

**§ 9701.709**

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**§ 9701.709 Actions involving discrimination.**

Section 7702 of title 5, U.S. Code, is modified to read “MSPB or MRP” wherever the terms “Merit Systems Protection Board” or “Board” are used.

**§ 9701.710 Savings provision.**

This subpart does not apply to adverse actions proposed prior to the date of an affected employee’s coverage under this subpart.

CHAPTER XCIX—DEPARTMENT OF DEFENSE  
HUMAN RESOURCES MANAGEMENT AND  
LABOR RELATIONS SYSTEMS (DEPARTMENT OF  
DEFENSE—OFFICE OF PERSONNEL  
MANAGEMENT)

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AUTHORITY: 5 U.S.C. 9902

SOURCE: 70 FR 66188, Nov. 1, 2005, unless otherwise noted.

**Subpart A—General Provisions**

**§ 9901.101 Purpose.**

(a) This part contains regulations governing the establishment of a new human resources management system and a new labor relations system within the Department of Defense (DoD), as authorized by 5 U.S.C. 9902. Consistent with 5 U.S.C. 9902, these regulations waive or modify various statutory provisions that would otherwise be applicable to affected DoD employees. These regulations are prescribed jointly by the Secretary of Defense and the Director of the Office of Personnel Management (OPM).

(b)(1) This part is designed to meet a number of essential requirements for the implementation of a new human resources management system and a new labor relations system for DoD. The guiding principles for establishing these requirements are to put mission first; respect the individual; protect rights guaranteed by law, including the statutory merit system principles in 5 U.S.C. 2301; value talent, performance, leadership, and commitment to public service; be flexible, understandable, credible, responsive, and executable;

ensure accountability at all levels; balance human resources system interoperability with unique mission requirements; and be competitive and cost effective.

(2) The key operational characteristics and requirements of NSPS and the labor relations system, which these regulations are designed to facilitate, are as follows: *High Performing Workforce and Management*—employees and supervisors are compensated and retained based on their performance and contribution to mission; *Agile and Responsive Workforce and Management*—workforce can be easily sized, shaped, and deployed to meet changing mission requirements; *Credible and Trusted*—system assures openness, clarity, accountability, and adherence to the public employment principles of merit and fitness; *Fiscally Sound*—aggregate increases in civilian payroll, at the appropriations level, will conform to OMB fiscal guidance; *Supporting Infrastructure*—information technology support, and training and change management plans are available and funded; and *Schedule*—NSPS and the labor relations system will be operational and demonstrate success prior to November 2009.

#### § 9901.102 Eligibility and coverage.

(a) Pursuant to the provisions of 5 U.S.C. 9902, all civilian employees of DoD are eligible for coverage under one or more of subparts B through I of this part, except to the extent specifically prohibited by law.

(b) At his or her sole and exclusive discretion, the Secretary may, subject to § 9901.105(b)—

(1) Establish or change the effective date for applying subpart I of this part to all eligible employees in accordance with 5 U.S.C. 9902(m); and

(2) With respect to subparts B through H of this part, apply these subparts to a specific category or categories of eligible civilian employees in organizations and functional units of the Department at any time in accordance with the provisions of 5 U.S.C. 9902. However, no category of employees may be covered by subparts B, C, E, F, G, or H of this part unless that category is also covered by subpart D of this part.

(c) Until the Secretary makes a determination under paragraph (b) of this section to apply the provisions of one or more subparts of this part to a particular category or categories of eligible employees in organizations and functional units, those employees, will continue to be covered by the applicable Federal laws and regulations that would apply to them in the absence of this part. All personnel actions affecting DoD employees will be based on the Federal laws and regulations applicable to them on the effective date of the action.

(d) Any new NSPS classification, pay, or performance management system covering Senior Executive Service (SES) members will be consistent with the policies and procedures established by the Governmentwide SES pay-for-performance framework authorized by 5 U.S.C. chapter 53, subchapter VIII, and applicable OPM regulations. If the Secretary determines that SES members employed by DoD should be covered by classification, pay, or performance management provisions that differ substantially from the Governmentwide SES pay-for-performance framework, the Secretary and the Director will issue joint regulations consistent with all of the requirements of 5 U.S.C. 9902.

(e) At his or her sole and exclusive discretion, the Secretary may rescind the application under paragraph (b) of this section of one or more subparts of this part to a particular category of employees and prescribe implementing issuances for converting that category of employees to coverage under applicable title 5 or other applicable provisions. The Secretary will notify affected employees and labor organizations in advance of a decision to rescind the application of one or more subparts of this part to them.

(f)(1) Notwithstanding any other provision of this part, but subject to the following conditions, the Secretary may, at his or her sole and exclusive discretion, apply one or more subparts of this part as of an effective date specified to a category of employees in organizational and functional units not currently eligible for coverage because of coverage under a system established by a provision of law outside the

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waivable or modifiable chapters of title 5, U.S. Code, if the provision of law outside those waivable or modifiable title 5 chapters provides discretionary authority to cover employees under a given waivable or modifiable title 5 chapter or to cover them under a separate system established by the Secretary.

(2) In applying paragraph (f)(1) of this section with respect to coverage under subparts B and C of this part, the affected employees will be converted directly to the NSPS pay system from their current pay system. The Secretary may establish conversion rules for these employees similar to the conversion rules established under § 9901.373.

### § 9901.103 Definitions.

In this part:

*Band* means *pay band*.

*Basic pay* means an employee's rate of pay before any deductions and exclusive of additional pay of any kind, except as expressly provided by applicable law or regulation. For the specific purposes prescribed in § 9901.332(c) only, basic pay includes any local market supplement.

*Career group* means a grouping of one or more associated or related occupations. A career group may include one or more pay schedules.

*Competencies* means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics that an individual needs to perform a particular job or job function successfully.

*Contribution* means a work product, service, output, or result provided or produced by an employee or group of employees that supports the Departmental or organizational mission, goals, or objectives.

*Day* means a calendar day.

*Department* or *DoD* means the Department of Defense.

*Director* means the Director of the Office of Personnel Management.

*Employee* means an employee within the meaning of that term in 5 U.S.C. 2105.

*Furlough* means the placement of an employee in a temporary status without duties and pay because of lack of

work or funds or other non-disciplinary reasons.

*General Schedule* or *GS* means the General Schedule classification and pay system established under chapter 51 and subchapter III of chapter 53 of title 5, U.S. Code.

*Implementing issuance(s)* means a document or documents issued by the Secretary, Deputy Secretary, Principal Staff Assistants (as authorized by the Secretary), or Secretaries of the Military Departments to carry out a policy or procedure implementing this part. These issuances may apply Department-wide or to any part of DoD as determined by the Secretary at his or her sole and exclusive discretion. These issuances do not include internal operating guidance, handbooks, or manuals that do not change conditions of employment, as defined in § 9901.903.

*Initial probationary period* means the period of time, as designated by the Secretary, immediately following an employee's appointment, during which an authorized management official determines whether the employee fulfills the requirements of the position to which assigned.

*In-service probationary period*, such as a supervisory probationary period, means the period of time, as designated by the Secretary, during which an authorized management official determines whether the employee fulfills the requirements of the position to which assigned.

*Labor organization* means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with the Department concerning grievances and conditions of employment, but does not include—

(1) An organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(2) An organization which advocates the overthrow of the constitutional form of government of the United States;

(3) An organization sponsored by the Department; or

(4) An organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike.

*Mandatory removal offense (MRO)* means an offense that the Secretary determines in his or her sole, exclusive, and unreviewable discretion has a direct and substantial adverse impact on the Department's national security mission.

*Military Department* means the Department of the Army, the Department of the Navy, or the Department of the Air Force.

*MSPB* means the Merit Systems Protection Board.

*National Security Personnel System (NSPS)* means the human resources management system established under 5 U.S.C. 9902(a). It does not include the labor relations system established under 5 U.S.C. 9902(m).

*Occupational series* means a group or family of positions performing similar types of work. Occupational series are assigned a number for workforce information purposes (for example: 0110, Economist Series; 1410, Librarian Series).

*OPM* means the Office of Personnel Management.

*Pay band* or *band* means a work level and associated pay range within a pay schedule.

*Pay schedule* means a set of related pay bands for a specified category of employees within a career group.

*Performance* means accomplishment of work assignments or responsibilities and contribution to achieving organizational goals, including an employee's behavior and professional demeanor (actions, attitude, and manner of performance), as demonstrated by his or her approach to completing work assignments.

*Principal Staff Assistants* means senior officials of the Office of the Secretary who report directly to the Secretary or Deputy Secretary of Defense.

*Promotion* means the movement of an employee from one pay band to a higher pay band under implementing issuances. This includes movement of

an employee currently covered by a non-NSPS Federal personnel system to a position determined to be at a higher level of work in NSPS.

*Rating of record* means a performance appraisal prepared—

(1) At the end of an appraisal period covering an employee's performance of assigned duties against performance expectations over the applicable period; or

(2) As needed to reflect a substantial and sustained change in the employee's performance since the last rating of record as provided in implementing issuances.

*Reassignment* means the movement of an employee within DoD from his or her position of record to a different position or set of duties in the same or a comparable pay band under implementing issuances on a permanent or temporary/time-limited basis. This includes the movement of an employee between positions at a comparable level of work in NSPS and a non-NSPS Federal personnel system.

*Reduction in band* means the voluntary or involuntary movement of an employee from one pay band to a lower pay band under implementing issuances. This includes movement of an employee currently covered by a non-NSPS Federal personnel system to a position determined to be at a lower level of work in NSPS.

*Secretary* means the Secretary of Defense, consistent with 10 U.S.C. 113.

*SES* means the Senior Executive Service established under 5 U.S.C. chapter 31, subchapter II.

*SL/ST* refers to an employee serving in a senior-level position paid under 5 U.S.C. 5376. The term "SL" identifies a senior-level employee covered by 5 U.S.C. 3324 and 5108. The term "ST" identifies an employee who is appointed under the special authority in 5 U.S.C. 3325 to a scientific or professional position established under 5 U.S.C. 3104.

*Unacceptable performance* means performance of an employee which fails to meet one or more performance expectations, as amplified through work assignments or other instructions, for which the employee is held individually accountable.

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### § 9901.104 Scope of authority.

The authority for this part is 5 U.S.C. 9902. The provisions in the following chapters of title 5, U.S. Code, and any related regulations, may be waived or modified in exercising the authority in 5 U.S.C. 9902:

(a) Chapters 31, 33, and 35, dealing with staffing, employment, and work-force shaping (as authorized by 5 U.S.C. 9902(k));

(b) Chapter 43, dealing with performance appraisal systems;

(c) Chapter 51, dealing with General Schedule job classification;

(d) Chapter 53, dealing with pay for General Schedule employees, pay and job grading for Federal Wage System employees, and pay for certain other employees;

(e) Chapter 55, subchapter V, dealing with premium pay, except section 5545b;

(f) Chapter 71, dealing with labor relations (as authorized by 5 U.S.C. 9902(m));

(g) Chapter 75, dealing with adverse actions and certain other actions; and

(h) Chapter 77, dealing with the appeal of adverse actions and certain other actions.

### § 9901.105 Coordination with OPM.

(a) As specified in paragraphs (b) through (e) of this section, the Secretary will advise and/or coordinate with OPM in advance, as applicable, regarding the proposed promulgation of certain implementing issuances and certain other actions related to the ongoing operation of the NSPS where such actions could have a significant impact on other Federal agencies and the Federal civil service as a whole. Such pre-decisional coordination is intended as an internal DoD/OPM matter to recognize the Secretary's special authority to direct the operations of the Department of Defense pursuant to title 10, U.S. Code, as well as the Director's institutional responsibility to oversee the Federal civil service system pursuant to 5 U.S.C. chapter 11.

(b) DoD will advise OPM in advance regarding the extension of specific subparts of this part to specific categories of DoD employees under § 9901.102(b).

(c) Subpart B of this part authorizes the Secretary to establish and admin-

ister a position classification system and classify positions covered by the NSPS; in so doing, DoD will coordinate with OPM prior to—

(1) Establishing or substantially revising career groups, occupational pay schedules, and pay bands under §§ 9901.211 and 9901.212(a);

(2) Establishing alternative or additional occupational series for a particular career group or occupation under § 9901.221(b)(1) that differ from Governmentwide series and/or standards;

(3) Establishing alternative or additional classification standards for a particular career group or occupation under § 9901.221(b)(1) that differ from Governmentwide classification standards; and

(4) Establishing the process by which DoD employees may request reconsideration of classification decisions by the Secretary under § 9901.222, to ensure compatibility between DoD and OPM procedures.

(d) Subpart C of this part authorizes the Secretary to establish and administer a compensation system for employees of the Department covered by the NSPS; in so doing, DoD will coordinate with OPM prior to—

(1) Establishing maximum rates of basic pay and aggregate pay under § 9901.312 that exceed those established under 5 U.S.C. chapter 53;

(2) Establishing and adjusting pay ranges for occupational pay schedules and pay bands under §§ 9901.321(a), 9901.322(a) and (b), and 9901.372;

(3) Establishing and adjusting local market supplements under §§ 9901.332(a) and 9901.333;

(4) Establishing alternative or additional local market areas under § 9901.332(b) that differ from those established for General Schedule employees under 5 CFR 531.603;

(5) Establishing policies regarding starting rates of pay for newly appointed or transferred employees under §§ 9901.351 through 9901.354 and pay retention under § 9901.355;

(6) Establishing policies regarding premium pay under § 9901.361 that differ from those that exist in Governmentwide regulations; and

(7) Establishing policies regarding the student loan repayment program

under § 9901.303(c) that differ from Governmentwide policies with respect to repayment amounts, service commitments, and reimbursement.

(e) Subpart E of this part authorizes the Secretary to establish and administer authorities for the examination and appointment of employees to certain organizational elements of the Department covered by the NSPS; in so doing, DoD will coordinate with OPM prior to—

(1) Establishing alternative or additional examining procedures under § 9901.515 that differ from those applicable to the examination of applicants for appointment to the competitive and excepted service under 5 U.S.C. chapters 31 and 33, except as otherwise provided by subpart E of this part;

(2) Establishing policies and procedures for time-limited appointments under § 9901.511(d) regarding appointment duration, advertising requirements, examining procedures, the appropriate uses of time-limited employees, and the procedures under which a time-limited employee in a competitive service position maybe be converted without further competition to the career service; and

(3) Establishing alternative or additional qualification standards for a particular occupational series, career group, occupational pay schedule, and/or pay band under § 9901.212(d) or 9901.513 that significantly differ from Governmentwide standards.

(f) Subpart F of this part authorizes the Secretary to establish and administer a workforce shaping system for employees of the Department covered by the NSPS; in so doing, DoD will coordinate with OPM prior to modifying coverage, retention procedures, or appeal rights under subpart F of this part.

(g) Section 9902(1) of title 5, U.S. Code, requires the Secretary to make a determination that the Department has in place a performance management system that meets the criteria in 5 U.S.C. 9902(b) before the Secretary may apply the human resources management system established under 5 U.S.C. 9902(a) to an organization or functional unit that exceeds 300,000 civilian employees. In making this deter-

mination, the Secretary will coordinate with the Director.

(h) When a matter requiring OPM coordination is submitted to the Secretary for decision, the Director will be provided an opportunity, as part of the Department's normal coordination process, to review and comment on the recommendations and officially concur or nonconcur with all or part of them. The Secretary will take the Director's comments and concurrence/ nonconcurrency into account, advise the Director of his or her determination, and provide the Director with reasonable advance notice of the effective date of the matter. Thereafter, the Secretary and the Director may take such action(s) as they deem appropriate, consistent with their respective statutory authorities and responsibilities.

(i) The Secretary and the Director fully expect their staffs to work closely together on the matters specified in this section, before such matters are submitted for official OPM coordination and DoD decision, so as to maximize the opportunity for consensus and agreement before an issue is so submitted.

#### **§ 9901.106 Continuing collaboration.**

(a) *Continuing collaboration with employee representatives.* (1) Consistent with 5 U.S.C. 9902, this section provides employee representatives with an opportunity to participate in the development of implementing issuances that carry out the provisions of this part. This process is the exclusive procedure for the participation of employee representatives in the planning, development, or implementation of the implementing issuances that carry out the provisions of this part. Therefore, this process is not subject to the requirements of 5 U.S.C. chapter 71, including but not limited to the exercise of management rights, enforcement of the duty to consult or negotiate, the duty to bargain and consult, or impasse procedures, or the requirements established by subpart I of this part, including but not limited to §§ 9901.910 (regarding the exercise of management rights), 9901.916(a)(5) (regarding enforcement of the duty to consult or negotiate), 9901.917 (regarding the duty to

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bargain and consult), and 9901.920 (regarding impasse procedures).

(2)(i) For the purpose of this section, the term “employee representatives” includes representatives of labor organizations with exclusive recognition rights for units of DoD employees, as determined pursuant to subpart I of this part.

(ii) The Secretary, at his or her sole and exclusive discretion, may determine the number of employee representatives to be engaged in the continuing collaboration process. However, each national labor organization with one or more bargaining units accorded exclusive recognition in the Department affected by an implementing issuance will be provided the opportunity to participate in the continuing collaboration process.

(iii) Each national labor organization with multiple collective bargaining units accorded exclusive recognition will determine how its units will be represented within the limitations imposed by the Secretary under paragraph (a)(2)(i) of this section.

(3)(i) Within timeframes specified by the Secretary, employee representatives will be provided with an opportunity to submit written comments to, and to discuss their views and recommendations with, DoD officials on any proposed final draft implementing issuances. If views and recommendations are presented by employee representatives, the Secretary must consider these views and recommendations before taking final action. The Secretary will provide employee representatives a written statement of the reasons for taking the final action regarding the implementing issuance.

(ii) To the extent that the Secretary determines necessary, employee representatives will be provided with an opportunity to discuss their views with DoD officials and/or to submit written comments, at initial identification of implementation issues and conceptual design and/or at review of draft recommendations or alternatives.

(4) Employee representatives will be provided with access to information for their participation in the continuing collaboration process to be productive.

(5) Nothing in the continuing collaboration process will affect the right of

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the Secretary, Deputy Secretary, Principal Staff Assistants, or Secretaries of the Military Departments to determine the content of implementing issuances and to make them effective at any time.

(b) *Continuing collaboration with other interested organizations.* The Secretary may also establish procedures for continuing collaboration with appropriate organizations that represent the interests of a substantial number of nonbargaining unit employees.

### § 9901.107 Relationship to other provisions.

(a)(1) The provisions of title 5, U.S. Code, are waived, modified, or replaced to the extent authorized by 5 U.S.C. 9902 to conform to the provisions of this part.

(2) This part must be interpreted in a way that recognizes the critical national security mission of the Department, and each provision of this part must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission, as defined by the Secretary. The interpretation of the regulations in this part by DoD and OPM must be accorded great deference.

