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TIME TO BITE THE BULLET: FIXING FEDERAL LAW ENFORCEMENT PAY AND BENEFITS

HEARING

BEFORE THE

SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

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TIME TO BITE THE BULLET: FIXING FEDERAL LAW ENFORCEMENT PAY AND BENEFITS

TUESDAY, JULY 20, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2203, Rayburn House Office Building, Hon. Jo Ann Davis (chairwoman of the subcommittee) presiding.

Present: Representatives Jo Ann Davis of Virginia, Davis of Illinois, Norton and Van Hollen.

Present: Ron Martinson, staff director; Chad Bungard, deputy staff director and chief counsel; Chris Barkley and James Boland, professional staff members; Detgen Bannigan, clerk; John Landers, detailee; Tania Shand, minority professional staff member; and Teresa Coufal, minority assistant clerk.

Ms. DAVIS OF VIRGINIA. The Subcommittee on Civil Service and Agency Organization will come to order.

I want to begin by thanking everyone for being here today. We will be joined by a few more members on the subcommittee, but we are going to go ahead and start so that we do not hold everyone up.

This is an issue of the utmost importance to me and I know a lot of other Members of Congress. A year ago, the subcommittee held a hearing on the need for compensation and benefits reform for Federal law enforcement officers. It does not seem like it has been a year ago, but I guess it has been. The hearing evaluated the existing inequalities within the Federal law enforcement community and addressed several piecemeal approaches relating to law enforcement officer compensation and benefits reform.

When I use the term "law enforcement officer," I mean it in the broad sense, which is the correct sense. As pointed out at the last hearing, when law enforcement officials are killed in the line of duty, their names are inscribed as law enforcement officers on the National Law Enforcement Officers Memorial. Sadly, however, some of those very officers are not recognized as law enforcement officers when they are alive for pay and retirement purposes. This just does not sit very well with me, and with many others.

It was encouraging at that hearing to hear the Department of Justice witness recognize this current all-or-nothing disparate treatment among law enforcement personnel, and that DOJ is in fact a strong proponent of eliminating these disparities. There is no

doubt that the Federal law enforcement retirement system must be modernized to reflect the dangers and challenges that await our Nation's protectors in this post-September 11 world.

Another question broached at the hearing was how do we make sure we are paying our Federal law enforcement agents properly. There are several factors and questions to consider such as: Is the current pay scale meeting the needs of law enforcement officers in high cost of living areas? Is the current general schedule classification and basic pay system sufficiently flexible to address specific law enforcement problems? How do we resolve differences in pay flexibility among agencies, such as employees for DOD and DHS, where law enforcement employees will be converted to more labor market and performance systems? How do we resolve the perceptions of inequity and existing inconsistencies in premium pay entitlements? And how do we create a premium pay system that eliminates the pay compression for GS criminal investigators, while not creating another compression problem or inversion with higher-level employees?

Something needs to be done to correct the inconsistencies and inadequacies that currently exist for our folks who are on the front line risking their lives for our country. We have a lot of highly motivated, talented employees out there and we do not want to lose them or treat them unfairly. That is why shortly after the last hearing I introduced the Federal Law Enforcement Pay and Benefits Parity Act which was subsequently signed into law on December 19 of last year. That act required the Office of Personnel Management to submit a report and recommendations to Congress on eliminating disparities in pay and benefits entitlements among different groups of Federal law enforcement officers. I thought that report, which was due on April 30, 2004 would never get here. It was finally issued last Thursday, July 15, 2004. I would like to commend OPM for its hard work in putting together a thorough and thoughtful report on Federal law enforcement pay and benefits, even if it was late.

The report makes several specific recommendations, but they are all subsumed by OPM's over-arching recommendation that Congress grant it the administrative authority, subject to congressional oversight, to work in conjunction with the Attorney General and other stakeholders to modernize the entire pay and retirement system structure for the Federal law enforcement community, including modernizing the definition of law enforcement officer for coverage purposes.

OPM believes an administrative solution strikes the appropriate balance between the Federal Government's interests on one hand, and the relevant agencies' needs on the other. I look forward to hearing from OPM on all of its recommendations and findings, and the stakeholders on their particular thoughts on the report.

All of your comments today will be extremely helpful as the subcommittee continues to pursue its ongoing efforts to reform Federal law enforcement pay and benefits aiming toward one government-wide solution.

We will wait just a few seconds here, and our ranking member has come in, just at the opportune time because I am about to recognize him for an opening statement.

Mr. DAVIS OF ILLINOIS. Thank you very much.

Ms. DAVIS OF VIRGINIA. You are very welcome, Mr. Davis. It is always a pleasure to have you.

Mr. DAVIS OF ILLINOIS. I will tell you, after being up all night coming from Honolulu.

Ms. DAVIS OF VIRGINIA. Our heart breaks through that you are just getting in from Honolulu, Hawaii. [Laughter.]

We will give you a second to get your thoughts together.

Mr. DAVIS OF ILLINOIS. Thank you very much, Madam Chairwoman.

Federal officers, in varying degrees and capacities, uphold the Constitution and protect the public welfare. Over the years, however, there have been much debate and controversy, with no permanent resolution, on which types of Federal employees should be classified as "law enforcement officers," and as such should receive enhanced pay and retirement benefits.

In 1988, the Anti-Drug Abuse Act established the National Advisory Commission on Law Enforcement. The Commission studied pay benefits and other issues related to the recruitment and retention of employees defined as law enforcement under Federal retirement laws. The Commission's report, which was released in April 1990, made several recommendations for interim pay enhancements for law enforcement officers and suggested that the Office of Personnel Management, OPM, conduct a further study on the need for a new pay system for Federal law enforcement.

The Commission's report did note, however, that the statute defining Federal law enforcement officer was broad, encompassing both traditional positions within the field and less traditional positions not generally considered part of the law enforcement community.

As recommended by the Commission, Congress enacted the Federal Employees Pay and Comparability Act of 1990, which enhanced law enforcement pay and directed OPM to conduct a study of the pay and job evaluation for Federal law enforcement officers. OPM, along with the 45-member advisory committee drawn from law enforcement agencies and employee groups, produced in September 1993 a report entitled, A Plan to Establish a New Pay and Job Evaluation System for Federal Law Enforcement Officers.

Two months later, the Subcommittee on Post Office and Civil Service held a hearing on the report and its findings. In 1999, this subcommittee held a hearing on this issue entitled, Law Enforcement Retirement: Who Qualifies and Why. Last year, the subcommittee held a hearing on Federal law enforcement personnel entitled, How Can We Fix an Imbalanced Compensation System? Hearings have been held. Reports have been written, and the problem continues.

OPM's latest report may make the difference. Released last week, OPM's report, Federal Law Enforcement Pay and Benefits, chronicles the legislative and historic missteps that have led to the ad hoc approach to law enforcement classification, pay and benefits. I agree, however, with OPM's conclusion that a comprehensive and integrated governmentwide approach is needed to finally address this problem.

OPM recommends that Congress give it regulatory authority to establish a governmentwide framework for law enforcement retirement, classification and basic pay and premium pay systems. No specifics were offered. I would be interested in seeing a draft legislative proposal. Furthermore, I would like to hear the witnesses' view on the OPM's report and any recommendations that they may have.

Again, Madam Chairwoman, I thank you for holding this hearing and look forward to hearing the witnesses.

[The prepared statement of Hon. Jo Ann Davis follows:]

STATEMENT OF THE HONORABLE DANNY K. DAVIS
AT THE SUBCOMMITTEE ON CIVIL SERVICE
AND AGENCY ORGANIZATION
HEARING ON

Time to Bite the Bullet:
Fixing Federal Law Enforcement Pay and Benefits

Tuesday, July 19, 2004

Chairwoman Davis, federal officers, in varying degrees and capacities, uphold the Constitution and protect the public welfare. Over the years, however, there have been much debate and controversy, with no permanent resolution, on which types of federal employees should be classified as "law enforcement officers," and as such, should receive enhanced pay and retirement benefits.

In 1988, the Anti-Drug Abuse Act established the National Advisory Commission on Law Enforcement (the Commission), which studied pay, benefits, and other issues related to the recruitment and retention of employees defined as "law enforcement" under federal retirement laws. The Commission's report, which was released in April 1990, made several recommendations for interim pay enhancements for law enforcement officers and suggested that the Office of Personnel Management (OPM) conduct a further study on the need for a new pay system for federal law enforcement.

The Commission's report did note, however, that the statue defining "federal law enforcement officer" was broad, encompassing both traditional positions within the field and less traditional positions not generally considered part of the law enforcement community.

As recommended by the Commission, Congress enacted the Federal Employees Pay and Comparability Act of 1990 (FEPCA), which enhanced law enforcement pay and directed OPM to conduct a study of the pay and job evaluation for federal law enforcement officers. OPM, along with a 45-member advisory committee drawn from law enforcement agencies and employee groups, produced in September 1993 a report entitled, "A Plan to Establish a New Pay and Job Evaluation System for Federal Law Enforcement Officers. Two months later, the Subcommittee on Post Office and Civil Service held a hearing on the report and its findings.

In 1999, this Subcommittee held a hearing on this issue entitled, "Law Enforcement Retirement: Who Qualifies and Why?" Last year the Subcommittee held a hearing on federal law enforcement personnel entitled, "How Can We Fix an Imbalanced Compensation System?"

Hearings have been held, reports have been written, and the problem continues. OPM's latest report may make the difference. Released last week, OPM's report, "Federal Law Enforcement Pay and Benefits," chronicles the legislative and historic missteps that have led to the ad hoc approach to law enforcement classification, pay and benefits.

I agree with OPM's conclusion that a comprehensive and integrated Governmentwide approach is needed to finally address this problem. OPM recommends that Congress give it regulatory authority to establish a governmentwide framework for law enforcement retirement, classification and basic pay, and premium pay systems. No specifics were offered, but I would be interested in seeing a draft legislative proposal.

Furthermore, I would like to hear the witnesses' views on the OPM report and any recommendations they may have.

Thank you.

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Ms. DAVIS OF VIRGINIA. Thank you, Mr. Davis. It is good to have you here with us today. As always, we appreciate your input.

I ask unanimous consent that all Members have 5 legislative days to submit written statements and questions for the hearing record, and that any answers to written questions provided by the witnesses also be included in the record.

Without objection, it is so ordered.

I ask unanimous consent that a statement from the Federal Law Enforcement Officers Association be included in the record.

Without objection, it is so ordered.

I ask unanimous consent that all exhibits, documents and other materials referred to by Members and the witnesses may be included in the hearing record, and that all Members be permitted to revise and extend their remarks.

Without objection, it is so ordered.

On the first panel today, we are going to hear from Mr. Ronald Sanders, Associate Director for Strategic Human Resources Policy at the U.S. Office of Personnel Management. It is standard practice for this committee to administer the oath to all witnesses at one time. If all the witnesses who are here with us today who will be testifying could please stand, including any of those who may help in answering the questions. I will administer the oath. Anyone who is going to be helping Mr. Sanders answer the question, you are going to need to be under oath as well. My goodness, you have an entourage with you.

If you would please raise your right hands.

[Witnesses sworn.]

Ms. DAVIS OF VIRGINIA. Let the record state that the witnesses have answered in the affirmative and you all may be seated.

Mr. Sanders, we thank you again for being here with us today. We have your full testimony that we will put in the record, but if you would like to summarize for 5 minutes, we would love to hear from you.

STATEMENT OF RONALD SANDERS, ASSOCIATE DIRECTOR FOR STRATEGIC HUMAN RESOURCES POLICY, U.S. OFFICE OF PERSONNEL MANAGEMENT

Mr. SANDERS. Thank you, Madam Chairwoman and members of the subcommittee. OPM Director Kay Coles James has asked me to testify on her behalf this morning, and we welcome the opportunity to address a vital subject, pay and benefits disparities within the Federal law enforcement community.

As its title indicates, this hearing is a key milestone in the subcommittee's ongoing efforts to adopt a comprehensive, integrated solution to those disparities. The administration shares that goal and we sincerely appreciate your leadership in that regard.

The urgency is clear and present. One need only consider the dramatic challenges that have confronted the Federal law enforcement community in the wake of the terrorist attacks of September 11 and the beginning of our Nation's all-out war on terrorism. The specter of those horrific events and the ongoing need to secure our homeland demand that we pay careful attention to the strategic management of our frontline Federal law enforcement personnel.

My remarks today will focus on our recent report to Congress on Federal law enforcement pay and benefits. That report was submitted last week and this hearing begins the process of examining, discussing and acting on its conclusions. It focuses on three critical areas: retirement benefits, classification and basic pay, and premium pay.

In addition, we concentrate our analysis on two categories of employees with law enforcement responsibilities: one, those who qualify as law enforcement officers, or LEOs, under the civil service and Federal employee retirement systems; and two, those other law enforcement employees who have arrest authority, but who do not otherwise qualify as LEOs.

The report and this hearing come at a pivotal time for the Federal law enforcement community. The demands on Federal law enforcement agencies and their professionals are more global, more dangerous and more dynamic than ever before, rapidly evolving in ways that we never anticipated just a few years ago. There is no doubt that the Federal law enforcement work will continue to evolve at a dramatic rate in this post-September 11 world.

However, the rules that govern the pay and retirement of our law enforcement personnel have not kept pace. They do not reflect this reality and remain inflexible and fragmented. LEOs today are covered by a rigid half-century-old retirement structure, an outdated classification and basic pay system that is not sufficiently sensitive to their unique labor markets and performance requirements, and a confusing patchwork of premium payments.

For example, we found that with respect to LEO retirement coverage and benefits, the evolution of Federal law enforcement work has exacerbated the difficulty of applying the circa 1948 definition of law enforcement officer to modern missions and work situations. Legislation and litigation have extended enhanced LEO retirement benefits to some within the broader law enforcement community, but not others, exacerbating differences in the retirement coverage of similarly situated officers. LEO retirement provisions encourage experienced officers to retire at an early age, when it may be in the interest of law enforcement agencies to retain these employees just as they are reaching their peak in terms of experience.

With respect to basic pay for LEOs and other law enforcement personnel with arrest authority, the 50-plus-year-old general schedule system does not provide for sufficient flexibility to address law enforcement-specific classification and pay problems, which may vary by occupation, grade level, location and level of performance.

With the creation of new, more flexible basic pay systems for employees, including over 50,000 law enforcement personnel as we have defined them in the Departments of Homeland Security and Defense on the horizon, other law enforcement agencies still bound by the general schedule will be at a significant disadvantage.

Finally, with respect to premium pay rules that cover LEOs and others with arrest authority, there are complex pay differences among them and between them, and this may be exacerbated by the fact that Congress has provided administrative authority to set premium pay rules to FAA, TSA and DOD, the latter in conjunction with OPM. Extending that authority governmentwide would

ensure needed consistency, while allowing for flexibility to meet unique agency mission requirements.

Thus, it is clear that considerable and sometimes confusing differences currently exist among law enforcement personnel with respect to retirement, basic pay and premium pay. While the root causes may vary, we believe this patchwork of differences, in particular disparities between agencies that have flexibilities and those that do not, is counterproductive to the 21st century Federal law enforcement mission.

To meet that mission, our report recommends that Congress provide OPM with broad administrative authority to establish a governmentwide framework for law enforcement retirement, classification and pay, and premium pay. Such authority would be exercised with the concurrence of the Attorney General and in consultation with employing agencies and employee stakeholders. This framework would be tailored specifically for law enforcement jobs, providing all law enforcement agencies with the same flexibilities that only a few now enjoy, but with OPM playing a central coordinating role responsible for balancing governmentwide interests with unique agency needs, missions and cultures.

With respect to retirement, this framework would vest OPM with authority to modernize the definition of law enforcement officer and establish a flexible benefits structure that comports with it. One option under consideration would create a second LEO retirement tier with benefits falling between current law enforcement retirement and regular civil service retirement benefit levels.

With respect to classification and basic pay, this framework would provide all law enforcement agencies with flexibility similar to those at DHS, DOD and other agencies enjoy, but subject to central OPM coordination.

Finally, with respect to premium pay, the framework would provide a flexible administrative authority so that premium pay rules can be rationalized and modified to address current and emerging mission needs.

While we separately examined each of these three policy areas, we believe our recommendations should be acted on as a package. This package approach is imperative, given that the three areas are inextricably interrelated. We believe that taken together our recommendations will ensure that OPM and the Federal law enforcement community are equipped to balance agency and government interests in strategically managing some of our Nation's most valued and vital human resources. That is a goal that I am certain we all share.

Madam Chairwoman, on behalf of Director James, I want to thank you for the opportunity to testify on this vital topic. I will be happy to answer any questions you or members of the subcommittee may have.

[The prepared statement of Mr. Sanders follows:]

Statement of

Dr. Ronald P. Sanders
Associate Director for Strategic Human Resources Policy
U.S. Office of Personnel Management

Before the

Subcommittee on Civil Service and Agency Organization
Committee on Government Reform
United States House of Representatives

On

Time To Bite the Bullet: Fixing Federal Law Enforcement Pay and Benefits

July 20, 2004

Madam Chairwoman and Members of the Subcommittee:

Office of Personnel Management Director (OPM) Kay Coles James has asked me to testify on her behalf this morning, and we welcome the opportunity to address a vital subject: pay and benefits disparities within the Federal law enforcement community. As its title indicates, this hearing is a key milestone in the Subcommittee's ongoing efforts to adopt a comprehensive, integrated solution to those disparities. The Administration shares that goal, and we sincerely appreciate your leadership in that regard. The urgency is clear and present. One need only consider the dramatic challenges that have confronted the Federal law enforcement community in the wake of the Oklahoma City

bombing in 1995, the terrorist attacks of September 11, 2001, and our Nation's continuing all-out war on terrorism. The specter of those horrific events and the ongoing need to secure our homeland demand that we pay careful attention to the strategic management of our front-line Federal law enforcement personnel.

My remarks today will focus on our recent Report to Congress on Federal Law Enforcement Pay and Benefits, as required by section 2(b) of the Federal Law Enforcement Pay and Benefits Parity Act of 2003, Public Law 108-196 (December 19, 2003). The Congress asked OPM to submit a report providing a comparison of classification, pay and benefits among Federal law enforcement officers (LEOs) throughout the Government (that is, in all three branches) and making recommendations to correct any unwarranted differences. The result of months of intensive review, deliberation, and coordination with various law enforcement agencies and key employee stakeholders, that report was submitted last week, and this hearing begins the process of examining, discussing, and acting on its conclusions.

The report focuses on these critical areas: retirement benefits, classification and basic pay, and premium pay. In addition, we concentrate our analysis on two categories of employees with law enforcement responsibilities: (1) those employees who qualify as law enforcement officers under the Civil Service Retirement System (CSRS) and the Federal Employees' Retirement System (FERS) laws and regulations, and (2) those other law enforcement employees who have authority to make arrests under Federal law (or an equivalent authority to detain persons under military law) but who do not otherwise qualify as LEOs.

The report and this hearing come at a pivotal time for the Federal law enforcement community. The demands on Federal law enforcement agencies and their professionals are more global, more dangerous, and more dynamic than ever before, rapidly evolving in ways that we never anticipated just a few years ago. The mission of Federal law enforcement has expanded, especially since the terrorist attacks of 9/11. Federal law enforcement, inspection, and police forces currently include highly-trained,

specialized units who must be in a constant state of readiness, and there is no doubt that Federal law enforcement work will continue to evolve at a dramatic rate in the post-9/11 world.

However, the rules that govern the pay and retirement of our law enforcement personnel have not kept pace; they do not reflect this reality and remain fragmented and inflexible. LEOs today are covered by a rigid, half-century old retirement structure, an outdated classification and basic pay system that is not sufficiently sensitive to their unique labor markets and performance requirements, and a confusing patchwork of premium payments. For example, we found that:

With respect to LEO retirement coverage and benefits:

- The evolution of the Federal law enforcement profession has exacerbated the difficulty of applying the circa 1948 definition of "law enforcement officer" to modern missions and work situations.

- Legislation has extended enhanced LEO retirement benefits to some within the broader Federal law enforcement community, but not others, exacerbating differences in the retirement coverage of similarly situated personnel.

- Merit Systems Protection Board and Federal court decisions have created unwarranted differences in LEO retirement coverage, creating morale and administrative problems for employing agencies.

- LEO retirement provisions encourage experienced LEOs to retire at an early age, when it may be in the interest of law enforcement agencies to retain these employees, as they are reaching their peak in terms of experience.

With respect to the classification and basic pay for LEOs and other law enforcement personnel with arrest authority:

- The 50+-year old General Schedule (GS) system does not provide sufficient flexibility to address law enforcement-specific classification and pay problems, which may vary by occupation, grade level, location, and level of performance.

- Differences in pay flexibilities among agencies can harm morale, create staffing disruptions, and increase Government costs unnecessarily. With the creation of new basic pay systems for employees (including law enforcement personnel) in the Department of Homeland Security (DHS) and the Department of Defense (DoD) on the horizon, we anticipate that roughly 50,000 law enforcement employees could be converted from the GS system to basic pay systems that are more flexible and sensitive to labor markets and performance, potentially leaving other law enforcement agencies still bound by the General Schedule at a disadvantage.

- Pending legislative proposals (i.e., H.R. 466, H.R. 1676, and S. 985) would provide across-the-board approaches to problems that require far more targeted solutions, and, as a result, they would increase costs unnecessarily and produce unintended negative consequences.

