bargaining, the rules provide for consultation–between unions and the Department. What will be the impact of a shift from bargaining to consultation?

ANSWER: Consultation is a one-sided, optional and paternalistic arrangement—dependent totally on the largesse and good will of management. As a parent, I "consult" with my children. As a union leader, I want to negotiate with my employer.

Consultation in labor relations is the equivalent to of the eloquent description of the office of the vice presidency by Vice President John Nance Garner: "a warm cup of spit."

At one time—more than 40 years ago—consultation was the only role allowed for unions representing federal workers. It was not effective and it had no credibility with workers. We see no reason to go back in time 40 years. Those old timers of us who grew up in that system called that "collective begging."

3. National security needs -- The Defense Department argues that the provisions in the NSPS regulations are necessary to enable the Department to respond to urgent national security needs. How would you respond to that argument?

National security is the excuse, not the reason for the NSPS. National security has been used as an excuse for a range of abuses of civil liberties under this Administration. Since September 11, 2001 we have seen abundant examples of outstanding performance by DOD personnel—above and beyond the call of duty---without having to resort to the restrictive regulations contained in NSPS. Without NSPS, DOD fielded volunteer teams to repair the USS Cole under budget and ahead of schedule; volunteer teams who reported to Kuwait to outfit combat vehicles with additional armor, again—ahead of schedule and under budget. There are numerous examples that indicate extraordinary performance under current regulations to meet the demands of national security. As you know, NSPS began life some eight years ago in the bowels of the Heritage Foundation as a device to curtail union rights for federal workers. It has nothing to do with national security.

4. Whistleblower rights -- Both the statute and the regulations establishing the NSPS provide that whistleblower rights are not diminished. As a practical matter, do you believe whistleblower rights will be affected by the NSPS program?

Answer: Yes we do, in the negative. The assertion that whistleblower rights will not be diminished is not much comfort because those rights are not adequate now. Actually, as we have seen, the rights of individuals to report wrongdoing, corruption and malfeasance are tenuous under current circumstances. Weakening individual claims to representation in any fashion undercuts the few protections that currently exist. This personnel system is plainly subjective. DOD employees' appeals to unwarranted and unfair personnel actions taken by their supervisors for any reason or no reason at all are so limited in nature and scope as to be, at best, superficial. NSPS essentially makes all employees in DOD to employees, employed at will. I would (and will) advise every DOD employee who believes they have been the victims of unfair personnel treatment to file an EEO complaint to get access to federal courts for due process claims under the 14th amendment. The NSPS internal process is designed to be long, many steps, overly complicated, and a paternalistic "kangaroo court" where rank and file DOD employees cannot expect anything that remotely resembles justice.

Post-Hearing Questions for the Record
Submitted to Ronald Ault
From Senator John Warner

"From Proposed to Final: Evaluating the Regulations for the National Security Personnel System"

November 17, 2005

1. During my service as Secretary of the Navy during which I was privileged to have some civilian employees working side by side with the uniformed Navy, I valued very highly the sense of "Teamwork between the civilian and uniformed members of the United States Navy. "Teamwork is an intrinsic military value, in my judgment, and essential to mission accomplishment. Some have been concerned that NSPS could– undermine that sense of teamwork, by increasing the competition between individuals for recognition of their performance. How can we safeguard this essential element of national service teamwork as we move forward in changing the personnel systems of the Department of Defense?

ANSWER: The system as now proposed has no credibility with workers. Workers and their elected representatives have no sense of "ownership" of the process or the system that DOD has developed. DOD describes unions and workers as "stakeholders" in NSPS, but DOD's tactics belie the meaning of the word. We are stakeholders in DOD and in the country at large, but we have not been accorded a legitimate role in design and development of NSPS. So, we are frustrated stakeholders. Teamwork, cooperation or, to use a phrase that has fallen out of favor, "partnership," requires trust and credibility— which this system lacks. A short and concise answer is we cannot safeguard any system that the employees have no ownership in nor participated in its development.

2. In preparation for a hearing of the Armed Services Committee which I chaired in April, –2005, I asked my good friend John Gage to whittle down the scores of issues that he–identified with the draft regulation to a few flashpoint issues a handful of things that had the highest priority from his perspective. He did that, and in his testimony to the SASC on April 14, 2005, identified six flashpoints

Composition of the National Security Relations Board.

The standard for mitigation of adverse actions by the Merit Systems Protection– Board.

The requirement for written standards for employee performance– general lowering of pay for the DoD civilian workforce; and

Procedures for identifying who will be affected by a Reduction in Force.

It is my understanding that the final regulations reflect progress on some of these issues. How far has the Department come in addressing these issues to ensure the success of NSPS?

ANSWER: I would prefer to let President Gage speak for himself on the matters that he and his union have identified as "flashpoints." On behalf of the 36 unions of the UDWC who have designated me to represent them in these hearings, I must say that we fail to see any progress, except that managers will be required to provide employees with an initial set of written performance standards. DOD has not addressed the root problems with the system—Specifically, that, in direct contravention to the explicit instructions contained in the legislative history accompanying the act authorizing NSPS, DOD has restricted collective bargaining, constrained employee rights to due process and ignored the clear charge to involve employee representatives in the development of this system. DOD has been non-responsive to our calls for some budgetary accountability for the costs involved in development of the program, in the re-invention of parallel third-party structures to administer it, and in the costs of training for both supervisory and rank and file workers in the operation of NSPS. It will cost taxpayers billions- and for what? NSPS harms real security and is nothing more than pure and simple union busting.

We renew our call to you, Senator Warner, and your colleagues on the committee to demand more candor and truth from DOD on these issues.

And I would add that there are some among on Capitol Hill who say we need experience with NSPS before Congress steps in. No one in their right mind wants any experience in an execution; no one wants experience in near death experiences, nor being physically abused to find out about torturing prisoners in Iraq. We need Congress to act now to rein in DOD before the damage is irreparable. NSPS will turn DOD into FEMA on steroids in a never ending hurricane aftermath! Our country cannot conduct such an experiment, and risk the lives of those serving in the military as they seek to sustain the global war on terrorism.

Senator Warner, as you know, DOD is mostly made up of a seasoned, aged workforce employed for decades under a known personnel system that guaranteed certain rights and pay. Personnel recruitment has been difficult and expensive. Now, DOD proposes to totally discard that system (not fix any present problems with that known and proven system) and completely replace it with NSPS, designed in secret totally by managers from only a management prospective, without any consideration for any portion of their civilian workforce. No matter what the outcome of the pending federal lawsuit, NSPS has NO CREDIBILITY with its workers because it ignores the interests of those who are most affected by it

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