(b) For the purpose of applying other provisions of law or Governmentwide regulations that reference provisions under chapters 31, 33, 35, 43, 51, 53, 55 (subchapter V only), 71, 75, and 77 of title 5, U.S. Code, the referenced provisions are not waived but are modified consistent with the corresponding regulations in this part, except as otherwise provided in this part (including paragraph (c) of this section) or in implementing issuances. Applications of this rule include, but are not limited to, the following:

(1) If another provision of law or Governmentwide regulations requires coverage under one of the chapters modified or waived under this part (*i.e.*, chapters 31, 33, 35, 43, 51, 53, 55 (subchapter V only), 71, 75, and 77 of title 5, U.S. Code), DoD employees are deemed to be covered by the applicable chapter notwithstanding coverage under a system established under this part. Selected examples of provisions that continue to apply to any DoD employees

(notwithstanding coverage under subparts B through I of this part) include, but are not limited to, the following:

(i) Foreign language awards for law enforcement officers under 5 U.S.C. 4521 through 4523;

(ii) Pay for firefighters under 5 U.S.C. 5545b;

(iii) Recruitment, relocation, and retention payments under 5 U.S.C. 5753 through 5754; and

(iv) Physicians' comparability allowances under 5 U.S.C. 5948.

(2) In applying the back pay law in 5 U.S.C. 5596 to DoD employees covered by subpart H of this part (dealing with appeals), the reference in section 5596(b)(1)(A)(ii) to 5 U.S.C. 7701(g) (dealing with attorney fees) is considered to be a reference to a modified section 7701(g) that is consistent with § 9901.807(f)(6).

(3) In applying the back pay law in 5 U.S.C. 5596 to DoD employees covered by subpart I of this part (dealing with labor relations), the references in section 5596 to provisions in chapter 71 are considered to be references to those particular provisions as modified by subpart I of this part.

(c) Law enforcement officer special base rates under section 403 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101-509) do not apply to employees who are covered by an NSPS classification and pay system established under subparts B and C of this part.

(d) Nothing in this part waives, modifies or otherwise affects the employment discrimination laws that the Equal Employment Opportunity Commission (EEOC) enforces under 42 U.S.C. 2000e *et seq.*, 29 U.S.C. 621 *et seq.*, 29 U.S.C. 791 *et seq.*, and 29 U.S.C. 206(d).

#### § 9901.108 Program evaluation.

(a) The Secretary will evaluate the regulations in this part and their implementation. The Secretary will provide designated employee representatives with an opportunity to be briefed and a specified timeframe to provide comments on the design and results of program evaluations.

(b) Involvement of employee representatives in the evaluation process does not waive the rights of any party under applicable law or regulations.

## Subpart B—Classification

### GENERAL

#### § 9901.201 Purpose.

(a) This subpart contains regulations establishing a classification structure and rules for covered DoD employees and positions to replace the classification structure and rules in 5 U.S.C. chapter 51 and the job grading system in 5 U.S.C. chapter 53, subchapter IV, in accordance with the merit principle that equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(b) Any classification system prescribed under this subpart will be established in conjunction with the pay system described in subpart C of this part.

#### § 9901.202 Coverage.

(a) This subpart applies to eligible DoD employees and positions listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b)(2).

(b) The following employees of, or positions in, DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions that would otherwise be covered by the General Schedule classification system established under 5 U.S.C. chapter 51;

(2) Employees and positions that would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

(3) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376;

(4) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9901.102(d); and

(5) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

**§ 9901.203 Waivers.**

(a) When a specified category of employees is covered by a classification system established under this subpart, the provisions of 5 U.S.C. chapter 51 and 5 U.S.C. 5346 are waived with respect to that category of employees, except as provided in paragraph (b) of this section, §§ 9901.107, and 9901.222(d) (with respect to OPM’s authority under 5 U.S.C. 5112(b) and 5346(c) to act on requests for review of classification decisions).

(b) Section 5108 of title 5, U.S. Code, dealing with the classification of positions above GS–15, is not waived for the purpose of defining and allocating senior executive service positions under 5 U.S.C. 3132 and 3133 or applying provisions of law outside the waivable and modifiable chapters of title 5, U.S. Code—e.g., 5 U.S.C. 4507 and 4507a (regarding Presidential rank awards) and 5 U.S.C. 6303(f) (regarding annual leave accrual for members of the SES and employees in SL/ST positions).

**§ 9901.204 Definitions.**

In this subpart:

*Band* means *pay band*.

*Basic pay* has the meaning given that term in § 9901.103.

*Career group* has the meaning given that term in § 9901.103.

*Classification*, also referred to as job evaluation, means the process of analyzing and assigning a job or position to an occupational series, career group, pay schedule, and pay band for pay and other related purposes.

*Competencies* has the meaning given that term in § 9901.103.

*Occupational series* has the meaning given that term in § 9901.103.

*Pay band* or *band* has the meaning given that term in § 9901.103.

*Pay schedule* has the meaning given that term in § 9901.103.

*Position* or *job* means the duties, responsibilities, and related competency requirements that are assigned to an employee whom the Secretary approves for coverage under § 9901.202(a).

**§ 9901.205 Bar on collective bargaining.**

Pursuant to 5 U.S.C. 9902(f)(4) and (m)(7), any classification system established under this subpart is not subject

to collective bargaining. This bar on collective bargaining applies to all aspects of the classification system, including, but not limited to coverage determinations, the design of the classification structure, and classification methods, criteria, and administrative procedures and arrangements.

CLASSIFICATION STRUCTURE

**§ 9901.211 Career groups.**

For the purpose of classifying positions, the Secretary may establish career groups based on factors such as mission or function; nature of work; qualifications or competencies; career or pay progression patterns; relevant labor-market features; and other characteristics of those occupations or positions. The Secretary will document in implementing issuances the criteria and rationale for grouping occupations or positions into career groups.

**§ 9901.212 Pay schedules and pay bands.**

(a) For purposes of identifying relative levels of work and corresponding pay ranges, the Secretary may establish one or more pay schedules within each career group.

(b) Each pay schedule may include one or more pay bands.

(c) The Secretary will document in implementing issuances the definitions for each pay band which specify the type and range of difficulty and responsibility; qualifications or competencies; or other characteristics of the work encompassed by the pay band.

(d) The Secretary will designate qualification standards and requirements for each career group, occupational series, pay schedule, and/or pay band, as provided in § 9901.513.

CLASSIFICATION PROCESS

**§ 9901.221 Classification requirements.**

(a) The Secretary will develop a methodology for describing and documenting the duties, qualifications, and other requirements of categories of jobs, and will make such descriptions and documentation available to affected employees.

(b) The Secretary will—

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(1) Assign occupational series to jobs consistent with occupational series definitions established by OPM under 5 U.S.C. 5105 and 5346, or by DoD; and

(2) Apply the criteria and definitions required by §§ 9901.211 and 9901.212 to assign jobs to an appropriate career group, pay schedule, and pay band.

(c) The Secretary will establish procedures for classifying jobs and may make such inquiries of the duties, responsibilities, and qualification requirements of jobs as it considers necessary for the purpose of this section.

(d) Classification decisions become effective on the date an authorized official approves the classification. A classification decision is implemented by a personnel action. The personnel action implementing a classification decision must occur within four pay periods after the date of the decision. Except as provided for in § 9901.222(b), such decisions will be applied prospectively and do not convey any retroactive entitlements.

### § 9901.222 Reconsideration of classification decisions.

(a) An individual employee may request that DoD or OPM reconsider the classification (*i.e.*, pay system, career group, occupational series, official title, pay schedule, or pay band) of his or her official position of record at any time.

(b) The Secretary will establish implementing issuances for reviewing requests for reconsideration. Such issuances will include a provision stating that a retroactive effective date may be required only if the employee is wrongfully reduced in band.

(c) An employee may request OPM to review a DoD determination made under paragraph (a) of this section. If an employee does not request an OPM reconsideration decision, DoD's classification determination is final and not subject to further review or appeal.

(d) OPM's final determination on a request made under this section is not subject to further review or appeal.

(e) Any determination made under this section will be based on criteria issued by the Secretary or, where the Secretary has adopted an OPM classification standard, criteria issued by OPM.

## TRANSITIONAL PROVISIONS

### § 9901.231 Conversion of positions and employees to the NSPS classification system.

(a) This section describes the transitional provisions that apply when DoD positions and employees initially are converted to a classification system established under this subpart. Affected positions and employees may convert from the GS system, a prevailing rate system, the SL/ST system, the SES system, or such other DoD systems as may be designated by the Secretary, as provided in § 9901.202. For the purpose of this section, the terms “convert,” “converted,” “converting,” and “conversion” refer to positions and employees that become covered by the NSPS classification system as a result of a coverage determination made under § 9901.102(b)(2) and exclude employees who move from a noncovered position to a position already covered by NSPS.

(b) The Secretary will issue implementing issuances prescribing policies and procedures for converting DoD employees to a pay band upon initial implementation of the NSPS classification system. Such procedures will include provisions for converting an employee who is retaining a grade under 5 U.S.C. chapter 53, subchapter VI, immediately prior to conversion. The Secretary will convert an employee's rate of pay as provided in § 9901.373.

## Subpart C—Pay and Pay Administration

### GENERAL

### § 9901.301 Purpose.

(a) This subpart contains regulations establishing pay structures and pay administration rules for covered DoD employees to replace the pay structures and pay administration rules established under 5 U.S.C. chapter 53 and 5 U.S.C. chapter 55, subchapter V, as authorized by 5 U.S.C. 9902. Various features that link pay to employees' performance ratings are designed to promote a high-performance culture within DoD.

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(b) Any pay system prescribed under this subpart will be established in conjunction with the classification system described in subpart B of this part.

(c) Any pay system prescribed under this subpart will be established in conjunction with the performance management system described in subpart D of this part.

### § 9901.302 Coverage.

(a) This subpart applies to eligible DoD employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b)(2).

(b) The following employees of, or positions in, DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by the General Schedule pay system established under 5 U.S.C. chapter 53, subchapter III;

(2) Employees and positions who would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

(3) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376;

(4) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9901.102(d); and

(5) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

(c) This section does not apply in determining coverage under § 9901.361 (dealing with premium pay).

### § 9901.303 Waivers.

(a) When a specified category of employees is covered under this subpart—

(1) The provisions of 5 U.S.C. chapter 53 are waived with respect to that category of employees, except as provided in § 9901.107 and paragraphs (b) and (c) of this section; and

(2) The provisions of 5 U.S.C. chapter 55, subchapter V (except section 5545b), are waived with respect to that category of employees to the extent that those employees are covered by alternative premium pay provisions estab-

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lished by the Secretary under § 9901.361 in lieu of the provisions in 5 U.S.C. chapter 55, subchapter V.

(b) The following provisions of 5 U.S.C. chapter 53 are not waived:

(1) Sections 5311 through 5318, dealing with Executive Schedule positions;

(2) Section 5371, insofar as it authorizes OPM to apply the provisions of 38 U.S.C. chapter 74 to DoD employees in health care positions covered by section 5371 in lieu of any NSPS pay system established under this subpart or the following provisions of title 5, U.S. Code: Chapters 51, 53, and 61, and subchapter V of chapter 55. The reference to “chapter 51” in section 5371 is deemed to include a classification system established under subpart B of this part; and

(3) Section 5377, dealing with the critical pay authority.

(c) Section 5379 is modified. The Secretary may establish and administer a student loan repayment program for DoD employees, except that the Secretary may not make loan payments for any noncareer appointee in the SES (as defined in 5 U.S.C. 3132(a)(7)) or for any employee occupying a position that is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character. Notwithstanding § 9901.302(a), any DoD employee otherwise covered by section 5379 is eligible for coverage under the provisions established under this paragraph, subject to a determination by the Secretary under § 9901.102(b)(2).

### § 9901.304 Definitions.

In this part:

*Band* means *pay band*.

*Band rate range* means the range of rates of basic pay (excluding any local market supplements) applicable to employees in a particular pay band, as described in § 9901.321. Each band rate range is defined by a minimum and maximum rate.

*Basic pay* has the meaning given that term in § 9901.103.

*Bonus* means an element of the performance payout that consists of a one-time lump-sum payment made to employees. It is not part of basic pay.

*Career group* has the meaning given that term in § 9901.103.

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*Competencies* has the meaning given that term in § 9901.103.

*Contribution* has the meaning given that term in § 9901.103.

*Contribution assessment* means the determination made by the pay pool manager as to the impact, extent, and scope of contribution that the employee's performance made to the accomplishment of the organization's mission and goals.

*CONUS* or *Continental United States* means the States of the United States, excluding Alaska and Hawaii, but including the District of Columbia.

*Extraordinary pay increase* or *EPI* means a discretionary basic pay increase or bonus to reward an employee at the highest performance level who has been assigned the maximum number of shares available under the rating and contribution scheme when the payout formula does not adequately compensate them for the employee's extraordinary performance and contribution, as described in § 9901.344(b).

*Local market supplement* means a geographic- and occupation-based supplement to basic pay, as described in § 9901.332.

*Modal rating* means, for the purpose of pay administration, the most frequent rating of record assigned to employees in the same pay band within a particular pay pool for a particular rating cycle.

*Pay band* or *band* has the meaning given that term in § 9901.103.

*Pay pool* means the organizational elements/ units or other categories of employees that are combined for the purpose of determining performance payouts. Each employee is in only one pay pool at a time. *Pay pool* also means the amount designated for performance payouts to employees covered by a pay pool.

*Pay schedule* has the meaning given that term in § 9901.103.

*Performance* has the meaning given that term in § 9901.103.

*Performance payout* means the total monetary value of a performance pay increase and bonus provided under § 9901.342.

*Performance share* means a unit of performance payout awarded to an employee based on performance. Performance shares may be awarded in mul-

tiples commensurate with the employee's performance and contribution rating level.

*Performance share value* means a calculated value for each performance share based on pay pool funds available and the distribution of performance shares across employees within a pay pool, expressed as a percentage or fixed dollar amount.

*Promotion* has the meaning given that term in § 9901.103.

*Rating of record* has the meaning given that term in § 9901.103.

*Reassignment* has the meaning given that term in § 9901.103.

*Reduction in band* has the meaning given that term in § 9901.103.

*Standard local market supplement* means the local market supplement that applies to employees in a given pay schedule or band who are stationed within a specified local market area (the boundaries of which are defined under § 9901.332(b)), unless a targeted local market supplement applies.

*Targeted local market supplement* means a local market supplement established to address recruitment or retention difficulties or other appropriate reasons and which applies to a defined category of employees (based on occupation or other appropriate factors) in lieu of the standard local market supplement that would otherwise apply.

*Unacceptable performance* has the meaning given that term in § 9901.103.

### **§ 9901.305 Bar on collective bargaining.**

Pursuant to 5 U.S.C. 9902(f)(4) and (m)(7), any pay program established under authority of this subpart is not subject to collective bargaining. This bar on collective bargaining applies to all aspects of the pay program, including but not limited to coverage decisions, the design of pay structures, the setting and adjustment of pay levels, pay administration rules and policies, and administrative procedures and arrangements.

#### OVERVIEW OF PAY SYSTEM

### **§ 9901.311 Major features.**

Through the issuance of implementing issuances, the Secretary will

## § 9901.312

establish a pay system that governs the setting and adjusting of covered employees' rates of pay and the setting of covered employees' rates of premium pay. The NSPS pay system will include the following features:

(a) A structure of rate ranges linked to various pay bands for each career group, in alignment with the classification structure described in subpart B of this part;

(b) Policies regarding the setting and adjusting of band rate ranges based on mission requirements, labor market conditions, and other factors, as described in §§ 9901.321 and 9901.322;

(c) Policies regarding the setting and adjusting of local market supplements to basic pay based on local labor market conditions and other factors, as described in §§ 9901.331 through 9901.333;

(d) Policies regarding employees' eligibility for pay increases based on adjustments in rate ranges and supplements, as described in §§ 9901.323 and 9901.334;

(e) Policies regarding performance-based pay, as described in §§ 9901.341 through 9901.345;

(f) Policies on basic pay administration, including movement between career groups, positions, pay schedules, and pay bands, as described in §§ 9901.351 through 9901.356;

(g) Linkages to employees' ratings of record, as described in subpart D of this part; and

(h) Policies regarding the setting of and limitations on premium payments, as described in § 9901.361.

### § 9901.312 Maximum rates.

The Secretary will establish limitations on maximum rates of basic pay and aggregate pay for covered employees.

### § 9901.313 National security compensation comparability.

(a) To the maximum extent practicable, for fiscal years 2004 through 2008, the overall amount allocated for compensation of the DoD civilian employees who are included in the NSPS may not be less than the amount that would have been allocated for compensation of such employees for such fiscal years if they had not been con-

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verted to the NSPS, based on at a minimum—

(1) The number and mix of employees in such organizational or functional units prior to conversion of such employees to the NSPS; and

(2) Adjustments for normal step increases and rates of promotion that would have been expected, had such employees remained in their previous pay schedule.

(b) To the maximum extent practicable, implementing issuances will provide a formula for calculating the overall amount to be allocated for fiscal years beyond fiscal year 2008 for compensation of the civilian employees included in the NSPS. The formula will ensure that in the aggregate employees are not disadvantaged in terms of the overall amount of compensation available as a result of conversion to the NSPS, while providing flexibility to accommodate changes in the function of the organization and other changed circumstances that might impact compensation levels.

(c) For the purpose of this section, “compensation” for civilian employees means basic pay, taking into account any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or similar payment under other legal authority.

### SETTING AND ADJUSTING RATE RANGES

#### § 9901.321 Structure.

(a) The Secretary will establish ranges of basic pay for pay bands, with minimum and maximum rates set and adjusted as provided in § 9901.322.

(b) For each pay band within a career group, the Secretary will establish a common rate range that applies in all locations.

#### § 9901.322 Setting and adjusting rate ranges.

(a) Within his or her sole and exclusive discretion, the Secretary may, subject to § 9901.105(d)(2), set and adjust the rate ranges established under § 9901.321. In determining the rate ranges, the Secretary may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of

other Federal agencies, and any other relevant factors.

(b) The Secretary may determine the effective date of newly set or adjusted band rate ranges. Established rate ranges will be reviewed for possible adjustment at least annually.

(c) The Secretary may establish different rate ranges and provide different rate range adjustments for different pay bands.

(d) The Secretary may adjust the minimum and maximum rates of a pay band by different percentages.

**§ 9901.323 Eligibility for pay increase associated with a rate range adjustment.**

(a) Employees with a current rating of record above “unacceptable” and employees who do not have a current rating of record for the most recently completed appraisal period will receive a percentage increase in basic pay equal to the percentage by which the minimum of their rate range is increased. This section does not apply to employees receiving a retained rate under § 9901.355.

(b) Employees with a current rating of record of “unacceptable” will not receive a pay increase under this section.

LOCAL MARKET SUPPLEMENTS

**§ 9901.331 General.**

The basic pay ranges established under §§ 9901.321 through 9901.323 may be supplemented in appropriate circumstances by local market supplements, as described in §§ 9901.332, 9901.333, and 9901.334. These supplements are expressed as a percentage of basic pay and are set and adjusted as described in § 9901.333.

**§ 9901.332 Local market supplements.**

(a) The Secretary may establish local market supplements that apply in specified local market areas whose boundaries are set at the Secretary’s sole and exclusive discretion, subject to paragraph (b) of this section and § 9901.105(d)(4). Local market supplements apply to employees whose official duty station is located in the given local market area. The Secretary may establish standard or targeted local market supplements.

(b)(1) The establishment or modification of geographic area boundaries for standard local market supplements by the Secretary will be effected by regulations which, notwithstanding 5 U.S.C. 553(a)(2), will be promulgated in accordance with the notice and comment requirements of 5 U.S.C. 553. As provided by the non-waived provisions of 5 U.S.C. 5304(f)(2) (modified here to apply to DoD regulations issued under the authority of this paragraph), judicial review of any such regulation is limited to whether or not it was promulgated in accordance with such requirements.