And, finally, with respect to the premium pay rules that cover LEOs and other law enforcement personnel with arrest authority:

- While most Federal law enforcement employees are covered by the standard premium pay provisions established in title 5 of the United States Code, there are other complex premium pay differences among and between LEOs and other law enforcement personnel.

- Caps on aggregate premium pay for Federal Labor Standards Act (FLSA)-exempt employees serve important purposes but also lead to pay compression. However, pending legislative proposals to bar their application to availability pay for

criminal investigators would result in excessive pay increases for affected employees, produce pay inversions, and create new inequities.

- Moreover, codifying premium pay rules in law precludes rapid response to changing agency mission requirements. Administrative authority to rationalize and modify these rules would provide far more flexibility. In recent years, Congress has provided such flexibility to the Federal Aviation Administration, the Transportation Security Administration, and (with OPM) the Department of Defense.

Thus, it is clear that considerable and sometimes confusing differences currently exist among law enforcement personnel with respect to retirement, classification and basic pay, and premium pay. And, while their root causes vary, we believe these differences (in particular, disparities between agencies that have pay flexibilities and those that do not) are counterproductive to the 21st Century Federal law enforcement mission. As is always the case, particular differences will have had their original purposes and original proponents. OPM, like the Congress and particularly this Committee, carries the special responsibility to consider an issue or specific circumstance using a Governmentwide perspective that applies our expertise and extensive experience at developing solutions that work for the agencies, for employees and their representatives, and for the whole Nation.

To meet this mandate, our report recommends that Congress provide OPM with broad administrative authority to establish a Governmentwide framework for law enforcement retirement, classification and basic pay, and premium pay. Such authority would be exercised with the concurrence of the Attorney General and in consultation with employing agencies, as well as Federal law enforcement professionals and their representatives. This framework would be tailored specifically for law enforcement jobs, providing all law enforcement agencies with the same flexibilities that only a few now enjoy, but with OPM playing a central, coordinating role, responsible for balancing Governmentwide interests with unique agency needs, missions and cultures and ensuring

that, insofar as possible, changes do not unfairly affect those who are covered by the current structure.

We believe such a framework would allow law enforcement agencies to create contemporary and effective human resources systems for their front-line professionals, while still ensuring overall consistency and commonality where appropriate.

- With respect to retirement, this framework would continue to acknowledge the Government's need for a "young and vigorous" law enforcement corps, but it would vest OPM with the authority to modernize the definition of LEO, and establish a more responsive benefits structure that will give agencies maximum flexibility for recruitment and retention of experienced personnel. One option under consideration would create a second LEO retirement tier with benefits falling between current law enforcement retirement and regular civil service retirement benefit levels.

- With respect to classification and basic pay, this framework would provide all law enforcement agencies with flexibilities similar to those that DHS, DoD, and other agencies enjoy, but subject to central OPM coordination Governmentwide. In so doing, it would allow agencies to make strategic pay decisions that reflect their unique missions, labor markets, cultures, and workforces, but with OPM coordinating such things as pay ranges and pay adjustments among affected agencies to ensure against adverse consequences.

- And, finally, with respect to premium pay, the framework would provide a flexible administrative authority so that premium pay rules can be more easily modified to address current and emerging mission needs, prevailing practices, or policy/administrative problems. While similar rules would apply to similarly situated employees, the new system would provide the flexibility to establish special rules to respond to unique and emerging agency circumstances.

While we have separately examined each policy area—retirement benefits, classification and basic pay, and premium pay—we believe our recommendations should be acted on as a package. This "package" approach is imperative, given that the three areas we examined are inextricably interrelated, each impacting the others to some greater or lesser extent; for example, basic pay and classification elements impact retirement system computation, which in turn may affect the retirement creditability of premium pay.

We believe that taken together, these recommendations will provide the administrative authority and flexibility to support a more strategic, mission-centered system of pay and retirement benefits for our law enforcement professionals. However, OPM understands that with greater authority and flexibility comes greater accountability. We are ready to accept that accountability and believe that by consolidating and coordinating it where it is now diffuse, OPM and the Federal law enforcement community will be better able to ensure that both agency and Governmentwide interests are balanced in strategically managing some of our Nation's most vital and valued human resources. That is a goal that I am certain we all share.

Madam Chairwoman, on behalf of Director James, I want to thank you for the opportunity to testify on this vital topic. I will be happy to answer any questions you and the Members of the Subcommittee may have.

Ms. DAVIS OF VIRGINIA. Thank you very much, Mr. Sanders. We appreciate your being here this morning.

I generally go to my ranking member, but I am going to ask a few questions first here, if our ranking member does not mind.

As you know, OPM gets blamed for a lot of things that are not its fault, but rather Congress', which a lot of times is true, like many of the disparities pointed out in your report. I see that OPM wants to take full responsibility of both making the rules and carrying them out. Did anyone warn you to watch out for what you wish for because you just might get it?

Mr. SANDERS. We did so with some trepidation because this is a huge, complex problem. It has been growing literally for five-and-a-half decades. On the other hand, we believe that now accountability for the law enforcement community, particularly their pay and retirement benefits, is very diffuse. It is spread among a number of agencies at a time when the need for coordination and cohesion among those law enforcement agencies in meeting mission requirements is at an all-time high.

So working with the Attorney General, we believe that by concentrating and consolidating that accountability, as difficult as the problems may be, will provide for a more integrated strategic solution to these problems, bring about consistency where it is appropriate, but balance the need for agency flexibility where that makes sense as well.

Ms. DAVIS OF VIRGINIA. Then you cannot come back and blame us if you do it.

In all seriousness now, I am deeply disappointed that your report and recommendations simply ignored groups seeking LEO status, solely because they did not have arrest authority. Does your exclusion of these groups from the report mean that OPM would ignore them if Congress granted the authority you seek to create a comprehensive pay and retirement system, simply because they do not have arrest authority?

Let me give you two more questions on the same subject, and then you can answer them all. And if your answer is that you will not ignore them, why are they excluded from this report? Then do you intend to ignore the groups that do not have arrest authority, even if they are part of the larger law enforcement community? Or are you planning to take away coverage from currently covered occupations that do not have arrest authority?

I am referring now to, you have cooks and support staff in the prisons who do not have arrest authority, yet they are considered LEOs and they get all the benefits. Yet you have Customs inspectors who do not get the benefits.

Mr. SANDERS. Let me speak to the last question first, because I know that is on a lot of folks' minds. Let me respond in two respects as well: one, with respect to prison support personnel; the other more generally because I know that some are concerned about losing their current LEO status.

With respect to prison support personnel, Congress extended LEO coverage to them in the 1950's for a variety of reasons. To be sure, they are in theory supposed to meet physical requirements; to be sure, they do have limited detention authority under the clas-

sic definition of investigate, apprehend and detain, how we have defined LEOs today.

To be quite candid, we did not choose to question that wisdom. Congress did it for a variety of reasons, and those reasons may still exist. We just did not focus on them. Instead, we tried to sharpen our focus on the law enforcement community as it is more traditionally defined. You have already pointed this out, Madam Chairwoman, the sort of conventional definition of law enforcement officer is far broader than the more restrictive definition that the retirement systems provide for coverage. I want to speak to that.

So we focused on those who meet the classic definition and those with arrest authority for a particular reason. For those that have LEO status today, while it is premature to talk about whether they would be grandparented or anything like that, because we just proposed this authority and Congress certainly has not had a chance to act on it. I can tell you this, we are extremely sensitive to the concerns about folks who have that status today and are worried about losing it.

Given the uncertainties of the future, particularly congressional action, there is no way that I could promise or guarantee that status will not be affected. I can tell you that we are very sensitive to that. I can tell you that agencies are very sensitive to that. In trying to balance governmentwide interests with agency interests, employee interests are part of that equation as well. Frankly, the last thing we would ever try to do intentionally is to stop agency operations in the exercise of the authority we have asked for.

So while I cannot promise anything, what I can say to those who have that status today we are sensitive to that concern. We know you have made major life decisions based on the expectations that you have, and we will do everything we can to respect and honor them.

Now, to the groups that were excluded, they were excluded deliberately. Let me take us back to first principles, this notion of a young and vigorous work force. We believe that principle, while it needs to be modernized, is as valid today as it was in 1948. When you think about that first principle, there are a number of consequences and implications from it. What it says is that the government in certain circumstances needs a young and vigorous work force. That is the principle I am talking about. And that in order to meet that need, it takes extraordinary action. It says to employees, you cannot work beyond this age. It says you cannot start work beyond this age. It says you are going to have a shortened career whether you like it or not because there are rigorous physical demands in the job. That is the young and vigorous.

Now, if you buy that first principle, that is the reason we have enhanced retirement benefits, to say to those employees that while we will take extraordinary action to limit the length of your career, we want to make sure that when you retire after long and faithful and honorable service, that you have a pension that is as financially viable as a regular civil servant who gets to work for 30 or 35 years. That is the reason for the enhanced benefits.

So again, if you buy the first principle, the reason that we have excluded certain groups from coverage of the report and our recommendations is because we do not believe, based on the analysis

that we have done, that there are sufficient reasons for a young and vigorous work force of, fill in the blank; let me be candid because I think we know who we are talking about. A young and vigorous work force of assistant U.S. Attorneys, I think you could make a compelling case that you need just the opposite. That is probably not right, because that is old and decrepit. [Laughter.]

What I mean is seasoned and experienced.

Ms. DAVIS OF VIRGINIA. Old and experienced.

Mr. SANDERS. Seasoned and experienced. I do not mean to make light of it, because I know their concerns are foremost in their own eyes, but the same thing with IRS revenue officers. I know that has been a proposal as well. If there is a compelling government interest to truncate their careers, to say we need a young and vigorous work force because of the physical demands on he job, then so be it. That is the part of the definition that we think we need to modernize.

The reason we have concentrated on the classic definition, and there is no intention to repeal that classic definition of investigate, apprehend and detain, but we believe that the clearest rationale for additional consideration should focus on those people who have arrest authority, because there is a clear nexus between the exercise of that arrest authority to potentially having to use deadly force in the performance of their duties, to actually go forward into danger, rather than retreat from it. We believe that there is compelling reason to consider them for some additional enhancements, but not those others where, again, we see no evidence that there is a need for a young and vigorous requirement with all of the consequences thereof.

Ms. DAVIS OF VIRGINIA. I will come back to that. I am going to yield now to my ranking member, Mr. Davis, for questions.

Mr. DAVIS OF ILLINOIS. Thank you very much, Madam Chairwoman.

Following up, are there other characteristics of law enforcement aside from the youthfulness of the work force and the danger that would lend itself to enhanced benefits or pay?

Mr. SANDERS. I think there are, but let me qualify my answer because I will go back and belabor the point with regard to that first principle. This has nothing directly to do with danger or threat or hazard. There are other ways to compensate employees for that. It has everything to do with the government taking extraordinary action to shorten people's careers because the government has made the judgment that they cannot work as long as others, whether they want to or not.

So what are some of those characteristics? Again, this is based on the analysis that led to our report, so I would characterize it as preliminary. Much more intensive work needs to be done with the law enforcement agencies. But if you take, for example, guard or police forces that have traditionally fallen short of the traditional LEO definition, even though it has been extended to some. For the most part, uniformed police forces in the executive branch are not covered by LEO retirement. That may have been appropriate some time ago, but if you look at those police forces today, while many of them may not meet the primary duty test of law enforcement officers, there are others of them who are on such elite units as

SWAT teams, explosive ordnance disposal teams, hostage rescue teams.

There is compelling reason to make sure that they are vigorous. I will not use the word "young" because I think the definition of "young" has frankly changed over the last five-and-a-half decades. The physical capabilities of a 50-year-old in 1948 are far different than what they are today, speaking personally. But if you look at those elite units; if you look at what had been traditionally guard or police forces, or inspectors for that matter who 5 years ago, frankly, we never thought that they would be on the front lines in antiterrorism efforts, and yet today they find themselves there.

So that is part of our analysis in trying to modernize the definition to extend it to those emerging law enforcement occupations, duties, responsibilities that frankly no one thought of in 1948 or the last time that this particular law has been visited.

Mr. DAVIS OF ILLINOIS. Would you give us an example of how broad and how deep the disparities might be in different areas? Are there categories of personnel where there is a big difference between their pay and retirement benefits versus others?

Mr. SANDERS. Yes, sir. There are a couple of fairly notable examples. Let's take uniformed police. There are four uniformed police forces, two in the executive branch, one in the Judicial and one in the Legislative, the Capitol Hill Police, that have LEO coverage, in contrast to other uniformed police forces in DOD or DHS, Veterans Affairs, that do not. When they operate in the same labor market, that is problematic.

Those same agencies, particularly the police forces in the Capitol and the legislative branch and the Judicial Branch, also enjoy significant pay flexibility. So if you look at the full performance level frontline officer in those agencies compared to Federal Protective Service, there are wide disparities in pay.

As I indicated earlier, those are symptoms. The root cause is the flexibility. Some have it; some do not. As DOD and DHS move toward a system that allows them, and I cannot say yet whether they will exercise this, but assume for the moment they will, they are moving toward a day when they have the authority in conjunction with OPM to develop a law enforcement-specific set of personnel policies and rules, particularly governing compensation. As more and more move in that direction, you have some with flexibilities, some without, those disparities will simply increase.

Is it a matter of urgency now? No, but this is an opportunity to get ahead of the game.

Mr. DAVIS OF ILLINOIS. How do Federal law enforcement officials compare, let's say, with State and local officials in pay classification and retirement benefits?

Mr. SANDERS. Those comparisons are not easy to make. With uniformed police, even the duties of a beat cop in LA or New York are probably different than uniformed police in the Federal Government. Nevertheless, so let me qualify the comparisons. Here is what the data tells us, that for law enforcement officers generally, there is not an across-the-board recruiting and retention problem; that generally at the full performance level, pay is quite competitive.

Let me just add a footnote here. When we compare pay, we are comparing base salary to base salary, with State and local officials, typically detectives and others, whose job titles do not exactly match. What we do not count in those comparisons are such things as law enforcement availability pay, which adds another 25 percent. Nor do we count the fact that availability pay and in some cases administratively uncontrollable overtime are also creditable to retirement, toward annuity. Those are not counted in those comparisons. Nevertheless, we believe at the full performance level for law enforcement officers, we are quite competitive and the retention figures bear that out.

There are, however, targeted problems. We have heard, for example, from our colleagues at the FBI Agents Association, and they tell some compelling stories about new agents and having to relocate to labor markets where the going rate for similar jobs is far higher. So at the entry level in some, but not all, law enforcement categories, we are not as competitive as we could be. The measures taken in 1990 with the special rates for law enforcement officers and the geographic adjustments have pretty much run their course.

These problems are dynamic and one of the reasons we have asked for administrative authority to deal with them is because they literally change from year to year. So the disparities are more targeted than they are across the board when it comes to pay. With uniformed officers, quit rates are unusually high. Some of that may be because of transfer from one branch of government to another, but some may be because pay is not as competitive, even though OPM about a year ago now phased in special rates for uniformed police officers. It is still too early to tell their effect. So those disparities exist among those who are covered by retirement systems and not those who are covered with a more flexible pay system.

Mr. DAVIS OF ILLINOIS. Thank you very much, Madam Chairwoman.

Ms. DAVIS OF VIRGINIA. Thank you, Mr. Davis.

Ms. Norton.

Ms. NORTON. Thank you, Madam Chairwoman. This is an important hearing. This is a problem that has been around since Methuselah and does not seem to get very far.

I certainly agree with the Chair that it is time to rationalize pay and benefits. I think the question is how, and that becomes very difficult when you consider the hodgepodge Congress made out of this mess, not to mention the courts who have gotten into it.

I simply want to say, Madam Chairwoman, that I am on the Homeland Security Committee and I think it is pretty dangerous now to go on with the present system we have, whereby there are different strokes for different folks when it comes to law enforcement in agencies. I am on another committee where this issue constantly arises about inequalities in pay and benefits.

So the first thing I would like to say is I think the kinds of distinctions we have now among law enforcement officers is positively dangerous. It is no longer just laughable. In the post-September 11 period, some kind of rational system has to come forward. I am not sure how we maintain stability in the law enforcement work force since, if you are in one of these positions that is not as favorable as another, I am sure you are looking around to get to the other.

It would be very interesting to know what the turnover is in the less-favored positions.

I understand, of course, that the government has some positions which pay less, because less is involved. There are different categories, different layers of law enforcement officer. All that could be accommodated.

My problem is not, and I think this report is a step forward, my problem is what does OPM really have in mind when it wants, "broad" authority. I think a lot of that needs to be fleshed out. For example in the executive summary on page one, and I am reading, all agencies would have the flexibility to make strategic decisions that support mission accomplishment in a cost-effective manner. That sounds to me to say you can devote however much money you feel like to the law enforcement end of it. Again, if you have an agency, for example, that is human capital-oriented, you just may feel in your own agency that law enforcement is not very important, and maybe you are right. The study says both agency interests and governmentwide interests would be considered and balanced, and somehow the Attorney General would be the final, or his concurrence would be necessary.

Well, I am not sure about that system because I am not sure we would not end up with the same kind of hodgepodge. I do not know if OPM has any intention to flesh out more of what it thinks a system would look like, because I would be very interested in hearing what you would have to say on that.

Mr. SANDERS. We have certainly thought about it. We have known for over a decade that the general schedule really does not value law enforcement pay very effectively. It does not take into account, for example, the need to operate without close supervision, to literally make life and death decisions in an instant. None of that is reflected in the classification standards for the general schedule.

So we have begun thinking about it. But let me add another phrase to the architecture here, because while agency flexibility is an important element of that architecture, equally important is the notion that it would be subject to strong central OPM coordination to avoid any sort of destructive interagency competition. OPM would coordinate, literally broker pay adjustments and pay ranges with agencies having flexibility to operate within a broad framework, the parameters of which we would set with the entire law enforcement community.

One of the things that has become clear to us is that it is almost impossible, in fact I would probably strike the word "almost," to come up with a one-size-fits-all solution to this. When you look at Homeland Security with some of its emerging occupations, they have the same sort of frontline homeland security responsibilities as others, for example, in the Department of Justice, but their competencies, their career paths, even their labor markets are different.

So imposing that sort of one-size-fits-all scheme on two departments trying to find lowest common denominator is problematic. On the other hand, establishing parameters so that they are not cannibalizing each other, that is another thing. That is the central coordinating role that OPM would play, with the Attorney General.

If you will permit me the analogy, you have the President's chief human capital officer and the Nation's chief law enforcement officer working together as stewards of this community to try to bring them all together, to set those parameters where they need to be, and balance the flexibilities.

Ms. NORTON. What about the Homeland Security Department?

Mr. SANDERS. Absolutely, and they are going to be a key player in this and at the table.

Ms. NORTON. I do not know what the Attorney General has to do with it. Particularly when you are talking in Washington, law enforcement really means security. So that we are not just talking about stopping somebody from stealing something. We are really talking about security. So I would be very concerned if the major player was not the Homeland Security Department, rather than the Attorney General.

Mr. SANDERS. There is no question that Homeland Security will be part of this, but the reason the Attorney General is there is because literally by Constitution, he is the chief law enforcement officer, sort of the steward of that community as its principal focus.

Ms. NORTON. Thank you, Madam Chairwoman.

Ms. DAVIS OF VIRGINIA. Thank you, Ms. Norton.

Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Madam Chairwoman. Thank you, Dr. Sanders for being here. I thank you for holding this hearing, Madam Chairwoman. As you and others have noted, it has been an issue that people have worked on for many years. I think we can all agree that the inconsistencies in the system do lead to unfairness and inequality that needs to be worked on. At the same time, as you suggested, there are some circumstances in one agency that may be different than others, and we need to obviously be sensitive to that.

My particular interest in this issue, my attention was grabbed by the situation at NIH, the National Institutes for Health, where the Federal law enforcement officers there are in my view not treated with the kind of respect and dignity they deserve, compared to many others that are in Federal law enforcement. The result has been high attrition rates at the same time that people have recognized the security threat at NIH has risen. We built a fence around the complex recently. They are in the process of constructing a biohazard level III laboratory, a new one at a major intersection.

So we have rising concerns with respect to homeland security, and it is very important that we have a police force that gets the respect that it deserves in order to make sure that we retain good people there. That is part one of the bill that I know is identified under the umbrella of different pieces of legislation that we are considering today.

Let me just pick up on what my colleague, Ms. Norton, was asking about with respect to delegating OPM the administration with the authority. Is there any other example that you know of where, for example, retirement benefits for Federal employees are left subject to the regulatory process as opposed to being in the code, in the law?

Mr. SANDERS. No, sir. That part of it would be an extension. On the other hand, we believe that the complexities warrant it. There

are parallels, however. For example, Congress has vested with OPM the authority to administer the Federal Employee Health Benefits Program, which is equally compelling and important within a very broad statutory framework. We determine eligibility and benefit coverage and levels, etc., under FEHB. So this would be sort of parallel to that.

Mr. VAN HOLLEN. But I guess you have obviously different groups of Federal law enforcement officers around the country. The concern people would have would be the possibility that retirement benefits, which is obviously something that people bank on for the long term, could be subject to change through administrative procedure as opposed to going through a full-blown legislative process. I just flag that as something that I believe, and you have reinforced, this would be new authority, unprecedented in that sense. I do think that before we tread down that road, Madam Chairwoman, we need to just think of what the consequences are.