(2) Notwithstanding paragraph (b)(1) of this section, the Secretary’s establishment of a standard local market area boundary or boundaries identical to those used for locality pay areas established under 5 U.S.C. 5304 does not require separate DoD regulations.

(c) Local market supplements are considered basic pay for only the following purposes:

(1) Retirement deductions, contributions, and benefits under 5 U.S.C. chapter 83 or 84;

(2) Life insurance premiums and benefits under 5 U.S.C. chapter 87;

(3) Premium pay under 5 U.S.C. chapter 55, subchapter V, or similar payments under other legal authority, including this subpart;

(4) Severance pay under 5 U.S.C. 5595;

(5) Cost-of-living allowances and post differentials under 5 U.S.C. 5941;

(6) Overseas allowances and differentials under 5 U.S.C. chapter 59, subchapter III, to the extent authorized by the Department of State;

(7) Recruitment, relocation, and retention incentives, supervisory differentials, and extended assignment incentives under 5 U.S.C. chapter 57, subchapter IV, and 5 CFR part 575;

(8) Lump-sum payments for accumulated and accrued annual leave under 5 CFR 550, subpart L;

(9) Determining the rate of basic pay upon conversion to the NSPS pay system as provided in § 9901.373(b);

(10) Other payments and adjustments authorized under this subpart as specified by implementing issuances;

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(11) Other payments and adjustments under other statutory or regulatory authority for which locality-based comparability payments under 5 U.S.C. 5304 are considered part of basic pay; and

(12) Any provisions for which DoD local market supplements are treated as basic pay by law.

#### § 9901.333 Setting and adjusting local market supplements.

(a) Within his or her sole and exclusive discretion, the Secretary may, subject to § 9901.105(d)(3), set and adjust local market supplements. In determining the amounts of the supplements, the Secretary will consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, allowances and differentials under 5 U.S.C. chapter 59, and any other relevant factors.

(b) The Secretary may determine the effective date of newly set or adjusted local market supplements. Established supplements will be reviewed for possible adjustment at least annually in conjunction with rate range adjustments under § 9901.322.

#### § 9901.334 Eligibility for pay increase associated with a supplement adjustment.

(a) When a local market supplement is adjusted under § 9901.333, employees to whom the supplement applies with a current rating of record above “unacceptable,” and employees who do not have a current rating of record for the most recently completed appraisal period, will receive any pay increase resulting from that adjustment.

(b) Employees with a current rating of record of “unacceptable” will not receive a pay increase under this section.

#### PERFORMANCE-BASED PAY

#### § 9901.341 General.

Sections 9901.342 through 9901.345 describe the performance-based pay that is part of the pay system established under this subpart. These provisions are designed to provide the Secretary with the flexibility to allocate available funds to employees based on individual performance or contribution or team or organizational performance as

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a means of fostering a high-performance culture that supports mission accomplishment.

#### § 9901.342 Performance payouts.

(a) *Overview.* (1) The NSPS pay system will be a pay-for-performance system and, when implemented, will result in a distribution of available performance pay funds based upon individual performance, individual contribution, team or organizational performance, or a combination of those elements. The NSPS pay system will use a pay pool concept to manage, control, and distribute performance-based pay increases and bonuses. The performance payout is a function of the amount of money in the performance pay pool and the number of shares assigned to individual employees.

(2) The rating of record used as the basis for a performance pay increase is the one assigned for the most recently completed appraisal period, except that if an appropriate rating official determines that an employee’s current performance is inconsistent with that rating, that rating official may prepare a more current rating of record, consistent with § 9901.409(b). Unless otherwise provided in implementing issuances, if an employee is not eligible to have a rating of record for the current rating cycle for reasons other than those identified in paragraphs (f) and (g) of this section, such employee will not be eligible for a performance payout under this part.

(3) Pay pools will be managed by a pay pool manager and/or pay pool panel. The Secretary will define in implementing issuances the responsibilities of pay pool managers and pay pool panels to include the review of proposed rating and share assignments to ensure that employees are treated fairly and consistently and in accordance with the merit system principles.

(b) *Performance pay pools.* (1) The Secretary will issue implementing issuances for the establishment and management of pay pools for performance payouts.

(2) The Secretary may determine a percentage of pay to be included in pay pools and paid out in accordance with accompanying implementing issuances as—

- (i) A performance-based pay increase;
- (ii) A performance-based bonus; or
- (iii) A combination of a performance-based pay increase and a performance-based bonus.

(c) *Performance shares.* (1) The Secretary will issue implementing issuances regarding the assignment of a number or range of shares for each rating of record level, subject to paragraphs (c)(2) and (c)(3) of this section. Performance shares will be used to determine performance pay increases and/or bonuses.

(2) Employees with unacceptable ratings of record will be assigned zero shares.

(3) Where the Secretary establishes a range of shares for a rating of record level, he or she will provide guidance in implementing issuances on the use of share ranges. DoD organizations will notify employees at least 90 days prior to the end of the appraisal period of the factors that may be considered in making specific share assignments. Pay pool managers and/or pay pool panels will review proposed share assignments to ensure that factors are applied consistently across the pay pool and in accordance with the merit system principles.

(d) *Performance payout.* (1) The Secretary will establish a methodology that authorized officials will use to determine the value of a performance share. A performance share may be expressed as a percentage of an employee's rate of basic pay (exclusive of local market supplements under § 9901.332) or as a fixed dollar amount, or both.

(2) To determine an individual employee's performance payout, the share value determined under paragraph (d)(1) of this section will be multiplied by the number of performance shares assigned to the employee.

(3) The Secretary may provide for the establishment of control points within a band that limit increases in the rate of basic pay. The Secretary may require that certain criteria be met for increases above a control point.

(4) A performance payout may be an increase in basic pay, a bonus, or a combination of the two. However, an increase in basic pay may not cause the employee's rate of basic pay to exceed the maximum rate or applicable

control point of the employee's band rate range. Implementing issuances will provide guidance for determining the payout amount and the appropriate distribution between basic pay and bonus.

(5) The Secretary will determine the effective date(s) of increases in basic pay made under this section.

(6) Notwithstanding any other provision of this section, the Secretary will issue implementing issuances to address the circumstances under which an employee receiving a retained rate under § 9901.355 may receive a lump-sum performance payout. Any performance payout in the form of a bonus for a retained rate employee may not exceed the amount that would be received by an employee in the same pay pool with the same rating of record whose rate of pay is at the maximum rate of the same band.

(e) *Proration of performance payouts.* The Secretary will issue implementing issuances regarding the proration of performance payouts for employees who, during the period between performance payouts, are—

(1) Hired, transferred, reassigned, or promoted;

(2) In a leave-without-pay status (except as provided in paragraphs (f) and (g) of this section); or

(3) In other circumstances where proration is considered appropriate.

(f) *Adjustments for employees returning after performing honorable service in the uniformed services.* The Secretary will issue implementing issuances regarding how to set the rate of basic pay prospectively for an employee who leaves a DoD position to perform service in the uniformed services (in accordance with 38 U.S.C. 4303 and 5 CFR 353.102) and returns through the exercise of a reemployment right provided by law, Executive order, or regulation under which accrual of service for seniority-related benefits is protected (e.g., 38 U.S.C. 4316). The Secretary will credit the employee with increases under § 9901.323 and increases to basic pay under this section based on the employee's DoD rating of record for the appraisal period upon which these adjustments are based. If an employee does not have a rating of record for the appraisal period serving as a basis for

### § 9901.343

these adjustments, the Secretary will base such adjustments on the average basic pay increases granted to other employees in the same pay pool and pay band who received the same rating as the employee's last DoD rating of record or the modal rating, whichever is most advantageous to the employee. In unusual cases where insufficient statistical information exists to determine the modal rating or when previous ratings do not convert to the NSPS rating scale, the Secretary may establish alternative procedures for determining a basic pay increase under this section.

(g) *Adjustments for employees returning to duty after being in workers' compensation status.* The Secretary will issue implementing issuances regarding how to set the rate of basic pay prospectively for an employee who returns to duty after a period of receiving injury compensation under 5 U.S.C. chapter 81, subchapter I (in a leave-without-pay status or as a separated employee). For the intervening period, the Secretary will credit the employee with increases under § 9901.323 and increases to basic pay under this section based on the employee's DoD rating of record for the appraisal period upon which these adjustments are based. If an employee does not have a rating of record for the appraisal period serving as a basis for these adjustments, such adjustments will be based on the average basic pay increases granted to other employees in the same pay pool and pay band who received the same rating as the employee's last DoD rating of record or the modal rating, whichever is most advantageous to the employee. In unusual cases where insufficient statistical information exists to determine the modal rating or when previous ratings do not convert to the NSPS rating scale, the Secretary may establish alternative procedures for determining a basic pay increase under this section.

### § 9901.343 Pay reduction based on unacceptable performance and/or conduct.

An employee's rate of basic pay may be reduced based on a determination of unacceptable performance, conduct, or both. Such reduction may not exceed 10 percent unless the employee has been

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changed to a lower pay band and a greater reduction is needed to set the employee's pay at the maximum rate of the pay band. (See also §§ 9901.352 and 9901.354.) An employee's rate of basic pay may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both.

### § 9901.344 Other performance payments.

(a) In accordance with implementing issuances authorized officials may make other payments to—

(1) Recognize organizational or team achievement;

(2) Reward extraordinary individual performance through an extraordinary pay increase (EPI), as described in paragraph (b) of this section; and

(3) Provide for other special circumstances.

(b) An EPI is paid in addition to performance payouts under § 9901.342 and will usually be made effective at the time of those payouts. The future performance and contribution level exhibited by the employee will be expected to continue at an extraordinarily high level.

### § 9901.345 Treatment of developmental positions.

The Secretary may issue implementing issuances regarding pay increases for developmental positions. These issuances may require employees to meet certain standardized assessment or certification points as part of a formal training/developmental program. The Secretary may provide adjustments under this section in lieu of or in addition to adjustments under § 9901.342.

### PAY ADMINISTRATION

### § 9901.351 Setting an employee's starting pay.

Subject to implementing issuances, the Secretary may set the starting rate of pay for individuals who are newly appointed or reappointed to the Federal service anywhere within the assigned pay band.

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### § 9901.352 Setting pay upon reassignment.

(a) Subject to paragraphs (b) and (c) of this section and subject to implementing issuances, the Secretary may set pay anywhere within the assigned pay band when an employee is reassigned, either voluntarily or involuntarily, to a position in the same or comparable pay band.

(b) Subject to the adverse action procedures set forth in subpart G of this part and implementing issuances (or other appropriate adverse action procedures for employees not covered by subpart G of this part, such as procedures for National Guard Technicians under 32 U.S.C. 709(f)), the Secretary may reduce an employee's rate of basic pay within a pay band for unacceptable performance and/or conduct. A reduction in pay under this paragraph may not be more than 10 percent or cause an employee's rate of basic pay to fall below the minimum rate of the employee's pay band. Such a reduction may be made effective at any time.

(c) The Secretary will prescribe policies in implementing issuances regarding setting pay for an employee whose pay is reduced involuntarily, but not through adverse action procedures. In the case of completion of a temporary reassignment or failure to successfully complete an in-service probationary period, the employee's rate of basic pay will be set at the same rate the employee received prior to the temporary reassignment or placement in the position requiring the probationary period, with appropriate adjustment of the employee's rate of basic pay based on rate range increases or performance payouts that occurred during the time the employee was assigned to the new position. Any resulting reduction in basic pay is not considered an adverse action under subpart G of this part (or similar authority).

### § 9901.353 Setting pay upon promotion.

Except as otherwise provided in implementing issuances, upon an employee's promotion, the employee will receive an increase in his or her rate of basic pay equal to at least 6 percent, unless this minimum increase results in a rate of basic pay higher than the maximum rate of the applicable pay

band. An employee's rate of basic pay upon promotion may not be less than the minimum of the rate range.

### § 9901.354 Setting pay upon reduction in band.

(a) Subject to paragraphs (b) and (c) of this section, pay may be set anywhere within the assigned pay band when an employee is reduced in band, either voluntarily or involuntarily. As applicable, pay retention provisions established under § 9901.355 will apply.

(b) Subject to the adverse action procedures set forth in subpart G of this part (or other appropriate adverse action procedures for employees not covered by subpart G of this part, such as procedures for National Guard Technicians under 32 U.S.C. 709(f)), the Secretary may assign an employee involuntarily to a position in a lower pay band for unacceptable performance and/or conduct, and may simultaneously reduce the employee's rate of basic pay. A reduction in basic pay under this paragraph may not cause an employee's rate of basic pay to fall below the minimum rate of the employee's new pay band, or be more than 10 percent unless a larger reduction is needed to place the employee at the maximum rate of the lower band.

(c) The Secretary will prescribe policies in implementing issuances regarding setting pay for an employee who is reduced in band involuntarily, but not through adverse action procedures. In the case of termination of a temporary promotion or failure to successfully complete an in-service probationary period, the employee's rate of basic pay will be set at the same rate the employee received prior to the temporary promotion or placement in the position requiring the probationary period, with appropriate adjustment of the employee's rate of basic pay based on rate range increases or performance payouts that occurred during the time the employee was assigned to the new position. Any resulting reduction in basic pay is not considered an adverse action under subpart G of this part (or similar authority).

### § 9901.355 Pay retention.

(a) Subject to the requirements of this section, the Secretary will issue

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implementing issuances regarding pay retention. Pay retention prevents a reduction in basic pay that would otherwise occur by preserving the former rate of basic pay within the employee's new pay band or by establishing a retained rate that exceeds the maximum rate of the new pay band. Local market supplements are not considered part of basic pay in applying pay retention.

(b) Pay retention will be based on the employee's rate of basic pay in effect immediately before the action that would otherwise reduce the employee's rate. A retained rate will be compared to the range of rates of basic pay applicable to the employee's position.

(c) Subject to any employee eligibility requirements the Secretary may prescribe, pay retention will apply when an employee is reduced in band through reduction in force (RIF), reclassification, or other appropriate circumstances, as specified in implementing issuances. Pay retention will be granted for a period of 2 years (that is, 104 weeks).

(d) Employees entitled to a retained rate will receive any performance payouts in the form of bonuses, rather than salary adjustments, as provided in § 9901.342(d)(6).

(e) Employees entitled to a retained rate will not receive minimum rate range adjustments under § 9901.323(a), but are entitled to receive any applicable local market supplement adjustments under § 9901.334(a).

### § 9901.356 Miscellaneous.

(a) Except in the case of an employee who does not receive a pay increase under § 9901.323 because of an unacceptable rating of record, an employee's rate of basic pay may not be less than the minimum rate of the employee's pay band.

(b) Except as provided in § 9901.355, an employee's rate of basic pay may not exceed the maximum rate of the employee's band rate range.

(c) The Secretary will follow the rules for establishing pay periods and computing rates of pay in 5 U.S.C. 5504 and 5505, as applicable. For employees covered by 5 U.S.C. 5504, annual rates of pay will be converted to hourly rates of pay in computing payments received by covered employees.

(d) The Secretary may promulgate implementing issuances that provide for a special increase prior to an employee's movement in recognition of the fact that the employee will not be eligible for a promotion increase under the GS system, if a DoD employee moves from the pay system established under this subpart to a GS position having a higher level of duties and responsibilities.

### PREMIUM PAY

#### § 9901.361 General.

(a) This section applies to eligible DoD employees and positions which would otherwise be covered by 5 U.S.C. chapter 55, subchapter V, subject to a determination by the Secretary under § 9901.102(b)(2). As provided in § 9901.303(a)(2), for employees covered by such a determination, the provisions of 5 U.S.C. chapter 55, subchapter V (except section 5545b), are waived or modified to the extent that the Secretary establishes alternative premium pay provisions for such employees in lieu of the provisions in 5 U.S.C. chapter 55, subchapter V.

(b) The Secretary may establish alternative or additional forms of premium pay, or make modifications in premium payments under 5 U.S.C. chapter 55, subchapter V (except section 5545b), for specified categories of employees through implementing issuances. The types of premium payments the Secretary may establish or modify include, but are not limited to—

(1) Overtime pay (excluding overtime pay under the Fair Labor Standards Act);

(2) Compensatory time off;

(3) Sunday, holiday, and night pay;

(4) Annual premium pay for standby duty and administratively uncontrollable overtime work;

(5) Availability pay for criminal investigators; and

(6) Hazardous duty differentials.

(c) The Secretary will determine the conditions of eligibility for the amounts of and the limitations on payments made under the authority of this section.

## CONVERSION PROVISIONS

**§ 9901.371 General.**

(a) This section and §§ 9901.372 and 9901.373 describe the provisions that apply when DoD employees are converted to the NSPS pay system established under this subpart. An affected employee may convert from the GS system, a prevailing rate system, the SL/ST system, or the SES system (or such other systems designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902), as provided in § 9901.302. For the purpose of this section and §§ 9901.372 and 9901.373, the terms “convert,” “converted,” “converting,” and “conversion” refer to employees who become covered by the pay system without a change in position (as a result of a coverage determination made under § 9901.102(b)(2)) and exclude employees who move from a noncovered position to a position already covered by the NSPS pay system.

(b) The Secretary will issue implementing issuances prescribing the policies and procedures necessary to implement these transitional provisions.

**§ 9901.372 Creating initial pay ranges.**

DoD will set the initial band rate ranges for the NSPS pay system established under this subpart. The initial ranges may link to the ranges that apply to converted employees in their previously applicable pay system (taking into account any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or similar payment under other legal authority).

**§ 9901.373 Conversion of employees to the NSPS pay system.**

(a) When the NSPS pay system is established under this subpart and applied to a category of employees, employees will be converted to the system without a reduction in their rate of pay (including basic pay and any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or similar payment under other legal authority).

(b) When an employee receiving a special rate under 5 U.S.C. 5305 before conversion is converted to an equal rate of pay under the NSPS pay system that consists of a basic rate and a local market supplement, the conversion is not a reduction in pay for the purpose of applying subpart G of this part (or similar authority).

(c) If another personnel action (e.g., promotion, geographic movement) takes effect on the same day as the effective date of an employee’s conversion to the new pay system, the other action will be processed under the rules pertaining to the employee’s former system before processing the conversion action.

(d) An employee on a temporary promotion at the time of conversion will be returned to his or her official position of record prior to processing the conversion. If the employee is temporarily promoted immediately after the conversion, pay will be set under the rules for promotion increases under the NSPS pay system.

(e) The Secretary has discretion to make one-time pay adjustments for employees when they are converted to the NSPS pay system. The Secretary will issue implementing issuances governing any such pay adjustment, including rules governing employee eligibility, pay computations, and the timing of any such pay adjustment.

**Subpart D—Performance Management****§ 9901.401 Purpose.**

(a) This subpart provides for the establishment in DoD of a performance management system as authorized by 5 U.S.C. 9902.

(b) The performance management system established under this subpart is designed to promote and sustain a high-performance culture by incorporating the following elements:

(1) Adherence to merit principles set forth in 5 U.S.C. 2301;

(2) A fair, credible, and transparent employee performance appraisal system;

(3) A link between the performance management system and DoD’s strategic plan;

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(4) A means for ensuring employee involvement in the design and implementation of the system;

(5) Adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the performance management system;

(6) A process for ensuring ongoing performance feedback and dialogue among supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;

(7) Effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance;

(8) A means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the performance management system; and

(9) A pay-for-performance evaluation system to better link individual pay to performance, and provide an equitable method for appraising and compensating employees.

### § 9901.402 Coverage.

(a) This subpart applies to eligible DoD employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b)(2), except as provided in paragraph (c) of this section.

(b) The following employees and positions in DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by 5 U.S.C. chapter 43;

(2) Employees and positions who were excluded from chapter 43 by OPM under 5 CFR 430.202(d) prior to the date of coverage of this subpart; and

(3) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

(c) This subpart does not apply to employees who have been, or are expected to be, employed in an NSPS position for less than a minimum period (as defined in § 9901.404) during a single 12-month period.

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### § 9901.403 Waivers.

When a specified category or group of employees is covered by the performance management system(s) established under this subpart, the provisions of 5 U.S.C. chapter 43 are waived with respect to that category of employees.

### § 9901.404 Definitions.

In this subpart—

*Appraisal* means the review and evaluation of an employee's performance.

*Appraisal period* means the period of time established under a performance management system for reviewing employee performance.

*Competencies* has the meaning given that term in § 9901.103.

*Contribution* has the meaning given that term in § 9901.103.

*Minimum period* means the period of time established by the Secretary during which an employee will perform under applicable performance expectations before receiving a rating of record.

*Pay-for-performance evaluation system* means the performance management system established under this subpart to link individual pay to performance and provide an equitable method for appraising and compensating employees.

*Performance* has the meaning given that term in § 9901.103.

*Performance expectations* means the duties, responsibilities, and competencies required by, or objectives associated with, an employee's position and the contributions and demonstrated competencies management expects of an employee, as described in § 9901.406(d).

*Performance management* means applying the integrated processes of setting and communicating performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance in support of the organization's goals and objectives.

*Performance management system* means the policies and requirements established under this subpart, as supplemented by implementing issuances, for setting and communicating employee performance expectations, monitoring

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performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance. It incorporates the elements set forth in § 9901.401(b).

*Rating of record* has the meaning given that term in § 9901.103.

*Unacceptable performance* has the meaning given that term in § 9901.103.

### § 9901.405 Performance management system requirements.

(a) The Secretary will issue implementing issuances that establish a performance management system for DoD employees, subject to the requirements set forth in this subpart.

(b) The NSPS performance management system will—

(1) Specify the employees covered by the system(s);

(2) Provide for the appraisal of the performance of each employee at least annually;

(3) Specify the minimum period during which an employee will perform before being eligible to receive a rating of record;

(4) Hold supervisors and managers accountable for effectively managing the performance of employees under their supervision as set forth in paragraph (c) of this section;

(5) Specify procedures for setting and communicating performance expectations, monitoring performance and providing feedback, and developing, rating, and rewarding performance; and

(6) Specify the criteria and procedures to address the performance of employees who are detailed or transferred and for employees in other special circumstances.

(c) In fulfilling the requirements of paragraph (b) of this section, supervisors and managers are responsible for—

(1) Clearly communicating performance expectations and holding employees responsible for accomplishing them;

(2) Making meaningful distinctions among employees based on performance and contribution;

(3) Fostering and rewarding excellent performance;

(4) Addressing poor performance; and

(5) Assuring that employees are assigned a rating of record when required by implementing issuances.

### § 9901.406 Setting and communicating performance expectations.

(a) Performance expectations will support and align with the DoD mission and its strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance.

(b) Performance expectations will be communicated in writing, including those that may affect an employee's retention in the job. Performance expectations will be communicated to the employee prior to holding the employee accountable for them. However, notwithstanding this requirement, employees are always accountable for demonstrating professionalism and standards of appropriate conduct and behavior, such as civility and respect for others.

(c) Performance expectations for supervisors and managers will include assessment and measurements of how well supervisors and managers plan, monitor, develop, correct, and assess subordinate employees' performance.

(d) Performance expectations may include—

(1) Goals or objectives that set general or specific performance targets at the individual, team, and/or organizational level;

(2) Organizational, occupational, or other work requirements, such as standard operating procedures, operating instructions, manuals, internal rules and directives, and/or other instructions that are generally applicable and available to the employee; and

(3) Competencies an employee is expected to demonstrate on the job, and/or the contributions an employee is expected to make.

(e) Performance expectations may be amplified through particular work assignments or other instructions (which may specify the quality, quantity, accuracy, timeliness, or other expected characteristics of the completed assignment, or some combination of such characteristics). Such assignments and instructions need not be in writing.

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(f) Supervisors will involve employees, insofar as practicable, in the development of their performance expectations. However, final decisions regarding performance expectations are within the sole and exclusive discretion of management.

### § 9901.407 Monitoring performance and providing feedback.

In applying the requirements of the performance management system and its implementing issuances and policies, supervisors will—

(a) Monitor the performance of their employees and their contribution to the organization; and

(b) Provide ongoing (*i.e.*, regular and timely) feedback to employees on their actual performance with respect to their performance expectations, including one or more interim performance reviews during each appraisal period.

### § 9901.408 Developing performance and addressing poor performance.

(a) Implementing issuances will prescribe procedures that supervisors will use to develop employee performance and to address poor performance.

(b) If at any time during the appraisal period a supervisor determines that an employee's performance is unacceptable, the supervisor will—

(1) Consider the range of options available to address the performance deficiency, which include, but are not limited to, remedial training, an improvement period, a reassignment, an oral warning, a letter of counseling, a written reprimand, or adverse action as defined in subpart G of this part, including a reduction in rate of basic pay or pay band; and

(2) Take appropriate action to address the deficiency, taking into account the circumstances, including the nature and gravity of the unacceptable performance and its consequences.

(c) As specified in subpart H of this part (or other appropriate appeal procedures, if not covered by subpart H of this part, such as procedures for National Guard Technicians under 32 U.S.C. 709(f)), employees may appeal adverse actions (e.g., suspensions of more than 14 days, reductions in pay and pay band, and removal) based on

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unacceptable performance and/or conduct.

### § 9901.409 Rating and rewarding performance.

(a) The NSPS performance management system will establish a multi-level rating system as described in the implementing issuances.

(b) An appropriate rating official will prepare and issue a rating of record after the completion of the appraisal period. In accordance with implementing issuances, an additional rating of record may be issued to reflect a substantial and sustained change in the employee's performance since the last rating of record. A rating of record will be used as a basis for—

(1) A pay determination under any applicable pay rules;

(2) Determining reduction in force retention standing; and

(3) Such other action that the Secretary considers appropriate, as specified in implementing issuances.

(c) A rating of record will assess an employee's performance with respect to his or her performance expectations, as amplified through work assignments or other instructions, and/or relative contributions and is considered final when issued to the employee with all appropriate reviews and signatures.

(d) An appropriate rating official will communicate the rating of record and number of shares to the employee prior to payout.

(e) A rating of record issued under this subpart is an official rating of record for the purpose of any provision of title 5, Code of Federal Regulations, for which an official rating of record is required. Ratings of record will be transferred between subordinate organizations and to other Federal departments or agencies in accordance with implementing issuances.

(f) The Secretary may not lower the rating of record of an employee based on an approved absence from work, including the absence of a disabled veteran to seek medical treatment as provided in Executive Order 5396.

(g) A rating of record may be challenged by a nonbargaining unit employee only through a reconsideration process as provided in implementing issuances. This process will be the sole

and exclusive method for all nonbargaining unit employees to challenge a rating of record. A payout determination will not be subject to the reconsideration process.

(h) A bargaining unit employee may choose a negotiated grievance procedure or the administrative reconsideration process established under paragraph (g) of this section, but not both, to challenge his or her rating of record. An employee who chooses the administrative reconsideration process may not revert to a negotiated grievance procedure. A payout determination will not be subject to the negotiated grievance procedure. Any individual or panel reviewing a rating of record under a negotiated grievance procedure 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.

(i) A supervisor or other rating official may prepare an additional performance appraisal for the purposes specified in the applicable performance management system (e.g., transfers and details) at any time after the completion of the minimum period. Such an appraisal is not a rating of record.

(j) Implementing issuances will establish policies and procedures for crediting performance in a reduction in force in accordance with subpart F of this part (or other appropriate workforce shaping procedures for those not covered by subpart F of this part, such as National Guard Technicians under 32 U.S.C. 709).

## Subpart E—Staffing and Employment

### GENERAL

#### § 9901.501 Purpose.

(a) This subpart sets forth policies and procedures for the establishment of qualification requirements; recruitment for, and appointment to, positions; and assignment, reassignment, detail, transfer, or promotion of employees, consistent with 5 U.S.C. 9902(a) and (k).

(b) The Secretary will comply with merit principles set forth in 5 U.S.C.

2301 and with 5 U.S.C. 2302 (dealing with prohibited personnel practices).

(c) The Secretary will adhere to veterans' preference principles set forth in 5 U.S.C. 2302(b)(11), consistent with 5 U.S.C. 9902(a) and (k).

#### § 9901.502 Scope of authority.

When a specified category of employees, applicants, and positions is covered by the system established under this subpart, the provisions of 5 U.S.C. 3301, 3302, 3304, 3317(a), 3318 and 3319 (except with respect to veterans' preference), 3321, 3324, 3325, 3327, 3330, 3341, and 5112(a) are modified and replaced with respect to that category, except as otherwise specified in this subpart. In accordance with § 9901.105, the Secretary will prescribe implementing issuances to carry out the provisions of this subpart.

#### § 9901.503 Coverage.

(a) This subpart applies to eligible DoD employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b).

(b) The following employees and positions in DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by 5 U.S.C. chapters 31 and 33 (excluding members of the Senior Executive Service); and

(2) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

#### § 9901.504 Definitions.

In this subpart—

*Career employee* means an individual appointed without time limit to a competitive or excepted service position in the Federal career service.

*Initial probationary period* has the meaning given that term in § 9901.103.

*In-service probationary period* has the meaning given that term in § 9901.103.

*Promotion* has the meaning given that term in § 9901.103.

*Reassignment* has the meaning given that term in § 9901.103.

*Reduction in band* has the meaning given that term in § 9901.103.

*Temporary employee* means an individual not on a career appointment

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who is employed for a limited period of time not to exceed 1 year. The appointment may be extended, up to a maximum established by implementing issuances, to perform the work of a position that does not require an additional permanent employee.

*Term employee* means an individual not on a career appointment who is employed for a period of more than 1 year up to a maximum established by implementing issuances, when the need for an employee's service is not permanent.

*Time-limited employee* means an individual appointed to a position for a period of limited duration (e.g., term or temporary) in either the competitive or excepted service.

### EXTERNAL RECRUITMENT AND INTERNAL PLACEMENT

#### § 9901.511 Appointing authorities.

(a) *Competitive and excepted appointing authorities.* The Secretary may continue to use excepted and competitive appointing authorities and entitlements under chapters 31 and 33 of title 5, U.S. Code, Governmentwide regulations, or Executive orders, as well as other statutes, and those individuals will be given career or time-limited appointments, as appropriate.

(b) *Additional appointing authorities.* (1) The Secretary and the Director may enter into written agreements providing for new excepted and competitive appointing authorities for positions covered by the National Security Personnel System, including non-competitive appointments, and excepted appointments that may lead to a subsequent noncompetitive appointment to the competitive service.

(2)(i) DoD and OPM will jointly publish a notice in the FEDERAL REGISTER when establishing a new competitive appointing authority or a new excepted appointing authority that may lead to a subsequent noncompetitive appointment to a competitive position in the career service. DoD and OPM will issue a notice with a public comment period before establishing such authority, except as provided in paragraph (b)(2)(ii) of this section.

(ii) If the Secretary determines that a critical mission requirement exists,

DoD and OPM may establish a new appointing authority as described in paragraph (b)(2)(i) of this section effective upon publication of a FEDERAL REGISTER notice without a preceding comment period. However, the notice will invite public comments, and DoD and OPM will issue another notice if the authority is revised based on those comments.

(3) The Secretary will prescribe appropriate implementing issuances to administer a new appointing authority established under paragraph (b) of this section.

(4) At least annually, a consolidated list of all appointing authorities established under this section and currently in effect will be published in the FEDERAL REGISTER.

(c) *Severe shortage/critical need hiring authority.* (1) The Secretary may determine that there is a severe shortage of candidates or a critical hiring need, as defined in 5 U.S.C. 3304(a)(3) and 5 CFR part 337, subpart B, for particular occupations, pay bands, career groups, and/or geographic locations, and establish a specific authority to make appointments without regard to § 9901.515. Public notice will be provided in accordance with 5 U.S.C. 3304(a)(3)(A).

(2) For each specific authority, the Secretary will document the basis for the severe shortage or critical hiring need, consistent with 5 CFR 337.204(b) or 337.205(b), as applicable.

(3) The Secretary will terminate or modify a specific authority to make appointments under this section when it determines that the severe shortage or critical need upon which the authority was based no longer exists.

(4) The Secretary will prescribe appropriate implementing issuances to administer this authority and will notify OPM of determinations made under this section.

(d) *Time-limited appointing authorities.* (1) The Secretary may prescribe the procedures for appointing employees, the duration of such appointments, and the appropriate uses of time-limited employees. These procedures will preclude the use of employees on term appointments in positions that should be filled on a permanent basis. Term appointments may be used to accomplish permanent work in circumstances

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where the position cannot be filled permanently, e.g., the incumbent will be out of the position for a significant period of time, but is expected to return.

(2) The Secretary will prescribe implementing issuances establishing the procedures under which a time-limited employee serving in a competitive service position may be converted without further competition to the career service if—

(i) The vacancy announcement met the requirements of § 9901.515(a) and included the possibility of noncompetitive conversion to a competitive position in the career service at a later date;

(ii) The individual was appointed using the competitive examining procedures set forth in § 9901.515(b) and (c); and

(iii) The employee completed at least 2 years of continuous service at the fully successful level of performance or better.

### § 9901.512 Probationary periods.

(a) The Secretary may establish initial probationary periods of at least 1 year, but not to exceed 3 years, as deemed appropriate for employees appointed to positions in the competitive and excepted service covered by NSPS. The Secretary will prescribe the conditions for such periods, such as creditable service, in implementing issuances. Initial probationary periods established for more than 1 year will be applied to categories of positions or types of work that require a longer time period to evaluate the employee's ability to perform the work. A preference eligible who has completed 1 year of an initial probationary period is covered by subparts G and H of this part.

(b) The Secretary may establish in-service probationary periods. The Secretary will prescribe the conditions for such periods, such as creditable service and groups of positions or occupations to be covered, in implementing issuances. An employee who does not satisfactorily complete an in-service probationary period will be returned to a grade or band no lower than that held before the in-service probationary period and will have his or her rate of basic pay set in accordance with

§ 9901.352(c) or 9901.354(c), as applicable. Nothing in this section prohibits an action against an individual serving an in-service probationary period for cause unrelated to performance.

### § 9901.513 Qualification standards.

The Secretary may continue to use qualification standards established or approved by OPM. The Secretary also may establish qualification standards for positions covered by NSPS.

### § 9901.514 Non-citizen hiring.

The Secretary may establish procedures for appointing non-citizens to positions within NSPS under the following conditions:

(a) In the absence of a qualified U.S. citizen, the Secretary may appoint a qualified non-citizen in the excepted service; and

(b) Immigration and security requirements will apply to these appointments.

### § 9901.515 Competitive examining procedures.

(a) In recruiting applicants from outside of the civil service for competitive appointments to competitive service positions in NSPS, the Secretary will provide public notice for all vacancies in the career service in accordance with 5 CFR part 330 and—

(1) Will accept applications for the vacant position from all U.S. citizens;

(2) Will, at a minimum, consider applicants from the local commuting area;

(3) May concurrently consider applicants from other targeted recruitment areas, as specified in the vacancy announcement, in addition to those applicants from the minimum area of consideration; and

(4) May consider applicants from outside that minimum area(s) of consideration as necessary to provide sufficient qualified candidates.

(b) The Secretary may establish procedures for the examination of applicants for entry into competitive and excepted service positions in the National Security Personnel System. Such procedures will adhere to the merit system principles in 5 U.S.C. 2301 and veterans' preference requirements as set forth in 5 U.S.C. 1302(b) and (c)

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and 3309 through 3320, as applicable, and will be available in writing for applicant review. These procedures will also include provisions for employees entitled to priority consideration referred to in 5 U.S.C. 8151.

(c) In establishing examining procedures for appointing employees in the competitive service under paragraph (b) of this section, the Secretary may use traditional numerical rating and ranking or alternative ranking and selection procedures (category rating) in accordance with 5 U.S.C. 3319(b) and (c).

(d) The Secretary will apply the requirements of paragraphs (a) through (c) of this section to the recruitment of applicants for time-limited positions in the competitive service in order to qualify an appointee for noncompetitive conversion to a competitive position in the career service, in accordance with § 9901.511.

### § 9901.516 Internal placement.

The Secretary may prescribe implementing issuances regarding the assignment, reassignment, reinstatement, detail, transfer, and promotion of individuals or employees into or within NSPS. Such implementing issuances will be made available to applicants and employees. Internal placement actions may be made on a permanent or temporary basis using competitive and noncompetitive procedures. Those exceptions to competitive procedures set forth in 5 CFR part 335 apply to NSPS.

## Subpart F—Workforce Shaping

### § 9901.601 Purpose and applicability.

This subpart contains the regulations implementing the provisions of 5 U.S.C. 9902(k) concerning the Department's system for realigning, reorganizing, and reshaping its workforce. This subpart applies to categories of positions and employees affected by such actions resulting from the planned elimination, addition, or redistribution of functions, duties, or skills within or among organizational units, including realigning, reshaping, delaying, and similar organizational-based restructuring actions. This subpart does not apply to actions involving the conduct

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and/or performance of individual employees, which are covered by subpart G of this part.

### § 9901.602 Scope of authority.

When a specified category of employees is covered by the system established under this subpart, the provisions of 5 U.S.C. 3501 through 3503 (except with respect to veterans' preference) are modified and replaced with respect to that category, except as otherwise specified in this subpart. In accordance with § 9901.105, the Secretary will prescribe implementing issuances to carry out the provisions of this subpart.

### § 9901.603 Definitions.

In this subpart:

*Competing employee* means a career employee (including an employee serving an initial probationary period), an employee serving on a term appointment, and other employees as identified in implementing issuances.

*Competitive area* means the boundaries within which employees compete for retention under this subpart, based on factors described in § 9901.605(a).

*Competitive group* means employees within a competitive area who are on a common retention list for the purpose of exercising displacement rights.

*Displacement right* means the right of an employee who is displaced from his or her present position because of position abolishment, or because of displacement resulting from the abolishment of a higher-standing employee on the retention list, to displace a lower-standing employee on the list on the basis of the retention factors.

*Modal rating* means, for the purpose of reduction in force, the rating of record that occurs most frequently in a particular competitive group.

*Notice* means a written communication to an individual employee stating that the employee will be displaced from his or her position as a result of a reduction in force action under this subpart.

*Rating of record* has the meaning given that term in § 9901.103.

*Retention factors* means tenure, veterans' preference, performance, length of service, and such other factors as the Secretary considers necessary and

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appropriate to rank employees within a particular retention list.

*Retention list* means a list of all competing employees occupying positions in the competitive area, who are grouped in the same competitive group on the basis of retention factors. While all positions in the competitive group are listed, only competing employees have retention standing.

*Tenure group* means a group of employees with a given appointment type. In a reduction in force, employees are first placed in a tenure group and then ranked within that group according to other retention factors.

*Undue interruption* means a degree of interruption that would prevent the completion of required work by an employee within 90 days after the employee has been placed in a different position.