I thank you for the report and I look forward to the other witnesses.

Ms. DAVIS OF VIRGINIA. Thank you, Mr. Van Hollen. Actually, that was one of the followup questions I was going to ask Mr. Sanders, because one of the things that does concern me is if we were to give this broad authority to increase or cut benefits, it could be very costly. It would be my concern that the administration could just come in and cut benefits anytime they would like if we vest all the authority into OPM. So I think that is where you were going with that, and that is one of the concerns I have.

Another question I have is, and Ms. Norton touched on that, is why should the Attorney General have veto power, because that is basically what you are suggesting, that he or she would have total veto power over any proposal to revamp the system, because you are basically saying the Attorney General has the right to say yea or nay. Is that not correct in what you suggested?

Mr. SANDERS. That is correct. The exact language of the report is, with the concurrence of the Attorney General. While in theory that would potentially represent veto power, we look at this as more of a strategic partnership. I will emphasize that while the Attorney General is singled out in the report, that should not be taken to mean that other key law enforcement agencies, particularly Homeland Security, will not be at the table working with us.

It is that strategic partnership. OPM can bring considerable human capital expertise to the table, but we are not accountable for law enforcement operations. We need to make sure that the people who are responsible for missions are there. Frankly, Madam Chairwoman, I think that is one of the safeguards here, because in terms of accountability, that is sort of our accountability in the first resort to that community, to those agencies that have a mission to perform and we want to make sure that human capital strategies support that mission, not undercut it.

So having them at the table, the Attorney General as Director James' counterpart in this, but other law enforcement agencies at the table as well I think is critical to bring that operational responsibility and perspective to the mix.

Ms DAVIS. Do not get me wrong. This is not saying anything negative about the current Attorney General or any other Attorneys

General, but inherently would they not be more focused on their own agency's role, their own law enforcement focus within their own agency, as opposed to, say, the law enforcement folks over at the Veterans Administration or somewhere?

Mr. SANDERS. That may be true, but if you put the broader community-wide hat on, flexibilities in one agency if they are not balanced by flexibilities in another, if they are not managed, coordinated etc., as part of this effort, that could still have a negative impact on your agency. I think that is part of the balancing act here. No one is suggesting it is going to be easy, but part of the balancing act is to have all of the agency heads who will be a participant in this not only think about their own agency and the flexibilities they need, but also to think about the broader law enforcement community.

I believe that, particularly in recent years, as that law enforcement community has had to work together in a far more cohesive, coordinated way in an operational context, that they will be able to do that. They understand now with interagency task forces literally the rule rather than the exception, that there needs to be some coherence and consistency in the way we manage our personnel, even while they may have unique mission and culture needs in their own respective agencies.

Ms. DAVIS OF VIRGINIA. I understand that. I understand what you are saying that you need to have all the broader range of agency heads who have input and have something to bring to the table, but yet your suggestion is only giving the veto power to the AG. It is not giving the veto power to any other agency head. That is my concern.

Mr. SANDERS. As a practical matter, though, given that we would exercise this authority through the regulatory process, it would be subject to interagency clearance. Any law enforcement agency would be able to say, wait a minute, we tried to convince OPM of this as part of our discussions, but at the end of the day we are raising formal objection to this, and that matter would be addressed by OMB.

Ms. DAVIS OF VIRGINIA. Just understand, my real concern is for all of our law enforcement officers and that they should be called that if that is in fact what they are doing, that they be treated fairly and equally, especially when they are alive as well as when they are dead. That just is something that just sticks with me, that they are considered law enforcement officers on the memorial, but not when they are alive. I have trouble with that.

Mr. Davis.

Mr. DAVIS OF ILLINOIS. I have just one question. Would I be correct in assessing your testimony to suggest that in looking at retirement policy, that there might be more consideration of the requirements that are needed to do the job from even a physical capacity as opposed to lumping some people in where they are able to perhaps retire at too early an age?

Mr. SANDERS. I think that being able to address that is one of the centerpieces of our recommendations. What has become clear is that while today the current situation literally provides for an all or nothing proposition. You either meet the full primary duty test to investigate, apprehend or detain, or you do not. What has be-

come clear is that there are gradations. There are emerging law enforcement occupations, responsibilities, duties, missions that fall somewhere in between and that are not addressed. There are many who have frontline homeland security responsibilities that even with those responsibilities do not meet the primary duty test.

On the other hand, is there a need for a "young and vigorous" work force, "to perform the missions that those agencies are now responsible for?" That is a question for the agency heads. If the answer is yes, and there are some gradations, that is precisely why we think we need the administrative authority, as unprecedented as it may be, to try to tailor the levels of benefits to reflect those gradations.

Let me just say that when we suggest a second tier of benefits as an option, and it is an option, there are others, we by no means, let me say this as emphatically as I can, we by no means suggest that they are second-class citizens. What we do mean is that there are differences in duties and responsibilities. Some will meet the full LEO test as a primary duty and others who do not, but whose jobs are just as important.

Mr. DAVIS OF ILLINOIS. Thank you very much, Madam Chairwoman. I have no further questions. I would note, though, I was just thinking about my experiences as a member of the Chicago City Council. We had law enforcement authority, and I could imagine some of my colleagues responding in terms of when they would be able to retire, of whether the requirements for running would be the same as those who do the job.

Thank you very much.

Ms. DAVIS OF VIRGINIA. Depending on their length of office, that may determine their retirement.

Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Madam Chairwoman. I have no further questions.

Ms. DAVIS OF VIRGINIA. Thank you, Mr. Van Hollen.

Mr. Sanders, thank you so much for being with us today. I appreciate all the comments and answers to our questions. If we have others, we will submit them to you in writing.

I would like to now invite our second panel of witnesses to please come forward. I will remind you we have already sworn you in. First, we are going to hear from Ms. Colleen Kelley, national president of the National Treasury Employees Union. Then we will hear from Mr. Frederick Bragg. Mr. Bragg is the president of the Federal Bureau of Investigation Agents Association. And then we will hear from Mr. Louis Cannon, president of the D.C. State Lodge and chairman of the National Fraternal Order of Police, Federal Officers Committee. Finally, we will hear from Mr. T.J. Bonner, who is president of the National Border Patrol Council.

Thank you all for joining us today and thank you for your patience. As soon as we get you situated and your names in front of you, so I will know who you are, we will begin first with Ms. Kelley. Ms. Kelley, it is always a pleasure to have you here before this committee. As you know, for all of you we will have your written statements for the record. If you would summarize, we will recognize you for 5 minutes.

STATEMENTS OF COLLEEN KELLEY, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION; FREDERICK BRAGG, PRESIDENT, FEDERAL BUREAU OF INVESTIGATION AGENTS ASSOCIATION; LOU CANNON, PRESIDENT, D.C. STATE LODGE, CHAIRMAN, NATIONAL FOP FEDERAL OFFICERS ASSOCIATION; AND T.J. BONNER, PRESIDENT, NATIONAL BORDER CONTROL COUNCIL

Ms. KELLEY. Thank you very much, Chairwoman Davis, Ranking Member Davis and members of the subcommittee. I appreciate the opportunity to testify on the recent release of OPM's report to Congress on law enforcement officer retirement benefits, classification and pay.

As the OPM report identified, the dramatic challenges that face the Federal law enforcement community in the wake of the September 11 attacks and the war on terrorism have noted the issue of Federal LEO status to the forefront of Federal employee pay and benefit issues. The OPM report recommends that Congress give OPM the authority to establish and administer a new governmentwide framework for all three components: retirement benefits, classification and basic pay, and premium pay.

While NTEU would agree with the report's assessment that presently there is considerable and sometimes confusing differences that exist among law enforcement personnel, NTEU has serious concerns regarding the report's recommendation to provide OPM with broad authority to create and maintain a governmentwide LEO retirement and pay system.

As the committee is aware, NTEU and representatives from the three largest Department of Homeland Security employee unions are currently meeting with management representatives of DHS and OPM concerning the new DHS human resources management system, as part of the statutory meet and confer process. It is unfortunate that the proposed pay, performance and classification regulations that are being discussed are basically a set of generalized concepts that lack the detail necessary for us to gauge the potential impact on employees in DHS.

The OPM report would expand these concepts in place of statutory rights to Federal law enforcement employees governmentwide. NTEU strongly believes that if the Federal law enforcement retirement program is to be modified, it needs to be done by statute. As OPM has just confirmed, there is nowhere in the Federal Government where retirement benefits are set by regulation, as opposed to statute, including DHS and DOD, neither of which have flexibility over retirement systems in their proposed regulations.

Federal LEOs need to be able to rely on retirement rules. Few things are more important for recruitment and retention. The ability to alter LEO retirement by regulation could lead to a patchwork of ever-changing regulations if each administration could simply alter the Federal LEO retirement system by regulatory FIAT.

In the Bureau of Customs and Border Protection of DHS, LEO retirement should cover CBP officers and Canine Enforcement officers. Their responsibilities have always involved protecting our borders, interdicting drugs and facilitating lawful trade. They have evolved to defending us against terrorism and to stop weapons of mass destruction and those who would bring them into our coun-

try, as well as the risks that come with these added job responsibilities.

NTEU strongly believes that CBP officers should receive the same 20-year retirement benefits as those enjoyed by other Federal law enforcement personnel. The OPM report notes the possibility of establishing a second-tier of LEO retirement benefits. While NTEU could have an interest in exploring this concept, leaving such a determination to OPM and the Department of Justice is unacceptable.

The report also indicates that the 20-year retirement rule would be less generous under this proposal, and that also is unacceptable.

The OPM report also recommends providing OPM the authority to devise a new pay system for Federal LEOs. NTEU does not believe that a pay-banding system as proposed in the DHS personnel regulations, as well as the OPM report, should be expanded to other Federal law enforcement agencies.

The basic structure of the existing system is sound. No information has ever been produced to show that the new pay-band system will enhance the efficiency of the Department's operations in general or as it relates to law enforcement personnel.

The report also recommends that Congress give OPM regulatory authority to establish a framework of premium payrolls that would apply to all Federal law enforcement employees in consultation with employing agencies. While some Federal agencies have been given the authority to establish their own premium payrolls, such as FAA and TSA, others are covered by special law enforcement premium pay provisions such as the Customs Officer Pay Reform Act, or COPRA. COPRA was created in 1994 to ensure that overtime pay to Customs inspectors bore a more relationship to hours worked and to compensate inspection personnel for living with unpredictability and constant irregularity in their work schedules.

In fact, COPRA will now be used as the exclusive overtime and premium pay system for all CBP officers and agriculture specialists in CBP in the Department of Homeland Security starting July 25, 2004. So the issue of disparate premium pay systems is not an issue within CBP anymore.

NTEU also believes that premium pay should continue to be creditable as basic pay for retirement, as is established under COPRA for CBP officers and for Federal LEOs governmentwide. In addition, NTEU continues to believe that premium payrolls should be codified in law and not established under administrative authority. CBP officers at DHS deserve the same 20-year retirement benefits as those enjoyed by other Federal law enforcement personnel.

We look forward to working closely with Congress to ensure that any changes to LEO pay and benefits are statutory and are fair to Federal law enforcement personnel.

Thank you.

[The prepared statement of Ms. Kelley follows:]

National Treasury Employees Union

TESTIMONY OF
NATIONAL TREASURY EMPLOYEES UNION
NATIONAL PRESIDENT
COLLEEN M. KELLEY

ON

"TIME TO BITE THE BULLET: FIXING FEDERAL LAW ENFORCEMENT PAY AND BENEFITS"

BEFORE

HOUSE GOVERNMENT REFORM SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION

TUESDAY JULY 20, 2004 10 A.M.
2203 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, D.C.

Chairwoman Davis, Ranking Members Davis, distinguished members of the Committee, I would like to thank the Subcommittee for the opportunity to follow up on NTEU's July 23, 2003 testimony concerning personnel issues affecting law enforcement employees of the federal government as it relates to the recent release of the Office of Personnel Management's (OPM) report to Congress on law enforcement officer retirement benefits, classification, and pay.

As President of the National Treasury Employees Union (NTEU), I have the honor of leading a union that represents over 150,000 federal employees, including over 8,000 Customs Inspectors, and over 900 Customs Canine Enforcement Officers (CEO's) who perform law enforcement functions. As the OPM report identified, the dramatic challenges that face the Federal law enforcement community in the wake of the 9-11 attacks and the war on terrorism have moved the issue of federal law enforcement officer status to the forefront of federal employee pay and benefit issues.

The OPM report responds to section 2(b) of the Federal Law Enforcement Pay and Benefits Parity Act of 2003, Public Law 108-196, which called for OPM to submit a report to Congress providing a comparison of classification, pay, and benefits among Federal law enforcement personnel throughout the Government and to make recommendations to correct any unwarranted differences by April 30, 2004. This report focuses on the three major components of law enforcement pay and benefits: 1.) retirement benefits; 2.) classification and basic pay; and 3.) premium pay. The report recommends to Congress that OPM be given the authority to establish and administer a new government wide framework for law enforcement officer (LEO) retirement, classification and basic pay, and premium pay systems.

While NTEU would agree with the report's assessment that presently, "considerable and sometimes confusing differences exist among law enforcement personnel, and these differences, often the result of incremental legislation and litigation, are counterproductive to the 21st Century Federal law enforcement mission," NTEU also has strong concerns regarding the report's recommendation to provide OPM with the broad authority to create and maintain a government-wide Law Enforcement Officer (LEO) pay and retirement system.

As the committee is aware, NTEU and representatives from the three largest Department of Homeland Security (DHS) employee unions are currently meeting with management representatives of DHS and OPM concerning the new DHS Human Resources Management System as part of the statutory "meet and confer" process mandated by the Homeland Security Act (HSA) of 2002. During this ongoing process that is scheduled to end on July 23, 2004, NTEU and the other employee unions have provided OPM and DHS with revised versions of the proposed, pay, performance, and classification system set forth in the proposed DHS regulations with little feedback from OPM and DHS.

It is unfortunate that the current proposed pay, performance, and classification regulations being discussed at the "meet and confer" process, are basically a set of generalized concepts which lack the detail necessary for employee unions such as NTEU, to gauge the potential impact on bargaining unit employees in DHS. In addition, DHS/OPM has decided to draft separate and more specific implementing regulations in workgroups that as of today, have not included union participation but, will include the services of an outside contractor- Northrop Grumman who recently was awarded a contract worth up to $175 million. NTEU strongly

believes that if the new DHS personnel regulations are to be accepted by DHS employees, having full employee representative involvement in the process is essential.

It is in this light that NTEU has strong concerns with the proposal to grant OPM additional flexibility over the retirement and premium pay system of all federal LEO personnel as recommended in the OPM report. While NTEU would have preferred to have more time to thoroughly review the 146 page report before this hearing, we will attempt to summarize our concerns surrounding LEO retirement, classification and basic pay, and premium pay systems addressed in the OPM report.

LEO RETIREMENT:

In the area of LEO retirement, the OPM report recommends granting OPM broad regulatory authority to establish the structure of law enforcement retirement by regulation in consultation with agencies and the concurrence of the Attorney General, as a, "workforce management tool to make LEO retirement more flexible and adaptable to the rapidly evolving needs of the law enforcement community."

NTEU would agree with the report that over the years, the definition of LEO as it relates to retirement laws has been "muddied" by legislation and litigation leading to a number of inconsistencies that make standardizing LEO retirement benefits quite difficult. NTEU would also agree with the report that the demands of the federal law enforcement officer have evolved and warrant a review to possibly include additional federal personnel such as Customs and Border Protection Officers (CBP) who not only protect our border from illegal drugs and

facilitate lawful trade, but must now defend against weapons of mass destruction and terrorism and the risks that come with these added job responsibilities. NTEU strongly believes that Customs and Border Protection Officers should receive LEO retirement benefits.

The report states that the Federal law enforcement system must be modernized to reflect and address the challenges of the post 9-11 world. NTEU fully agrees. However, NTEU strongly believes that if the federal LEO retirement program is to be modified, it needs to be done by statute. I am aware of no example in the federal government where retirement benefits are set by regulation as opposed to statute. Neither, DHS or DOD have the "flexibility" over retirement systems in their proposed regulations. Federal LEO's need to be able to rely on retirement rules. Few things are more important for recruitment and retention. The ability to alter LEO retirement by regulation could lead to a patchwork of ever changing regulations if each Administration could simply alter the federal law enforcement officer retirement system by regulatory fiat.

The report notes the possibility of establishing a second tier of law enforcement officer retirement benefits. While NTEU could have an interest in exploring this concept, leaving such a determination to OPM and DOJ is unacceptable. The report also intimates that the 20 year retirement rule would be less generous under this proposal and that is also unacceptable.

LEO CLASSIFICATION AND BASIC PAY:

The OPM report recommends providing OPM the authority to play a central coordinating role in working with agencies to devise a pay system for Federal law enforcement officers. NTEU would disagree with the report's findings that the GS classification and pay schedule does

not provide sufficient flexibility to address law enforcement specific classification and pay problems and has to be replaced with a "pay banding" system covering Federal law enforcement employees throughout the government including, the legislative and judicial branches.

NTEU has been involved with DHS and OPM in identifying possible changes to the current basic pay and classification systems for DHS employees for over two years. In that time, NTEU has found that any changes to the basic pay and classification systems must be justified by mission needs, and designed to minimize burdens on managers, supervisors and employees to implement and administer the systems, so that all can remain focused on the mission to protect homeland security. NTEU does not believe that a pay banding system as proposed in the DHS personnel regulations, as well as the OPM report, meets these tests nor should it be expanded to other federal law enforcement agencies by providing considerable agency flexibility in setting and adjusting individual rates of pay within a "pay banding" structure.

During the research and design process of the DHS personnel regulations, DHS conducted a number of town hall and focus group meetings to obtain input from employees on their views of any problems with the current HR management systems and changes they would like to see made. Most employees at the town hall meetings and focus groups reported that they were generally satisfied with the current GS system; most problems cited related to the application and administration of the system, rather than to the design of the GS system itself. The problems most frequently cited included inadequate funding for awards and Quality Step Increases to recognize superior performance, and inadequate resources (including both a lack of time and a lack of adequate training) for supervisors to effectively manage and evaluate

employee performance. Employees cited a few problems with the classification of some jobs under the General Schedule grading system, but most of these could be addressed through increased agency control over these grade level determinations, and/or a better appeal process for challenging classification determinations.

Like the DHS employees we represent, NTEU does not believe that radical changes are needed in the pay and classification systems to accommodate the needs of federal law enforcement personnel. The basic structure of these systems is sound, and they include numerous features to ensure both fairness to employees and opportunities to recognize and reward superior performance. The proposed DHS regulations highlighted in the OPM report support abandoning the General Schedule basic pay system for federal employees with a radically different and unproven "pay banding" system based entirely on managerial discretion. The pay banding plan appears to eliminate across the board annual raises, allowing employees in some locations of the country to be paid significantly less than others, which will not fix the above average quit rates for certain entry level law enforcement occupations such as legacy Customs inspectors that had an average quit rate of 12 percent at the GS-5 level from FY2001 through FY 2003 No information has ever been produced to show that the new "pay band" system will enhance the efficiency of the department's operations especially as it relates to law enforcement personnel and NTEU would strongly oppose granting OPM the authority to expand the "pay banding" system government-wide.

LEO PREMIUM PAY:

The report recommends that Congress give OPM regulatory authority to establish a framework of premium pay rules that would apply to all Federal law enforcement employees in consultation with the employing agencies. NTEU cautions this committee that the issue of law enforcement officer premium pay must be handled carefully especially in light of its complex interaction with federal employees' base pay and retirement benefits

While some federal agencies have been given the authority to establish their own premium pay rules such as FAA and TSA, others such as CBP officers are covered by special law enforcement premium pay provisions such as the Customs Officer Pay Reform Act (COPRA).

In 1993, Congress created the Customs Officer Pay Reform Act (COPRA) to ensure that overtime hours paid to Inspectors bore a more direct relationship to hours worked. COPRA recognized that legacy Customs officers deserved pay incentives and enhanced compensation for their arduous shift work and irregular hours. Since 1994, COPRA has been the exclusive pay system for legacy Customs officers performing inspection duties and in fact will now be used as the exclusive overtime and premium pay system for all CBP officers and CBP Agriculture Specialists starting July 25, 2004. So the issue of disparate premium pay systems is not an issue within CBP, the largest division of DHS, with COPRA covering approximately 20,000 employees.

Most federal employees who perform law enforcement duties are paid under pay systems tailored to specifically compensate them for their work. This is the case for inspection personnel

and criminal investigators of the DEA, FBI, Border Patrol, and National Park Service. The FBI, DEA and other federal law enforcement agencies pay employees premium pay on an annual basis to compensate them for working irregular, unscheduled overtime duty. Sometimes this can amount to an additional 25% increase in their rate of pay although the officer may not work even one hour of overtime or at night during any given week. Other federal criminal investigators and legacy Customs pilots receive a 25% pay differential annually. This pay incentive is known as availability pay and compensates these employees for being available to work outside their regular shifts. Like CBP, these pay systems are necessary to attract and retain a high quality and professional workforce.