### § 9901.604 Coverage.

(a) *Employees covered.* The following employees and positions in DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by 5 U.S.C. chapter 35 (excluding members of the Senior Executive Service and employees who are excluded from coverage by other statutory authority); and

(2) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

(b) *Actions covered*—(1) *Reduction in force.* This subpart will apply when a displacement action occurs within a retention list or when releasing a competing employee from a retention list by separation, reduction in band, or assignment involving displacement, and the release results from an action described in § 9901.601.

(2) *Transfer of function.* The Secretary will issue implementing issuances consistent with 5 U.S.C. 3503 prescribing procedures to be used when a function transfers from one competitive area to a different competitive area.

(3) *Furlough.* The provisions in 5 CFR 351.604 will apply when furloughing a competing employee for more than 30 consecutive calendar days, or more than 22 workdays in 1 calendar year if done on a discontinuous basis, except as otherwise provided in this subpart.

(c) *Actions excluded.* This subpart does not apply to—

(1) The termination of a temporary promotion or temporary reassignment and the subsequent return of an employee to the position held before the temporary promotion or temporary reassignment (or to a position with comparable pay band, pay, status, and tenure);

(2) A reduction in band based on the reclassification of an employee's position due to the application of new classification standards or the correction of a classification error or classification actions covered under § 9901.222;

(3) Placement of an employee serving on a seasonal basis in a nonpay, nonduty status in accordance with conditions established at time of appointment;

(4) A change in an employee's work schedule from other-than-full-time to full-time;

(5) A change in an employee's mixed tour work schedule in accordance with conditions established at time of appointment;

(6) A change in the scheduled tour of duty of an other-than-full-time schedule;

(7) A reduction in band based on the reclassification of an employee's position due to erosion of duties, except that this exclusion does not apply to such reclassification actions that will take effect after an agency has formally announced a reduction in force in the employee's competitive area and when the reduction in force will take effect within 180 days; or

(8) Any other personnel action not covered by paragraph (b) of this section.

### § 9901.605 Competitive area.

(a) *Basis for competitive area.* The Secretary may establish a competitive area on the basis of one or more of the following considerations:

(1) Geographical location(s);

(2) Line(s) of business;

(3) Product line(s);

(4) Organizational unit(s); and

(5) Funding line(s).

(b) *Employees included in competitive area.* A competitive area will include

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all competing employees holding official positions of record in the defined competitive area.

(c) *Review of competitive area determinations.* The Secretary will make all competitive area definitions available for review.

(d) *Change of competitive area.* Competitive areas will be established for a minimum of 90 days before the effective date of a reduction in force. In implementing issuances, the Secretary will establish approval procedure requirements for any competitive area identified less than 90 days before the effective date of a reduction in force.

(e) *Limitations.* The Secretary will establish a competitive area only on the basis of legitimate organizational reasons, and competitive areas will not be used for the purpose of targeting an individual employee for reduction in forces on the basis of nonmerit factors.

(f) *Bar on collective bargaining.* Pursuant to 5 U.S.C. 9902(f)(4) and (m)(7), the establishment of a competitive area under the authority of this subpart is not subject to collective bargaining.

### § 9901.606 Competitive group.

(a) The Secretary will establish separate competitive groups for employees—

(1) In the excepted and competitive service;

(2) Under different excepted service appointment authorities; and

(3) With different work schedules (e.g., full-time, part-time, seasonal, intermittent).

(b) The Secretary may further define competitive groups on the basis of one or more of the following considerations:

- (1) Career group;
- (2) Pay schedule;
- (3) Occupational series or specialty;
- (4) Pay band; or
- (5) Trainee status.

(c) An employee is placed into a competitive group based on the employee's official position of record. An employee's official position description may be supplemented with other applicable records that document the employee's actual duties and responsibilities.

(d) The competitive group includes the official positions of employees on a detail or other nonpermanent assign-

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ment to a different position from the competitive group.

(e) Pursuant to 5 U.S.C. 9902(f)(4) and (m)(7), the establishment of a competitive group under the authority of this subpart is not subject to collective bargaining.

### § 9901.607 Retention standing.

(a) *Retention list.* Within each competitive group, the Secretary will establish a retention list of competing employees in descending order based on the following:

(1) Tenure, with career employees listed first, followed by employees serving an initial probationary period, and then followed by employees on term appointments and other employees as identified in implementing issuances;

(2) Veterans' preference, in accordance with the preference requirements in 5 CFR 351.501(c) and (d), including the preference restrictions found in 5 U.S.C. 3501(a);

(3) The ratings of record, as determined in accordance with implementing issuances;

(4) Creditable civilian and/or uniformed service in accordance with 5 U.S.C. 3502(a)(A) and (B) and 5 CFR 351.503, but without regard to provisions covering additional service credit for performance in 5 CFR 351.503(c)(3) and (e); and

(5) The Secretary may establish tie-breaking procedures when two or more employees have the same retention standing.

(b) *Active uniformed service member not on list.* The retention list does not include the name of an employee who, on the effective date of the reduction in force, is on active duty in the uniformed services with a restoration right under 5 CFR part 353.

(c) *Access to retention list.* An employee who received a specific reduction in force notice and the employee's representative have access to the applicable retention list in accordance with 5 CFR 351.505. Where 5 CFR 351.505 uses the terms "competitive level" or "retention register," the term *retention list* (as defined in this subpart) is substituted.

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### § 9901.608 Displacement, release, and position offers.

(a) *Displacement to other positions on the retention list.* (1) An employee who is displaced because of position abolishment, or because of displacement resulting from the abolishment of the position of a higher-standing employee on the retention list, may displace a lower-standing employee on the list if—

(i) The higher-standing employee is qualified for the position consistent, as applicable, with 5 CFR 351.702, or the Department's own qualifications applied consistent with other requirements in 5 CFR 351.702;

(ii) No undue interruption would result from the displacement; and

(iii) The position of the lower-standing employee is in the same pay band, or in a lower pay band, as the position of the higher-standing employee.

(2) A displacing employee retains his or her status and tenure.

(b) *Release from the retention list.* (1) Employees are selected for release from the list on the basis of the ascending order of retention standing set forth in § 9901.607(a).

(2) A competing employee may not be released from a retention list that contains a position held by a temporary employee when the competing employee is qualified to perform in that position under § 9901.608(a)(1)(i).

(3) The release of an employee from the retention list may be temporarily postponed when appropriate under 5 CFR 351.506, 351.606, 351.607, and 351.608. Where part 351 uses the term "competitive level" in these four sections, the term *retention list* (as defined in this subpart) is substituted.

(c) *Placement in vacant positions.* At the Secretary's option, an employee affected by § 9901.608(a)(1) may be offered a vacant position within the competitive area in lieu of reduction in force, based on relative retention standing as specified in § 9901.607(a).

(d) *Actions for employees with no offer.* If a released employee does not receive an offer of another position under paragraph (c) of this section to a position on a different retention list, the Secretary may—

(1) Separate the employee by reduction in force; or

(2) Furlough the employee under § 9901.604(b)(3).

### § 9901.609 Reduction in force notices.

The Secretary will provide a specific written notice to each employee reached for an action in reduction in force competition at least 60 days before the reduction in force becomes effective. When a reduction in force is caused by circumstances not reasonably foreseeable, the Secretary, at the request of a Component head or designee, may approve a notice period of less than 60 days. The shortened notice period must cover at least 30 full days before the effective date of release. The content of the notice will be prescribed in implementing issuances.

### § 9901.610 Voluntary separation.

(a) The Secretary may—

(1) Separate from the service any employee who volunteers to be separated even though the employee is not otherwise subject to separation due to a reduction in force; and

(2) For each employee voluntarily separated under paragraph (a)(1) of this section, retain an employee in a similar position who would otherwise be separated due to a reduction in force.

(b) The separation of an employee under paragraph (a) of this section will be treated as an involuntary separation due to a reduction in force.

### § 9901.611 Reduction in force appeals.

(a) An employee who believes the provisions of this subpart were not properly applied may appeal the reduction in force action to the Merit Systems Protection Board as provided for in 5 CFR 351.901 if the employee was—

(1) Separated by reduction in force;

(2) Reduced in band by reduction in force; or

(3) Furloughed by reduction in force under § 9901.604(b)(3).

(b) Paragraph (a) of this section does not apply to actions taken under internal DoD placement programs, including the DoD Priority Placement Program.

**Subpart G—Adverse Actions**

## GENERAL

**§ 9901.701 Purpose.**

This subpart contains regulations prescribing the requirements for employees who are removed, suspended, furloughed for 30 days or less, reduced in pay, or reduced in pay band (or comparable reduction). The Secretary may prescribe implementing issuances to carry out the provisions of this subpart.

**§ 9901.702 Waivers.**

With respect to any category of employees covered by this subpart, subchapters I and II of 5 U.S.C. chapter 75, in addition to those provisions of 5 U.S.C. chapter 43 specified in subpart D of this part, are waived and replaced by this subpart.

**§ 9901.703 Definitions.**

In this subpart:

*Adverse action* means a removal, suspension, furlough for 30 days or less, reduction in pay, or reduction in pay band (or comparable reduction).

*Band* has the meaning given that term in § 9901.103.

*Day* has the meaning given that term in § 9901.103.

*Furlough* has the meaning given that term in § 9901.103.

*Indefinite suspension* means the placement of an employee in a temporary status without duties and pay pending investigation, inquiry, or other administrative action. An indefinite suspension continues for an indeterminate period of time and ends with the occurrence of pending conditions set forth in the notice of actions which may include the completion of any subsequent administrative action.

*Initial probationary period* has the meaning given that term in § 9901.103.

*In-service probationary period* has the meaning given that term in § 9901.103.

*Mandatory removal offense (MRO)* has the meaning given that term in § 9901.103.

*Reduction in pay* means a decrease in an employee's rate of basic pay fixed by law or administrative action for the position held by the employee before any deductions and exclusive of addi-

tional pay of any kind. Basic pay does not include local market supplements under subpart C of this part or similar payments. Nonreceipt of a pay increase is not a reduction in pay.

*Removal* means the involuntary separation of an employee from the Federal service.

*Suspension* means the temporary placement of an employee, for disciplinary reasons, in a nonduty/ nonpay status.

**§ 9901.704 Coverage.**

(a) *Actions covered.* This subpart covers removals, suspensions, furloughs of 30 days or less, reductions in pay, or reductions in band (or comparable reductions).

(b) *Actions excluded.* This subpart does not cover—

(1) An action taken against an employee during an initial probationary period established under § 9901.512(a), except when the employee is a preference eligible who has completed 1 year of that probationary period;

(2) A reduction in pay or pay band of an employee who does not satisfactorily complete an in-service probationary period under § 9901.512(b) if the employee is returned to a grade or band and rate of basic pay no lower than that held before the in-service probationary period.

(3) An action that terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different position in a comparable pay band, if the employee was informed that the promotion was to be of limited duration;

(4) A reduction in force action under subpart F of this part;

(5) An action imposed by the Merit Systems Protection Board under 5 U.S.C. 1215;

(6) A voluntary action by an employee;

(7) An action taken or directed by OPM based on suitability under 5 CFR part 731;

(8)(i) Termination of appointment on the expiration date specified as a basic condition of employment at the time the appointment was made;

(ii) Termination of appointment before the expiration date specified as a

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basic condition of employment at the time the appointment was made, except when the termination is taken against—

(A) A preference eligible employee who has completed 1 year under a time-limited appointment; or

(B) An employee who has completed a probationary period under a term appointment;

(9) Cancellation of a promotion to a position not classified prior to the promotion;

(10) Placement of an employee serving on an intermittent or seasonal basis in a temporary non-duty, non-pay status in accordance with conditions established at the time of appointment;

(11) Reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation;

(12) An action taken under a provision of statute, other than one codified in title 5, U.S. Code, which excludes the action from 5 U.S.C. chapter 75 or this subpart;

(13) A classification determination, including a classification determination under subpart B of this part;

(14) Suspension or removal under 5 U.S.C. 7532; and

(15) An action to terminate grade retention upon conversion to the NSPS pay system established under subpart C of this part.

(c) *Employees covered.* Subject to a determination by the Secretary under § 9901.102(b)(2), this subpart applies to DoD employees, except as excluded by paragraph (d) of this section.

(d) *Employees excluded.* This subpart does not apply to—

(1) An employee who is serving a probationary period, except when the employee is a preference eligible who has completed 1 year of that probationary period;

(2) A member of the Senior Executive Service;

(3) An employee who is terminated in accordance with terms specified as conditions of employment at the time the appointment was made;

(4) An employee whose appointment is made by and with the advice and consent of the Senate;

(5) An employee whose position has been determined to be of a confidential, policy-determining, policy-mak-

ing, or policy-advocating character by—

(i) The President, for a position that the President has excepted from the competitive service;

(ii) OPM, for a position that OPM has excepted from the competitive service; or

(iii) The President or the Secretary for a position excepted from the competitive service by statute;

(6) An employee whose appointment is made by the President;

(7) A reemployed annuitant who is receiving an annuity from the Civil Service Retirement and Disability Fund or the Foreign Service Retirement and Disability Fund;

(8) An employee who is an alien or non-citizen occupying a position outside the United States, as described in 5 U.S.C. 5102(c)(11);

(9) A member of the National Security Labor Relations Board;

(10) A non-appropriated fund employee;

(11) A National Guard technician who is employed under 32 U.S.C. 709; and

(12) An employee against whom an adverse personnel action is taken or imposed under any statute or regulation other than this subpart.

REQUIREMENTS FOR REMOVAL, SUSPENSION, FURLOUGH OF 30 DAYS OR LESS, REDUCTION IN PAY, OR REDUCTION IN BAND (OR COMPARABLE REDUCTION)

### § 9901.711 Standard for action.

The Secretary may take an adverse action under this subpart only for such cause as will promote the efficiency of the service.

### § 9901.712 Mandatory removal offenses.

(a) The Secretary has the sole, exclusive, and unreviewable discretion to identify offenses that have a direct and substantial adverse impact on the Department's national security mission. Such offenses will be identified in advance in implementing issuances, publicized upon establishment via notice in the FEDERAL REGISTER, and made known to all employees on a periodic basis, as appropriate, through means determined by the Secretary.

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(b) The procedures in §§ 9901.713 through 9901.716 apply to actions taken under this section. However, a proposed notice required by § 9901.714 may be issued to the employee in question only after the Secretary's review and approval.

(c) The Secretary has the sole, exclusive, and unreviewable discretion to mitigate the removal penalty on his or her own initiative or at the request of the employee in question.

(d) Nothing in this section limits the discretion of the Secretary to remove employees for offenses other than those identified by the Secretary as an MRO.

### § 9901.713 Procedures.

An employee against whom an adverse action is proposed is entitled to the following:

- (a) A proposal notice under § 9901.714;
- (b) An opportunity to reply under § 9901.715; and
- (c) A decision notice under § 9901.716.

### § 9901.714 Proposal notice.

(a) *Notice period.* An employee will receive a minimum of 15 days advance written notice of a proposed adverse action. However, if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the notice period may be shortened to a minimum of 5 days. No notice of proposed action is necessary for furlough without pay due to unforeseen circumstances, such as sudden breakdown in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

(b) *Contents of notice.* (1) The proposal notice will inform the employee of the factual basis for the proposed action in sufficient detail to permit the employee to reply to the notice, and inform the employee of his or her right to review the evidence supporting the proposed action. Evidence may not be used that cannot be disclosed to the employee, his or her representative, or designated physician pursuant to 5 CFR 297.204.

(2) When some but not all employees in a given category and/or organizational unit are being furloughed, the proposal notice will state the basis for selecting a particular employee for fur-

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lough, as well as the reasons for the furlough.

(c) *Duty status during notice period.* An employee will remain in a duty status in his or her regular position during the notice period. However, if it is determined that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, adversely impact the Department's mission, or otherwise jeopardize legitimate Government interests, one or a combination of the following alternatives may be taken:

(1) Assign the employee to duties where it is determined that the employee is no longer a threat to the employee or others, the Department's mission, or Government property or interests;

(2) Allow the employee to take leave, or place him or her in an appropriate leave status (annual leave, sick leave, or leave without pay) or absence without leave if the employee has absented himself or herself from the worksite without approved leave; or

(3) Place the employee in a paid, non-duty status for such time as is necessary to effect the action.

### § 9901.715 Opportunity to reply.

(a) An employee will be provided a minimum of 10 days, which will run concurrently with the notice period, to reply orally and/or in writing to a notice of proposed adverse action. However, if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the reply period may be reduced to a minimum 5 days, which will run concurrently with the notice period. No opportunity to reply is necessary for furlough without pay due to unforeseen circumstances, such as sudden breakdown in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

(b) The opportunity to reply orally does not include the right to a formal hearing with examination of witnesses.

(c) During the opportunity to reply period, the employee will be provided a reasonable amount of official time to

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review the evidence, and to furnish affidavits and other documentary evidence, if the employee is otherwise in an active duty status.

(d) An official will be designated to receive the employee's written and/or oral response. The official will have authority to make or recommend a final decision on the proposed adverse action.

(e) The employee may be represented by an attorney or non-Federal employee representative, at the employee's expense, or other representative of the employee's choice, subject to paragraph (f) of this section. The employee will provide a written designation of his or her representative.

(f) An employee's representative may be disallowed if the representative is—

(1) An individual whose activities as representative would cause a conflict between the interest or position of the representative and that of the Department,

(2) An employee of the Department whose release from his or her official position would give rise to unreasonable costs or whose work assignments preclude his or her release; or

(3) An individual whose activities as representative could compromise security.

(g)(1) An employee who wishes consideration of any medical condition that may be relevant to the proposed adverse action will provide medical documentation, as that term is defined at 5 CFR 339.104, during the opportunity to reply, whenever possible.

(2) A medical examination may be required or offered pursuant to 5 CFR part 339, subpart C, when an employee's medical documentation is under consideration.

(3) Withdrawal or delay of a proposed adverse action is not required when an employee's medical condition is under consideration. However—

(i) The employee will be allowed to provide medical documentation during the opportunity to reply;

(ii) Compliance with 29 CFR 1614.203 and relevant Equal Employment Opportunity Commission rules will occur; and

(iii) Compliance with 5 CFR 831.1205 or 844.202, as applicable, will occur in the issuance of a decision to remove.

### § 9901.716 Decision notice.

(a) Any reasons for the action other than those specified in the proposal notice may not be considered in a decision on a proposed adverse action.

(b) Any response from the employee and the employee's representative, if the response is provided to the official designated under § 9901.715(d) during the opportunity to reply period, and any medical documentation furnished under § 9901.715(g) will be considered.

(c) The decision notice will specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights under subparts H or I of this part.

(d) To the extent practicable, the notice to the employee will be delivered on or before the effective date of the action. If delivery cannot be made to the employee in person, the notice may be delivered to the employee's last known address of record on or before the effective date of the action.

### § 9901.717 Departmental record.

(a) *Document retention.* The Department will keep a record of all relevant documentation concerning the action for a period of time pursuant to the General Records Schedule and the Guide to Personnel Recordkeeping. The record will include the following:

- (1) A copy of the proposal notice;
- (2) The employee's written response, if any, to the proposal;
- (3) A summary of the employee's oral response, if any;
- (4) A copy of the decision notice; and
- (5) Any supporting material that is directly relevant and on which the action was substantially based.

(b) *Access to the record.* The Department will make the record available for review by the employee and furnish a copy of the record upon the employee's request or the request of the Merit Systems Protection Board (MSPB), but not less than 15 days after such a request.

### SAVINGS PROVISION

### § 9901.721 Savings provision.

This subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

### Subpart H—Appeals

#### § 9901.801 Purpose.

This subpart implements the provisions of 5 U.S.C. 9902(h), which establishes the process for Department employees to appeal certain adverse actions covered under subpart G of this part.

#### § 9901.802 Applicable legal standards and precedents.

In accordance with 5 U.S.C. 9902(h)(3), in applying existing legal standards and precedents, MSPB and arbitrators, in applicable cases, are bound by the legal standard set forth in § 9901.107(a)(2).

#### § 9901.803 Waivers.

When a specified category of employees is covered by an appeals process established under this subpart, the provisions of 5 U.S.C. 7701 are waived with respect to that category of employees to the extent they are inconsistent with the provisions of this subpart. The provisions of 5 U.S.C. 7702 are modified as provided in § 9901.809. The appellate procedures specified herein supersede those of MSPB to the extent MSPB regulations are inconsistent with this subpart. MSPB will follow the provisions in this subpart until it issues conforming regulations, which may not conflict with this part.

#### § 9901.804 Definitions.

In this subpart:

*Administrative judge* or *AJ* means the official, including an administrative law judge, authorized by MSPB to hold a hearing in a matter covered by this subpart and subpart G of this part, or to decide such a matter without a hearing.

*Class appeal* means an appeal brought by a representative(s) of a group of similarly situated employees consistent with the provisions of Rule 23 of the *Federal Rules of Civil Procedure*.

*Harmful error* means error by the Department in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the error was harmful, *i.e.*, that it

caused substantial harm or prejudice to his or her rights.

*Mandatory removal offense (MRO)* has the meaning given that term in § 9901.103.

*MSPB* means the Merit Systems Protection Board.

*Petition for Review (PFR)* means a request for full MSPB review of a final Department decision.

*Preponderance of the evidence* means the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

*Request for Review (RFR)* means a preliminary request for review of an initial decision of an MSPB administrative judge before that decision has become a final Department decision.

#### § 9901.805 Coverage.

(a) Subject to a determination by the Secretary under § 9901.102(b)(2), this subpart applies to employees in DoD organizational and functional units that are included under NSPS who appeal removals; suspensions for more than 14 days, including indefinite suspensions; furloughs of 30 days or less; reductions in pay; or reductions in pay band (or comparable reductions), which constitute appealable adverse actions for the purpose of this subpart, provided such employees are covered by § 9901.704.

(b) This subpart does not apply to a reduction in force action taken under subpart F of this part, nor does it apply to actions taken under internal DoD placement programs, including the DoD Priority Placement Program.

(c) Appeals of suspensions of 14 days or less and other lesser disciplinary measures are not covered under this subpart but may be grieved through a negotiated grievance procedure or an administrative grievance procedure, whichever is applicable.

(d) The appeal rights in 5 CFR 315.806 apply to the termination of an employee in the competitive service while serving a probationary period.

(e) Actions taken under 5 U.S.C. 7532 are not appealable to MSPB.

(f) Except as expressly provided in subpart C of this part, actions taken

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under that subpart are not appealable to MSPB.

### § 9901.806 Alternative dispute resolution.

The Secretary recognizes the value of using alternative dispute resolution methods such as mediation, an ombudsman, or interest-based problem-solving to address employee-employer disputes arising in the workplace, including those which may involve disciplinary or adverse actions. Such methods can result in more efficient and more effective outcomes than traditional, adversarial methods of dispute resolution. The use of alternative dispute resolution is encouraged. Such methods will be subject to collective bargaining to the extent permitted by subpart I of this part.

### § 9901.807 Appellate procedures.

(a) *General.* (1) A covered Department employee may appeal to MSPB an adverse action listed in § 9901.805(a). Such an employee has a right to be represented by an attorney or other representative of his or her own choosing. The procedures in this subpart do not apply when the action is taken under the special national security provisions established by 5 U.S.C. 7532.

(2)(i) This section modifies MSPB's appellate procedures with respect to appeals under this subpart, as applicable.

(ii) MSPB will refer appeals to an AJ for adjudication. The AJ must make a decision at the close of the review and provide a copy of the decision to each party to the appeal and to OPM.

(3) The Director of OPM may, as a matter of right at any time in the proceeding, intervene or otherwise participate in any proceeding under this section in any case in which the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

(4) If the AJ is of the opinion that an appeal could be processed more expeditiously without adversely affecting any party, the AJ may—

(i) Consolidate appeals filed by two or more appellants; or

(ii) Join two or more appeals filed by the same appellant and hear and decide them concurrently.

(5) If an employee has been removed under subpart G of this part, neither the employee's status under any retirement system established by Federal statute nor any election made by the employee under any such system will affect the employee's appeal rights.

(6) All appeals, including class appeals, will be filed no later than 20 days after the effective date of the action being appealed, or no later than 20 days after the date of service of a decision under subpart G of this part, whichever is later.

(7) Either party may file a motion to disqualify a party's representative at any time during the proceedings.

(b) *Case suspension.* Requests for case suspensions must be submitted jointly by the parties.

(c) *Settlement.* (1) An MSPB AJ may not require any party to engage in settlement discussions in connection with any action appealed under this section. Where the parties voluntarily agree to enter into settlement discussions under paragraph (c)(2) of this section, if either party decides that such discussions are not appropriate, the matter will proceed to adjudication.

(2) Where the parties agree to engage in formal settlement discussions, these discussions will be conducted by an official other than the AJ assigned to adjudicate the case. Nothing prohibits the parties from engaging in settlement discussions on their own.

(d) *Discovery.* The parties may seek discovery regarding any matter that is relevant to any of their claims or defenses. However, by motion, either party may seek to limit such discovery because the burden or expense of providing the material outweighs its benefit, or because the material sought is privileged, not relevant, unreasonably cumulative or duplicative, or can be secured from some other source that is more convenient, less burdensome, or less expensive.

(1) Prior to filing a motion to limit discovery, the parties must confer and attempt to resolve any pending objection(s).

(2) Neither party may submit more than one set of interrogatories, one set

of requests for production, and one set of requests for admissions. The number of interrogatories or requests for production or admissions may not exceed 25 per pleading, including subparts; in addition, neither party may conduct/compel more than 2 depositions.

(3) The AJ may grant a party's motion for additional discovery only upon a showing of necessity and good cause.

(e) *Hearing*—(1) *Burden of proof.* An adverse action taken against an employee will be sustained by the MSPB AJ if it is supported by a preponderance of the evidence, unless the employee shows by a preponderance of the evidence—

(i) That there was harmful error in the application of Department procedures in arriving at the decision;

(ii) That the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(iii) That the decision was not in accordance with law.

(2) *Decisions without a hearing.* If the AJ determines upon his or her own initiative or upon request by either party that some or all material facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing, including filing evidence and/or arguments, within 15 calendar days, issue an order limiting the scope of the hearing or issue a decision without holding a hearing.

(f) *Initial decision*—(1) *Time limit.* An initial decision must be made by an AJ no later than 90 days after the date on which the appeal is filed.

(2) *Mitigation.* (i) An AJ will give great deference to the determination regarding the penalty imposed.

(ii) An AJ may not modify the penalty imposed unless such penalty is totally unwarranted in light of all pertinent circumstances. In evaluating the appropriateness of the penalty, the AJ will give primary consideration to the impact of the sustained misconduct or poor performance on the Department's national security mission in accordance with § 9901.107(a)(2).

(iii) In cases of multiple charges, the third party's determination in this regard is based on the justification for the penalty as it relates to the sustained charge(s).

(iv) When a penalty is mitigated, the maximum justifiable penalty must be applied. The maximum justifiable penalty is the severest penalty that is not so disproportionate to the basis for the action as to be totally unwarranted in light of all pertinent circumstances.

(v) If the adverse action is based on an MRO, the penalty may only be mitigated as prescribed in § 9901.808.

(3) *Reviewing charges.* Neither the MSPB AJ, nor the full MSPB, may reverse an action based on the way in which the charge is labeled or the conduct characterized, provided the employee has sufficient notice to respond to the charge.

(4) *Performance expectations.* Neither the MSPB AJ, nor the full MSPB, may reverse an action based on the way a performance expectation is expressed, provided that the expectation would be clear to a reasonable person.

(5) *Interim relief.* Pursuant to 5 U.S.C. 9902(h)(4), employees will not be granted interim relief, nor will an action taken against an employee be stayed, unless specifically ordered by the full MSPB following final decision by the Department.

(i) If the interim relief ordered by the full MSPB provides that the employee will return or be present at the place of employment pending the outcome of any petition for review, and the Secretary determines, in his or her sole, exclusive, and unreviewable discretion, that the employee's return to the workplace is impracticable or the presence of the employee is unduly disruptive to the work environment, the employee may be placed in an alternative position, or may be placed on excused absence pending final disposition of the employee's appeal.

(ii) Nothing in paragraph (f)(5) of this section may be construed to require that any award of back pay or attorney fees be paid before an MSPB decision becomes final.

(6) *Attorney fees.* (i) Except as provided in paragraph (f)(6)(ii) of this section or as otherwise provided by law, the AJ may require payment by the Department of reasonable attorney fees incurred by an employee if the employee is the prevailing party and the AJ determines that payment by the

Department is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(ii) If the employee is the prevailing party and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1), the payment of reasonable attorney fees must be in accordance with the standards prescribed in § 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(g) *Department's final decision*—(1) *Request for Review*. The initial AJ decision will become the Department's final decision 30 days after its issuance, unless either party files an RFR with MSPB and the Department concurrently (with service on the other party) within that 30-day period in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart. If a party does not submit an RFR within the above time limit, the RFR will be dismissed as untimely filed unless a good reason for the delay is shown.

(2) *Department review process*. (i) Thirty days after the timely filing of an RFR, the initial AJ decision will become the Department's final, non-precedential decision, unless notice is served on the parties and MSPB within that 30-day period that the Department will act on the RFR. When no such notice is served, MSPB will docket and process a party's RFR as a petition for full MSPB review in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart. Timeframes will be established in implementing issuances for those instances where action is taken on an RFR.

(ii) If a decision is made to act on the RFR, the other party to the case will be provided 15 days to respond to the RFR. An extension to the filing period may be granted for good cause. After receipt of a timely response to the RFR—

(A) If a determination is made that there has been a material error of fact, or that there is new and material evidence available that, despite due diligence, was not available when the record closed, the matter will be remanded to the assigned AJ for further adjudication or a final DoD decision

will be issued modifying or reversing that initial decision or decision after remand. Any remand will be served on all parties with an opportunity for those parties to comment to the AJ. An AJ decision after remand must be made no later than 30 days after the date of receipt of the remand. However, if the Department's remand order includes instructions to hold a hearing, the AJ decision will be made not later than 45 days after receipt of the remand order. Decisions on remand will be treated as initial decisions for purpose of further review.

(B) Where it is determined that the initial AJ decision has a direct and substantial adverse impact on the Department's national security mission, or is based on an erroneous interpretation of law, Governmentwide rule or regulation, or this part, a final DoD decision will be issued modifying or reversing that initial decision; or

(C) Where it is determined that the initial AJ decision should serve as precedent, a final DoD decision will be issued affirming that initial decision for such purposes.

(3) *Precedential effect*. Any decision issued by the Department after reviewing an initial AJ decision is precedential unless—

(i) The Secretary determines that the DoD decision is not precedential; or

(ii) The final DoD decision is reversed or modified by the full MSPB.

(4) *Publication of decisions*. Precedential DoD decisions will be published. Further details regarding the publication of DoD precedential decisions will be provided in implementing issuances.

(h) *Appeal of Department's final decision*—(1) *OPM Petition for Review*. Any decision under paragraph (a)(2) of this section is final unless a party to the appeal or the Director of OPM petitions the full MSPB for review within 30 days. The Director, after consultation with the Secretary, may petition the full MSPB for review if the Director believes the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive. MSPB, for good cause shown, may extend the filing period.

(2) *Petition for Review*. (i) Upon receipt of a final DoD decision issued

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under paragraph (g)(2)(ii) of this section, an employee or OPM may file a PFR with the full MSPB within 30 days in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart.

(ii) The Board may dismiss any petition that, in the view of the Board, does not raise substantial questions of fact or law.

(iii) The full MSPB may order corrective action only if the Board determines that the decision was—

(A) Arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(B) Obtained without procedures required by law, rule, or regulation having been followed; or

(C) Unsupported by substantial evidence.

(iv) Upon receipt of a petition for full MSPB review or an RFR that becomes a PFR as a result of the expiration of the Department's review period in accordance with paragraph (g)(2)(i) of this section, the other party to the case and/or OPM, as applicable, will have 30 days to file a response to the petition. The full MSPB will act on a PFR within 90 days after receipt of a timely response, or the expiration of the response period, as applicable, in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart.

(3) *Request for reconsideration of final MSPB decision.* The Director of OPM, after consultation with the Secretary, may seek reconsideration by MSPB of a final MSPB decision in accordance with 5 U.S.C. 7703(d), which is modified for this purpose. The Director of OPM must seek reconsideration within 35 days after the date of service of the Board's final order. If the Director seeks such reconsideration, the full MSPB must render its decision no later than 60 days after receipt of a response to OPM's petition in support of such reconsideration. The full MSPB must state the reasons for its decision.

(4) *Failure of MSPB to meet deadlines.* Failure of MSPB to meet the deadlines imposed by paragraphs (f)(1), (h)(2)(iv), and (h)(3) of this section in a case will not prejudice any party to the case and will not form the basis for any legal action by any party. If the AJ or full MSPB fails to meet the above time limits, the full MSPB will inform the

Secretary in writing of the cause of the delay and will recommend future actions to remedy the problem.

(i) *Judicial review.* The Secretary or an employee adversely affected by a final order or decision of MSPB may seek judicial review under 5 U.S.C. 9902(h)(6).

**§ 9901.808 Appeals of mandatory removal actions.**

(a) Procedures for appeals of adverse actions to MSPB based on MROs will be the same as for other offenses except as otherwise provided by this section.

(b) If one or more MROs are sustained, the MSPB AJ may not mitigate the penalty.

(c) Only the Secretary may mitigate the penalty within the Department.

(d) If the MSPB AJ or the full MSPB sustains an employee's appeal based on a finding that the employee did not commit an MRO, a subsequent proposed adverse action (other than an MRO) based in whole or in part on the same or similar evidence is not precluded.

**§ 9901.809 Actions involving discrimination.**

(a) In considering any appeal of an action filed under 5 U.S.C. 7702, the Board will apply the provisions of 5 U.S.C. 9902 and this part.

(b) In any appeal of an action filed under 5 U.S.C. 7702 that results in a final Department decision, if no petition for review of the Department's decision is filed with the full Board, and if requested by the appellant, the Department will refer only the discrimination issue to the full Board for adjudication.

(c) All references in 5 U.S.C. 7702 to 5 U.S.C. 7701 are modified to read 5 CFR part 9901, subpart H.

**§ 9901.810 Savings provision.**

This subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

### Subpart I—Labor-Management Relations

#### § 9901.901 Purpose.

This subpart contains the regulations which implement the provisions of 5 U.S.C. 9902(m) relating to the Department's labor-management relations system. This labor management relations system addresses the unique role that the Department's civilian workforce plays in supporting the Department's national security mission and promotes a collaborative issue-based approach to labor management relations. These regulations recognize the rights of DoD employees to organize and bargain collectively, as provided for in 5 U.S.C. 9902 and this part and subject to any exclusion from coverage or limitation on the scope of bargaining pursuant to law, including this part, issuances, and implementing issuances, applicable Presidential issuances (e.g., Executive orders), and any other applicable legal authority.

#### § 9901.902 Scope of authority.

When a specified category of employees is covered by the labor-management relations system established under this subpart, the provisions of 5 U.S.C. 7101 through 7135 are modified and replaced by the provisions in this subpart with respect to that category, except as otherwise specified in this subpart. Implementing issuances may be prescribed to carry out the provisions of this subpart.

#### § 9901.903 Definitions.

In this subpart:

*Authority* means the Federal Labor Relations Authority described in 5 U.S.C. 7104(a).

*Board* means the National Security Labor Relations Board established by this subpart.

*Collective bargaining* means the performance of the mutual obligation of a management representative of the Department and an exclusive representative of employees in an appropriate unit in the Department to meet at reasonable times and to bargain in a good faith effort to reach agreement, pursuant to 5 U.S.C. 9902 and this subpart, with respect to the conditions of employment affecting such employees and

to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

*Collective bargaining agreement* means an agreement entered into as a result of collective bargaining pursuant to the provisions of 5 U.S.C. 9902 and this subpart.

*Component* means an organizational unit so prescribed and designated by the Secretary in his or her sole and exclusive discretion, such as, for example, the Office of the Secretary of Defense, a Military Department, a Defense Agency, or a DoD Field Activity.

*Conditions of employment* means personnel policies, practices, and matters affecting working conditions—whether established by rule, regulation, or otherwise—except that such term does not include policies, practices, and matters relating to—

(1) Political activities prohibited under 5 U.S.C. chapter 73, subchapter III;

(2) The classification of any position, including any classification determinations under subpart B of this part;

(3) The pay of any employee or for any position, including any determinations regarding pay or adjustments thereto under subpart C of this part; or

(4) Any matters specifically provided for by Federal statute.

*Confidential employee* means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations.

*Consult* means to consider the interests, opinions, and recommendations of a recognized labor organization in rendering decisions. This can be accomplished in face-to-face meetings or through other means, e.g., teleconferencing, e-mail, and written communications.

*Dues* means dues, fees, and assessments.

*Exclusive representative* means any labor organization which is recognized

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as the exclusive representative of employees in an appropriate unit consistent with the Department's organizational structure, pursuant to 5 U.S.C. 7111 or as otherwise provided by § 9901.911.

*FMCS* means Federal Mediation and Conciliation Service.

*Grade* means a level of work under a position classification or job grading system.

*Grievance* means any complaint—

(1) By any employee concerning any matter relating to the conditions of employment of the employee;

(2) By any labor organization concerning any matter relating to the conditions of employment of any employee; or

(3) By any employee, labor organization, or the Department concerning—

(i) The effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) Any claimed violation, misinterpretation, or misapplication of any law, rule, regulation, or issuance issued for the purpose of affecting conditions of employment.

*Implementing issuance or issuances* has the meaning given that term in § 9901.103.

*Issuance or issuances* means a document issued by the Secretary, Deputy Secretary, Principal Staff Assistants (as authorized by the Secretary), or Secretaries of the Military Departments to carry out a policy or procedure of the Department other than those issuances implementing this part.

*Labor organization* has the meaning given that term in § 9901.103.

*Management official* means an individual employed by the Department in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the Department.

*Person* has the meaning given that term in 5 U.S.C. 7103(a)(1).

*Professional employee* has the meaning given that term in 5 U.S.C. 7103(a)(15).

*Supervisor* means an individual employed by the Department having authority in the interest of the Department to hire, direct, assign, promote, reward, transfer, furlough, layoff, re-

call, suspend, discipline, or remove employees; to adjust their grievances; or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority. It also means an individual employed by the Department who exercises supervisory authority over military members of the armed services, such as directing or assigning work or evaluating or recommending evaluations.