NTEU believes that premium pay rules should be codified in law and not established under administrative authority. In addition, NTEU also believes that premium pay should continue to be creditable as basic pay for retirement as is established under COPRA for CBP officers and federal law enforcement officers government-wide.

CONCLUSION:

NTEU remains convinced that CBP Officers should receive the same early retirement benefits as those enjoyed by other federal law enforcement personnel. We look forward to working closely with Congress to ensure that any changes to LEO pay and benefits are fair to federal law enforcement personnel. Thank you for the opportunity to be here today on behalf of NTEU and its over 150,000 members to discuss these extremely important federal employee issues.

Ms. DAVIS OF VIRGINIA. Thank you, Ms. Kelley.

Mr. Bragg. You guys got out of order there. I will have to figure out who you are. Mr. Bragg, you are recognized for 5 minutes.

Mr. BRAGG. Chairwoman Davis, Ranking Member Davis and members of the subcommittee, thank you for the opportunity to appear before the subcommittee to testify about the urgent crisis in the pay and personnel system among Federal law enforcement, particularly within the Federal Bureau of Investigation.

My name is Fred Bragg. I am a special agent with the FBI and the President of the FBI Agents Association. The FBIAA is a nongovernmental professional association with a membership of nearly 9,000 current and more than 2,000 retired agents nationwide. I am testifying today on behalf of the FBIAA and not as an official representative of the FBI.

Let me begin by offering special thanks to Chairwoman Davis, Ranking Member Davis and especially the committee staff for your hard work and leadership in support of this legislation to address problems associated with law enforcement compensation. Madam Chairwoman and members of the subcommittee, the recently released report from OPM acknowledges and confirms several important conclusions about deficiencies in the current pay and personnel system. However, its policy recommendations fall far short of the decisive legislative action that is needed to address current problems before they undermine the ability of Federal law enforcement agencies to fully protect the public.

Legislative proposals such as H.R. 1676 that can address the real problem facing Federal law enforcement, have been introduced and enjoy widespread bipartisan support. We hope that the subcommittee finds itself in a position to take immediate action to address these critical Federal law enforcement issues.

The OPM report is clear about three main points: the general inadequacy of the GS system; the existence of problems in high-cost cities; and the need to address pay compression. Although the FBIAA is encouraged by the report's conclusions regarding the status quo, we are not encouraged by the policy recommendations in the report. The FBIAA does not believe Congress should defer unilaterally to OPM on this critical issue of national importance.

The FBIAA is particularly concerned about several aspects of this report. First, enhancing OPM authority. The new report calls on Congress to grant OPM virtually unfettered authority to determine everything from salaries, covered employees, pay ranges, and governing principles to performance systems. For example, consider the following.

How should the retirement system be reformed? The report states, "We recommend that OPM be given the authority to necessarily modernize law enforcement officer's retirement benefits." How should classification and basic pay issues be addressed? The report states, "OPM should be given the authority to establish a flexible basic pay framework for Federal law enforcement employees through the government." What changes can be made to solve problems associated with premium pay and premium pay caps? The report unsurprisingly recommends that, "Congress give OPM regulatory authority to establish a framework of premium pay

rules that would apply to Federal law enforcement employees throughout the government."

The only clear result of following the report's recommendations would be that OPM would be given an unlimited amount of time and discretion to design a new compensation system.

Second, using the DHS personnel system as a model. The only meaningful details of how the new OPM-created system might function can be found in the report's endorsement of the DHS personnel system approach. And yet the DHS system was not designed specifically for law enforcement; does not have an actual track record to demonstrate its efficiency; and is taking years to develop and implement.

Third, the failure to address cost-of-living issues. The OPM report concedes that the compensation system is harming Federal law enforcement officers living and working in high-cost cities. Despite the flaws in the pay comparison process and the fact that inadequate compensation is undermining retention and morale issues in cities such as New York and San Francisco, the OPM report offers no meaningful recommendations to address this problem. OPM recognizes that there may be no comparable local law enforcement work, however the report dismisses legislation that would allow for consideration of cost-of-living issues, as opposed to making pay comparisons.

The FBIAA represents agents who deserve to have the real cost of living considered, rather than having their compensation determined by inappropriate comparison to police officers. The FBI agents have special skills, advanced education and have no control over where they are assigned to live and work. The time has come for Congress to legislate specific, concrete and guaranteed changes to locality pay in high-cost areas in order to address problems that even OPM admits exist.

Finally, flawed methodology. In addition to the substantive problems we have found in OPM's recommendations, I also believe that there are significant methodological flaws related to this report. My written testimony highlights the details of these deficiencies.

In conclusion, the FBIAA understands that the recent OPM report is simply one step on the road toward real reform of the Federal law enforcement officers' compensation system, and the report makes some valuable conclusions about the deficiency of the status quo. However, the report offers no meaningful recommendation and very little comfort to FBI agents and other Federal law enforcement officers who are struggling to make ends meet while serving our country.

The FBI Agents Association will continue to work with Congress and agencies such as OPM to create a workable and efficient compensation system for Federal law enforcement officers.

I would like to end with a statement from one FBI agent assigned to the New York city office in response to an FBIAA survey about the cost-of-living issues, "I joined the Bureau to save the world and be part of the best law enforcement agency in the world. Now, I am just trying to save my family and provide for their future. I continue my career with the Bureau because I still feel a sense of duty and obligation and to my country in pursuing justice. My morale level is negative one. The local and State police agencies

make considerably more money with better benefits and incentives than the FBI. The situation is continually growing worse and will ultimately cause irreparable harm to the Bureau, the Federal Government, and ultimately the United States of America."

Thank you for the opportunity to testify. I look forward to answering your questions.

[The prepared statement of Mr. Bragg follows:]

Testimony of Frederick E. Bragg
On Behalf of the Federal Bureau of Investigation Agents Association
Before the Subcommittees on Civil Service and Agency Organization
Government Reform Committee
United States House of Representatives

Time to Bite the Bullet: Fixing Federal Law Enforcement Pay and Benefits
July 20, 2004

I. Introduction

Chairwoman Davis, Ranking Member Davis, and members of the Subcommittee, thank you for this opportunity to appear before the Subcommittee to testify about the urgent crisis in the pay and personnel system among federal law enforcement, particularly within the Federal Bureau of Investigation (FBI).

My name is Fred Bragg. I am a Special Agent in the FBI and the president of the FBI Agents Association (FBIAA), a non-governmental professional association with a membership of nearly 9,000 current and more than 2,000 retired agents nationwide. I am testifying today on behalf of the FBIAA, not as an official representative of the FBI. The FBIAA has been working with legislators, executive agencies, and other organizations to secure meaningful and necessary reforms to the pay and performance evaluation system for career federal law enforcement officers.

Let me begin by offering special thanks to both Chairwoman Davis and Ranking Member Davis for your hard work and leadership in support of legislation to address problems associated with law enforcement compensation. Your bipartisan leadership, and that of other members of the committee, is critical to our joint efforts. We truly appreciate all that you have done and are doing for the men and women who safeguard our homes, streets, communities, and country.

Allow me to also thank Congressman Mike Rogers, who has likewise been a leader in the effort to ensure the continued excellence and effectiveness of the FBI and other federal law enforcement agencies. We also express our appreciation to Senator Voinovich who has shown a determined commitment to federal law enforcement.

The professional staff of this subcommittee should also be recognized for their hard work and dedication. I first met them last year on an official trip to the Los Angeles FBI Office where they heard first hand of the situation effecting agents assigned to high cost of living areas. They are truly engaged in the topic and maintain regular communications with the stakeholders. They represent you well.

Madam Chairwoman and members of the subcommittee, the recently released report from the Office of Personnel Management (OPM), entitled *Federal Law Enforcement Pay and Benefits: Report to the Congress* (Report or OPM Report), acknowledges and confirms several important conclusions about deficiencies in the current pay and personnel system. However, its policy recommendations fall far short of the decisive legislative action that is needed to address current

problems before they undermine the ability of federal law enforcement agencies to fully protect the public. The FBIAA has heard from agents around the country about a range of severe financial problems that are resulting from the inadequacy of the current compensation system, and these financial strains are taking a toll on morale and performance.

FBI Agents are on the frontlines in our nation's battles against organized criminal networks, violent crime, and terrorism. Most Agents have come to serve their nation as a second career, bringing with them a wealth of experience, education, and expertise. Many Agents are trained accountants, lawyers, and scientists, and the sacrifices and financial burdens associated with obtaining these skills should be considered when making compensation decisions. If the compensation system is unable to consider the financial, emotional, and professional burdens on FBI agents, and other federal law enforcement officers (FLEOs), the FBIAA is concerned that eventually the ability of our nation to adequately protect U.S. citizens may be jeopardized. In light of these concerns, we think the recent OPM Report underscores the need for congressional action in its discussion of the *status quo,* but fails recognize the type of reform that is needed right now.

The recommendations included in the OPM report should be considered in the context of field investigation records, news reports, and the comments attached to this testimony that show the true nature of problems facing federal law enforcement and solutions that are available to legislators. Legislative proposals that can address the real problems facing federal law enforcement have been introduced and enjoy widespread bipartisan support. We hope the subcommittee finds itself in a position to take immediate action to address these critical federal law enforcement issues.

Below this testimony addresses OPM's findings, then OPM's recommendations.

II. Inadequacy of the Current Compensation System for FLEOs: OPM's Findings

The OPM Report is clear about one thing: the current compensation system does not work and needs to be reformed. The FBIAA agrees with this conclusion. OPM notes that the current system is broken and that it may be undermining the ability for federal law enforcement agencies to recruit and retain highly qualified individuals in many areas of the country. The OPM findings underscore the need for immediate reforms to the compensation system.

A. General Inadequacy of the GS System

The OPM Report erases any doubts that may exist about the dysfunctional nature of the General Schedule as it is applied to FLEOs. The Report concludes that "[t]he GS basic pay system…is outdated, inflexible, market-insensitive, and performance insensitive. In particular, the GS classification and pay provisions do not function well for law enforcement employees."[1]

[1] OFFICE OF PERSONNEL MANAGEMENT, FEDERAL LAW ENFORCEMENT PAY AND BENEFITS: REPORT TO CONGRESS, 25 (2004) [hereinafter *Report or OPM Report*].

Furthermore, the Report finds that the problems inherent in the current compensation system "harm morale, create staffing disruptions, and increase Government costs unnecessarily."[2]

The OPM Report also makes it clear that problems with the GS system are amplified when the system is applied to highly skilled FLEOs who perform very taxing job duties, such as FBI Agents. The report explains that "the GS system is focused on traditional white-collar work and may not adequately address or value factors that are important in law enforcement work, such as physical requirements, responsibility to use deadly force, the need to make critical split-second decisions without supervisory guidance, and the need to approach or remain in dangerous situations rather than retreat from them."[3] FBI agents must grapple with all of the factors discussed, and as a result, the deficiencies in the GS system that OPM notes are particularly troublesome when applied to FBI agents.

B. Problems in High-Cost of Living Areas

In addition to the general problems associated with the GS system, the Report also finds that there are unique problems facing FLEOs employed in high cost-of-living areas of the country. The Report notes, "significant entry/developmental pay problems may exist in locations with very high labor rates, such as San Francisco, Los Angeles, and New York City."[4]

The GS system's inability to fairly compensate FLEOs in high-cost areas is undermining the performance and quality of law enforcement efforts in high-cost areas. For example, OPM recognizes that "recruitment problems" in high cost of living areas are likely resulting from insufficiency of compensation and that "severe disparities" may exist between local labor rates and the compensation of FLEOs in high costs cities. [5]

Inadequate compensation in high-cost areas can substantially undermine morale, retention, and the ability for FLEOs to serve the nation. As one FBI Agent assigned to New York City explained in response to an FBIAA survey about cost of living issues:

> I joined the Bureau to save the world and be a part of the best law enforcement agency in the world. Now I'm just trying to save my family and provide for their future. I continue my career with the Bureau because I still feel a sense of duty and obligation to my country and in pursuing justice. My morale level is a Negative 1. The local and state police agencies...make considerabl[y] more money with better benefits and incentives than do SAs of the FBI. For being the "best of the best," we are paid worse than...law enforcement agencies in the area. This situation is continually growing worse and will ultimately cause irreparable harm to the Bureau, the Federal Government, and ultimately the United States of America.

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[2] *Id.*
[3] *Id.* at 31.
[4] *Id.* at Appendix D, 8.
[5] *Id.* at 41, Appendix D, 8.

Cities such as New York, Los Angeles, and San Francisco are uniquely vulnerable to criminal and terrorist threats, and Congress has a duty to ensure that federal law enforcement efforts in these cities are able to perform to their maximum potential. For this reason, the FBIAA urges Congress to take concrete and immediate action to address cost of living issues for FLEOs in high-cost cities. We applaud OPM's recognition that problems do exist for law enforcement efforts in some of our nations most populated and vulnerable areas. We believe that Congress should act as soon as possible to address this crisis.

C. Pay Compression

FLEOs, and criminal investigators such as FBI agents in particular, are subject to premium pay rules that place a cap on the amount of total pay those employees can receive. Investigators do not receive hourly compensation for overtime work, but instead receive a standard "availability pay supplement" of 25 percent which requires the officers to work unlimited overtime. This pay cap means that more senior investigators end up being paid the same amount, without regard to the salaries that these investigators have earned as a result of performance or seniority.

OPM, in its report, recognizes that this problem exists. In fact, the OPM Report states that "Pay is compressed in that employees can be entitled to different rates of basic pay, but receive the same total pay because of the cap...this problem is most visible with respect to GS criminal investigators who regularly receive a 25-percent availability pay supplement."[6]

However, the OPM Report does not explain the problems that result from pay compression. The report should have noted that pay compression results in an strong reluctance of criminal investigators to take on supervisory duties because they will not be compensated for those duties. The disincentive to assume supervisory duties prevents law enforcement agencies from being able to fully compensate deserving employees and deprives management of the expertise and leadership available from experienced and qualified FLEOs. Although the OPM Report concedes that there is a need for a "different approach" towards the capping of premium pay, the report offers no indication of what specific actions, outside of lifting pay caps, could be adopted to address the problem of pay compression.[7] This is a significant failing of the report. The FBIAA supports H.R. 1676, which lifts the pay cap.

D. Conclusions about the *Status Quo*

OPM's Report finds that the current FLEO compensation system is inherently defective, fails to account for high-cost areas, results in pay compression, and needs to be reformed. The FBIAA supports these conclusions wholeheartedly. OPM's conclusions about the *status quo* should help encourage legislators to act swiftly to reform the compensation system by addressing immediate needs in high-cost areas and adopting concrete plans to develop a separate compensation system for FLEOs. Neither FLEOs nor the nation can afford to wait any longer to address these problems, **and the time has come for Congress to lead the way towards real reform**.

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[6] *Id.* at 51.
[7] *Id.* at 56-58.

III. OPM's Policy Judgments

Given the strength of OPM's findings regarding the inherent deficiencies of the current FLEO compensation system, one would expect to find policy recommendations that call for speedy reform and include clear details about the nature of needed reforms. This is not the case. The policy recommendations included in the recent OPM Report are vague in nature and amount to little more than an attempt to expand the power and discretion of OPM.

In addressing the question of how to fix the problems with FLEO compensation that have been slowly eroding the morale and performance of federal law enforcement agencies, the OPM Report is clear on two points: 1) OPM should be solely responsible for determining what actions need to be taken; and 2) no reforms should be undertaken until OPM decides what actions are appropriate. Thus, OPM's answer to the pressing need for compensation reform could result in more delay, while FLEOs and the nation they protect wait for the Agency to decide what to do.

The FBIAA does not believe Congress should defer unilaterally to OPM on this critical issue of national importance. The FBIAA is fully prepared to work with OPM, and legislation supported by the FBIAA would give OPM significant input in the process of designing a separate, FLEO compensation system. While it is important that OPM maintain a full and active role in the development of such a system, the final system and its details should be a creature legislative deliberation.

A. Enhancing OPM Authority

The OPM Report is replete with calls for enhanced OPM authority. In fact, more power for OPM appears to be the solution to every issue discussed in the report. Rather than advise Congress on what actions legislators should consider taking to reform the GS system, OPM calls on Congress to delegate virtually all responsibility for details to OPM. As the cover letter to the report explains, "We recommend that Congress provide OPM with broad authority to establish a governmentwide framework for law enforcement retirement, classification and basic pay, and premium pay systems."[8] In sum, the report calls on Congress to grant OPM virtually unfettered authority to determine everything from salaries, covered employees, pay ranges, governing principles, to performance systems.

The idea that enhancing OPM's authority is a cure-all for law enforcement compensation problems is the one consistent theme in the report. For example:

- How should the retirement system be reformed? The report states "we recommend that OPM be given the authority necessary to modernize LEO retirement benefits."[9];

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[8] *OPM Report* Cover Letter.
[9] *OPM Report* at 8.

- How should classification and basic pay issues be addressed? The report states "OPM should be given authority to establish a flexible basic pay framework for Federal law enforcement employees throughout the Government."[10]; and

- What changes can be made to solve problems associated with premium pay and premium pay caps? The report unsurprisingly recommends that "Congress give OPM regulatory authority to establish a framework of premium pay rules that would apply to Federal law enforcement employees throughout the Government."[11]

OPM further criticizes legislation offering specific reform ideas, and instead offers only terms such as "flexible" and "appropriate" as policy guidance. The only clear result of following the Report's recommendations would be that OPM would be given an unlimited amount of time and discretion to design a new compensation system. Given the importance and severity of problems facing FLEOs, Congress should undertake efforts to specifically address cost-of-living issues, premium pay cap problems, and the need for immediate action towards developing a new compensation system. Terms such as "flexibility" provide cold comfort to FLEOs, and the citizens they protect, who are having difficulty making ends meet and law enforcement agencies having trouble recruiting and retaining top-notch employees. Congress should not defer to OPM's request for more power and unlimited time to address problems with FLEO compensation.

B. Using the DHS Personnel System as a Model

Given the broad authority requested by OPM in the report one would expect the report to also include specific discussions of a timetable that OPM could operate under or details on how the new system might function. Unfortunately, there is no timetable and the details discussed provide little guidance. The only meaningful details of how the new OPM-created system might function can be found in the report's endorsement of an approach modeled after the development of a personnel system for the Department of Homeland Security ("DHS") that focuses on an OPM-established framework including a "common structure of law enforcement occupations, a structure of bands or rate ranges for various levels of work, and provisions for establishing and adjusting those rate ranges."[12]

Pointing to the DHS personnel system as a model for all law enforcement is not an encouraging development. The DHS system was not designed with law enforcement needs in mind, does not have an actual track record to demonstrate its efficacy, and has taken years to develop. Law enforcement groups, such as the FBIAA, have argued strenuously that many features of the proposed DHS system, especially aspects touted as promoting "flexibility" and "performance," will not operate well in a law enforcement context, and may actually undermine crime control and national security objectives. As noted in the attached comments on the DHS system that

[10] *Id.* at 26.
[11] *Id.* at 57.
[12] *Id.* at 26.

have been submitted to OPM by the FBIAA, such a system is not an appropriate guide for reform to the FLEO compensation.

One example of why the DHS system is an improper model for FLEOs is the concept of "pay for performance." The attached comments from the FBIAA discuss the flaws of this concept in detail, but it is vital that legislators understand that application of pay for performance to FLEOs is, among other things, counterproductive. A former Director of the FBI once said, "Cooperation is the backbone of law enforcement." Making the pay of agents contingent upon "performance" only means that agents will have less incentive to cooperate with each other and more uncertainty regarding their compensation. Complex federal law enforcement investigations are inherently cooperative in nature – any policy that supports an incentive for law enforcement to work unilaterally will jeopardize investigations, and by extension, national security.

Additionally, pointing to the DHS model for creating a separate compensation system provides little or no meaningful guidance regarding how the Agency would address the pay compression problems, high-cost areas, or the resulting recruitment and retention problems. Quite simply, other than enhanced OPM power, and a delay in meaningful reforms, the Report offers very little for those seeking to address problems associated with the GS compensation system.

C. Failure to Address Cost-of-Living Issues

As described earlier, the OPM Report concedes that the compensation system is producing uniquely harmful results for FLEOs living and working in high-cost cities. Despite OPM's recognition of this problem, the Report does not provide a workable solution to the problem. In fact, the Report recommends maintaining the same defective "job comparison" procedures that have allowed for the current problems to occur.

The OPM Report recognizes that the pay comparison procedures are inherently handicapped by variations between different types of FLEOS, and differences between federal and local law enforcement work. For example, the Report states, "not all law enforcement jobs are equal in terms of mission impact, scope of responsibilities, knowledge/skill requirements, training standards, market value, etc."[13] Furthermore, the Report notes that differences between local and federal law enforcement responsibilities present "a particular challenge in making salary comparisons."[14] In fact, OPM even admits that the limits on the pay comparison process are so severe that OPM "may be unable to find sufficient direct comparators for GS-13 Federal investigators."[15]

Despite the flaws in the pay comparison process, and the fact that inadequate compensation is undermining retention and morale in cities such as New York and San Francisco, the OPM Report offers no meaningful recommendations to address the problems. For example, notwithstanding the fact that OPM recognizes that there may be no comparable local law enforcement work that requires the same responsibilities and skills that are required of federal

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[13] *Id.* at Appendix H, page 1.
[14] *Id.*
[15] *Id.* at Appendix H, page 2.

criminal investigators, the report dismisses legislation that would allows consideration of cost-of-living issues, as opposed to making pay comparisons.[16] This conclusion comes with no proposal to address the problems faced by FLEOs, ignores the report's own conclusions about the difficulty of comparing labor rates, and makes it impossible for OPM to determine the adequacy of current compensation because the report admits that "OPM was unable to conduct or contract for a comprehensive salary survey for this report."[17]

The FBIAA represents active and retired FBI agents who deserve to have their real costs of living considered, rather than having their compensation determined by inappropriate comparisons to local police officers. FBI agents have special skills, advanced educations, and have no control over where they are assigned to live and work. To continue to determine their compensations by looking at local officers is inaccurate and dangerous, because the flaws in such an approach are undermining the morale and performance of agents who are tasked with fighting national and international criminal and terrorist enterprises. The time has come for Congress to dictate specific, concrete, and guaranteed changes to locality pay in high cost areas in order to address problems that even OPM admits exist.

D. Flawed Methodology

The FBIAA is very concerned that OPM has used an opaque and insufficient methodology to reach their conclusions. As a result, their conclusions do not reflect the realties of FLEO life, and the data used to reach conclusions is incomplete.

OPM's methodology is opaque because the agency failed to consult any individuals or organizations actually involved with the groundwork of federal law enforcement. While OPM may have communicated with FBI headquarters, OPM did not meet with groups that maintain day-to-day communications with agents in the field. Making reliable conclusions about retention and morale is impossible without working from the ground up, and OPM's report reflects a fundamental disconnect from FLEOs in the field.

Similarly, the data used by OPM to support their findings is often flawed or incomplete. For instance, the OPM Report offers conclusions about pay comparisons while admitting that they did not conduct a full-scale comparison. The Report also asserts that recruitment and retention are not problems without analyzing quit rates by location, experience level or time on the force.

IV. Conclusion

The FBIAA understands that the recent OPM report is simply one step on the road towards real reform of the FLEO compensation system, and the report makes some valuable conclusions about the deficiencies of the *status quo*. However, the report offers no meaningful recommendations and very little comfort to FBI agents, and other FLEOs, who are struggling to make ends meet in high-cost cities while serving our country. The FBIAA has long been an

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[16] *Id.* at Appendix D, page 13.
[17] *Id* at Appendix H, page 3.

advocate for addressing both the short-term and long-terms needs of FLEOs, and the recent OPM report sacrifices the very real needs of today at the altar of continued bureaucratic turf battles.

The FBI Agents Association will continue to work with Congress and agencies such as OPM to create a workable and efficient compensation system for FLEOs, and we appreciate the opportunity to continue our work with Congress to forge an effective and fair compensation system for federal law enforcement officers.

Attachment 1

The FBI Agents Association

March 22, 2004

OPM Resource Center
Room B469
Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Re: FBI Agents Association Comments on Proposed Department of Homeland Security Human Resources Management System, February 20, 2004 (69 FR 8030).

Attn.: Docket # DHS-2004-001, RIN 3206-AK31

To Whom It May Concern:

The FBI Agents Association (FBIAA) appreciates the opportunity to submit comments on the proposed Department of Homeland Security (DHS) human resources management system (69 *Fed. Reg.* 8030 (February 20, 2004)). While FBI agents do not fall within the jurisdiction of DHS, it is our understanding from key decision-makers that the DHS system will serve as a model for the treatment of federal law enforcement officers (FLEOs) government-wide. Thus, as a population potentially affected by the DHS system, we are pleased to offer the following comments.

The FBIAA has been actively engaged in efforts to create a fair and rational compensation system for FLEOs who are serving our nation. Creating a better system will enhance national security by ensuring that we attract and retain the best and the brightest. It is important that the DHS personnel system is created with careful and proper consideration of how the decisions made in the process will affect law enforcement officers inside and outside of DHS.

The FBIAA is a professional association with a membership of nearly 9,000 current and more than 2,000 retired agents nationwide. The FBIAA was founded over two decades ago in response to the growing recognition that agents needed to join together in order to protect and advance the interests of agents both within the Bureau, as well as in the public domain. The FBIAA works diligently to promote and facilitate the intelligent, skillful, and efficient discharge of the professional duties of all FBI agents. The Association works hard to advance and safeguard the careers, economic interests, conditions of employment, and welfare of FBI agents and retired FBI agents. These comments are on behalf of the FBIAA, and should not be read as an official statement from the FBI.

We support the efforts of the Office of Personnel Management (OPM) and DHS to create an innovative new personnel system that can best serve the interests of our nation. There are many

aspects of the proposed personnel system that we support, and we understand and appreciate the time and effort that has been spent developing the proposed system. Despite these efforts, however, the FBIAA is deeply concerned about several aspects of the proposed personnel system. We believe that OPM and DHS should carefully consider several issues before the DHS system is implemented or applied to non-DHS FLEOs, such as FBI agents.

The demands on FLEOs, and FBI agents in particular, are unique and severe. As the DHS system is developed and implemented, it is vital to national security and public safety that OPM and DHS fully consider the viewpoints of those who are on the front lines of our nation's battles against crime, drugs, and terrorism. If, as many have claimed, the DHS system will be the model for reform in other agencies, a full analysis of law enforcement issues is especially important. The issues that the FBIAA proposes addressing include:

- The need for a separate compensation system for FLEOs;
- The importance of locality and special skills pay adjustments; and
- The drawbacks of "pay for performance" in a law enforcement context.

I. The Need for a Separate Compensation System for FLEOs

The FBIAA supports the creation of a separate FLEO compensation and evaluation system that takes into account the unique role FLEOs play in protecting the nation and the special skills required to complete that mission. First, we support removing the DHS employees from the general schedule (GS) because the GS does not advance the DHS's mission to protect the homeland. Second, the FBIAA generally supports the concept of occupational clustering within DHS and recommends grouping DHS's FLEOs together. First removing DHS employees from the GS then grouping certain types of employees together attains a similar end for which the FBIAA has been working: the creation of a non-GS pay and compensation system for all FLEOs. Based on much of the same logic, we would like to work with OPM to create a separate compensation and evaluation system for non-DHS FLEOs. We propose keeping the DHS and non-DHS systems distinct, but believe it is necessary to ensure that they work together and neutralize any incentive to work at one agency over another.

A. Creation of a Separate System

When Congress created the DHS, it directed and authorized the Department to develop its own homeland security personnel system. In essence, the members of Congress recognized that the GS does not advance the Department's mission "of protecting the Nation against future terrorist attacks." 69 *Fed. Reg.* 8030. The missions and functions of DHS are similar to those of the FBI and other federal law enforcement agencies. The rule's preamble states, "DHS analyzes threats and intelligence,...protects our critical infrastructure,...and implements other security measures." *Id.* at 8030. Not only do FLEOs, particularly FBI agents, share these responsibilities, but also non-DHS FLEOs have a greater burden: to protect the nation from all criminal threats. Of course, the vital role that DHS employees play in national security cannot be overstated. We support removing DHS employees from the GS and developing a compensation and evaluation system unique to their skills and DHS's needs. Likewise, the critical role non-DHS FLEOs play in protecting our nation from terrorist—indeed all criminal—attacks necessitates removing

FLEOs from the GS and developing a separate compensation and evaluation system for them as well.

B. Establishment of Occupational Clusters

The proposed rule changes the method by which federal employees are classified within DHS. Rather than lump all DHS employees into one system, the rule proposes establishing "occupational clusters by grouping occupations and positions that are similar in terms of type of work, mission, developmental/career paths, competencies, and/or skill sets." *Id.* at 8037. The logic inherent in this description mirrors the reasoning the FBIAA has advanced on behalf of the creation of a separate FLEO compensation and evaluation system. Those who share unique work, goals, risks, and careers should be evaluated separately from others with different occupations and risks.

The occupational cluster approach serves as the defining feature governing compensation schemes and job evaluations. *Id.* Although the proposed rule does not identify which occupational clusters will be created, it is easy to see why clustering FLEOs makes sense. Law enforcement duties are unique in terms of the skills and obligations required of those who perform them. Moreover, the case for a separate pay system for FLEOs is neither new nor revolutionary. In the early 1990s, OPM and the statutorily chartered National Advisory Commission on Law Enforcement (NACLE) studied the issue of a federal law enforcement specific pay system. Both OPM and NACLE concluded that a separate system should be created. Subsequent to reporting these findings to Congress, however, these recommendations were not effectuated due to a change in administration. The study recommending a law enforcement specific pay system was initiated during the first Bush Administration, completed in the Clinton Administration, and has received favorable reviews from various administration and congressional leaders.

As both Director of OPM Kay Coles James and Deputy Secretary of Homeland Security Admiral James Loy testified in a February 25, 2004 joint hearing discussing the proposed regulations, OPM is the agency tasked with ensuring that the reforms occurring at DHS align with the treatment of similarly situated employees at other agencies.[18] All FLEOs serve this nation, and the public cannot afford to have some officers compensated more fairly than others. Unless great care is taken, there is the potential that the development of a new system covering DHS law enforcement jobs could cause an exodus of other FLEOs, such as FBI agents, to DHS.

Together, DHS and OPM are tasked with creating an effective model for personnel system reforms in other agencies. We encourage OPM and DHS to clarify the proposed regulations by specifying that law enforcement officers should be compensated separately, both within DHS and in other agencies.

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[18] *The Key to Homeland Security: The New Human Resources System*, Joint Hearing before Senate Committee on Governmental Affairs Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia and House Committee on Government Reform Subcommittee on Civil Service and Agency Reorganization, February 25, 2004 (no transcript available).

II. Concerns Regarding Locality and Special Skills Pay Adjustments

The proposed DHS system includes several types of pay adjustments for DHS employees. Of particular interest to FBI agents are the provisions relating to locality pay supplements and individual adjustments for DHS employees who possess special skills or competencies. *Id.* at 8038-39, 8055, 8057 The FBIAA supports efforts to fairly compensate employees living in high cost of living areas, as well as those employees possessing special skills and/or competencies. It is very important that OPM and DHS ensure that locality and special skills pay adjustments are implemented in a way that ensures certainty and does not promote internal competition among FLEOs.

A. The Importance of Locality Pay Supplements

Given the important and difficult tasks undertaken by DHS employees and non-DHS FLEOs, the FBIAA supports efforts to fairly compensate employees living in high cost of living areas. In cities such as the metropolitan areas of Los Angeles, New York, San Francisco, Boston, Chicago, Detroit, and the District of Columbia, compensation simply has not kept up with the cost of living. For law enforcement officers in these areas, the current GS pay scale is entirely inadequate to recruit and retain a highly skilled law enforcement workforce. As a result, FLEOs are increasingly forced to choose between providing for their families and protecting the nation.

While this may seem unfathomable, in certain areas, we actually have FBI agents who are forced to use housing assistance programs due to financial constraints. For example, the current salary for a newly hired FBI Special Agent in San Francisco is $56,453, including all overtime payments. A search for a "low income" home within the commuting distance of San Francisco (60 to 90 minutes commute) placed the house in the $300,000 range with a mandatory income of $86,000 per annum. We urgently need to fix these pay and cost of living disparities.

As shown, FBI agents are uniquely aware of the need for locality pay supplements, and we applaud the inclusion of locality pay supplements in the proposed regulations. However, we object to leaving the determination of whether to provide a locality pay supplement to the sole discretion of the Department. Additionally, we believe the "pay comparison" methodology is flawed and propose a high cost of living analysis instead. Each are discussed below.

1. Locality Pay Supplements Should Not be Discretionary

The proposed regulations provide sole discretion to DHS to determine whether to provide a locality supplement, the amount of locality supplements, and whether employees qualify for those supplements. The proposed regulations provide that, "Within its sole discretion, DHS…may set and adjust locality and special pay supplements." *Id.* at 8055. Furthermore, while there is no provision requiring locality pay supplements to be issued, there are provisions that actually limit the availability of such supplements, such as the provision that conditions qualification for such supplements on an employee's performance rating. *Id.* Linking locality supplements to a subjective performance rating undermines certainty and incentivizes internal competition among employees. In a law enforcement context, both can devastate a FLEO's ability to successfully investigate crime.

The way the proposed regulations are drafted there is no assurance that compensation for DHS employees will keep pace with rising costs of living, because there is no requirement that such locality pay supplements be issued. This scheme creates uncertainty, undermining the ability for DHS employees to plan their finances because there is no guarantee that their salary will keep pace with the cost of living. This combination of factors could rapidly lead to recruitment and retention problems in high costs of living areas. FBI agents have seen this phenomenon occur in our agency and recommend creating a locality supplement system that ensures certainty by linking the locality supplement to a high cost of living index, as discussed below.

It is vital that locality pay supplements be a predictable component of the DHS compensation system, and that any application of the DHS system to other agencies not include unlimited agency discretion. Our national security cannot afford the risks that result from inadequate compensation in high cost of living areas. Sufficient locality pay supplements are not a matter of convenience, they are an absolute necessity if our federal law enforcement agencies are going to be able to guarantee that the most skilled and qualified employees can work in the areas that most need their services: expensive metropolitan areas.

2. The "Pay Comparison" Model Should Not Be Used to Determine Salaries or Locality Pay Supplements

The proposed regulations are unclear as to the particular methodology that should be used to determine the amounts of locality pay supplements, and provide only that "OPM may consider mission requirements, labor market conditions, availability of funds…and other relevant factors." *Id.* While the FBIAA supports looking to many of these variables, we object to the use of "labor market conditions." During the February 25, 2004 hearing on the proposed DHS regulations, Comptroller General of the Government Accounting Office David Walker stated that locality pay supplements for law enforcement officers could be determined by looking at compensation rates for local law enforcement officers in the localities in question.[19] Thus, locality pay for law enforcement officers under the new DHS system could be determined by using the old "pay comparison" method used in the GS system. Our research indicates that this method is flawed, and we believe the creation of a new system should move away from pay comparison. Rather, we suggest adopting a high cost of living analysis to determine locality supplements.

The FBIAA proposes looking at the real cost of living to determine what the cost of living, or locality, adjustment should be in each metropolitan area. We rely upon the cost of living analysis of the Chamber of Commerce's research arm to determine what cities require adjustments and to set the level of each adjustment. The Chamber of Commerce cost of living index is highly regarded and widely used by the private sector, the President's Council of Economic Advisors, and the United States Census Bureau. This index captures and analyzes the cost of living across the nation based on real costs for consumer goods and services ranging from health care to groceries to housing. If this formula were to be put into place, it would go a long way towards establishing pay equity across the country and encouraging sound personnel management practices.

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[19] *Id.*

By comparison, the manner in which locality rates are calculated for FLEOs is out of step with reality. OPM calculates these rates on the basis of the labor market for comparable nonfederal and private sector jobs. This process results in flawed comparisons, because federal law enforcement work, and the skills of those individuals who perform the work, do not have comparable counterparts on the local level. For example, in determining wage rates for FBI agents, OPM uses deputy sheriffs as the comparable nonfederal job category. However, FBI agents as a rule require four-year college degrees, often possess advanced degrees, and enter the FBI at older ages, typically after a prior career with significant professional experience. In other words, the OPM's wage comparison greatly undervalues our agents.

The "pay comparison" model is also flawed because it ignores a variety of significant variables relevant to compensation. To meaningfully compare local and federal compensation for FLEOs, a variety of additional factors should be considered, which fall under the broad categories of "Job Qualifications" and "Job Benefits" and are discussed below. By undervaluing federal law enforcement, the proposed compensation system may undermine morale, recruitment, and retention goals.

a. Job Qualifications

The current "pay comparison" methodology compares FLEO compensation to salaries for entry-level local police officers. The results of these comparisons are misleading because they do not reflect the different qualifications possessed by starting local police officers and starting FLEOs.

FLEOs in general, and FBI agents in particular, have professional degrees and come to federal law enforcement as a second or third career. Additionally, FLEOs routinely use sophisticated investigative techniques and are responsible for dangerous law enforcement work related to organized crime, national security, and counter-terrorism. This expertise and education carries with it substantial economic costs and has an economic value that makes its consideration necessary in any discussion regarding pay equity.

Because FLEOs are required to be more highly educated in order to perform complex job duties, any salary comparison should include a comparative analysis of job qualifications. Relevant variables include:

- Level of education;
- Experience;
- Average or required age;
- Assignment availability/mobility requirements;
- Specialized expertise (language, technical skills, etc.);
- Vision/hearing requirements; and
- Length of required training.

If these variables are included in an attempt to identify a comparable job at the local level it will likely result in the conclusion that there are, in terms of required skills or qualifications, no local law enforcement jobs that are properly comparable to work as a FLEO. To accurately determine pay, it is necessary to move beyond the "pay comparison" model and compensate DHS law enforcement

officers, and other FLEOs, based upon a fair salary that it is adjusted for the real cost of living in the areas in which they work.

b. Job Benefits

The second reason that the "pay comparison" approach fails for FLEOs is because salary comparisons, standing alone, do not properly portray the full scope of compensation. To accurately compare compensation, it is necessary to collect and compare information on the types of benefits that are provided to local/state and FLEOs.

Differences in benefits can substantially change the real economic value of a compensation package, and the current pay comparison approach does not fully consider the impact of benefits on compensation equity. For example, while the current approach utilized by OPM does consider the 25 percent availability pay ("AVP") paid to FLEOs, it does not take into account the fact that FLEOs cannot receive any overtime pay in addition to the AVP. It is common for state and local LEOs to supplement their base pay by up to 50 percent in the form of overtime pay. Thus, failing to consider overtime benefits results in a skewed comparison of compensation.

Another aspect of compensation that needs to be considered is the economic value of retirement benefits. For retirement purposes, after 20 years of service FLEOs receive 34 percent of their salary (based upon a three year average) with AVP, and a one percent per year increase for every year of service over 20 years. In comparison, many localities provide benefits that pay from 60 percent to 90 percent of salary (based upon the single highest salaried year) with overtime and shift differentials included in that amount, and lucrative cost of living increases. These differences can represent many thousands of dollars of value to employees and have very real impacts on retention, morale, and the equity of a compensation system.

If a fair method for comparing compensation is going to be implemented at DHS, and applied subsequently to FLEOs in other agencies, the following benefits should be considered:

- Health Insurance (Medical, Dental, Vision, etc.);
- Vacation/Holiday time;
- Uniform allowances;
- Education bonuses (offset or not against salary);
- Pension plans;
- Overtime pay (including whether there is a cap on overtime pay);
- Life insurance and/or disability insurance;
- Annual cost of living adjustments; and
- Housing offsets.

In sum, the FBIAA finds the continued reliance upon the "pay comparison" approach to compensation to be faulty. The creation of a new personnel system for DHS provides an excellent opportunity to build a compensation system for FLEOs that is properly calibrated to account for the fact that job qualifications, responsibilities, and benefits provided to local and federal law enforcement differ in degrees that make fair pay comparison functionally impossible.

D. Special Skills Pay Adjustments

The proposed regulations provide for the establishment of "special skills payments" which are intended to compensate employees for "specializations for which the incumbent is trained and ready to perform at all times." 69 *Fed. Reg.* at 8057. The summary of the proposed regulations explains that these payments "are designed to adjust individual pay levels based upon the acquisition and assessment of competencies, skills, and knowledge," and that special assignment payments will be available to employees who undertake "assignments of greater difficulty or complexity." *Id.* at 8039. However, as with locality payments, the issuance of such payments remains within the sole discretion of DHS. *Id.* at 8057 ("Special skills payments are not basic pay for any purpose and be terminated or reduced at any time without triggering pay retention or adverse action procedures.")

The FBIAA applauds OPM and DHS for embracing the concept that employees should be compensated for possessing unique educations and skills. FLEOs often possess advanced skills and degrees that deserve to be fairly compensated. If DHS, and other federal agencies such as the FBI, hope to recruit and retain individuals with the types of advanced skills that are required to investigate and pursue complex terrorist and criminal networks, then it is essential that these skills and job duties are accounted for in compensation packages.

For this reason, it is necessary that the provisions in the regulations regarding special skills and special assignments payments be clarified and made non-discretionary. The provisions need to specifically recognize that technical skills and the possession of advanced degrees count as "special skills." Furthermore, the term "special assignment" needs to be expanded to include assignments that require high-level skills, have a significant impact on national security, or otherwise demand the most qualified employees. Finally, if DHS and other agencies hope to recruit the finest available employees, compensation for special skills and assignments should be predictable and certain.

Federal employees, and FLEOs in particular, who possess special skills and serve on special assignments are providing unique services to our nation and making definite sacrifices in terms of their time and safety. These services and sacrifices deserve a firm promise of compensation. Fair compensation for employees with special skills should be guaranteed in order to make sure that our government is able to recruit, retain, and fairly pay the law enforcement officers who protect our citizens.

III. The "Pay for Performance" System Is Counterproductive for Law Enforcement.

In the proposed regulations DHS and OPM have decided to waive the provision of chapter 43 of Title 5 of the United States Code, "in order to design a performance management system that will…ensure greater employee accountability with respect to individual performance expectations, as well as organizational results." *Id.* at 8039. The proposed "pay for performance" system will condition market-related pay adjustments, locality pay supplements and other individual pay supplements such as special skills payments on evaluations of an individual's job performance. *Id.* at 8038 ("[T]hese pay adjustments will be provided only to employees who meet or exceed performance expectations.")