### § 9901.904 Coverage.

(a) *Employees covered.* This subpart applies to eligible DoD employees, subject to a determination by the Secretary under § 9901.102(b)(1), except as provided in paragraph (b) of this section. DoD employees who would otherwise be eligible for bargaining unit membership under 5 U.S.C. chapter 71, as modified by § 9901.912, are eligible for bargaining unit membership under this subpart. In addition, this subpart applies to an employee whose employment in the Department has ceased because of any unfair labor practice under § 9901.916 of this subpart and who has not obtained any other regular and substantially equivalent employment.

(b) *Employees excluded.* This subpart does not apply to—

(1) An alien or noncitizen of the United States who occupies a position outside the United States;

(2) A military member of the armed services;

(3) A supervisor or a management official;

(4) Any person who participates in a strike in violation of 5 U.S.C. 7311; or

(5) Any employee excluded pursuant to § 9901.912 or any other legal authority.

### § 9901.905 Impact on existing agreements.

(a) Any provision of a collective bargaining agreement that is inconsistent with this part and/or implementing

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issuances is unenforceable on the effective date of the applicable subpart(s) or such issuances. The exclusive representative may appeal a determination that a provision is unenforceable to the National Security Labor Relations Board in accordance with the procedures and time limits pursuant to § 9901.908 and the Board's regulations. However, the Secretary, in his or her sole and exclusive discretion, may continue all or part of a particular provision(s) with respect to a specific category or categories of employees and may cancel such continuation at any time; such determinations are not precedential.

(b) Upon request by an exclusive representative, the parties will have 60 days after the effective date of coverage under the applicable subpart and/or implementing issuance to bring into conformance those remaining negotiable collective bargaining agreement provisions directly affected by the collective bargaining agreement provisions rendered unenforceable by the applicable subpart and/or implementing issuance. During that period, the parties may utilize the negotiation impasse provisions of § 9901.920 to assist in resolving any impasses.

(c) Any provision of a collective bargaining agreement that is inconsistent with an issuance remains in effect until the expiration, renewal, or extension of the term of the agreement, whichever occurs first.

### § 9901.906 Employee rights.

Each employee has the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee will be protected in the exercise of such right. Except as otherwise provided under this subpart, such right includes the right—

(a) To act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities; and

(b) To engage in collective bargaining with respect to conditions of

employment through representatives chosen by employees under this subpart.

### § 9901.907 National Security Labor Relations Board.

(a) The Secretary has sole, exclusive, and unreviewable authority to determine the effective date for the establishment of the National Security Labor Relations Board.

(b)(1) The National Security Labor Relations Board is composed of at least three members who are appointed by the Secretary for terms of 3 years, except that the appointments of the initial Board members will be for terms of 1, 2, and 3 years, respectively. The Secretary may extend the term of any member beyond 3 years when necessary to provide for an orderly transition and/or appoint the member for up to two additional 1-year terms. The Secretary, in his or her sole and exclusive discretion, may appoint additional members to the Board; in so doing, he or she will make such appointments to ensure that the Board consists of an odd number of members.

(2) Members of the Board will be independent, distinguished citizens of the United States who are well known for their integrity, impartiality, and expertise in labor relations, and/or the DoD mission and/or other related national security matters, and will be able to acquire and maintain an appropriate security clearance. Members may be removed by the Secretary only for inefficiency, neglect of duty, or malfeasance in office.

(3) An individual chosen to fill a vacancy on the Board will be appointed for the unexpired term of the member who is replaced and, at the Secretary's option, an additional term or terms.

(c) *Appointment of the Chair.* The Secretary, at his or her sole and exclusive discretion, will appoint one member to serve as Chair of the NSLRB.

(d) *Appointment procedures for non-Chair NSLRB members.* (1) The appointments of the two non-Chair NSLRB members will be made by the Secretary, at his or her sole and exclusive discretion, after he or she considers any lists of nominees submitted by labor organizations that represent employees in the Department.

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(2) The submission of lists of recommended nominees by labor organizations must be in accordance with timelines and requirements set forth by the Secretary, who may provide for consultation in order to obtain further information about a recommended nominee. The ability of the Secretary to appoint NSLRB members may not be delayed or otherwise affected by the failure of any labor organization to provide a list of nominees that meets the timeframe and requires established by the Secretary.

(e) *Appointment of additional non-Chair NSLRB members.* If the Secretary determines that additional members are needed, he or she may, subject to the criteria set forth in paragraph (b)(2) of this section, appoint the additional members according to the procedures established by paragraph (d) of this section.

(f) A Board vacancy will be filled according to the procedure used to appoint the member whose position was vacated.

(g)(1) The Board will establish procedures for the fair, impartial, and expeditious assignment and disposition of cases, including standards for asserting or declining jurisdiction.

(2) To the extent practicable, the Board will use a single, integrated process to address all matters associated with a negotiations dispute, including unfair labor practices, negotiability disputes, and bargaining impasses. The Board may, pursuant to its regulations, use a combination of mediation, factfinding, and any other appropriate dispute resolution methods to resolve all such disputes at the earliest practicable time and with a minimum administrative burden.

(3) A vote of the majority of the Board (or a three-person panel of the Board) will be final. A vacancy on the Board does not impair the right of the remaining members to exercise all of the powers of the Board. The vote of the Chair will be dispositive in the event of a tie.

(h) Decisions of the Board are final and binding.

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### § 9901.908 Powers and duties of the Board.

(a) Section 9902(m)(6) of title 5, U.S. Code, requires that the labor relations system established under this subpart provide for an independent third party review of labor relations issues set out in § 9901.908(b), including defining the third party to provide the review. Notwithstanding § 9901.907 and pending establishment of the Board, the Secretary, in consultation with the Director, may designate a third party to exercise the authority of the Board in accordance with this subpart.

(b) The Board may to the extent provided in this subpart and in accordance with regulations prescribed by the Board—

(1) Conduct investigations and hearings, and resolve allegations of unfair labor practices, including allegations concerning strikes, work stoppages, slowdowns, and picketing, or condoning such activity by failing to take action to prevent or stop such activity;

(2) Resolve issues relating to the scope of bargaining and the duty to bargain in good faith under § 9901.917;

(3) Resolve exceptions to arbitration awards. In doing so, the Board will conduct any review of an arbitral award in accordance with 5 U.S.C. 7122(a) as modified in § 9901.923;

(4) Resolve negotiation impasses in accordance with § 9901.920;

(5) Conduct *de novo* review involving all matters within the Board's jurisdiction; and

(6) Have discretion to evaluate the evidence presented in the record and reach its own independent conclusions with respect to the matters at issue, but in no case may the Board issue status quo ante remedies, where such remedies are not intended to cure egregious violations of this subpart or where such an award would impose an economic hardship or interfere with the efficiency or effectiveness of the Department's mission or impact national security.

(c) In any case in which the Board or its authorized agent, in the Board's or the agent's unreviewable discretion, declines to adjudicate any unfair labor practice allegation(s) because the allegation(s) was not timely filed, fails to

state an unfair labor practice, or for other appropriate reasons, the Board or the agent, as applicable, will provide the person making the allegation(s) a written statement of the reasons for such determination.

(d) Upon the request of a DoD Component or a labor organization concerned, the Board may issue guidance for matters within its jurisdiction.

(e) The Board's decisions will be written and published.

**§ 9901.909 Powers and duties of the Federal Labor Relations Authority.**

(a) To the extent provided in this subpart (pursuant to the authority in 5 U.S.C. 9902), the Federal Labor Relations Authority, in accordance with conforming regulations prescribed by the Authority, may—

(1) Determine the appropriateness of bargaining units pursuant to the provisions of § 9901.912;

(2) Supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer 5 U.S.C. 7111 (relating to the according of exclusive recognition to labor organizations), which is not waived for the purpose of this subpart;

(3) Resolve disputes regarding the granting of national consultation rights; and

(4) Upon request of a party, review only those Board decisions on—

(i) Unfair labor practices, except those issued under § 9901.908(c);

(ii) Arbitral awards under § 9901.908; and

(iii) Negotiability disputes.

(b) In any matter filed with the Authority, if the responding party believes that the Authority lacks jurisdiction, that party will timely raise the issue with the Authority and simultaneously file a copy of its response with the Board in accordance with regulations established by the Authority. The Authority will promptly transfer the case to the Board, which will determine whether the matter is within the Board's jurisdiction. If the Board determines that the matter is not within its jurisdiction, the Board will return the matter to the Authority for a decision

on the merits of the case. The Board's determination with regard to its jurisdiction in a particular matter is final and not subject to review by the Authority. The Authority will promptly decide those cases that the Board has determined are within the jurisdiction of the Authority.

(c)(1) To obtain review by the Authority of a Board decision, a party will request a review of the record of a Board decision by the Authority by filing such a request in writing within 15 days after the issuance of the decision. A copy of the request will be served on all parties. Within 15 days after service of the request, any response will be filed. The Authority will establish, in conjunction with the Board, standards for the sufficiency of the record and other procedures, including notice to the parties. The Authority will accept the findings of fact and interpretations of this part made by the Board and sustain the Board's decision unless the requesting party shows that the Board's decision was—

(i) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(ii) Caused by harmful error in the application of the Board's procedures in arriving at such decision; or

(iii) Unsupported by substantial evidence.

(2) The Authority will complete its review of the record and issue a final decision within 30 days after receiving the party's response to such request for review. If the Authority does not issue a final decision within this mandatory time limit, the Authority will be considered to have denied the request for review of the Board's decision, which will constitute a final decision of the Authority and is subject to judicial review in accordance with 5 U.S.C. 7123.

(d) Judicial review of any Authority decision is as prescribed in 5 U.S.C. 7123(a). The references in 5 U.S.C. 7123(a) to other provisions in 5 U.S.C. chapter 71 are considered to be references to those particular provisions as modified by this subpart.

**§ 9901.910 Management rights.**

(a) Subject to paragraphs (b) through (e) of this section, nothing in this subpart may affect the authority of any

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management official or supervisor of the Department—

(1) To determine the mission, budget, organization, number of employees, and internal security practices of the Department;

(2) To hire, assign, and direct employees in the Department; to assign work, make determinations with respect to contracting out, and to determine the personnel by which Departmental operations may be conducted; to determine the numbers, types, pay schedules, pay bands and/or grades of employees or positions assigned to any organizational subdivision, work project or tour of duty, and the technology, methods, and means of performing work; to assign employees to meet any operational demand; and to take whatever other actions may be necessary to carry out the Department's mission; and

(3) To lay off and retain employees, or to suspend; remove; reduce in pay, pay band, or grade; or take other disciplinary action against such employees or, with respect to filling positions, to make selections for appointments from properly ranked and certified candidates for promotion or from any other appropriate source.

(b) Management is prohibited from bargaining over the exercise of any authority under paragraph (a) of this section or the procedures that it will observe in exercising the authorities set forth in paragraphs (a)(1) and (a)(2) of this section.

(c) Notwithstanding paragraph (b) of this section, the Secretary in his or her sole, exclusive, and unreviewable discretion, may authorize bargaining over the procedures that will be observed in exercising the authorities set forth in paragraphs (a)(1) and (a)(2) of this section. This authorization will be based on a determination by the Secretary, in his or her sole, exclusive, and unreviewable discretion, that bargaining is necessary to advance the Department's mission or promote organizational effectiveness. Any specific authorization remains in effect until an agreement is reached or management withdraws from negotiations, whichever occurs first.

(d) Unless the Secretary elects to bargain under paragraph (c) of this sec-

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tion, management will consult at the request of an exclusive representative as required under § 9901.917 over the procedures that will be observed in exercising the authorities set forth in paragraphs (a)(1) and (a)(2) of this section. Consultation does not require that the parties reach agreement on any covered matter. The parties may, upon mutual agreement, provide for FMCS or another third party to assist in this process. Neither the Board nor the Authority may intervene in this process.

(e) If an obligation exists under § 9901.917 to bargain or consult regarding any authority under paragraph (a) of this section, management will provide notice to the exclusive representative concurrently with the exercise of that authority. However, at its sole, exclusive, and unreviewable discretion, management may provide notice to an exclusive representative of its intention to exercise an authority under paragraph (a) of this section as far in advance as practicable. Further, nothing in paragraph (e) of this section establishes an independent right to bargain or consult.

(f) When an obligation exists under § 9901.917, management will provide notice to the exclusive representative and an opportunity to present its views and recommendations regarding the exercise of an authority under paragraph (a) of this section, and the parties will bargain at the level of recognition (unless otherwise delegated below that level, at their mutual agreement, or as provided for in §§ 9901.917 and 9901.918) over otherwise negotiable—

(1)(i) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraph (a)(3) of this section and procedures which management officials and supervisors will observe in exercising any authority under paragraph (a)(3) of this section; and

(ii) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraphs (a)(1) and (a)(2) of this section. Appropriate arrangements within the duty to bargain include proposals on matters such as personal hardships and safety measures.

(2) Appropriate arrangements within the duty to bargain do not include proposals on matters such as the routine assignment to specific duties, shifts, or work on a regular or overtime basis except when the Secretary in his or her sole, exclusive, and unreviewable discretion authorizes such bargaining. This authorization will be based on a determination by the Secretary, in his or her sole, exclusive, and unreviewable discretion, that bargaining is necessary to advance the Department's mission or promote organizational effectiveness. Any specific authorization remains in effect until an agreement is reached or management withdraws from negotiations, whichever occurs first.

(g) Where a proposal falls within the coverage of both paragraph (a)(1) and (a)(3) of this section or paragraph (a)(2) and (a)(3) of this section, the matter will be determined to be covered by paragraph (a)(1) or (a)(2) of this section for the purpose of collective bargaining.

(h) Any mid-term agreements, reached with respect to paragraphs (c), (f)(1)(ii), or (f)(2) of this section will not be precedential or binding on subsequent acts, or retroactively applied, except at the Secretary's sole, exclusive, and unreviewable discretion.

(i) Nothing will delay or prevent the Secretary from exercising his or her authority under this subpart.

**§ 9901.911 Exclusive recognition of labor organizations.**

Exclusive recognition will be accorded to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees, in an appropriate unit as determined by the Authority, who cast valid ballots in the election.

**§ 9901.912 Determination of appropriate units for labor organization representation.**

(a) The Authority will determine the appropriateness of any unit. The Authority will determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this subpart, the appropriate unit should be estab-

lished on a Department, plant, installation, functional, or other basis and will determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the Department, consistent with the Department's mission and organizational structure and § 9901.107(a).

(b) A unit may not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor may a unit be determined to be appropriate if it includes—

(1) Except as provided under 5 U.S.C. 7135(a)(2), which is not waived for the purpose of this subpart, any management official or supervisor;

(2) A confidential employee;

(3) An employee engaged in personnel work in other than a purely clerical capacity;

(4) An employee engaged in administering the provisions of this subpart;

(5) Both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) Any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) Any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by the Department whose duties directly affect the internal security of the Department, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law or this subpart relating to labor-management relations may not be represented by a labor organization—

(1) Which represents other individuals to whom such provision or subpart applies; or

(2) Which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision or subpart applies.

(d) Two or more units in the Department for which a labor organization is

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the exclusive representative may, upon petition by the Secretary or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority will certify the labor organization as the exclusive representative of the new larger unit.

**§ 9901.913 National consultation.**

(a) If, in connection with the Department or Component, no labor organization has been accorded exclusive recognition on a Department or Component basis, a labor organization that is the exclusive representative of a substantial number of the employees of the Department or Component, as determined in accordance with criteria prescribed by the Authority, will be granted national consultation rights by the Department or Component. National consultation rights will terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to any labor organization's eligibility for, or continuation of, national consultation rights will be subject to determination by the Authority.

(b)(1) Any labor organization having national consultation rights in connection with any Department or Component under subsection (a) of this section will—

(i) Be informed of any substantive change in conditions of employment proposed by the Department or Component; and

(ii) Be permitted reasonable time to present its views and recommendations regarding the changes.

(2) If any views or recommendations are presented under paragraph (b)(1) of this subsection to the Department or Component by any labor organization—

(i) The Department or Component will consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(ii) The Department or Component will provide the labor organization a written statement of the reasons for taking the final action.

(c) Section 9901.913(b) does not apply where the proposed change is bargained at the national level or where con-

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tinuing collaboration procedures under § 9901.106 apply.

(d) Nothing in this section precludes the Department or the Component from seeking views and recommendations from labor organizations having exclusive representation within the Department or Component which do not have national consultation rights.

(e) Nothing in this section will be construed to limit the right of the agency or exclusive representative to engage in collective bargaining.

**§ 9901.914 Representation rights and duties.**

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit will be given the opportunity to be represented at—

(i) Any formal discussion between a Department management official(s) and bargaining unit employees, the purpose of which is to discuss and/or announce new or substantially changed personnel policies, practices, or working conditions. This right does not apply to meetings between a management official(s) and bargaining unit employees for the purpose of discussing operational matters where any discussion of personnel policies, practices or working conditions—

(A) Constitutes a reiteration or application of existing personnel policies, practices, or working conditions;

(B) Is incidental or otherwise peripheral to the announced purpose of the meeting; or

(C) Does not result in an announcement of a change to, or a promise to change, an existing personnel policy(s), practice(s), or working condition(s);

(ii) Any discussion between one or more Department representatives and one or more bargaining unit employees concerning any grievance filed under the negotiated grievance procedure;

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(iii) Any examination of a bargaining unit employee by a representative of the Department in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action against the employee and the employee requests such representation; or

(iv) Any discussion between one or more Department representatives and one or more bargaining unit employees in connection with a formal complaint of discrimination only if the employee(s), in his or her sole and exclusive discretion, requests such representation.

(3) Bargaining unit employees will be informed annually of their rights under paragraph (a)(2)(iii) of this section.

(4) Employee representatives employed by the Department are subject to the same expectations regarding conduct as any other employee, whether they are serving in their representative capacity or not.

(5) Except in the case of grievance procedures negotiated under this subpart, the rights of an exclusive representative under this section may not be construed to preclude an employee from—

(i) Being represented by an attorney or other representative of the employee's own choosing, other than the exclusive representative, in any grievance or appeal action; or

(ii) Exercising grievance or appellate rights established by law, rule, or regulation.

(b) The duty of the Secretary or appropriate Component(s) of the Department and an exclusive representative to negotiate in good faith under paragraph (a) of this section includes the obligation—

(1) To approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) To be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) To meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) If agreement is reached, to execute on the request of any party to the negotiation, a written document em-

bodying the agreed terms, and to take such steps as are necessary to implement such agreement; and

(5) In the case of the Department or appropriate Component(s) of the Department, to furnish information to an exclusive representative, or its authorized representative, when—

(i) Such information exists, is normally maintained in the regular course of business, and is reasonably available;

(ii) The exclusive representative has requested such information and demonstrated a particularized need for the information in order to perform its representational functions in grievance or unfair labor practice proceedings, or in negotiations; and

(iii) Disclosure is not prohibited by law.

(c) Disclosure of information in paragraph (b)(5) of this section does not include the following:

(1) Disclosure prohibited by law or regulations, including, but not limited to, the regulations in this part, Governmentwide rules and regulations, Departmental implementing issuances and other policies and regulations, and Executive orders;

(2) Disclosure of information if adequate alternative means exist for obtaining the requested information, or if proper discussion, understanding, or negotiation of a particular subject within the scope of collective bargaining is possible without recourse to the information;

(3) Internal Departmental guidance, counsel, advice, or training for managers and supervisors relating to collective bargaining;

(4) Any disclosures where an authorized official has determined that disclosure would compromise the Department's mission, security, or employee safety; and

(5) Personal addresses, personal telephone numbers, personal e-mail addresses, or any other information not related to an employee's work.