The FBIAA, and the agents who are members of the FBIAA, understand the need for employees to perform their tasks effectively, efficiently, and with honor. After all, we often depend upon our fellow

employees' performance to protect our lives and the lives of innocent citizens. However, the FBIAA is concerned about the application of a "pay for performance" system to FLEOs because such a system will likely be unworkable and counterproductive, as discussed below.

1. Pay for Performance Lacks Objectivity

The "pay for performance" is unworkable in a law enforcement context because there is not a fair and objective way to measure performance for FLEOs. FLEOs, and FBI agents in particular, work in teams, put in long hours, and share information and resources within the agency and with other law enforcement agencies. It is not clear what standards can be created to fairly measure performance in this context. The easiest way to measure success is by measuring the quantity of cases solved, crimes prevented, or criminal networks disrupted. However, if arrests or convictions are measured, then it will punish those who work on complex and long-term cases that take years to pursue, and often conclude with valuable information but little in terms of tangible arrests or convictions.

The proposed regulations provide no guidance as to what sorts of measures can or will be applied to law enforcement officers, and the FBIAA believes that there are no measures that are reliable, objective, and fair enough to warrant making them a condition for fair compensation.

2. Pay for Performance Undermines the Teamwork Necessary for Law Enforcement Work

In addition to the practical issue of how to measure performance, the FBIAA is concerned that application of a "pay for performance" to FLEOs in DHS, and potentially to FLEOs in other agencies, will have a negative impact on the law enforcement operations in these agencies.

First, the application of this system to FLEOs in DHS and other agencies will inject a competitive element into law enforcement operations. Effective law enforcement is built on a foundation of teamwork, cooperation, and information sharing. However, a "pay for performance" system fosters competition among employees because the system, in order to function, requires that some employees be credited with law enforcement success while others are not. When the entire range of compensation adjustments are passed through a performance filter, it is not difficult to foresee the difficulties that may arise in the law enforcement context. Employees will compete for information, cases, and credit. In law enforcement this type of competition creates a disincentive for cooperation between law enforcement employees and agencies, and those communication breakdowns undermine the safety of our nation and its citizens.

Second, FLEOs should not have their financial security connected to their arrests, convictions, or investigations. Connecting compensation and law enforcement operations may draw the credibility of FLEOs into question, both in the public forum and in courtrooms. It also creates a financial incentive for FLEOs to focus on quantity of law enforcement activity rather than quality. The credibility problem arises because the "pay for performance" system will have to rely upon indicators of performance such as convictions or arrests that will tie a FLEO's compensation to judicial outcomes, a fact that will surely be exploited by criminal defendants and their attorneys.

Third, a focus on measurable performance statistics creates an incentive for law enforcement officers to pursue large numbers of lower level criminals and terrorists, rather than spending the time and taking the risk of failure inherent in doing the complex an difficult legwork necessary to go after criminal and terrorist kingpins. FLEOs, and FBI agents in particular, are often barely able to provide for themselves and their families. If their locality pay adjustments and other pay supplements were conditioned on any of the conceivable measurements of performance it would create a perverse incentive for these employees to make sure they focused on short-term and easily attainable results (quantity) rather than long-term and risky investigations (quality).

FBI agents work in concert with DHS employees in the effort to investigate, capture, and prosecute criminals and terrorists before they have an opportunity to injure or kill our fellow citizens. OPM and DHS need to be very wary of introducing elements of competition that may undermine the credibility of law enforcement and create incentives for employees to avoid difficult and risky cases that are at the very heart of our battles against criminal networks and terrorist organizations.

If our nation is going succeed in bringing down dangerous criminal networks all law enforcement employees and agencies will need to work together. The FBIAA urges OPM and DHS to reconsider the appropriateness of "pay for performance" in a law enforcement context. FBI agents have serious reservation about the operation of the system within DHS, and know the system would be counterproductive if applied to the FBI.

Conclusion

OPM, key legislators, and experts across the board have stated the new DHS personnel system will be a model for reform in other agencies. If this is the case, OPM and DHS need to consider the unique implications of the proposed personnel system for all FLEOs.

There is a pressing need to create a fair and separate compensation system for FLEOs. The FBIAA supports the proposed regulations provisions relating to locality pay adjustments and special skills payments, subject to the changes we articulated above. In the law enforcement context, "pay for performance" undermines teamwork and results in negative consequences for the investigation of criminal cases. We ask that DHS and OPM reconsider and reform these areas when developing a system for non-DHS FLEOs.

The law enforcement battle against crime and terrorism is vital, and the FBIAA and its member agents are resolved to protect our nation. A compensation system that is being touted as a model for other agencies needs to take account of the skills offered, and sacrifices made by law enforcement employees in the federal government. The current proposal has many positive first-steps but needs further refinement before it is applied in a law enforcement context.

The FBIAA appreciates the opportunity to comment on these regulations and participate in the process to design a compensation and personnel system that is best suited to protect our homeland.

Very truly yours,

Frederick E. Bragg
President

Ms. DAVIS OF VIRGINIA. Thank you very much, Mr. Bragg.

Mr. Cannon.

Mr. CANNON. Good morning, Madam Chairwoman, Ranking Member Davis and distinguished members of the subcommittee. It is a pleasure to appear before you to discuss the issue of Federal law enforcement pay and benefits.

When I appeared before the subcommittee last July, we argued that reform of the law enforcement officer retirement system would improve the recruitment and retention efforts of law enforcement agencies throughout the Federal Government, ensure equity among the various law enforcement and police occupations, and permanently end the confusion regarding which requirements qualify law enforcement employees for law enforcement status.

Because of the critical nature of these issues, the FOP was pleased to support the Federal Law Enforcement Pay and Benefits Parity Act introduced by you, Madam Chairwoman, and Senator George Voinovich. As you know, the legislation directed OPM to report to Congress by 30 April on the disparities in law enforcement classification, pay and benefits across the Federal Government, and provide the recommendations for addressing them. While we are still reviewing the findings and recommendations of the report which was released this past Friday, I would like to discuss our view on a number of key issues regarding reform of the law enforcement retirement system.

First, if the goal is to eliminate disparities in the LEO retirement system, how can Congress ensure that granting the authority they seek to tailor the program to agency-specific needs will not in fact create new authorities or increase existing ones? For example, if OPM was able to grant a specific agency the authority to offer enhanced retirement benefits to meet an urgent staffing crisis, what safeguards would be needed to ensure that it did not result on a drain on the personnel of other agencies who were not given the authority? Is it advisable to detach what is a guaranteed benefit for all Federal employees from statutory law, and in essence allow each agency to have its own retirement program for law enforcement officers?

Eliminating the existing disparities in the LEO retirement system would seem to require at a minimum a basic statutory framework under which all Federal law enforcement personnel are included and provided with a fixed benefit.

Second, if the primary purpose of the LEO retirement system is to enable agencies to maintain young and vigorous work forces, and as OPM acknowledged, it has been successful in this regard, what problems have been caused for those agencies which provide this benefit to their employees by the current requirements for retirement?

Regardless of the physical rigors which may be required in an average work week, law enforcement officers are still required to place their lives on the line each and every day to protect U.S. officials, their fellow employees and the visitors to their facilities. The uniqueness of their work means that such factors as age and physical ability are extremely relevant to an employee's continued ability to perform their assigned duties.

Finally, if the definition of law enforcement officer is inflexible and does not allow agencies to easily expand LEO retirement coverage to their employees, how should the statutory definition be revised to better reflect the hazards and requirements of the modern-day law enforcement mission?

A first step in any reform effort is to amend the definition of what constitutes a law enforcement officer under the law. As OPM has noted, the current definition of a law enforcement officer has not kept pace with the evolution of the Federal law enforcement work force. It imposes and out-of-date black and white concept for law enforcement in criminal investigation on a broad continuum of law enforcement duties for the present day.

In its report to Congress, OPM has also recommended that it be given the regulatory authority to establish a flexible basic and premium pay framework for Federal law enforcement employees throughout the government. We agree with OPM's assertion that the general schedule system does not fully value the work performed by Federal law enforcement personnel and that a separate pay and classification system may be necessary for these occupations. Likewise, we believe that all law enforcement employees can be accommodated under a framework that provides for general consistency among law enforcement agencies, recognizes the fluctuations in different labor markets around the country, and which will prevent the type of talent drain which was evident in 2002 with the creation of TSA and the increased staffing requirements of the Federal air marshal program.

However, given OPM's request for basic and premium pay and classification-setting authority, similar to that provided to DHS, it is important to look at those issues which were raised by the release of the proposed DHS human resources management system. Our written testimony goes into greater detail regarding our views on the DHS system. However, I would like to point out that the FOP does not believe that DHS and OPM have successfully taken into consideration the unique and distinctive work performed by the Department's law enforcement employees in drafting the proposed rule with regard to a pay-for-performance system. The FOP is primarily concerned with whether and how such a system would be applied to law enforcement employees of the Department. Obviously, basing annual pay raises and pay adjustments on such factors as seizures made, number of arrests or other factors relating to the performances of the employee's official duties, would create a culture that weakens the Homeland Security mission.

Therefore, it would seem to be unwise to implement such a system for law enforcement employees at DHS or elsewhere without first ascertaining whether a system is feasible or appropriate for the law enforcement profession. In the end, the question is not whether OPM should be provided with the authority to set a classification, pay and retirement structure specifically tailored for Federal law enforcement personnel, but with the eventual breadth and scope of that authority.

Further, despite OPM's assertion that ensuring consistency does not require policies that are set in the concrete of statute, the FOP believes that there are many areas in which consistency can only be achieved through law. Indeed, resolution of such issues as sys-

tem coverage, the level of flexibility provided to individual agencies, long-term policies to improve recruitment and retention of personnel across the board, and many others will require congressional involvement and oversight.

In conclusion, Madam Chairwoman, let me say again that we appreciate your proven commitment to America's Federal, State and local law enforcement officers. The FOP looks forward to working with you and the other members of the subcommittee on this critically important issue.

I would be pleased to answer any questions.

[The prepared statement of Mr. Cannon follows:]

GRAND LODGE
FRATERNAL ORDER OF POLICE ®

309 Massachusetts Avenue, NE
Washington, DC 20002
Phone 202-547-8189 • Fax 202-547-8190

CHUCK CANTERBURY
PRESIDENT

JAMES O PASCO, JR.
EXECUTIVE DIRECTOR

TESTIMONY

Of

Louis P. Cannon
President, District of Columbia Fraternal Order of Police
Chairman, Federal Officers Committee, National Fraternal Order of Police

"Time to Bite the Bullet: Fixing Federal Law Enforcement Pay and Benefits"

Before the
Subcommittee on Civil Service and Agency Organization
Committee on Government Reform
U.S. House of Representatives

20 July 2004

Building on a Proud Tradition

Good Morning Madam Chairman, Ranking Member Davis and distinguished members of the Subcommittee. I am Lou Cannon, President of the District of Columbia Lodge of the Fraternal Order of Police, and Chairman of the National F.O.P.'s Federal Officers Committee. It is a pleasure to appear before you again on behalf of National President Chuck Canterbury and the more than 318,000 members of our organization to discuss the issue of Federal law enforcement pay and benefits. The title of today's hearing is extremely appropriate, and highlights the focus which the Subcommittee has placed on these issues throughout the 108th Congress. The Subcommittee is to be commended for its efforts on this and other issues important to Federal employees, and we are grateful for the opportunity to appear before you here today.

In July 2003, the F.O.P. appeared before the Subcommittee to present its views and concerns with respect to inequities in the pay and benefits received by Federal law enforcement officers. Among the issues we raised at that time was the top priority for the more than 25,000 Federal officers who are members of our organization: the continued inequitable treatment of Federal police officers and other law enforcement employees under the "LEO" or "6(c)" retirement provisions of Chapters 83 and 84 of Title 5, U.S. Code, and our support for H.R. 2442, the "Law Enforcement Officers Equity Act," introduced by Representatives Bob Filner and John McHugh. The release of the Department of Homeland Security's (DHS) proposed regulations regarding a new human resources management system and the passage of similar legislation for the Department of Defense—and their potential effects on existing provisions of law concerning pay—again brought this issue to the fore.

At no time in our nation's history has there been a greater need to ensure that the Federal government is able to effectively recruit and retain its Federal law enforcement

workforce. Since the 9/11 terrorist attacks, the responsibilities of law enforcement at every agency have changed dramatically. In addition to their role maintaining law and order, Federal law enforcement officers must now confront new challenges such as those posed by terrorists using chemical, biological or radiological weapons to attack our nation. Because of the critical nature of these issues, the F.O.P. was pleased to support the "Federal Law Enforcement Pay and Benefits Parity Act of 2003" introduced by you, Madam Chairman, and your counterpart on the Governmental Affairs Committee, Senator George Voinovich. As you know, the legislation which was signed into law in December directed the Office of Personnel Management (OPM) to report to Congress by 30 April on the disparities in law enforcement classification, pay and benefits across the Federal government, and to provide recommendations for addressing these disparities. The contents of the final report, which was released this past Friday, has been a subject of great interest to the membership of the F.O.P. And while we are still reviewing the findings and recommendations it contains, we would like to briefly discuss our views on a number of key issues.

Retirement

When the F.O.P. last appeared before the subcommittee, we argued that reform of the "law enforcement officer" retirement system would improve the recruitment and retention efforts of law enforcement agencies throughout the Federal government, bring equity among the various law enforcement and police occupations, and permanently end the confusion regarding which requirements qualify law enforcement employees for law enforcement status. OPM has made several general recommendations with regard to the future of the law enforcement officer retirement system; based primarily on OPM being "given the authority necessary to modernize LEO retirement benefits."[1] One option

[1] *Report to the Congress: Federal Law Enforcement Pay and* Benefits, Office of Personnel Management, July 2004, Page 8.

which they presented was the creation of a "second tier" of law enforcement benefits, which would fall between current LEO benefits and regular retirement benefits. In addition, they noted that if provided with this broad authority, they would be able to ensure consistency in benefits ("where appropriate"), allow flexibility in establishing retirement eligibility standards and mandatory requirements, and have "the ability to establish a more responsive benefits structure that will give agencies maximum flexibility for recruitment and retention of experienced personnel."[2]

Thus, OPM's report raises several important issues regarding reform of the law enforcement retirement system:

1. If the goal is to eliminate disparities in the LEO retirement system, how can Congress ensure that granting OPM the authority they seek to tailor the program, through regulations, to agency-specific needs will not in fact create new disparities or increase existing ones? For example, if OPM was able to grant a specific agency the authority to offer enhanced retirement benefits to meet an urgent staffing crisis, what safeguards would be needed to ensure that it did not result in a drain on the personnel of other agencies who were not given this authority? Obviously, the problems with the current system were showcased in the success of the Transportation Security Administration's (TSA) efforts to draw experienced law enforcement personnel from other agencies because of their ability to provide higher pay and better retirement benefits. Thus, is it advisable to detach what is a guaranteed benefit for all Federal employees from statutory law and, in essence, allow each agency to have its own retirement program for law enforcement officers? Eliminating the existing disparities in the LEO retirement system would seem to require, at a minimum, a basic statutory framework under which all Federal law enforcement personnel are included and provided with a fixed benefit.

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[2] *Report*, Page iii.

2. **If the primary purpose of the LEO retirement system is to enable agencies to maintain young and vigorous workforces and, as OPM has acknowledged it has been successful in this regard, what problems have been caused by the requirements for retirement for those agencies which provide this benefit to their employees?** The concerns which have been expressed regarding the loss of experienced personnel if LEO retirement is offered across the board are only valid if you discount the importance to the law enforcement mission for agencies to be able to maintain a young and vigorous workforce. An officer who joins a Federal police force at, for example, the age of 22 would not be eligible for regular retirement until age 47 at the earliest. As the officer ages into his fifties, the question becomes not whether he or she can still provide his agency with additional years of service, but what type of service will he or she be capable of performing.

The jobs performed by Federal public safety employees are unique compared to most occupations throughout the government. Regardless of the physical rigors which may be required in an average workweek, they are still required to place their lives on the line each and every day to protect U.S. officials, their fellow employees, and the visitors to their facilities. This uniqueness also means that, unlike most other positions within the Federal government, such factors as age and physical ability are extremely relevant to an employee's ability to perform his or her assigned duties. That is why having a young and vigorous workforce is essential to ensuring that when the need arises, every officer in a given department is ready and capable of subduing an individual resisting arrest or chasing a fleeing subject.

In 1996, Congress addressed this issue when it enacted a permanent exemption for public safety employers from the *Age Discrimination in Employment Act* as part of the omnibus spending bill of 1996. This law allowed State and local governments to

again set and enforce maximum hiring ages for new employees and a mandatory retirement age without facing individual lawsuits alleging age discrimination. The Fraternal Order of Police strongly supported the enactment of this law to ensure that public safety personnel are able to meet the physical demands of their profession. During floor consideration of a similar bill which passed the House of Representatives in 1995, then Subcommittee on Employer-Employee Relations Chairman Harris Fawell noted that "the public safety field is one of the rare exceptions where one's age is relevant to one's ability to perform effectively as a firefighter or law enforcement officer."[3] Rep. Major Owens also spoke on the need for mandatory hiring and maximum separation ages:

> "Age does indeed affect an individual's ability to perform the duties of a public safety officer. This is not a stereotype. This is not ageism. This is a medical fact. Physical ability declines with age. For example, aerobic capacity declines at a rate of 1 percent per year after age 30. Strength declines at a rate of 10-13 percent every decade. The risk of sudden incapacitation also clearly increases with age, increasing sixfold between the age of 40 and 60 years of age. These physical effects are not experienced by all people to the same degree or at the same precise time. But they pose a significant problem to public safety agencies in their efforts to maintain a fit and effective workforce."[4]

Not only is an appreciation of the unique physical demands and abilities required in law enforcement work essential to understanding the need for an earlier retirement for public safety officers; but the health and physical risks associated with their particular occupation must also be taken into account. One recent study, for example, found that "police officers are twice as likely as the rest of us to suffer heart attacks, strokes and other cardiovascular disease." The study, conducted by Iowa State University and published in 1998, looked at 232 retired male law enforcement officers and found that the rate of heart attacks and related conditions among these individuals was 31.5 percent, compared to 18.4 percent for the general population. When known risk factors were taken out of the equation, "working as a law enforcement officer meant a 2.34 times

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[3] Statement of Rep. Harris Fawell, *Congressional Record*, 28 March 1995, Page: H3822.
[4] Statement of Rep. Major Owens, *Congressional Record*, 28 March 1995, Page H3823.

greater risk of disease." These unseen risks, such as the prevalence of on the job injury or disability, constant stress, and the increased risk of heart and hypertension disorders, are all factors that need to be considered when looking at the necessity for police officers and others to retire earlier than other Federal employees.

3. If the definition of "law enforcement" officer is inflexible and does not allow agencies to easily expand LEO retirement coverage to their employees, how should the statutory definition be revised to better reflect the hazards and requirements of the modern day law enforcement mission? A "first step" in any reform effort is to amend the definition of what constitutes a law enforcement officer under the law. There appears to be very little if any disagreement that the current definition is outdated and does not reflect the increased hazards faced by today's Federal law enforcement personnel. Indeed, OPM notes in the report that the current definition of "law enforcement officer" "has not kept pace with the evolution of the Federal law enforcement workforce," and "imposes an out of date, black-and-white concept of law enforcement and criminal investigation on the broad continuum of law enforcement duties of the present day."[5]

The question, then, is not whether OPM should be granted with the regulatory authority to make alterations to the Federal LEO retirement system, but with the eventual breadth and scope of that authority, and what issues must be addressed through revisions to existing law.

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[5] *Report,* Page 14.

Classification, Basic Pay & Premium Pay

In its report to Congress, OPM has recommended that it be "given the authority to establish a flexible basic pay framework for Federal law enforcement employees throughout the Government,...Consistent with the paybanding framework that has been proposed for DHS, this Governmentwide framework would include a common structure of law enforcement occupations, a structure of bands or rate ranges for various levels of work, and provisions for establishing and adjusting those rate ranges."[6] Such a framework would provide Federal law enforcement agencies with "considerable flexibility to design tailored systems for performance management and individual employee pay adjustments."[7]

With regard to the issue of premium pay, OPM has again recommended that Congress grant the agency the "regulatory authority necessary to establish a framework of premium pay rules for Federal law enforcement employees throughout the Government," and to work with the agencies to "develop appropriate solutions to existing problems associated with premium pay caps or other premium pay provisions."[8] This would allow OPM to "work with agencies so that premium pay rules can be more easily modified to address current needs or adjusted to correct any problems that surface;" and develop regulations governing system coverage, overtime pay for FLSA-exempt employees, pay differentials, hazardous duty pay, other special payments and differentials, and when overtime is creditable as basic pay for retirement purposes.[9]

We agree with OPM's assertion that the General Schedule system does not fully value the work performed by Federal law enforcement personnel, and that a new, separate pay and classification system may be necessary for these occupations. Likewise, we believe that all law enforcement employees can be accommodated under a framework

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[6] *Report,* Page 26.
[7] *Ibid.*
[8] *Report,* Page 44.
[9] *Report,* Page 57.

that provides for general consistency among law enforcement agencies, recognizes the fluctuations in different labor markets around the country, and which would prevent the type of "talent drain" which was evident in 2002 with the creation of the Transportation Security Administration and the increased staffing requirements of their Federal Air Marshal program. However, given OPM's request for basic and premium pay- and classification-setting authority similar to that provided to the Department of Homeland Security (DHS), it is important to look at those issues which were raised by the release of the proposed DHS Human Resources Management System earlier this year.

In creating the Department of Homeland Security, Congress recognized the need for a centralized national effort to strengthen the safety and security of our nation in the wake of the devastating terrorist attacks of 11 September 2001. To carry out its primary mission, Congress transferred more than 20 agencies from Departments across the Federal government. Each of these agencies brought with them certain personnel policies and practices which were uniquely their own, creating a need for the new Department to develop a human resources management system which would bring all of their employees within a single, consolidated system. As the preamble to the proposed regulations made clear, "the Department of Homeland Security was created in recognition of the paramount responsibility to safeguard the American people from terrorist attacks and other threats to homeland security."[10] This primary mission of the Department is carried out by its more than 40,000 law enforcement employees, which makes DHS the second largest employer of law enforcement officers in the Federal government behind the Department of Justice.

In its formal public comments, the F.O.P. argued that DHS and OPM had not successfully taken into consideration the unique and distinctive work performed by the

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[10] Proposed Rule, Department of Homeland Security/Office of Personnel Management, *Federal Register*, Vol. 69, No. 34; 20 February 2004, Page 8035.

Department's law enforcement employees as opposed to that performed by those in its other administrative and non-law enforcement positions when drafting the proposed rule. With respect to the three areas of pay, classification and performance management, DHS and OPM intend to establish a "pay for performance" system "designed to ensure that employees have a clear understanding of their expected performance and to reinforce and reward high-performing employees who advance and support the Department's mission."[11] This is indeed a laudable goal—one which should be the same for all Federal agencies—however, the problem lies primarily in extending such a system to the rank and file law enforcement employees of the Department who serve on the front lines in the war on terror at home, and whose positions are not comparable to any other in the Federal service.

Given the lack of specificity in the proposed rule, the F.O.P. is primarily concerned with how such a system would be applied to the law enforcement employees of the Department, as well as with its implementation. First and foremost, the Department has not provided any evidence that a "pay for performance" system is appropriate or feasible for law enforcement work in general or, in particular, that such a system as DHS and OPM are contemplating can be successfully applied on the scale which has been proposed.

Experts in the human resources field have noted that there are several potential downsides of "pay for performance" systems, ones which could be potentially exacerbated by their application to law enforcement positions and, more importantly, compromise the ability of DHS to carry out its mission. Steven Kelman, a professor at Harvard University's John F. Kennedy School of Government, has noted that one potential problem arises from the effect that providing extra pay for strong performance has on "people who are intrinsically motivated to perform," in that the use of "increased

[11] Proposed Rule, Page 8036.

extrinsic rewards might actually produce poorer performance among intrinsically motivated people."[12] Kelman argues that such a system presents a special problem for government agencies where public sector workers are more likely to be intrinsically motivated to perform their work than those in the private sector, and where the size of the rewards available to high-performers in the public sector are likely to be "modest" when compared to those available from private sector companies. In addition, Kelman argues that a second problem with such systems is that "individually based reward systems can cause harm when collaboration, teamwork and information sharing in a work group are crucial to good performance."[13] Nowhere are these statements more applicable that to the law enforcement profession. The mission carried out by front-line police officers and criminal investigators works best when it works in a team environment, where officers are not expected to compete with one another but to work together to prevent crimes, and arrest those who violate the law.

The second problem with implementing a pay for performance system for law enforcement officers arises from the need to establish "performance appraisal factors" for a position which all too often has no counterpart outside of the Federal government and whose duties, responsibilities, and impact on public safety are extremely difficult to quantify. Obviously, basing the annual raises and pay adjustments on such factors as seizures made, number of arrests, or other factors related to the performance of the employee's official duties would create a culture that weakens the homeland security mission. In addition, the problem with developing these standards is that "job standards were much easier to define in the industrial age than today, now that most federal employees are expected to act more independently and use more discretion...[and] beyond some basic output measures and standards of conduct, many jobs rely on

[12] "The Right Pay," by Steven Kelman, GovExec.com, May 15, 2003.
[13] *Ibid.*

subjective standards of effectiveness."[14] During a briefing on the proposed regulations, held on 9 March at OPM headquarters, OPM and DHS officials acknowledged that the scope and nature of these performance appraisal factors were still under review. Therefore, it would seem to be unwise to implement such a system for law enforcement employees at DHS or elsewhere without first ascertaining whether such a system is feasible or appropriate for a profession which values teamwork over individualism, and which requires an employee to willingly place his life on the line as a regular part of his everyday duties.

The question again is not whether OPM should be provided with authority to set a classification and pay structure specifically tailored for Federal law enforcement personnel, but with the breadth and scope of that authority. Further, despite OPM's assertion that ensuring consistency does not require policies that are "set in the 'concrete' of statute," the F.O.P. believes that there are many areas in which consistency can only be achieved through law. Indeed, resolution of such issues as system coverage, the level of flexibility provided to individual agencies, long term policies to improve recruitment and retention of personnel across the board, and many others will require congressional involvement and oversight.

In conclusion, Madam Chairman, let me say again on behalf of National President Chuck Canterbury and the membership of the Fraternal Order of Police, that we appreciate your proven commitment to America's Federal, State and local law enforcement officers. The F.O.P. looks forward to working with you and the other Members of the Subcommittee on this critically important issue, and I would be pleased to answer any questions you may have.

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[14] "The Rating Game," by Brian Friel, *Government Executive* Magazine, 15 August 2003.

Ms. DAVIS OF VIRGINIA. Thank you, Mr. Cannon.

Mr. Bonner, you are recognized for 5 minutes.

Mr. BONNER. Thank you, Chairwoman Davis, Ranking Member Davis. On behalf of the approximately 60,000 Federal law enforcement officers represented by the American Federation of Government Employees in a wide variety of law enforcement occupations, we are pleased to have the opportunity to present our views concerning Federal law enforcement pay and benefits.

Without question, dedicated law enforcement officers are our Nation's most valuable resource in the fight against crime and terrorism. It is therefore imperative that their pay and benefit systems be capable of attracting and retaining the best and brightest employees.

This matter has been a perennial concern for Congress, which has ordered numerous studies on various related topics. Most recently, the Federal Law Enforcement Pay and Benefits Parity Act of 2003 required the Office of Personnel Management to submit a report to Congress that included, "a comparison of classifications, pay and benefits among law enforcement officers across the Federal Government and recommendations for ensuring to the maximum extent practicable the elimination of disparities in classifications, pay and benefits for law enforcement officers throughout the Federal Government."

Although this report was due on April 30, 2004, it was not released to the public until July 26, 2004, last Friday. The only specific recommendation made in the report was a call for Congress to cede its responsibility to administer and oversee the pay and benefits of law enforcement officers to OPM, which would exercise this new broad regulatory authority in consultation with the employing agencies and with the concurrence of the Attorney General.

The fact that OPM fails to outline any role for the affected employees and their representatives in the development of these systems is indicative of its arrogant belief that it is capable of independently developing systems that will be accepted by frontline Federal law enforcement officers. OPM's recommendation is strongly opposed by AFGE. Congress is much more sensitive to the will of the people than the executive branch, and should retain this power, especially with respect to such an important group of civil servants.

The fact that over 30 different sections of the OPM report raise concerns about the costs of funding, pay and benefits reforms makes it abundantly clear that OPM's primary concern is protecting the public coffers, not protecting the public from crime and terrorism.

Undoubtedly, this short-sighted approach will ultimately prove extremely costly in terms of both dollars and lives. The cost of a single large-scale terrorist attack would far exceed all of the expenditures necessary to transform the current pay and benefits systems into ones that are fair, equitable and capable of attracting and retaining dedicated and outstanding law enforcement officers.

In essence, OPM's recommendation has the effect of declaring the new personnel system at the Department of Homeland Security a total success, even though it has yet to be implemented. This wildly optimistic assessment is contrary to the comments of the over-

whelming majority of employees, as well as practical experience. During town hall meetings last year with DHS employees, the prevailing sentiment was that the current general schedule pay system, with some relatively minor modifications, would be far preferable to an untested pay-for-performance scheme.

Similarly during the recent public comment period concerning the proposed new DHS personnel regulations, almost all of the 3,800 comments expressed grave concerns about the proposed new pay system. Moreover, every single pay-for-performance experiment that has been conducted in the Federal sector that has not been accompanied by substantial funding increases has failed miserably. Placed into the existing general schedule pay system, such significant funding increases would remedy most of its problems by enabling managers to exercise the many flexibilities that already exist in that system.

Although OPM's report fails to make specific recommendations concerning the means to eliminate disparities in classifications, pay and benefits for Federal law enforcement officers, it does contain a lengthy discussion of such matters and includes several possible options. Due to the extremely short response period, AFGE is unable to generate an exhaustive analysis or rebuttal of those points at this time. Rather, it will issue an independent report in the near future that contains specific recommendations to deal with the problems identified by Congress.

The report will also respond in detail to the options surfaced by OPM. The recommendations in AFGE's report will adhere to the general principles of fairness and equity. Their adoption would result in systems that are credible and acceptable to employees. In the final analysis, the ultimate test of any pay and benefit system is its ability to attract and retain high-quality employees.

The following overview highlights some of the issues that will be covered in AFGE's report: expand the definition of Federal law enforcement officer to include all Federal police officers, guards, inspectors and other similarly situated employees; expand full law enforcement retirement benefits to all Federal law enforcement officers who meet the expanded law enforcement officer definition; leave the mandatory retirement age at 57; implement incentives for retirement-eligible employees to continue working; enhance and expand geographic pay; retain the current general schedule pay system and fund the ample flexibilities therein; abandon the notion of pay-for-performance for Federal law enforcement officers, which will only serve to de-motivate these otherwise highly motivated employees; retain different overtime systems for different types of overtime work; expand Fair Labor Standards Act coverage to all Federal law enforcement officers; eliminate overtime earnings limitations; standardize night, Sunday and holiday differentials to more generous levels; repeal the pay flexibilities granted to the Departments of Homeland Security and Defense; and finally, expand collective bargaining rights and civil service protections to all Federal law enforcement officers.

In sum, AFGE agrees that there are numerous inequities within the current pay and benefits systems, but strongly disagrees with OPM's recommendation that Congress cede its authority to set and administer the pay and benefits of Federal law enforcement offi-

cers. These roles properly belong to Congress, which is in a far better position to make decisions that are driven primarily by the public interest.

Public safety is the single most important function that a government performs. Allowing it to become subservient to fiscal considerations would set the stage for further national tragedies.

Thank you. I would be happy to answer any questions.

[The prepared statement of Mr. Bonner follows:]

STATEMENT OF THE

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFL-CIO

BEFORE THE

SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION

COMMITTEE ON GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

"TIME TO BITE THE BULLET: FIXING FEDERAL LAW ENFORCEMENT PAY AND BENEFITS"

PRESENTED BY

T.J. BONNER
PRESIDENT
NATIONAL BORDER PATROL COUNCIL

JULY 20, 2004

On behalf of the approximately 60,000 Federal law enforcement officers represented by the American Federation of Government Employees (AFGE) in a wide variety of law enforcement occupations, thank you for the opportunity to present our views concerning Federal law enforcement pay and benefits. Without question, dedicated law enforcement officers are our Nation's most valuable resource in the fight against crime and terrorism. It is therefore imperative that their pay and benefits systems be capable of attracting and retaining the best and brightest employees.

This matter has been a perennial concern for Congress, which has ordered numerous studies on various related topics. Most recently, the Federal Law Enforcement Pay and Benefits Parity Act of 2003 required the Office of Personnel Management (OPM) to submit a report to Congress that included "a comparison of classifications, pay, and benefits among law enforcement officers across the Federal Government; and recommendations for ensuring, to the maximum extent practicable, the elimination of disparities in classifications, pay and benefits for law enforcement officers throughout the Federal Government." Although this report was due on April 30, 2004, it was not released to the public until July 16, 2004.

The only specific recommendation made in the report was a call for Congress to cede its responsibility to administer and oversee the pay and benefits of Federal law enforcement officers to OPM, which would exercise this new broad regulatory authority in consultation with employing agencies and with the concurrence of the Attorney General. The fact that OPM fails to outline any role for the affected employees and their representatives in the development of these systems is indicative of its arrogant belief that it is capable of independently developing systems that will be accepted by front-line Federal law enforcement officers.

OPM's recommendation is strongly opposed by AFGE. Congress is much more sensitive to the will of the people than the executive branch, and should retain this power, especially with respect to such an important group of civil servants. The fact that over 30 different sections of the OPM report raise concerns about the costs of funding pay and benefits reforms makes it abundantly clear that

OPM's primary concern is protecting the public coffers, not protecting the public from crime and terrorism. Undoubtedly, this short-sighted approach will ultimately prove extremely costly in terms of both dollars and lives. The cost of a single large-scale terrorist attack would far exceed all of the expenditures necessary to transform the current pay and benefits systems into ones that are fair, equitable and capable of attracting and retaining dedicated and outstanding law enforcement officers.

In essence, OPM's recommendation has the effect of declaring the new personnel system at the Department of Homeland Security (DHS) a total success even though it has yet to be implemented. This wildly optimistic assessment is contrary to the comments of the overwhelming majority of employees, as well as practical experience. During town hall meetings last year with DHS employees, the prevailing sentiment was that the current General Schedule pay system, with some relatively minor modifications, would be far preferable to an untested pay-for-performance scheme. Similarly, during the recent public comment period concerning the proposed new DHS personnel regulations, almost all of the 3,800 comments expressed grave concerns about the proposed new pay system. Moreover, every single pay-for-performance experiment that has been conducted in the Federal sector that has not been accompanied by substantial funding increases has failed miserably. Placed into the existing General Schedule pay system, such significant funding increases would remedy most of its problems by enabling managers to exercise the many flexibilities that already exist in that system.

Although OPM's report fails to make specific recommendations concerning the means to eliminate disparities in classifications, pay and benefits for Federal law enforcement officers, it does contain a lengthy discussion of such matters, and includes several possible options. Due to the extremely short response period, AFGE is unable to generate an exhaustive analysis or rebuttal of those points at this time. Rather, it will issue an independent report in the near future that contains specific recommendations to deal with the problems identified by Congress. The report will also respond in detail to the options surfaced by OPM.

The recommendations in AFGE's report will adhere to the general principles of fairness and equity. Their adoption would result in systems that are credible and acceptable to employees. In the final analysis, the ultimate test of any pay and benefits systems is their ability to attract and retain high-quality employees.

The following overview highlights some of the issues that will be covered in AFGE's report:

- *Definition of Federal law enforcement officer.* The current statutory definitions of Federal law enforcement officers for all purposes are overly narrow and exclude many employees who are engaged in bona fide law enforcement duties. These definitions need to be expanded to include all Federal police officers, guards, inspectors, and other similarly-situated employees. No employees who are currently included should be excluded.
- *Law enforcement retirement benefits.* Full law enforcement retirement benefits should be provided to all Federal law enforcement officers who meet the expanded law enforcement officer definition. OPM's option to provide a less generous law enforcement retirement system for some of these employees is unacceptable, as it is contrary to the basic principles of fairness and equity.
- *Mandatory retirement age.* OPM's suggestion that the mandatory retirement age should be raised is unsupported by common-sense and experience. Although life expectancies have risen slightly during the past few decades, much of that has to do with modern medicine and not physical fitness. The fact that extreme physical exertion is not an everyday occurrence for law enforcement officers makes the prospect of serious injury all the more likely for middle-aged officers. Moreover, raising the mandatory retirement age would also require a concomitant increase in the entry age. Any attempts to maintain the current entry age restrictions while raising the mandatory retirement age would almost certainly be overturned by the courts on the basis of age discrimination.
- *Incentives for retirement-eligible employees to continue working.* The current system provides very little incentive for employees to remain in service beyond the time they are eligible for retirement.

This could easily be remedied by implementing a progressive retirement formula that increases the percentage of their benefit at that point in their career instead of decreasing it as under current law, and by raising the maximum percentage of salary that an employee can receive as an annuity.

- *Geographic pay.* The underlying concept of the current system – standardized general salary rates with adjustments for geographic areas that have a higher than average cost of living – is sound. Unfortunately, the geographic adjustments in many areas have not kept pace with the cost of living, creating a large gap between Federal pay and that of similarly-situated employees in the private sector and State and local governments. These defects must be addressed if the Federal Government is to remain competitive.
- *Pay flexibilities.* The current General Schedule pay system has ample flexibilities to reward performance, overcome recruitment and retention difficulties, and address every conceivable special circumstance. There is no justification for abandoning the current system, which is fair and largely predictable, especially since the potential for arbitrary and capricious compensation variations within OPM's proposed systems would increase exponentially.
- *Pay-for-performance.* Federal law enforcement officers are highly-motivated individuals who depend upon the close cooperation of their colleagues to accomplish their mission. They must be self-motivated and able to work without close supervision. Placing these employees under a private industry pay-for-performance model will be counter-productive, and will demotivate and demoralize them.
- *Overtime systems.* The different types of overtime worked by various categories of Federal law enforcement officers require different types of overtime systems. For example, while the concept of availability pay makes sense for criminal investigators who primarily work a single shift and are frequently called back afterwards, it makes little sense for Border Patrol agents who are assigned to around-the-clock shifts and whose overtime is almost exclusively an unpredictable continuation of their duties.

- *Fair Labor Standards Act.* Employees should be covered by the provisions of the Fair Labor Standards Act (FLSA) regardless of their overtime system. Employees who work long hours deserve to be fairly compensated for all hours worked. Without FLSA coverage, employees end up working long hours without any compensation.
- *Overtime limitations.* Artificially limiting the amount of money that employees can earn without regard to the hours that they work is also unfair and demoralizing. OPM's argument that this can lead to pay inversion problems is grossly overstated. The example used to support that argument compares the pay of a GS-15 Step 10 Criminal Investigator to that of a Senior Executive Service manager, when in fact almost all criminal investigators are paid at the GS-13 level.
- *Differentials.* The disparity in night, Sunday, and holiday differentials of Federal law enforcement officers should be eliminated by providing all such employees with the more generous and fair differentials.
- *Relationship of General Schedule pay system and DHS and DOD pay systems.* The new flexibilities within the Departments of Homeland Security and Defense will exacerbate pay inequities among Federal law enforcement officers. Instead of following OPM's recommendation to extend such flexibilities to the pay systems of all Federal law enforcement officers, a more rationale approach would be to eliminate these untried flexibilities and reinstate the role of Congress in setting and overseeing pay for all Federal law enforcement officers.
- *Collective bargaining rights and civil service protections.* Pay and benefits are but one factor that contribute to the attractiveness of a career in Federal law enforcement. Fair treatment and a meaningful voice in workplace decisions are other necessary elements in the equation. All Federal law enforcement officers deserve full collective bargaining rights and civil service protections. Without such rights and protections, it will be extremely difficult to maintain a cadre of dedicated, high-quality employees.

In sum, AFGE agrees that there are numerous inequities within the current pay and benefits systems, but strongly disagrees with OPM's recommendation that Congress cede its authority to set and administer the pay and benefits of Federal law enforcement officers. These roles properly belong to Congress, which is in a far better position to make decisions that are driven primarily by the public interest. Public safety is the single most important function that a government performs. Allowing it to become subservient to fiscal considerations would set the stage for further national tragedies.

Ms. DAVIS OF VIRGINIA. Thank you, Mr. Bonner.

Mr. Bragg, as a supporter, and by the way, no decisions have been made yet on that report from OPM, so we have not decided to do what they have suggested. This is a very complicated, although to me it seems simple, but when you try to get something passed, it is not simple. So I have found out in the last couple of years on the Hill.

Mr. Bragg, I have a question for you. As a supporter of Representative Rogers' bill, H.R. 1676, that we have talked about in the past, a bill which excludes availability pay for Federal criminal investigators from the limitation of premium pay, among other things, what is your reaction to OPM's report critical of such legislation? I am sorry for the short time you had to read the report, but we did not have but 1 day more than you did.

Mr. BRAGG. I believe that their concern, I mean, they do not deny that there is a problem, but they are concerned about the pay inversion and how it will affect the SES. I can speak for the FBI Agents Association, the membership. There are approximately 12,000 of those assigned to GS and maybe 200 in the SES category. I think they can work it out. They can find something to marry the two systems together to where there is not an inverted effect on the system.

Ms. DAVIS OF VIRGINIA. You all know we have several bills in this committee, and rather than do things piecemeal, we are trying to come up with something that would stop this problem from here on out, so that people would be treated fairly.

With that said, you all heard the testimony from Mr. Sanders of OPM. As of right now, LEOs must complete 20 years of LEO service to qualify for higher benefits. Any of you can answer this. Would you be in favor of changing the retirement system to allow higher benefits for each year of LEO service, even if that total did not reach 20? Anybody want to jump in?

Mr. CANNON. I will jump into the pond and start the ripples going.

Ms. DAVIS OF VIRGINIA. All right.