(d)(1) An agreement between the Department or appropriate Component(s) of the Department and the exclusive representative is subject to approval by the Secretary.

(2) The Secretary will approve the agreement within 30 days after the

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date the agreement is executed if the agreement is in accordance with the provisions of these regulations and any other applicable law, rule, regulation, issuance, or implementing issuance.

(3) If the Secretary does not approve or disapprove the agreement within the 30-day period specified in paragraph (d)(2) of this section, the agreement will take effect and is binding on the Department or Component(s), as appropriate, and the exclusive representative, but only to the extent it is consistent with Federal law, Presidential issuance (e.g., Executive order), Governmentwide regulations, issuances and implementing issuances, or the regulations in this part.

(4) A local agreement subject to a national or other controlling agreement at a higher level may be approved under the procedures of the controlling agreement or, if none, under Departmental regulations. Bargaining will be at the level of recognition except where delegated.

(5) Provisions in existing collective bargaining agreements are unenforceable if they are contrary to Federal law, Presidential issuance (e.g., Executive order), the regulations in this part, or implementing issuances. Provisions in existing collective bargaining agreements that are inconsistent with Governmentwide regulations or issuances (other than implementing issuances), are unenforceable upon expiration, extension, renewal, or renegotiation of the collective bargaining agreement, whichever occurs first.

**§ 9901.915 Allotments to representatives.**

(a) If the Department has received from an employee in an appropriate unit a properly executed written or electronic assignment which authorizes the Department to deduct from the pay of the employee amounts for the payment of regular and periodic dues and other financial assessments of the exclusive representative of the unit, the Department will honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment will be made at no cost to the exclusive representative or the employee. Except as provided under paragraph (b) of this section, any such as-

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signment may not be revoked for a period of 1 year.

(b) An allotment under paragraph (a) of this section for the deduction of dues with respect to any employee terminates when—

(1) The agreement between the Department or Department Component and the exclusive representative involved ceases to be applicable to the employee; or

(2) The employee is suspended or expelled from membership by the exclusive representative.

(c)(1) Subject to paragraph (c)(2) of this section, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in the Department have membership in the labor organization, the Authority will investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the Department has a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

(2)(i) The provisions of paragraph (c)(1) of this section do not apply in the case of any appropriate unit for which there is an exclusive representative.

(ii) Any agreement under paragraph (c)(1) of this section between a labor organization and the Department or Department Component with respect to an appropriate unit becomes null and void upon the certification of an exclusive representative of the unit.

**§ 9901.916 Unfair labor practices.**

(a) For the purpose of this subpart, it is an unfair labor practice for the Department—

(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this subpart;

(2) To encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) To sponsor, control, or otherwise assist any labor organization, other

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than to furnish, upon request, customary and routine services and facilities on an impartial basis to other labor organizations having equivalent status;

(4) To discipline or otherwise discriminate against an employee because the employee has filed a complaint or petition, or has given any information or testimony under this subpart;

(5) To refuse, as determined by the Board, to negotiate in good faith or to consult with a labor organization, as required by this subpart;

(6) To fail or refuse, as determined by the Board, to cooperate in impasse procedures and impasse decisions, as required by this subpart;

(7) To enforce any issuance (other than an implementing issuance), or Governmentwide regulation, which is in conflict with an applicable collective bargaining agreement if the agreement was in effect before the issuance or regulation was prescribed.

(8) To fail or refuse otherwise to comply with any provision of this subpart.

(b) For the purpose of this subpart, it is an unfair labor practice for a labor organization—

(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this subpart;

(2) To cause or attempt to cause the Department to discriminate against any employee in the exercise by the employee of any right under this subpart;

(3) To coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) To discriminate against an employee with regard to the terms and conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) To refuse, as determined by the Board, to negotiate in good faith or to consult with the Department as required by this subpart;

(6) To fail or refuse, as determined by the Board, to cooperate in impasse procedures and impasse decisions as required by this subpart;

(7)(i) To call, or participate in, a strike, work stoppage, or slowdown, or picketing of the Department in a labor-management dispute if such picketing interferes with an agency's operations; or

(ii) To condone any activity described in paragraph (b)(7)(i) of this section by failing to take action to prevent or stop such activity; or

(8) To otherwise fail or refuse to comply with any provision of this subpart.

(c) Notwithstanding paragraph (b)(7) of this section, informational picketing which does not interfere with the Department's operations will not be considered an unfair labor practice.

(d) For the purpose of this subpart, it is an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by the labor organization, except for failure to meet reasonable occupational standards uniformly required for admission or to tender dues uniformly required as a condition of acquiring and retaining membership. This does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this subpart.

(e) The Board will not consider any allegation of an unfair labor practice filed more than 6 months after it occurred, unless the Board determines, pursuant to its regulations, that there is good cause for the late filing.

(f) Unfair labor practice issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except where an employee has an option of using the negotiated grievance procedure or an appeals procedure in connection with an adverse action, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

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(g) The expression of any personal view, argument, opinion, or the making of any statement which publicizes the fact of a representational election and encourages employees to exercise their right to vote in such an election, corrects the record with respect to any false or misleading statement made by any person, or informs employees of the Government's policy relating to labor-management relations and representation, will not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions—

(1) Constitute an unfair labor practice under any provision of this subpart; or

(2) Constitute grounds for the setting aside of any election conducted under any provision of this subpart.

**§ 9901.917 Duty to bargain and consult.**

(a) The Department or appropriate Component(s) of the Department and any exclusive representative in any appropriate unit in the Department, through appropriate representatives, will meet and negotiate in good faith as provided by this subpart for the purpose of arriving at a collective bargaining agreement. In addition, the Department or appropriate Component(s) of the Department and the exclusive representative may determine appropriate techniques, consistent with the operational rules of the Board, to assist in any negotiation.

(b) If bargaining over an initial collective bargaining agreement or any successor agreement is not completed within 90 days after such bargaining begins, the parties may mutually agree to continue bargaining, or either party may refer the matter to the Board for resolution in accordance with procedures established by the Board. At any time prior to going to the Board, either party may refer the matter to FMCS for assistance.

(c) If the parties bargain during the term of an existing collective bargaining agreement, or in the absence of a collective bargaining agreement, over a proposed change affecting bargaining unit employees' conditions of employment, and no agreement is reached within 30 days after such bargaining begins, the parties may mutu-

ally agree to continue bargaining, or either party may refer the matter to the Board for resolution in accordance with procedures established by the Board. Either party may refer the matter to FMCS for assistance at any time.

(d)(1) Management may not bargain over any matters that are inconsistent with law or the regulations in this part, Governmentwide rules and regulations, issuances and implementing issuances, or Executive orders.

(2) Except as otherwise provided in § 9901.910(d), management has no obligation to bargain or consult over a change to a condition of employment unless the change is otherwise negotiable pursuant to these regulations and is foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change.

(3) Nothing in paragraphs (b) or (c) of this section prevents management from exercising the rights enumerated in § 9901.910.

(e) If a management official involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Board in accordance with procedures established by the Board.

**§ 9901.918 Multi-unit bargaining.**

(a) Negotiations can occur at geographical or organizational levels within DoD or a Component with the local exclusive representatives impacted by the proposed change.

(b) Any such negotiations will—

(1) Be binding on all parties afforded the opportunity to bargain with representatives of DoD or the Component;

(2) Supersede all conflicting provisions of applicable collective bargaining agreements of the labor organization(s) affected by the negotiations; and

(3) Be subject to impasse resolution by the Board under procedures prescribed by the Board. In resolving impasses, the Board will ensure that agreement provisions are consistent with regard to all similarly situated employees. The determination as to

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which organizations are covered under multi-unit bargaining is not subject to review by the Board.

(c) When agreement is reached under this section, individual bargaining units cannot opt out of or veto the agreement.

(d) Any party may request the services of FMCS to assist with these negotiations.

(e) Labor organizations may request multi-unit bargaining, as appropriate. The Secretary has sole and exclusive authority to grant the labor organizations' request.

(f) The Department will prescribe implementing issuances on the procedures and constraints associated with multi-unit bargaining.

### § 9901.919 Collective bargaining above the level of recognition.

(a) Negotiations can occur at the DoD or Component level with labor organization(s) at an organizational level above the level of exclusive recognition. The decision to negotiate at a level above the level of recognition as well as the unions involved, is within the sole and exclusive discretion of the Secretary to determine and will not be subject to review.

(b) Any such agreement reached in these negotiations will—

(1) Be binding on all subordinate bargaining units of the labor organization(s) afforded the opportunity to bargain above the level of recognition, and on DoD and its Components, without regard to levels of recognition;

(2) Supersede all conflicting provisions of other collective bargaining agreements of the labor organization(s), including collective bargaining agreements negotiated with an exclusive representative at the level of recognition, except as otherwise determined by the Secretary;

(3) Not be subject to further negotiations with the labor organizations for any purpose, including bargaining at the level of recognition, except as the Secretary may decide, in his or her sole and exclusive discretion; and

(4) Be subject to review by the Board only to the extent provided by this subpart.

(c) When agreement is reached under this section, individual labor organiza-

tions or bargaining units cannot opt out of or veto the agreement.

(d) Negotiations will be subject to impasse resolution by the Board under procedures prescribed by the Board. In resolving impasses, the Board will ensure that agreement provisions are consistent with regard to all similarly situated employees. The determination as to which organizations are covered under national level bargaining is not subject to review by the Board;

(e) The National Guard Bureau and the Army and Air Force National Guard are excluded from coverage under this section. Where National Guard employees are impacted, negotiations at the level of recognition are authorized.

(f) The Secretary may require and a labor organization or organizations may request bargaining above the level of recognition, as appropriate. The Secretary has sole and exclusive authority to grant such requests; and

(g) The Department will prescribe implementing issuances on the procedures and constraints associated with collective bargaining above the level of recognition.

### § 9901.920 Negotiation impasses.

(a) If the Department and exclusive representative are unable to reach an agreement under §§ 9901.905, 9901.914, 9901.917, 9901.918, or 9901.919, either party may submit the disputed issues to the Board for resolution.

(b) The Board may take whatever action is necessary and not inconsistent with this subpart to resolve the impasse, to include use of settlement efforts.

(c) Pursuant to §§ 9901.907 and 9901.926, the Board's regulations will provide for a single, integrated process to address all matters associated with a negotiations dispute, including unfair labor practices, negotiability disputes, and negotiation impasses.

(d) Notice of any final action of the Board under this section will be promptly served upon the parties. The action will be binding on such parties during the term of the agreement, unless the parties agree otherwise.

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**§ 9901.921 Standards of conduct for labor organizations.**

Standards of conduct for labor organizations are those prescribed under 5 U.S.C. 7120, which is not modified.

**§ 9901.922 Grievance procedures.**

(a)(1) Except as provided in paragraph (a)(2) of this section, any collective bargaining agreement will provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in paragraphs (e), (f) and (h) of this section, the procedures will be the exclusive procedures for grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in paragraph (a) of this section will be fair and simple, provide for expeditious processing, and include procedures that—

(i) Assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) Assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) Provide that any grievance not satisfactorily settled under the negotiated grievance procedure is subject to binding arbitration, which may be invoked by either the exclusive representative or the Department.

(2) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (b)(1)(iii) of this section will, to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order a stay of any personnel action in a manner similar to the manner described in 5 U.S.C. 1221(c) with respect to the Merit Systems Protection Board and order the Department to take any disciplinary action identified under 5 U.S.C. 1215(a)(3) that is otherwise within the authority of the Department to take.

(3) Any employee who is the subject of any disciplinary action ordered under paragraph (b)(2) of this section may appeal such action to the same extent and in the same manner as if the Department had taken the disciplinary action absent arbitration.

(c) The preceding paragraphs of this section do not apply with respect to any matter concerning—

(1) Any claimed violation of 5 U.S.C. chapter 73, subchapter III (relating to prohibited political activities);

(2) Retirement, life insurance, or health insurance;

(3) Any examination, certification, or appointment;

(4) A removal taken under mandatory removal authority as defined in § 9901.712;

(5) Any subject not within the definition of *grievance* in § 9901.903 (e.g., the classification or pay of any position), except for an adverse action under applicable authority, including subpart G of this part, which is not otherwise excluded by paragraph (c) of this section; or

(6) A suspension or removal taken under 5 U.S.C. 7532.

(d) To the extent not already excluded by existing collective bargaining agreements, the exclusions contained in paragraph (c) of this section apply upon the effective date of this subpart, as determined under § 9901.102(b)(1).

(e)(1) An aggrieved employee affected by a prohibited personnel practice under 5 U.S.C. 2302(b)(1) which also falls under the coverage of the negotiated grievance procedure may raise the matter under the applicable statutory procedures, or the negotiated procedure, but not both.

(2) An employee is deemed to have exercised his or her option under paragraph (e)(1) of this section to raise the matter under the applicable statutory procedures, or the negotiated procedure, at such time as the employee timely initiates an action under the applicable statutory or regulatory procedure or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(3) Selection of the negotiated grievance procedure in no manner prejudices the right of an aggrieved party to request the Merit Systems Protection Board to review the final decision pursuant to 5 U.S.C. 7702 in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(f)(1) For appealable matters, except for mandatory removal offenses under §9901.712, an aggrieved employee may raise the matter under an applicable appellate procedure or under the negotiated grievance procedure, but not both. An employee will be deemed to have exercised his or her option under this section when the employee timely files an appeal under the applicable appellate procedures or a grievance in accordance with the provisions of the parties' negotiated grievance procedure, whichever occurs first.

(2) An arbitrator hearing a matter appealable under 5 U.S.C. 7701 or subpart H of this part is bound by the applicable provisions of this part.

(g)(1) This paragraph applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which paragraph (e) of this section applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (g)(1) of this section may elect not more than one of the procedures described in paragraph (g)(3) of this section with respect thereto. A determination as to whether a particular procedure for seeking a remedy has been elected will be made as set forth under paragraph (g)(4) of this section.

(3) The procedures for seeking remedies described in this paragraph are as follows:

(i) An appeal under 5 U.S.C. 7701 or under subpart H of this part;

(ii) A negotiated grievance under this section; and

(iii) Corrective action under 5 U.S.C. chapter 12, subchapters II and III.

(4) For the purpose of this paragraph, an employee is considered to have elected one of the following, whichever election occurs first:

(i) The procedure described in paragraph (g)(3)(i) of this section if such employee has timely filed a notice of appeal under the applicable appellate procedures;

(ii) The procedure described in paragraph (g)(3)(ii) of this section if such employee has timely filed a grievance in writing in accordance with the provisions of the parties' negotiated procedure; or

(iii) The procedure described in paragraph (g)(3)(iii) of this section if such employee has sought corrective action from the Office of Special Counsel by making an allegation under 5 U.S.C. 1214(a)(1).

(h)(1) An employee may challenge a rating of record issued under subpart D of this part, through either the negotiated grievance procedure or an administrative reconsideration process under §9901.409(h), but not both, so long as the rating of record has not been raised in connection with an appeal under the provisions of 5 U.S.C. 7701 or subpart H of this part. Once an employee raises an issue on his or her rating of record issue in an appeal under 5 U.S.C. 7701 or subpart H of this part, any pending grievance, arbitration, or request for administrative reconsideration under §9901.409(h), will be dismissed with prejudice.

(2) Final decision authority in the negotiated grievance procedure may rest with—

(i) An independent arbitrator; or

(ii) A panel consisting of an independent arbitrator, a union representative, and a management representative.

(3) An arbitrator or panel 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 supervisor or pay pool panel.

(i) An arbitrator or panel hearing a matter under this subpart is bound by all applicable laws, rules, regulations, including applicable provisions of this part, issuances, and implementing issuances.

## § 9901.923

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### § 9901.923 Exceptions to arbitration awards.

(a) Either party to arbitration under this subpart may file with the Board an exception to any arbitrator's award, except an award issued in connection with an appealable matter under § 9901.922(f) or matters similar to those covered under 5 U.S.C. 4303 and 7512 arising under other personnel systems, which will be adjudicated under procedures described in § 9901.807(g) and (h). Such procedures are adopted in this subpart for these purposes.

(b) In addition to the bases contained in 5 U.S.C. 7122, exceptions may also be filed by the parties based on the arbitrator's failure to properly consider the Department's national security mission or to comply with applicable issuances and implementing issuances. The Board may take such action concerning the award as is consistent with this subpart.

(c) If no exception to an arbitrator's award is filed under paragraph (a) of this section during the 30-day period beginning on the date of such award, the award is final and binding. Either party will take the actions required by an arbitrator's final award. The award may include the payment of back pay (as provided under 5 U.S.C. 5596 and 5 CFR part 550, subpart H).

(d) Nothing in this section prevents the Board from determining its own jurisdiction without regard to whether any party has raised a jurisdictional issue.

### § 9901.924 Official time.

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this subpart will be authorized official time for such purposes, including attendance at impasse proceedings, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this section may not exceed the number of individuals designated as representing the Department for such purposes.

(b) Any activities performed by any employee relating to the internal business of the labor organization, including but not limited to the solicitation of membership, elections of labor orga-

nization officials, and collection of dues, will be performed during the time the employee is in a nonduty status.

(c) Except as provided in paragraph (a) of this section, the Authority or the Board, as appropriate, will determine whether an employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority or the Board will be authorized official time for such purpose during the time the employee would otherwise be in a duty status.

(d) Except as provided in the preceding paragraphs of this section, any employee representing an exclusive representative or, in connection with any other matter covered by this subpart, any employee in an appropriate unit represented by an exclusive representative, will be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

(e) Official time for representational activities will not extend to the representation of employees outside the representative's bargaining unit, except for multi-unit bargaining and/or bargaining above the level of recognition, in accordance with §§ 9901.918 and 9901.919 and mutual agreement of the agency and the exclusive representatives involved.

### § 9901.925 Compilation and publication of data.

(a) The Board will maintain a file of its proceedings.

(b) All files maintained under paragraph (a) of this section will be open to inspection and reproduction in accordance with 5 U.S.C. 552 and 552a. The Board will establish rules in consultation with the Department for maintaining and making available for inspection sensitive information.

### § 9901.926 Regulations of the Board.

The Department may issue initial interim rules for the operation of the Board and will consult with labor organizations granted national consultation rights on the rules. The Board will prescribe and publish rules for its operation in the FEDERAL REGISTER.

**Department of Defense**

**§ 9901.928**

**§ 9901.927 Continuation of existing laws, recognitions, agreements, and procedures.**

(a) Except as otherwise provided by §§ 9901.905 or 9901.912, nothing contained in this subpart precludes the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or an agreement that is otherwise consistent with law, the regulations in this part and DoD or Component issuances between the Department or a Component thereof and an exclusive representative of its employees, which is entered into before the effective date of this subpart, as determined under § 9901.102(b)(1).

(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838 or any

other Executive order, in effect on the effective date of this subpart (as determined under § 9901.102(b)(1)), will remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this subpart or by implementing issuances or decisions issued pursuant to this subpart.

**§ 9901.928 Savings provisions.**

This subpart does not apply to grievances or other administrative proceedings already pending on the date of coverage of this subpart, as determined under § 9901.102(b)(1). Any remedy that applies after the date of coverage under any provision of this part and that is in conflict with applicable provisions of this part is not enforceable.