Mr. CANNON. First of all, I think you are going to have to determine what LEO service is. That is going to be the big problem right there. Earlier you talked about people doing similar jobs. I can give you a specific example right now. At the Vice President's mansion located at the Naval Observatory, you have two uniformed forces that protect that facility: the U.S. Secret Service Uniform Division and the Department of Navy Police. Well, the U.S. Secret Service Uniform Division enjoys the pay and benefits of law enforcement officers. The Department of Navy personnel who do the identical job standing side by side with them do not. They start at significant lower pay and do not have the LEO retirement. So are they LEOs?

So we are going to have to define first of all what a LEO is. I think anything to give creditable service for LEO service would be a step in the right direction. First of all, are the guys wearing uniforms, carrying guns, inspecting the cars, protecting the Vice President, but their patch says Department of Navy Police, any less of a law enforcement officer than the U.S. Secret Service who they are working exactly alongside with?

Ms. KELLEY. NTEU believes that the current 20-year retirement and pay systems should not be diluted for anyone who is currently under the system. The need to define who is treated as a Federal law enforcement officer referred to them, and they are referred to every day at LEOs. They are referred to when you talk about their duties and when they are talked about in the newspapers. They are just not treated that way for pay and benefits.

So first and foremost, we believe that there should be no dilution of the current benefits for those who are covered. From there, the conversation about how to redefine appropriately who should be covered and what that coverage should be, we are open to discussion. We really have had no real proposal suggested to us.

Ms. DAVIS OF VIRGINIA. Are you open to a two-tier system that they talked about?

Ms. KELLEY. I would like to know what it is they have in mind. We are open to the discussion and we have told them this even in Homeland Security, but then there were never any specifics forthcoming. So we would be willing to talk about it as long as the existing tier does not suffer as a result, that should be maintained.

Ms. DAVIS OF VIRGINIA. Anybody else want to jump in the mix here? Then I want you to add to it. Do you think that agencies should be allowed to hire someone who is over the age of, I am probably treading into water I should not tread into here, over the age of 37, but still make them subject to mandatory retirement at 57? You know, those old decrepid people they talked about.

Mr. BONNER. Let me answer your first question first, which was creditable service for less than 20 years. I assume you are talking about a transition for people who are added into the mix. Clearly, there is a way to solve the problem. They have done this before when they initiated that system way back when. They grandfathered people so that people were able to get their full retirement. I am not sure exactly how they did it, but it is not an insolvable problem.

I am sorry. I forgot your second question.

Ms. DAVIS OF VIRGINIA. Yes, you just do not want to answer it.

Do you think agencies should be allowed to hire people after age 37, and still mandate retirement at 57?

Mr. BONNER. No, I do not. I think there is a very good reason that they have the age limit in place, notwithstanding the actuarials that show that people are living longer. I think that is due to the wonders of medicine. I would disagree with Mr. Sanders when he says that 50-year-olds are in better shape today than they were 50 years ago. Because of our sedentary lifestyle and because of air pollution and other factors, I think that the physical condition has probably deteriorated somewhat.

Ms. DAVIS OF VIRGINIA. Being over 50, I disagree with you. [Laughter.]

Mr. BONNER. I am over 50 myself. I will tell you, I do not relish the thought of wrestling on the ground with a 23-year-old who is in excellent physical shape. That is the danger of allowing people to go much beyond the mandatory age of 57. I think that there are ways to encourage people to stay beyond 50. Many State jurisdictions increase the percentage that people earn past that eligibility age, which is a great incentive for them to stick around. They also

raise the percentage of salary that they can get as part of their annuity.

We are currently capped at 80 percent. So someone in my situation who is eligible to retire right now, I am actually working for pennies on the dollar. When I show up to work, instead of making $20-some-odd an hour, when you factor it against the fact that I would be making a substantial portion of that were I retired, there is not much of an incentive for people to work beyond their eligibility point. We have to change that if we truly value that experience and want to hang onto that experience.

Ms. DAVIS OF VIRGINIA. Happy birthday.

Mr. CANNON. And looking forward to 57 and being able to retire. Maybe I will do something meaningful with my life like run for Congress after that.

One of the things that should be looked at is anything can have exemptions. At a meeting one time, there was a detective who had been a detective in a municipal agency up north for quite some time. He had been working on his college degree. Unfortunately, he did not obtain his college degree until he was 39. He stood up and he said, one of the things that had been his goal was to get his degree and become an FBI agent. Well, because he had not gotten his degree until he was 39, he is not eligible to be hired, because he came from the municipal sector and not a Federal sector.

So there are any number of things that could be explored. If he has law enforcement experience, credible law enforcement experience that can be converted from a municipal sector into Federal service, might that not be a valuable asset for an investigative agency to get an experienced investigator, albeit he is 2 years past his minimum age, and then either build something on the end of it where he could finish off his career either in another analytical portion of the FBI or whatever, but while he could serve law enforcement during those peak years.

So I think there are a number of things that could be explored there.

Ms. DAVIS OF VIRGINIA. I think you can see we have a difference of opinion even on the panel here.

I am going to yield to Mr. Davis and then we will have another round of questions.

Mr. DAVIS OF ILLINOIS. Thank you very much, Madam Chairwoman.

It seems to me that I detected sort of a flavor running through the panel that you all have some difficulty with OPM having the authority to handle this assignment on its own. Could you tell me why? Do you feel that they do not have the capability to do it, or are restricted? What is the reason?

Ms. KELLEY. For my part, it is two issues. One is that everything that is described in the authority they would have is about concepts. Based on our experience to date with DHS and OPM on the flexibilities they do have, after all this time we are still hearing from them concepts with no specificity as to what they will do. I expect that in the end what they do do may be a surprise to us. We will really have had no opportunity for meaningful input that could impact what final decisions would be.

But probably a larger issue for us is that as each administration changes, as each OPM Director changes, so could the rules about LEO. These are things that we believe are so critical, not only to employees, but to the agencies to accomplishing their missions, that they should be in statute and be so determined, recognizing that can be a very long and burdensome process, but figuring out how to streamline that, how to get the right answers and get it in the statute so that it is something employees can depend on and not be at the whim of a new administration or a new director throughout their career.

That is the main issue for NTEU.

Mr. DAVIS OF ILLINOIS. Mr. Cannon.

Mr. CANNON. I commend you on your choice of words, Mr. Davis, the flavor, because what I think we do not want is Baskin-Robbins, where we have 31 flavors and we get 31 different interpretations. It needs to be codified somewhere so that you have a model that you can go back to. I think that is part of the problem now, is that they have different interpretations and the implementation is so diverse.

Mr. BONNER. The fundamental problem that AFGE has with it is that the executive branch is not directly accountable to the people. I do not know about your ballot, but I have never been able to vote for the Director of OPM. I can vote for Members of Congress. I think Congress is therefore much more responsive to the concerns of the people.

Mr. BRAGG. Mr. Davis, I believe that most of the reasons why we are concerned have been echoed already in this room. However, the lack of definition of flexibility, throwing around the word "parameters." We believe that the decisions should lie right here in the legislature; that the policies should come from Congress. I have some problems with OPM's report on a couple of different levels, but for instance a specific example, a reference in their appendix to quit rates. They specifically talk about the quit rates of 18–11s. However, the quit rates for 18–11 GS–10's are lacking.

Now, FBI agents start at a GS–10. They remain there for 2 years, which means we probably have a pretty good chunk of people that are at the GS–10 level right now. They were not in the report. They went from seven, eight, nine to eleven, twelve. They skipped that whole category of GS–10's. We are concerned about that and what they are basing their answers on.

Mr. DAVIS OF ILLINOIS. Would a more precise definition of law enforcement officer be helpful? And where should that definition come from? Ms. Kelley.

Ms. KELLEY. I think the definition does need to be revised. I think it needs to be in the statute, not in the regulations and not a definition that can be changed every 6 months or every year or every 2 years. It needs to be in statute.

Recognizing that, my concerns about OPM's authority are in light of the fact that we have been trying to work through Congress for 15 years to secure law enforcement officer recognition status for legacy Customs inspectors and canine enforcement officers. Even with that, I still would like to see the fix and the appropriate words and definitions be addressed by Congress so that it is fixed and it is something employees can count on.

Mr. CANNON. I echo Ms. Kelley's sentiments there. Quite frankly, if it walks like a duck, it talks like a duck, and it quacks, it should be a duck, if they are out there doing law enforcement work. As in the situation I just explained, you have two agencies working side by side; one has; one has not. They are doing identical jobs. Why is one not and the other is?

Your average officer such as where I work at the U.S. Mint, we do essentially the same job as protecting facilities, personnel, the Director of the Mint, we have her protection. But we do not enjoy the same benefits and pay as the Capitol Police. Why is that?

Mr. BONNER. I agree that the definition needs to be expanded and I think that is the proper role of Congress.

Mr. BRAGG. The Chairwoman said it most succinctly earlier. It is such a simple thing that if you go on the wall, you are law enforcement, but it appears that within the Beltway, the definition of law enforcement officer is a long and drawn-out process. However, as the other members here have said, the perception of if you are law enforcement is very simple. If you have a uniform, you have a gun, you are exercising the authority to make arrests to protect people, to protect property, you are law enforcement. Again, it is a simple thing.

Mr. DAVIS OF ILLINOIS. Thank you very much. I guess, Mr. Cannon, they may have thought that since you all were protecting money and the Capitol Police were protecting the Members, that may have given a different definition. [Laughter.]

Thank you, Madam Chairwoman.

Ms. DAVIS OF VIRGINIA. Actually, Mr. Bragg, the one question I had, you just answered. I wanted you all to give me a definition of what is a law enforcement officer, because it seems awful simple to me as to what one is, and that is what you just said.

I have some constituents sitting in the back that I spoke to a couple of weeks ago, I guess, that in their description to me of what they do, they sound like a law enforcement officer, but they are not. Now I find out in the prisons, the cooks are. So I do not understand why we have a problem here. Then again, I have not been here as long as Mr. Davis has. I have not worked on this issue as long as he has. And I certainly did not know you have been trying to do something, Colleen, for 15 years, which is very frustrating to me. To me, it should be very simple. My guess is it is a question of dollars, which I would assume that is the problem. It is usually the problem around here.

To me, if you are law enforcement, and Mr. Cannon you stole my line I used at the last hearing. If it walks like a duck and quacks like a duck, it must be a duck. You guys all walk and quack like ducks, so I guess you are all ducks.

I do not understand why we have a problem. We certainly are going to take a look at it. As you can tell already, it is not going to be an easy issue. It is something that I wish, Mr. Bragg, as you said, it needs to fixed immediately. I tend to agree with you. But immediate and Congress tends to be several sessions of Congress, so I cannot promise you that the subcommittee will even get anything out real quick that we can get heard from the full committee and get to the House floor.

But you do have my word that as long as I am sitting here, we will do all we can to try and fix and correct the problem so that law enforcement officers are treated like law enforcement officers. But first, we have to find out what the definition is of a law enforcement officer.

Mr. Davis, do you any other questions?

Mr. DAVIS OF ILLINOIS. Other than to suggest that regulatory action oftentimes does not take as long, and would you be willing to run the risk in terms of the time differential in order to get a legislative fix as opposed to an administrative or regulatory one.

Thank you very much, Madam Chairwoman.

Ms. DAVIS OF VIRGINIA. Mr. Bragg.

Mr. BRAGG. I think we should get it right the first time. I would say legislative is the way to go.

Ms. DAVIS OF VIRGINIA. Even if it takes longer.

Mr. BRAGG. The 6-month OPM report took 7 or 8 months.

Ms. DAVIS OF VIRGINIA. Yes, it did.

Mr. BRAGG. So I think that the timeline——

Ms. DAVIS OF VIRGINIA. And I cannot say that I am happy with that either, or even what it came out to say.

Does anyone else have any other comments before we close? Well, I will say that we may end up having some more questions that we would submit to you in writing, in which case we would ask that you would get the answers back to us for the record. Again, we appreciate your all being here and just know that we do know the problem and we are going to try and fix it.

With that, the subcommittee stands adjourned.

[Whereupon, at 11:40 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

[Additional information submitted for the hearing record follows:]

Questions for the Record
July 20, 2004
Subcommittee on Civil Service and Agency Organization

Ron Sanders

- While there is some justification for administratively adjusting pay to target recruitment and retention problems, I am concerned that OPM now advocates adjusting retirement benefits to meet their temporary recruitment and retention problems. Isn't the retirement system a long-term proposition that agencies should not adjust to address short-lived problems?
- As you know, the cost of special retirement benefits is high. If we give OPM the general authority to increase or cut benefits, couldn't the Administration then create large amounts of new mandatory spending and/or cut benefits as it saw fit?
- Why should the Attorney General (AG) have veto power over proposals to revamp a Government-wide human resources program, or even just pieces of it? (The report says that OPM could make changes only with the concurrence of the AG, in essence giving him or her veto power)
    - As an agency head, wouldn't the AG's role be presumptively focused primarily on his or her own agency's well-being?
    - Why should the AG alone be able to block a premium pay plan that OPM and the CHCO Council might unanimously consider good policy, especially if that plan affects primarily the Department of Homeland Security, for example?
- It has come to our attention that the Department of Justice has a problem retaining Assistant United States Attorneys.
    - To eliminate this ostensible retention problem, should AUSAs be given enhanced retirement benefits similar to those given to Federal law enforcement officers?
    - If not, what do you recommend that Congress do legislatively, if anything, to address this ostensible retention problem?
- The report says that MSPB and court review of LEO retirement coverage "should be structured to maximize long-term utility, flexibility, consistency, and continuity." Can you elaborate on that statement?
    - In what way would you limit MSPB and judicial review?

T.J. Bonner

- Do you believe OPM's findings are an accurate reflection of the disparities that exist among the various Federal law enforcement entities?
- Are there other issues the OPM report failed to address?

Colleen Kelley

- In your written testimony, you indicate your firm belief that law enforcement retirement packages should be modified by statute as opposed to OPM regulation. Specifically, you raise the concern that retirement packages could become subject to a patchwork of regulations as changing Administrations impose their own regulatory agenda on the retirement systems. Can you please elaborate on why retirement should be done statutorily?
- OPM mentions that some groups need improvements in compensation in certain areas while other groups have satisfactory compensation. How can OPM's proposal manage the detailed and isolated needs of the numerous Federal law enforcement communities?

- Please explain why you believe that the premium pay rules should be codified in law and not established under administrative authority?
    - Again, how do you respond to OPM's concern that doing so fails to take into consideration the fact that inequities vary from group to group and therefore a single government-wide solution will not work?

Frederick Bragg

- The OPM report notes that "quit rates" are not very high among federal law enforcement officers, and uses this claim to support an assertion that the current compensation system needs more flexibility, but not "across-the-board" reform. Is there a reason for legislators to be concerned about retaining highly qualified law enforcement officers?

Louis Cannon

- In your written testimony, you note that "there are many areas in which consistency can only be achieved through law," which is contrary to OPM's conclusion that consistency will be better achieved if OPM has the broad authority to implement regulations tailored to specific problems. Please describe what kind of legislation you contemplate that would achieve a consistent compensation system for all Federal law enforcement personnel.
- Does the fact that police officers at DOD are not considered to be LEOs and therefore not subject to mandatory retirement at age 57 mean that the public is being put at risk?

Responses to Question for the Record

Mr. Ronald Sanders
Associate Director for Strategic Human Resources Policy
U. S. Office of Personnel Management

Follow-up Questions to the July 20, 2004 Hearing
Time to Bite the Bullet: Fixing Federal Law Enforcement Pay and Benefits

Question: While there is some justification for administratively adjusting pay to target recruitment and retention problems, I am concerned that OPM now advocates adjusting retirement benefits to meet their temporary recruitment and retention problems. Isn't the retirement system a long-term proposition that agencies should not adjust to address short-lived problems?

Answer: We agree. The retirement system needs to address long-term needs and should not be used to address temporary recruitment and retention problems. Law Enforcement Officer (LEO) retirement provisions have always been intended as a workforce management tool to maintain a young and vigorous LEO workforce. We need to reexamine those precepts in view of emerging needs. We need the opportunity to review the incentives of the current retirement system and to consider a more flexible approach that allows us to effectively address emerging long-term issues in a prudent way.

Question: As you know, the cost of special retirement benefits is high. If we give OPM the general authority to increase or cut benefits, couldn't the Administration then create large amounts of new mandatory spending and/or cut benefits as it saw fit?

Answer: Office of Personnel Management (OPM) realizes that effective management of the LEO workforce cannot be maintained without long-term consistent administration of LEO benefits. On the other hand, it should be clear that effective management of the LEO workforce is also hindered by inflexible rules. While misuse of any delegated authority is a theoretical possibility, the reality is that the Executive branch understands that arbitrary and irresponsible use of the LEO benefits program would be counterproductive to effective administration of the LEO workforce.

Since any increase in the normal cost of Federal Employees' Retirement System benefits is passed on to employing agencies, there would be an inherent disincentive to unnecessary liberalization of the benefit structure that would cause a drain on agency payroll appropriations. On the other hand, an untoward reduction in benefits would adversely affect human capital management of this essential portion of the employee population. Moreover, it is abundantly clear that misuse of the authority would not escape notice by the Congress, with the possibility of a resultant modification or elimination of the authority. Thus, the deleterious effects of mismanagement would be a strong inherent incentive against inappropriate use of the authority.

Question: Why should the Attorney General (AG) have veto power over proposals to revamp a Government-wide human resources program, or even just pieces of it?

(The report says that OPM could make changes only with the concurrence of the AG, in essence giving him or her veto power)

- As an agency head, wouldn't the AG's role be presumptively focused primarily on his or her own agency's well-being?

- Why should the AG alone be able to block a premium pay plan that OPM and the CHCO Council might unanimously consider good policy, especially if that plan affects primarily the Department of Homeland Security, for example?

Answer: If legislation is enacted to provide the administrative authority recommended in the OPM report, OPM expects to develop the framework for LEO pay and retirement benefits in close collaboration with all major law enforcement agencies. Thus, even before a proposed framework is submitted to the Attorney General for official concurrence, the Justice Department will have had extensive involvement in developing the framework along with other agencies. We expect to reach a general consensus among all major law enforcement agencies before we seek clearance of any proposed framework.

We have recommended a special concurrence role for the Attorney General in light of his or her responsibilities as the Government's chief law enforcement official and as the head of the agency employing the largest number of Federal law enforcement officers. The Attorney General's role in evaluating any proposed framework is to represent the mission and program interests of all law enforcement agencies. While OPM has a Governmentwide perspective on personnel management issues, we recognize the value of having the Attorney General bring a mission/program perspective to the table. Furthermore, we believe a formal concurrence role for the Attorney General will enhance the credibility of the framework in the eyes of Federal law enforcement officers.

Question: It has come to our attention that the Department of Justice has a problem retaining Assistant United States Attorneys.

- To eliminate this ostensible retention problem, should AUSAs be given enhanced retirement benefits similar to those given to Federal law enforcement officers?

Answer: The LEO retirement provisions are intended maintain a young and vigorous LEO workforce through provisions for early retirement with an enhanced annuity and mandatory retirement. If LEO retirement benefits were to be extended to Assistant United States Attorneys (AUSAs), it is not clear how these provisions would enhance retention. Indeed, it is even possible that an extension of LEO retirement benefits to AUSAs could exacerbate any retention problem of AUSAs since the LEO benefit structure encourages earlier than normal retirement with fewer years of service. Moreover, even if it would assist, an extension of LEO

retirement benefits might not be the most cost-effective way to address the issue. It may prove to be more cost-effective to use existing management tools.

- If not, what do you recommend that Congress do legislatively, if anything, to address this ostensible retention problem?

Answer: At this time, we do not believe there is a need for special legislation to address the retention of Assistant U.S. Attorneys. Retention problems can be addressed by a variety of methods under current law. For example, the Department of Justice may provide retention allowances under 5 U.S.C. 5754 as an incentive for these attorneys to remain in Federal service. The Federal Workforce Flexibility Act, which was signed by the President on October 30, 2004, enhanced the retention allowance authority to improve its effectiveness—e.g., by allowing for service agreements and lump-sum payments at the end of the service period. These enhancements will become effective on May 1, 2005. Other methods of improving retention might include the use of flexible work schedules, flexiplace arrangements, and other family-friendly policies designed to improve working conditions.

Based on data in OPM's Central Personnel Data File, the average annual quit rates for full-time permanent attorneys in the Office of U.S. Attorneys who are covered by an administratively determined pay authority (including Assistant U.S. Attorneys) were as follows: 5.1 percent in FY 2000, 5.4 percent in FY 2001, 3.4 percent in FY 2002, and 3.7 percent in FY 2003. These quit rates do not appear to indicate the existence of a severe retention problem.

Question: The report says that MSPB and court review of LEO retirement coverage "should be structured to maximize long-term utility, flexibility, consistency, and continuity." Can you elaborate on that statement?

- In what way would you limit MSPB and judicial review?

Answer: LEO retirement benefits have never been intended to be a reward or an entitlement. As discussed above, LEO retirement is a workforce management tool. In this respect, it is more akin to an agency's authority to classify positions to determine pay levels. The decision to classify a position as an LEO position is an agency management issue as well since it has a direct impact on workforce staffing, pay entitlements, and an agency's budget. Limiting the review process that applies to LEO retirement coverage issues to a process similar to the administrative review process that applies to the classification of positions would provide a more stable and equitable application of LEO provisions than currently exists.

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